

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.41 OF 2014

1. SHRI. BALKRISHNA SHANKAR
SAWANT alias Balkrishna Putu Bando,
son of late Shri. Shankar Sawant
major age, occupation landlord
(since deceased through legal
representatives)

1(a) Ashish Balkrishna Sawant,
Aged - 47 years,
Resident of H.No.224,
Palolem, Canacona, Goa.

1(b) Shradha Shashikant Kurdikar
Daughter of late Balkrishna Sawant
Age-46 years, married,
And her husband,

1(c) Shashikant Vishnu Kurdikar
Age-52 years

Both residents of H.No.36,
opposite George Apartments, Mala,
Panaji, Goa 403 001.

1(d) Radhika Raya Naik
Daughter of late Balkrishna Sawant
(since deceased through her legal
representatives)

1(d)(i) Pratha Raya Naik
Age - 15 years, minor,

1(d)(ii) Luky Raya Naik,
Age-13 years, minor,

The Appellants No.1(d)(i) and 1(d)(ii)
are represented by their natural
guardian, the Appellant No.1(e)

1(e) Raya Ganesh Naik
Son-in-law of late Balkrishna Sawant
Age-48 years, widower

All residents of H.No.425, Devtewada,
Behind C.T.N College, Curchorem,
Goa.

2. SMT. YAMUNA BALKRISHNA
SAWANT, wife of Appellant No.1,
major age, housewife,

Both residents of H. No.224,
Palolem, Canacona, Goa.

....Appellants

Versus

1. SHRI. GANBA BAGDU NAIK
DESSAI (DECEASED) through legal
heirs/representatives son of late
Shri. Bagdu Naik Dessai,

(a) SMT. TULSI SADANAND NAIK
daughter of late Shri. Ganba Bagdu Naik
Dessai, of major age, housewife and her
husband, (since deceased through her
legal representatives)

(b) SHRI. SADANAND M. NAIK
of major of, retired, both residents of
Holi Chakle Kuvawala Khacha, Banderi
Poll, H.No.2251, Ahmedabad 380001.
(since deceased through her legal
representatives)

Legal representatives of Respondent
Nos.1(a) and 1(b):-

1 (a)(i) Dr. Smruti J. Killedar
Daughter of late Sadanand M. Naik
Major of age, married
And her husband,

1 (a)(ii) Dr. Jyotindra Killedar
major of age, married,

1 (a)(iii) Smt. Sujata S. Desai alias Sujata
Joshi,
Daughter of late Sadanand M. Naik
Major of age, married
And her husband

1 (a)(iv) Madhukar M. Joshi
Major of age, married

1 (a)(v) Smt. Dolly Sudhir
Daughter of late Sadanand M. Naik
Major of age, married
And her husband

1 (a)(vi) Shri Sudhir M. C.
Major of age, married

1 (a)(vii) Dr. Lakshmi Y. Meghrajani
Daughter of late Sadanand M. Naik
Major of age, married
And her husband

1 (a)(viii) Dr. Yogesh Meghrajani
major of age, married,
All residents of Holi Chakle Kuvawala
Khacha, Banderi Poll, H.No.2251,
Ahmedabad 380001.

(c) SMT. ANURADHA B. PARTE,
Velal Niwas, Second Floor, Room
No.19, St. Xavier Road, Parle, Mumbai -
12. (deceased)

Represented by legal heirs:

c(i) SMT. NITIN THAKUR and her
husband

c(ii) SHRI. NITIN THAKUR

c(iii) SMT. SMITA AWAKSHI -
DOCTOR and her husband

c(iv) SHRI. AWAKSHI-DOCTOR

c(v) SMT. BHAKTI VISHWAS
CHAWAN and her husband

c(vi) SHRI. VISHWAS CHAWAN
all residents of Vithal Niwas
II floor, Room No. 19,
St. Xavier Road, Parle,
Mumbai 400012.

(d) SHRI. VASANT GANBA DESSAI
(DECEASED) represented through his
legal heirs/representatives

(i) SMT. YOJNA VINOD
ZAMBAULIKAR,
daughter of late Shri. Vasant Ganba
Dessai, of major age, housewife, and her
husband,

(ii) SHRI. VINOD ZAMBAULIKAR
of major age, both residents of H.No.
not known, near Damodar Saunsthan,
Zambaulim, Quepem, Goa.

(iii) SHRI. YOGESHRAO VASANT DESSAI

son of late Shri. Vasant Ganba Dessai, of major age, landlord, resident of H.No. not known Nagorcem, Palolem, taluka Canacona, Goa.

