

Conceicao Fernandes and Others Vs. Basilio Fernandes and Another

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Court : Mumbai Goa

Decided On : Jan-27-2014

Judge : U.V. Bakre

Appeal No. : Second Appeal No. 107 of 2013

Appellant : Conceicao Fernandes and Others

Respondent : Basilio Fernandes and Another

Judgement :

Oral Judgment:

Heard Mr. Diniz, learned Counsel appearing on behalf of the appellants and Mr. Coutinho, learned Counsel appearing on behalf of the Respondents.

2. This Second Appeal is directed against the Judgment and Decree dated 04/05/2013 passed by the District Judge-I, South Goa, Margao (First Appellate Court) in Regular Civil Appeal No. 219 of 2010, and the Judgment and Decree dated 10/11/2008, passed by the Civil Judge Senior Division, Margao (trial Court), in Special Civil Suit No.22/2002/A.

3. The appellants are the original plaintiffs and respondents are the defendants. The parties shall hereinafter be referred to as arrayed in the said suit.

4. The plaintiffs had filed the said Special Civil Suit for declaration that the encroachment done by the defendants in the year 1996 and thereafter constitutes trespass in the property of the plaintiffs and for direction to the defendants to remove the suit encroachment and give vacant possession thereof to the plaintiffs.

5. Case of the plaintiffs, in short, is as follows:

They are the owners in possession of the property known as 'Lote Oiteira' situated at Ambelim of Velim, Taluka Salcete bearing Land Registration No.25603 and surveyed under Nos.84/1 and 85/1 of Village Velim. Some time in the year 1988, the defendant no.1 trespassed into the said property in a portion under survey no. 84/1 and constructed a small house like a hut in an area of 20 square metres and late Joao Fernandes, the father of the plaintiffs no.2 and 3 had objected to the same and at that time the defendant no.1 and the said Joao Fernandes, entered into an oral agreement to the effect that a plot of land measuring 200 square metres where the house was constructed would be sold to the defendant no.1 @ Rs.200/- per square metre and it was agreed that the sale deed would be executed within one year. The Defendant no.1, however, delayed the execution of the sale deed and in the year 1991 the said Joao Fernandes expired. In the year 1996, the defendants made further encroachment and extended the house and did plantation in the plot of 200 square metres. On 01/11/1996, a notice was issued by the plaintiffs no.1 and 3 calling upon the defendant no.1 to come for execution of the sale deed. But the defendant no.1 claimed that the rate was too high due to which the sale deed could not be executed. In March, 1999, the defendant no.1 re-constructed his house and constructed a new house with laterite stones and cement, in an area of 75 square metres and made a fencing around the house, thereby encroaching upon the plot of land of the plaintiffs in an area of 566 square metres and also usurping 8 coconut trees and one mango tree of the plaintiffs. The plaintiffs approached Architect namely Shri M. D. L. Miranda to prepare the report and sketch of the encroachment and the said report and sketch are annexed to the plaint as Exhibit 'A'. The encroachment done by the defendants in the year 1996 and thereafter that is to say whatever construction and plantation done beyond the original hut of 20 square metres constitute trespass in the property of the plaintiffs and the same is

"suit encroachment". The plaintiffs are entitled for direction to the defendants to remove the suit encroachment and give vacant possession thereof to the plaintiffs.

