

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 154 OF 2005
AND
SECOND APPEAL NO. 156 OF 2005
WITH
MISC. CIVIL APPLICATION NO. 1893 OF 2023 (F)
IN
SECOND APPEAL NO. 154 OF 2005

1. Mr. Sylvestre Bonaparte Lacerda, major, seaman and his wife
 - 1a. Mrs. Severya Perpetua Rica De Silva, aged 45 years, and her husband,
 - 1b. Mr. Mauricio Salustino Roque De Silva, aged 52 years, both r/o 3303 e 27th Avenue Vancouver, BC V5R IP8, Canada.
 - 1c. Mrs. Lelith Lacerda Vedanayagam, aged 43 years, and her husband,
 - 1d. Paul Vedanayagam, aged 44 years, both r/o Laxman Towers, B 201, Behind D. Mart, New Link Road, Kanderpada, Dahisar West, Mumbai 400068.
 - 1e. Ms Sheryl Pascoala Lacerda, aged 39 years, r/o Second Palvem, Chinchinim, Salcete Goa 403715, Chinchinim, Salcete-Goa.
2. Mrs. Remy R. Lacerda, major, Nurse, both residents of House No.271/1, 2nd Palvem, Chinchinim, Salcete Goa ... Appellants

**Carried out amendment
as per order dated
1/12/22.**

V e r s u s

1. Mrs Mira Mendes, major, housewife, and her son
2. Mr Godwin Mendes, major, student, both residents of House No.274,
3. Mr. Piedade Pinto, major, service and his wife
4. Mrs. Belmira Pinto, major, housewife,
 - 4a. Loretta Pinto, major in age,
 - 4b. Boston Pinto, major in age, (since deceased)

- 4c. Browson Ricardo Pinto, major in age,
All residents of H. No. 293, 2nd
Palvem, Chinchinim, Salcete-Goa.
5. Jhoncy Pinto, major, student, all residents of
house No.293
6. Mrs. Sucorina Dias, housewife and her
7. Nicky Dias, major, service, both residents of
house No.294
8. Milton Lopes, major, service and his wife
9. Ilda Lopes, major, teacher, both residents of
house No.295
10. Wilson Pinto, major, unemployed, resident of
House No.299
11. Rodney D'Mello, major, student, resident of
House No.290
12. Pramod D'Silva, major, carpenter, resident of
House No.277
13. Roland D'Mello, major, resident of House
No.284
14. Mrs. Vincy Mendes, widow, resident of House
No.279/A
15. Mrs. Jesuina Pinto, major, housewife, and her
brother
16. Teotonio Pinto, mechanic, major, both resid-
ents of House No.301
- All residents of 2nd Palvem, Chinchinim, Sal-
cete Goa.Respondents
- Carried out amendment as
per order dated 1/12/22.
- Carried out amendment as
per order dtd.21/4/23.

**Mr. Gaurish Agni, Advocate with Mr. Kishan Kavlekar,
Advocate for the Appellant.**

**Mr. C. A. Coutinho, Advocate with Mr. Ivan Santimano,
Advocate for the Respondent nos. 1 to 9 and 13 to 16.**

CORAM: M. S. SONAK, J
Reserved on : 9th February, 2024
Pronounced on : 23rd February, 2024

JUDGMENT

1. Heard Mr. Gaurish Agni, learned Counsel for the Appellants and Mr. C. A. Coutinho, learned Counsel for the Respondent nos. 1 to 9 and 13 to 16.
2. This Second Appeal is directed against the Judgment and Decree dated 20.07.2005, made by the First Appellate Court in Regular Civil Appeal No. 116 of 2003.
3. The Appellants are the original Plaintiffs, and the Respondents are the Original Defendants in Regular Civil Suit No. 167 of 1993/C instituted before the Trial Court.
4. In the suit, the Plaintiffs pleaded that they were the owners in possession of a property bearing survey no. 8/7 of Village Chinchinim, which they purchased by Sale Deed dated 03.02.1981. The Plaintiffs further pleaded having constructed a compound wall along the boundaries of the suit property with the exception of the western boundary where the Plaintiffs left a one and half-metre passage between the suit property and the property of one Carmo Lacerda to be used as a foot access for the Plaintiffs, Cruz Lacerda, Joasinho Menezes and Mira Mendes (Defendant No.1).

5. The Plaintiffs pleaded that all the Defendants had three-metre-wide cemented motorable access through the property of Defendant No.13 touching the Chinchinim-Deussua road. They pleaded that this motorable road was used as an access by all the Defendants. This was in addition to the other accesses available to the Defendants as were pleaded in the plaint.