(iv) SMT. NAMRTA DAMODAR PRABHUEDESSAI

daughter of late Shri. Vasant Ganba Dessai, of major age, housewife, and her husband

(v) SHRI. DAMODAR PRABHUEDESSAI

of major age, both residents of near Quepem Bazar, H.No. not known, Quepem Bazar, Quepem, Goa.

(vi) KUM. LAPITA VASANT DESSAI

daughter of late Shri. Vasant Ganba Dessai, of major age, housework and her sister

(vii) KUM. NIRMALA VASANT DESSAI

daughter of late Shri. Vasant Ganba Dessai, of major age, housework and both residents of H.No. not known, Nagorcem, Palolem, Canacona, Goa.

2. SHRI. SHRIRANG PUTU BANDO

(NOW DECEASED)

represented through his legal heirs

(a) SHRI. SAMIR SHRIRANG BANDO alias Sawant, son of late Shri. P. Bando, of major age, employed and

his wife;

(b) SMT. NIMA SAMIR SAWANT alias Bando, of major age, employed;

(c) SHRI. RAJENDRA S. SAWANT alias Bando, son of late Shri. Shrirang P. Bando, of major age, employed and his wife;

(d) SMT. REKHA RAJENDRA SAWANT alias Bando, of major age, employed;

3. SMT. ANUCIA SHRIRANG BANDO, widow of late Shri. Shrirang P. Bando, of major age, housewife, Residents of Tara Temple Lane, Dr. Badkamkar Marg, Mumbai 400007.
(deceased represented by 2(a) to 2(d).

4. SHRI. PUNDALIK PUTU BANDO, son of late Shri. Putu Bando, of major age, employed and his wife;

5. SMT. ANJANI PUNDALIK BANDO,
of major age, housewife;
(since deceased through her legal
representatives)

5(a) Shri Hemant Pundalik Bando,
Son of late Anjani Pundalik Bando,
Major of age, bachelor,
Resident of B-103, Anant Sadan,
2nd floor, Juhu Church,
Juhu, Mumbai - 49.

6. SMT. VANITA JAIWANT BANDO

widow of late Shri. Jaiwant Bando
of major age, housewife and her children
(deceased represented by R-7 to R-16)

7. SHRI. BALAN JAIWANT BANDO
son of late Shri. Jaiwant Bando,
of major age, employed;

8. SHRI. PUSHKAR JAIWANT
BANDO
son of late Shri. Jaiwant Bando,
of major age, employed;

9. SHRI. AJAY JAIWANT BANDO
son of late Shri. Jaiwant Bando,
of major age, employed;

10. SHRI. SHARAD JAIWANT
BANDO
son of late Shri. Jaiwant Bando,
of major age, employed;

11. SMT. NILAMBAI JAIWANT
BANDO
of major age, housewife,

12. SMT. VRINDA AVINASH
KELSHIKAR
daughter of late Shri. Jaiwant Bando,
housewife, and her husband

13. SHRI. AVINASH KELSHIKAR
of major age, employed

14. SHRI. SAGAR JAIWANT BANDO
son of late Shri. Jaiwant Bando,
of major age, employed and his wife,
(since deceased through his legal
representatives)

14(a) Shri Amit Sagar Sawant,
Son of late Sagar Bando Sawant,
Major of age, married,
And his wife,

14(b) Smt. Poonam Amit Sawant,
Major of age, married,

Both residents of Kehsav Co-operative
Housing Society Ltd.,
Third Floor, Block No.10,
Pitambar Lane, Mahim,
Mumbai 400016.

15. SMT. USHA SAGAR BANDO
of major age, house, all residents of
Keshav Co-operative Housing Society
Ltd., Third Floor, Block No.10 Pitambar
Lane, Mahim, Mumbai 400016.

16. SHRI. ROHIDAS NARAYAN
BANDO
son of late Shri. Narayan Bando
of major age, employed and his sister
(deceased represented by R-17 and R-18)

17. SMT. ASHITA RAJNIKANT
KATKUL
daughter of late Shri. Narayan Bando
of major age, housewife and her husband

18. SHRI. RAJNIKANT KATKUL
of major age, employed
all residents of H.No. not known
Ville Parle, Mumbai.

....Respondents

Mr Sudesh Usgaonkar with Ms Rosette Pereira, Advocates for the
Appellants.