6. The defendants, by way of written statement, alleged as follows:

Late Joao Fernandes, by agreement of sale dated 10/01/1980, agreed to sell to the defendant no.1 a plot of land having an area of 500 square metres for a lumpsum of Rs.2500/- (Rupees Two Thousand Five Hundred only) and a sum of Rs.1200/- (Rupees One Thousand Two Hundred only) was paid as advance and the balance amount of Rs.1300/- (Rupees One Thousand Three Hundred only) was to be paid at the time of execution of the final sale deed. In the year 1981, the balance amount was paid to Joao Fernandes and the possession of the plot proposed for sale under the said agreement was handed over to the defendant no.1. The suit house was constructed by the defendant no.1 in the year 1981 and the plot was developed for agricultural purpose by incurring a huge expenditure since the land was rocky in nature. The final sale deed could not be executed and subsequently there was a dispute between Joao Fernandes and predecessor-in-title of the suit property and there was a civil suit pending in the Court of Margao. When the defendant no. 1 insisted upon the plaintiffs to execute the sale deed, the plaintiffs started demanding more money but the defendants refused as they had already paid the total consideration and only a formal deed of sale was remaining to be executed on account of the pending litigation. The defendant no.1, in the year 1981, constructed a loose laterite stone wall and fencing and planted several fruit bearing trees, when the possession of the said land was taken by the defendants on payment of the balance amount. The defendants denied the averments made by the plaintiffs in the plaint which were inconsistent with their case.

7. Following issues were framed by the Trial Court:

œ1 Whether in the month of March, 1999, the defendant no. 1 reconstructed his house and constructed totally a new house with late-rite stones and cement in an area of 75 m² and made a fence around the house, thereby encroaching upon a plot of land of plaintiffs in an area of 566m²?

2 Whether the construction and plantation done by the defendants in the year 1996, beyond the original hut of 20 m² constitute trespass in the property of the plaintiffs?

3 Whether the defendants constructed the house, as also the fencing, in the year 1981, and were in possession of plot of 500m², taken over on payment of entire consideration??

8. In order to prove their case before the trial Court, the plaintiffs examined the plaintiff no.3 as PW1, said Mr. M. D. L. Miranda as PW2 and one Mr. Albert Borges as PW3. The defendants examined the defendant no.1 as DW-1. The parties also produced various documents.

9. Upon appreciation of the evidence on record, the learned trial Court observed that if one goes through the case of the plaintiffs as pleaded in the plaint and as submitted in the written arguments, it can be seen that at one stage the plaintiffs alleged that the construction and plantation beyond 20 square metres constitute trespass [vide paragraph 12 of the plaint], whereas in the written arguments, it is stated that the present suit is not filed for eviction of the defendants and that the hut of 20 square metres and plot of 200 square metres are in possession of the defendants by virtue of an agreement and further that the suit is filed to recover possession of the encroachment made beyond 200 square metres. The trial Court held that neither the exact location of the hut of 20 square metres nor of the plot of land of 200 square metres has been shown on the sketch and the sketch prepared by PW 2 (M. D. L. Miranda) shows plot 'B' which refers to the entire area of 566 square metres and a structure of 75 square metres, therein. The trial Court held that the said sketch showing an area of 75 square metres of structure and the plot covered of 566 square metres, is of no help to the plaintiffs. The trial Court further observed that if according to the plaintiffs, the defendants are entitled only to an area of 200 square metres with a structure of 20 square metres in it, they ought to have identified the structure of 20 square metres and the plot of 200 square metres, which they have failed to do. The trial Court therefore categorically held that the suit area cannot be identified at all by its location in the sketch either by its boundaries or by its area due to which the sketch is of no help. The trial Court

relied upon the judgments of this Court in case of : (i)-. Mrs. Maria Cardozo and another V/s. Mr. John Pinto and Another [1999 (1) GLT 479] ; (ii).- Shri Chandreshwar Bhuthnath Saunsthan V/s. Ramdas Joshi [2002 (1) GLT 13]; and (iii).- Siridao Estate Pvt. Ltd. V/s. Rusai Marques [2001 (2) GLT 307] and held that the Court has consistently held that if the suit encroachment is not identified by sketch in terms of Order 7 Rule 3 of C.P.C. , it does not meet the requirements of law for granting any relief on suit encroachment. Therefore, mainly on the ground of lack of identification of the suit encroachment, the suit came to be dismissed.