6. The Plaintiffs have further pleaded that in May 1992, Defendant No.13 blocked the motorable access from his property by erecting a compound wall and leaving a gap of only half a metre. From that time, Defendant Nos. 1 to 12 began to use the foot access left by the Plaintiffs on their western boundary; however, later on, Defendant Nos. 1 to 12 started demanding motorable access and went to the extent of damaging the compound wall on the Plaintiffs' western boundary.

7. Accordingly, the Plaintiffs instituted the suit before the Trial Court, claiming relief of permanent injunction and compensation of ₹7,000/- for damaging the compound wall.

8. The Defendants filed their written statements and also raised a counter claim. They pleaded that there was a motorable access through the Plaintiffs' property, which all the Defendants were using for more than 50 years continuously, publicly and as of right. They,

however, pleaded that in 1984, the Plaintiffs, by constructing a compound wall, narrowed this access from the existing six metres of motorable access to only foot access.

9. The Defendants pleaded that the Plaintiffs, when constructing their house, requested the Defendants to agree to a slight deviation by assuring that the motorable access of at least three metres width would be maintained. The Plaintiffs proposed this deviation because the existing access, which had been used for over 50 years by the Defendants, would somewhat obstruct the Plaintiffs' construction plans.

10. The Defendants pleaded that all this was accepted by the Plaintiffs and the Defendants before the Panchayat. The Plaintiffs also gave in writing that they would leave a three metre access for the Defendants. Based on these assurances and undertakings of the Plaintiffs, the Panchayat passed the house construction plans and granted permission to the Plaintiffs.

11. The Defendants have pleaded that the Plaintiffs reneged on their assurances and constructed a compound wall that converted the three-metre motorable access into a foot access having a width of less than three metres.

12. The Defendants, apart from denying the Plaintiffs' case, raised a counterclaim pointing out that they had no other motorable access with a width of a minimum of three metres and, therefore, sought a declaration and a mandatory injunction to remove the portion of the compound wall put up by the Plaintiffs which was obstructing the use of the motorable access of three metres width.

13. The Plaintiffs filed the written statements to the counterclaim, denying that any of the Defendants had the right of way through the three-metre motorable access. The Plaintiffs maintained that the Defendants, at the highest, had a traditional foot access of one and a half metres, which the Plaintiffs maintained at the site. Accordingly, they prayed that the suit be decreed and the counter claim be dismissed.

14. The Plaintiffs examined four witnesses, including Plaintiff No. 1. Defendant No. 1 deposed in the matter, and Defendant examined three additional witnesses.

15. Based on the pleadings and on considering the evidence on record, the Trial Court framed and answered the following issues :

ISSUES	FINDINGS
1. Whether the plaintiffs prove that they erected the compound wall all along the boundaries of the suit property in February	In the negative.

1981 with the exception of the western boundary?

2. Whether the plaintiffs prove that they left a one and a half metre passage between the suit property and that of Carmo Lacerda to be used as a foot access for the plaintiffs and Cruz Lacerda, Joaosinho Menezes and Mira Mendes? In the negative.
3. Whether the plaintiffs prove that there is a three metres wide cemented motorable access through the property of the defendant no.13 available to the defendant nos. 1 to 13 to go to their respective houses and yet another access going to Koddeavaddo? In the negative.
4. Whether the plaintiffs prove that on 25.6.92, at 7 p.m., the defendants trespassed into the property of the plaintiffs and demolished a portion of the western wall of the plaintiffs as well as a part of the eastern wall and assaulted, insulted and threatened the plaintiffs ? In the negative.
5. Whether the plaintiffs prove that a few months after 25.6.92, the plaintiff no. 2 re-erected the demolished portion of the compound wall and that the defendants demolished the same on the very same day when it was put up and that for the said re-erection the plaintiff no.2 spent R5.3,000/- (Rupees three thousand only)? In the negative.
6. Whether the plaintiffs prove that cattle and pigs destroyed the plants of the plaintiffs by entering their garden through the demolished portion of the compound wall and that the plaintiffs have thereby suffered a loss of about Rs-1000/- (Rupees one thousand only) to their garden? In the negative.
7. Whether the plaintiffs prove that in May 1993 they re-built the demolished portion of the compound wall by spending Rs.3000/- (Rupees three thousand only) on the same? In the negative.
8. Whether the plaintiffs prove that the defendants have threatened to demolish the said Compound wall again? In the negative.