Mr Abhay Nachinolkar with Mr Siddhant Dhakankar, Advocates for Respondent Nos.1(d)(i) to 1(d)(vii).

CORAM: **M. S. SONAK, J.**

Reserved on: **1st MARCH 2024**
Pronounced on: **4th MARCH 2024**

JUDGMENT :

- 1.** Heard Mr Sudesh Usgaonkar with Ms Rosette Pereira for the appellants and Mr Abhay Nachinolkar with Mr Siddhant Dhakankar for respondent nos.1(d)(i) to 1(d)(vii).
- 2.** This appeal takes exception to the judgments and decrees dated 05.08.2006 and 28.11.2003 made by the First Appellate Court and the Trial Court, respectively, dismissing the appellants' Regular Civil Suit No.94 of 1988 against the respondents.
- 3.** This appeal was admitted on 16.07.2014 on the following substantial question of law:

"When the Courts below recorded a categorical finding that appellants have proved ownership and possession of the suit property which was described as one third part of property called "Udcatem", whether the Courts below were right in dismissing the suit only on the ground that the appellants have not given the area of said portion and described it under the present survey when there was no dispute about the identification raised by the respondents and the respondents were claiming the suit property as their own?"

4. Mr Usgaonkar, learned Counsel for the appellants submitted that the Trial Court and the appeal Court accepted that the appellants were the owners of the property described as one-third part of the property 'Udacatem'. This property was described in the appellants' title documents and the matriz record by its boundaries. Accordingly, there was no dispute about the identification of the suit property. Mr Usgaonkar, therefore, submitted that the two Courts should not have dismissed the suit on the alleged ground that the appellants failed to identify the suit property which was encroached upon by respondents 1 and 2 in this appeal or defendants 1 and 2 in the suit.

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5. Mr Usgaonkar submitted that the title documents and the matriz documents show that the property of the first and second respondents was on the eastern boundary of the suit property. He submitted that that the appellants' property was on their western boundary. He submitted that there was evidence of a ridge separating the two properties. Based on all this, he submitted that identification was not at all an issue and the two Courts should not have non-suited the appellants on such a ground. Mr Usgaonkar submitted that, in any case, the two Court could have always appointed a Commissioner as was held by the Hon'ble Supreme Court in the case of *Shreepat V/s. Rajendra Prasad & Ors.*¹.

¹ JT 2000 (7) SC 379

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6. Mr Usgaonkar submitted that in respect of the encroached portion, the appellants had instituted a suit against a trespasser, who put property comprised of. He submitted that this suit was decreed and the trespasser was ordered to be evicted. He submitted that the Trial Court erroneously declined to rely on this decree only because the present respondents ~~1 and 2 were not parties~~ to the said suit. He submitted that a judgment not inter parties is admissible under Section 13 of the Evidence Act as evidence of assertion of right to property in dispute. He relied on *Tirumala Tirupati Devasthanams V/s. K.M. Krishnaiah*² in support of this proposition.

7. For all the above reasons, Mr Usgaonkar submitted that the substantial question of law may be answered favouring the appellants.

8. Mr Nachinolkar defended the impugned judgments and decrees based on the reasoning reflected therein. He submitted that since encroachment was alleged by the appellants, the issue of identification of the alleged encroached portion was most crucial. He pointed out that the provisions of Order VII Rule 3 as applicable to Order VII Rule 3 (Bombay High Court Amendment) were not complied with by the appellants and no sketch showing the location and the extent of encroachment was filed along with the plaint. He submitted that the two Courts have recorded concurrent findings of fact which are duly supported by the material on record. Accordingly, he submitted that

² (1998) 3 SCC 331

the substantial question of law, as framed, does not arise and, in any case, ought to be decided against the appellants.

9. Mr Nachinolkar submitted that PW1 had clearly admitted that two beds of the suit property were encroached upon by the person who had put the gada and the plaintiffs/appellants were in possession of the remaining four beds. He submitted that the title document shows that the appellants were owners of one-third of the property 'Udacatem' and the balance two-third was owned by the first ~~and the second~~ respondents. In such circumstances, it was incumbent upon the appellants/plaintiffs to identify the alleged encroached portion including by way of compliance with the provisions of Order VII Rule 3 of CPC. He relied on *Shri Conceicao Fernandes & Ors. V/s. Shri Basilio Fernandes & Anr.*³ in support of this contention.