10. Aggrieved by the Judgment and Order dated 10/11/2008 passed by the trial Court in Special Civil Suit No. 22/2002/A, the plaintiffs approached the District Court and in Regular Civil Appeal No. 219 of 2010, the learned District Judge“I observed that no sketch had been filed along with the plaint, showing the location and extent of the suit encroachment made by the defendants and that the inspection report and plan of PW-2 does not prove the extent of the encroachment, beyond what is claimed by the plaintiffs to be the original area of 20 square metres of the hut constructed in the year 1988, by the defendant no.1. The First appellate Court held that the trial Court rightly held that the plaintiffs were required to show the encroachment in dimension and identify the same on the sketch, in terms of Order 7 Rule 3 of C.P.C. and they were also required to show the plot of 200 square metres and initial structure of 20 square metres and then the extension covering the structure of 75 square metres which they failed to do. It was held that the trial Court rightly dismissed the suit. Hence the appeal also came to be dismissed.

11. Mr. Diniz, learned Counsel appearing on behalf of the appellants submitted that the title of the plaintiffs is not disputed and that as per the agreement of sale dated 10/01/1980 produced by the defendants themselves, they had agreed to purchase plot of 250 square metres. He, therefore, submitted that the defendants cannot claim any land beyond the said area of 250 square metres. He pointed out that in the evidence it has gone that the defendants have fenced their area. According to him, therefore, the question of lack of identification of the encroachment does not at all arise and that it was for the defendants to identify their portion of 250 square metres. Mr. Diniz, learned Counsel appearing on behalf

of the plaintiffs further contended that in the plaint, the plaintiffs have nowhere averred that the hut of 20 square metres falls in the area of 566 square metres which is described as suit encroachment. He pointed out from the evidence that DW-1 has admitted that he had put up the suit hut in the year 1988 and that the said agreement was not acted upon till 1988 on account of litigation between the late father of the plaintiffs and one Jofrey. He pointed out that the lower Courts have relied upon a certificate dated 14/11/1996 allegedly issued by Sarpanch of Ambelim, though the said certificate was not admitted in evidence. He, therefore, contended that the finding of the First Appellate Court and of the trial Court that the house was constructed and the defendant no.1 was put in possession thereof in 1980-81 is totally perverse. He further pointed out that according to DW-1, he does not know the contents of his affidavit. Learned Counsel further submitted that there was no pleading in the written statement regarding Section 53-A of the Transfer of Property Act and, therefore, in the absence of any finding that the defendants were in possession of an area pursuant to agreement for sale dated 10/01/1980, the suit of the plaintiffs could not have been dismissed. He, therefore, urged that the findings of both the Courts below are perverse and liable to be set aside.

12. On the other hand, Mr. Coutinho, learned Counsel appearing on behalf of the defendants, submitted that paragraph 12 of the plaint beyond doubt reveals the case of the plaintiffs that the encroachment done by the defendants in the year 1996 and, thereafter, beyond the original hut of 20 square metres constitute trespass in the property of the plaintiffs and is the suit construction. He submitted that the report and sketch relied upon by the plaintiffs pertains to an area of 566 square metres and does not show the hut measuring 20 square metres. According to him, therefore, both the Courts below have rightly held that there is no identification of the suit encroachment in terms of Order 7 Rule 3 of C.P.C. The learned Counsel, appearing on behalf of the defendants, further invited my attention to the written arguments filed by the plaintiffs in the said suit wherein it is clearly stated that the present suit is not filed for eviction of the defendants as the hut of 20 square metres and plot of 200 square metres are in possession of the defendants by virtue of an agreement and that the suit is filed for recovery of possession of the encroachment made beyond 200 square metres. According to