9. Whether the plaintiffs are entitled to the relief prayed for? In the negative.
10. Whether the defendants prove that for more than 50 years they have had a motorable access of the width of 3 mts. (three metres) through the property of the plaintiffs and others? Partly in the Affirmative
11. Whether the defendants prove that the plaintiffs made a request in 1984 to the defendant no.6 and her husband and to the parents of the defendant no.8 and others to divert the access in the manner described in para 25 of the written statement In the Affirmative
12. Whether the defendants prove that the plaintiffs objected to the said access on 25.6.1992 and in October 1992 ? In the Negative.
13. Whether the defendants are entitled to the reliefs prayed for? In the Affirmative.
14. What relief? What Order? As per Order.

16. The Trial Court dismissed the Plaintiff's suit but decreed the counterclaim in terms of prayer clauses (a) and (b) by declaring that an access with a width of three metres exists through the Plaintiff's property bearing survey no. 8/7, on its western side, proceeding northwards. The Plaintiffs were permanently restrained from interfering with the said access by reducing its width or blocking the same. However, the Trial Court did not decree the Defendants' counterclaim in terms of prayer clause (c) in which the Defendants sought a mandatory injunction directing the Plaintiffs to demolish the compound wall constructed by the Plaintiffs without any license

from the Panchayat and to the extent it reduced the width of the suit access of three metres.

17. Accordingly, the Plaintiffs instituted Regular Civil Appeal No. 116 of 2003 before the First Appellate Court to impugn the Trial Court's Judgment and Decree dated 09.04.2003 to the extent it dismissed the Plaintiffs' suit and decreed the Defendants' counterclaim in terms of prayer clauses (a) and (b).

18. The Defendants filed Cross Objections (though these are styled as Cross Appeal No. 26/2004), challenging the impugned Judgment and Decree dated 09.04.2003 to the extent it denied the Defendants' relief of mandatory injunction in terms of prayer clause (c) of the counterclaim.

19. The First Appellate Court made two separate but almost identical Orders in Regular Civil Appeal No. 116/2003 and Cross Appeal No. 26/2004 in Regular Civil Appeal No. 116/2003. The operative portion of both the Judgments and Orders dated 20.07.2005 is the same and is transcribed below for convenience of reference :

ORDER

The instant appeal is partly allowed to the extent that the suit of the plaintiffs is also decreed partly. Accordingly, the impugned Judgment is modified. The order declaring that an access of width, of three metres exists through the property of the plaintiffs bearing survey no. 8/7 on its western side, proceeding northwards is upheld. The order permanently restraining the plaintiffs, their agents, etc., from interfering with the said access, by reducing its width or from blocking the same in any manner is also upheld. The defendants, their agents, etc., are hereby permanently restrained from demolishing /interfering with the compound walls of the plaintiffs. The plaintiffs are also directed to demolish their compound wall to the extent that it reduces the three metres of the said access.

Parties to bear their own costs.

Decree be drawn up accordingly.

Pronounced in the Open Court.”

20. Accordingly, the Plaintiffs have instituted this Second Appeal, which was admitted on 16.08.2006, on the following substantial questions of law :

“a. Whether courts below have committed error of law in granting relief of declaration of 3 mts. Wide road through the property bearing survey No. 8/7 of village Deusua, taluka Salcete on the western side proceeding northwards when there was deviation to the access as pleaded by the Respondents from the year 1984 and whether access was open peaceful,

continuous uninterrupted as of right for over twenty years u/s 15 of Indian Easements Act 1882.

b. Whether First Appellate Court could have ordered relief of demolition of portion of compound wall pleaded by the Appellants as constructed in the year 1981 and by the Respondents in the year 1984, the suit being instituted on 12.8.1993 and written statement cum counter claim filed on 8.9.93 which relief was barred by The Indian Limitation Act 1963?

d. Whether First Appellate Court committed error of law by deciding first appeal preferred by the Appellants and cross objections by the Respondents separately instead of by one common judgment and decree thereby affecting the decision of the case on merits.

21. Mr. Agni submitted that even by assuming that the pleadings in the written statement and the counterclaim filed by the Respondents were correct, it is apparent that the Defendants' use of the alleged access was interrupted in 1984. Thus, on their own pleadings, the Defendants could never establish continuous user of over 20 years, which was a pre-requisite under Section 15 of the Indian Easements Act, 1882.

22. Mr. Agni submitted that even otherwise, there is no evidence of open continuous user as of right established by any of the Defendants. He, therefore, submitted that the first substantial

question of law ought to be answered favouring the Plaintiffs and against the Defendants. Based on the same, the suit should have been decreed in its entirety and the counterclaim dismissed.