10. Mr Nachinolkar submitted that earlier there were 145 CrPC proceedings which were followed by a suit instituted by the plaintiffs concerning the very same property 'Udacatem'. He submitted that such a suit was withdrawn and this fact was not even pleaded in the plaint. Mr Nachinolkar pointed out that after this fact was pleaded in the written statement, the same was established during the cross of the appellants' witnesses.

11. For all the above reasons, Mr Nachinolkar submitted that this appeal may be dismissed.

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³ 2014 (6) ALL MR 141

12. The rival contentions now fall for determination.

13. The appellants/plaintiffs instituted Regular Civil Suit No.42 of 1985 in the Court of Civil Judge, Junior Division at Margao seeking restoration of possession of the suit property which they described in paragraphs 1 and 2 of the plaint. The description includes the name of the suit property, i.e. 'Udacatem' situated at Nagorcem, Canacona Goa, registered under no.12269. The plaintiffs stated that the suit property was also registered as "*one-third in the matriz records of Taluka Revenue Office of Canacona under No.725*".

14. In para 2 of the plaint, the plaintiffs gave the boundaries of the suit property. Paragraph 2 is transcribed below for the convenience of reference:

"2. The said property belongs to the Plaintiff and his members and the same is bounded as under:

EAST : Property of heirs of Molu Shiva Naik and Others.

WEST : Property known as Udacatem and forming part of Matriz No.725,

NORTH : Public Road which goes from Canacona to Palolem

SOUTH : Property of Devappa Bhikar & Others."

15. Mr Nachinolkar pointed out that even according to the averments in para 2 of the plaint, the western boundary of the suit property was the property known as 'Udacatem' and forming a part of matriz no.725. There is material on record which shows that the property described as two-thirds of 'Udacatem' was owned by the first

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~~and the second~~ respondents. In such circumstances, therefore, the two Courts have rightly held that the appellants should have pleaded with clarity on the precise status of encroachment or should have described the encroached property with greater clarity.

16. Apart from the above pleadings, both the Courts have referred to the appellants' evidence in which the appellants, despite questioning, failed to depose to the area of the suit property or the area of the encroached portion. The appellants also failed to describe the encroached portions in the context of boundaries, survey numbers or survey plans despite questions in this regard being posed to them during the cross-examination. Since the suit was for recovery of the alleged encroached portion and there is evidence that two-thirds of the larger property belonged to the first ~~and the second~~ respondents or their predecessors in title and the balance one-third belonged to the appellants or their predecessors in title, a proper description of the allegedly encroached portion was a must for the suits to succeed.

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17. Besides, in this case, the appellants/plaintiffs failed to comply with the provisions of Order VII Rule 3 which provides that in case where the subject matter of the suit is encroachment on immovable property, a sketch showing as approximately as possible the location and extent of encroachment shall also be filed along with the plaint. The issue is not whether such a requirement is mandatory or directory. Even if it is held that such a requirement is only directory, still, in the facts of the present case, the two Courts have rightly held that there was no

identification of the encroached portion either in the pleadings or in the evidence and in this context the absence of a sketch as contemplated by Order VII Rule 3 of CPC only compounded the appellants' difficulties further. There is no perversity or error in the concurrent findings recorded by the Trial Court and the First Appellate Court so as to warrant any interference in a Second Appeal.

18. Mr Nachinolkar referred to the deposition of Emuna Savant (PW1-the plaintiff/appellant no.2) who deposed on behalf of the plaintiffs/appellants. He pointed out that PW1 deposed that the matrix certificate at Exhibit PW1/F shows that two-third is registered in the name of Ramchandra Sinai Nagarsekar and one-third in the name of Rangu Moga Naik. Admittedly, these are the names of predecessors in title of the appellants and respondents 1 ~~and~~ 2. PW1 further deposed that the gado erected by one Santosh Gaonkar had covered two beds from the property 'Udacatem'. She deposed that except the gado the remaining four beds were in her possession. This was after she deposed that one-third of 'Udacatem' of which the appellants/plaintiffs claim to be the owners comprised six beds which were used to grow legumes.

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19. The two Courts or rather at least the Trial Court has held that such evidence does not establish any clear case of encroachment. Besides, there is hardly any identification of the encroached property because the appellants/plaintiffs failed to depose to any area of the encroached portion or for that matter the suit property, failed to identify the encroachment by boundaries, plans, survey records or even a sketch

as required under Order VII Rule 3 of CPC. No Surveyor or expert was also examined by the appellants/plaintiffs.