the learned Counsel, the above being the statement of the plaintiffs themselves, they were bound to identify the encroachment allegedly made beyond 200 square metres containing the hut of 20 square metres. He submitted that since the encroachment has not been identified in terms of the said statements, the Courts below have rightly held that there is no identification of the encroachment, in terms of Order 7 Rule 3 of C.P.C. He submitted that if the plaintiffs are at all seeking eviction of the defendants from the said area of 200 square metres, then it was incumbent upon them to have properly and specifically identified the said area. In all the circumstances above, the learned Counsel urged that there are concurrent findings of facts rendered by the two Courts below to the effect that the suit encroachment has not been identified. He submitted that the said findings are borne out from the evidence on record and the written arguments filed by the plaintiffs themselves. He submitted that the question of pleading in the written statement regarding Section 53-A of Transfer of Property Act did not at all arise in the matter. He, therefore, submitted that the Second Appeal deserves to be dismissed, there being no substantial question of law arising therein.

13. I have gone through the material on record. I have also considered the submissions made by the learned Counsel for the parties.

14. Order VII, Rule 3 of C.P.C., as applicable to the State of Goa, provides that where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers, and in case of encroachment, a sketch showing as approximately as possible the location and extent of the encroachment shall also be filed along with the plaint. It is fallacious to say that there is no pleading in the plaint regarding exclusion of hut admeasuring 20 square metres from the suit encroachment. In paragraph 12 of the plaint, the plaintiffs have specifically averred that the encroachments done by defendants in the year 1996 and thereafter, that is to say, whatever construction and plantation done beyond the original area of 20 square metres constitutes trespass in the property of the plaintiffs and the same is hereinafter referred to as the suit encroachment?. The plaintiffs have prayed for direction to the defendants to

remove the suit encroachment and give vacant possession of the land to the plaintiffs. Therefore, if the said pleadings in the plaint are to be taken into account, the plaintiffs were bound to show/identify, in terms of Order 7 Rule 3 of the C.P.C., the suit encroachment excluding the original hut of 20 square metres. Further, in the written arguments filed by the plaintiffs before the trial Court, the plaintiffs have specifically stated that the present suit is not filed for eviction of the defendants as the hut of 20 square metres and plot of 200 square metres are in possession of the defendants by virtue of an agreement and that the suit is filed to recover possession of the encroachment made beyond 200 square metres. If that be so, the plaintiffs were bound to show the suit encroachment beyond an area of 200 square metres which is allegedly in possession of the defendants by virtue of an agreement. What the plaintiffs have annexed to the plaint and subsequently proved through PW-2 Miranda is a report and sketch showing an area of 566 square metres along with a structure admeasuring 75 square metres. Therefore, as rightly held by both the Courts below, the said sketch and report of PW 2 is of no assistance to the plaintiffs at all. It has been rightly held by the Courts below that the suit encroachment has not been identified by plaintiffs by its location in the sketch, either by its boundaries or by its area etc., in terms of Order 7 Rule 3 of C.P.C. The trial Court has rightly relied upon the judgments of this Court wherein it has been held that if the suit encroachment is not identified by the sketch in terms of Order 7 Rule 3 of C.P.C., it does not meet the requirements of law for granting any relief on suit encroachment.

15. In view of the discussion supra, there is no perversity in the findings of the Courts below, with regard to the identification of the suit encroachment. The said findings are based on correct appreciation of the evidence on record. Merely because a Panchayat House Tax certificate dated 14/11/1996, which was marked as Exhibit C-30 subject to production of its original and proof of its contents, has been relied upon by both the Courts below or because in the cross examination, DW-1 stated that he does not know the contents of his affidavit and that at some stage stated that he had put up the suit hut in the year 1988 and that the agreement was not acted upon till 1988 on account of litigation between the late father of the plaintiffs and one Joffry Sales, that would not render the findings of both the Courts on lack of identification of suit encroachment, perverse. Lack of

identification of the suit encroachment is independently sufficient to hold that the plaintiffs are not entitled to the reliefs as claimed. No substantial question of law at all arises in the matter and, therefore, the appeal deserves to be dismissed.

16. In the result, the appeal stands dismissed. However, no order as to costs.

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