23. Mr. Agni submitted that on the pleadings in the written statement, the compound wall was constructed in 1984. However, the counterclaim was filed only on 08.09.1993. Consequently, the counterclaim was barred by limitation, and the Trial Court and the First Appellate Court erred in decreeing the counterclaim even partly and wholly.

24. Mr. Agni, based on the above contention, submitted that the second substantial question of law ought to be decided favouring the Plaintiffs and against the Defendants.

25. Mr. Agni submitted that the First Appellate Court erred in passing two separate Judgments for disposing of the Appeal and the Cross Objections. He submitted that the First Appellate Court should have passed a common Judgment, and this not having been done, the First Appellate Court's Orders warrant interference in this Second Appeal. Based on this contention, Mr Agni submitted that even the third substantial question of law ought to be decided in favour of the Plaintiffs and against the Defendants.

26. Mr. Agni pointed out how the Defendants had several alternate accesses, and the two Courts did not adequately consider this aspect. He submitted that the undertaking given to the Panchayat had to be read and construed in the context of the plan annexed to the undertaking. He submitted that the plan showed an access other than that which the Defendants were now claiming.

27. Mr. Agni submitted that the Plaintiffs were forced to give the undertaking by the Panchayat members and the local MLA, without which the Panchayat was not willing to grant any licence to the Plaintiffs. He submitted that the access shown in the plan annexed to the undertaking was quite different from the access now claimed by the Defendants.

28. For all the above reasons, Mr. Agni submitted that the Second Appeal may be allowed, the Plaintiffs' suit be decreed in its entirety, and the Defendant's counterclaim be dismissed in its entirety.

29. Mr. Coutinho, learned counsel for the Defendants, defended the First Appellate Court's impugned Judgment and Decree passed on the reasoning reflected therein. He submitted that there are concurrent findings recorded by the Trial Court and the First Appellate Court that the Defendants had three metres of motorable access on the western boundary of the Plaintiffs' property and that

the Plaintiffs obstructed the same by constructing a compound wall, which reduced the width of this motorable access.

30. Mr Coutinho submitted that the Trial Court, after concluding that the Defendants had proved that they had a three-metre access on the western boundary of the Plaintiffs' property and decreeing the counterclaim in terms of prayer clauses (a) and (b), almost arbitrarily and without assigning any reasons whatsoever, denied the Defendants' relief in terms of prayer clause (c) of the counterclaim.

31. Mr. Coutinho submitted that the First Appellate Court, while confirming the findings of the Trial Court on the existence of three metres of motorable access, only issued a mandatory injunction for demolition of the plaintiffs' compound wall to the extent it encroached upon this three metres of access and reduced its width. He submitted that there was no illegality involved and the First Appellate Court's impugned Judgment and Decree is valid in law and based on the evidence led by the parties.

32. Mr Coutinho submitted that the continuous user for over 50 years was pleaded and established by the Defendants. Merely because, at the Plaintiffs' request and to help the Plaintiffs to build their house, the Defendants agreed to a variation does not mean that the Defendants lost their easementary right or that there was no continuous user for more than 20 years. He submitted that all the

ingredients required under the Easement Act were pleaded and proved as held by the two Courts concurrently. Accordingly, he submitted that the first substantial question of law should be answered against the Plaintiffs, assuming that the question was indeed involved in this Appeal and could be regarded as a substantial question of law.

33. Mr Coutinho submitted that there was no question of the bar of limitation. Such an issue never came up for consideration before the Trial Court or even the Appellate Court. In any case, Mr. Coutinho submitted that it was the Plaintiffs' case that the Plaintiffs re-erected the compound wall a few months after 25.06.1992 or in May 1993. Accordingly, he submitted that even the second substantial question of law ought to be decided against the Plaintiffs.

34. Mr. Coutinho finally submitted that there was no bar to the First Appellate Court writing two separate but almost identical Judgments when dealing with the Appeal and the Cross Objections. He submitted that merely because the First Appellate Court delivered two separate but almost identical Judgments, no case is made out to set aside either or both such Judgments. He submitted that the third substantial question of law does not even amount to any question of law, much less a substantial question of law.

35. Mr. Coutinho submitted that the Second Appeal may be dismissed for all the above reasons.

36. The rival contentions now fall for my determination.

37. Insofar as the third substantial question of law is concerned, Mr. Agni was unable to point out any legal provision that prohibited the First Appellate Court from disposing of the Appeal and the Cross Objections by separate judgments. Accordingly, merely because the First Appellate Court may have passed separate Judgments, no case is made out to set aside such separate Judgments only on this ground.