20. In *Shri Conceicao Fernandes & Ors.* (supra), the learned Single Judge of this Court, after considering previous precedents on the issue, has held that if a suit in which the subject matter is an encroachment on immovable property is not identified by a sketch in terms of Order VII Rule 3 of CPC, then, it does not meet with the requirement of law for granting any relief on a suit alleging encroachment. In that case, the two Courts had also dismissed the suit for want of identification of the suit property and the encroached portion.

21. At this stage, appellants/plaintiffs cannot urge that some Court Commissioner should have been appointed for determining the encroachment. This is a case of sketchy pleadings followed by sketchy evidence. The purpose of the appointment of a Court Commissioner is not to gather evidence for the parties. In the absence of foundational pleadings, no useful purpose would have been served by appointing a Court Commissioner. The decision in *Shreepat* (supra) would therefore not apply to the present case given the nature of pleadings and the other material produced on record by the parties.

22. The appellants/plaintiffs failed to make any reference to either the 145 CrPC proceedings or Regular Civil Suit No.274/973 instituted in connection with the property 'Udacatem' of which two-thirds is held by the first ~~and the second~~ respondents and one-third by the appellants/plaintiffs. Even assuming that any orders under Section 145

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of CrPC are irrelevant, the appellants/plaintiffs should have disclosed about Regular Civil Suit No.274/1973 and then explained how they did not institute the same or how the same had no relevance to the issues involved in the present suit and appeals.

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23. The first ~~and the second~~ respondents pleaded about these facts in their written statements. In the cross-examination of PW1, she admitted that her husband had filed the suit against Ganba Desai at Margao and claimed the suit was pending. The expression used by her was “the same is trying now”. She stated that in the year 1973, her husband’s maternal uncle had filed the suit against the defendant bearing Regular Civil Suit No.274/1973, in which her husband was holding power of attorney for his maternal uncle. She denied the suggestion that her husband withdrew the suit filed against the defendants because the plaintiffs had no right. However, nothing was produced by PW1 to show that the suit was pending or that the suit had nothing to do with the property ‘Udacatem’. PW1 also deposed that she could say nothing in whose name two-thirds portion property ‘Udacatem’ was inscribed, but she asserted that “we are in possession of 1/3rd portion of the prop “Uddakatem”.

24. At another portion, PW1 admitted that two-third portion of ‘Udacatem’ was purchased by Ganba Desai from Ramchandra Sinai Nagarsekar on 03.09.1966 and ever since the defendants were in possession of the same. She denied the suggestion that on no less than two occasions, the appellants/plaintiffs had tried to trespass the first ~~and~~

second respondents by filing proceedings under Section 145 of CrPC and the Civil Suit.

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25. Although there is material on record that the appellants/plaintiffs had instituted a suit against one Santosh Gaonkar, who had put up a gada on the two beds of the one-third portion of the property 'Udacatem', the decree in the said suit cannot further the appellants'/plaintiffs' case against the first ~~and the second~~ respondents in the absence of proper identification of the encroached portion. This is more so because Emuna, after deposing about this suit being restricted to two beds, deposed that the plaintiffs were in possession of the remaining four beds. Accordingly, even after considering the decision in *Tirumala Tirupati Devasthanams* (supra), no case is made to interfere with the concurrent judgments and decrees made by the Trial Court and the First Appellate Court.

26. The appellants/plaintiffs are not justified in contending that there was never any dispute about the identification of the encroached property or the encroached portion of the suit property. At the highest, it can be said that there was no dispute about the appellants/plaintiffs having rights over one-third part and the first ~~and the second~~ respondents having rights over two-thirds part of the property 'Udacatem'. Precisely, for this reason, it was for the appellants/plaintiffs to plead with clarity and produce proper evidence about the first ~~and the second~~ respondents allegedly encroaching into the appellants'/plaintiffs' one-third portion of the property 'Udacatem'. As

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noted above, there are neither any pleadings nor evidence on this aspect. Even the sketch in terms of Order VII Rule 3 of CPC was not filed along with the plaint or even otherwise by the appellants/plaintiffs. Accordingly, no case is made to interfere with the concurrent findings recorded by the two Courts.

27. For all the above reasons, the substantial question of law will have to be answered against the appellants. As a consequence, this Second Appeal is liable to be dismissed and is hereby dismissed.

28. There shall be no order for costs.

M. S. SONAK, J.

NITI KISHOR
HALDANKAR

Digitally signed by NITI KISHOR
HALDANKAR
Date: 2024.03.16 16:32:53 +05'30'