38. Besides, if the separate Judgments are perused, it is apparent that they are almost identical. Therefore, the contention that the First Appellate Court, by writing two separate Judgments, has missed some points or that this has affected the decision of the case on merits cannot be accepted. As noted earlier, the contents of the two separate Judgments are almost identical.

39. Though Mr. Agni is correct in submitting that a common Judgment and Order invariably disposes of the Appeal and the Cross Objections or that it is better if the two are disposed of by a common Judgment and Order, in the absence of any legal provision prohibiting the passing of two separate Judgments and further,

considering the fact that the two separate Judgments are almost identical in their contents, the third substantial question of law, assuming the same, can be styled as a substantial question of law, is answered against the Plaintiffs. Based upon the answer to this question, the impugned Judgment and Decree made by the First Appellate Court does not deserve to be set aside or interfered.

40. As regards the second substantial question of law, it is necessary to note that the issue of limitation, in the present case, was a mixed question of law and fact. Although it is true that it is the duty of the Courts to examine the issue of limitation irrespective of whether or not any of the parties have raised such an issue, where such an issue involves adjudication into the mixed question of law and facts, some pleadings, followed by evidence is necessary for effective adjudication of such an issue. Besides, if the issues framed by the Trial Court in the suit are perused, it does not appear that the Trial Court even cast any issue of limitation.

41. In the counterclaim filed by the Defendants, they have pleaded that cause of action for filing the counterclaim arose on 05.08.1993. In any case, they had pleaded that in October 1992, the Plaintiffs, by constructing a step on the northern side at the mouth of the access, hindered the access of vehicles. They also pleaded that about two weeks before 25.06.1992, the Plaintiffs broke a portion of their own

compound wall lying by the side of the northern boundary. Thus, it is not entirely correct to say that the Defendants had pleaded that their access was blocked in 1984, and the counterclaim was instituted only in 1993.

42. Mr. Agni, no doubt, referred to paragraph 2 of the written statement filed by the Defendants. In this paragraph, the Defendants, while responding to paragraph 2 of the plaint, stated that construction was done in 1984 and not in 1981. However, on perusal of paragraphs 1 and 2 of the plaint and paragraph 2 of the written statement, it is clear that the construction referred to therein is of the compound wall. The Plaintiffs alleged that this construction was put up after leaving access of one and a half metres, but the Defendants alleged that the compound wall was constructed after leaving a passage of three metres. Therefore, based on the pleadings in paragraph 2 of the plaint, no case is made to conclude that the counterclaim was barred by limitation.

43. In any case, in such matters, the Plaintiffs' pleadings have to be read in their entirety. It is not proper or prudent to read some stray sentences out of context and, based upon the same, to infer that a suit or counterclaim was barred by limitation. This is more so because the Plaintiffs, in their written statements to the Defendants' counterclaim, filed on 19.07.1994, did not even deem it appropriate to

raise the bar of limitation. As noted earlier, such a bar was not raised either before the Trial Court or the First Appellate Court. On an independent examination of the scanty material on record on this issue, no case is made to infer that the counterclaim was barred by limitation. Such an examination was undertaken because Courts have to see if such a bar is attracted irrespective of any of the parties raising the limitation objection.

44. Therefore, for all the above reasons, it cannot be said that the issue of limitation is involved in the Second Appeal. In any case, even assuming that the same is involved, such an issue will have to be decided against the Plaintiffs. No material on record suggests that the counterclaim was barred by limitation.

45. Insofar as the first substantial question of law is concerned, there are concurrent findings of fact recorded by the Trial Court and the First Appellate Court that the Defendants have pleaded and established that they had motorable access of not less than three metres width passing through the Plaintiffs' property surveyed under no. 8/7. The evidence led by both parties more or less establishes this position, which is probably why a question of law based upon the perversity of findings was not even framed by this Court while admitting the Second Appeal.

46. Although no such question was framed, Mr. Agni's arguments about such a finding being perverse were entertained. Mr. Agni took the Court through the oral and documentary evidence on record. However, on assessing such evidence, it is difficult to hold that the findings recorded by the two Courts concurrently suffer from any perversity so as to warrant interference in a Second Appeal.

47. Recently, in **Bhagyashree Anant Gaonkar vs. Narendra alias Nagesh Bharma Holkar & anr.¹**, the Hon'ble Supreme Court has reiterated the position that the First Appellate Court is the final Court on questions of facts, but only if there is any substantial question of law, a second appeal could be entertained. The Court held that the existence of a substantial question of law is a condition precedent for entertaining the second appeal. The second appellate court must not re-evaluate or re-assess the evidence as if it were exercising the jurisdiction that is vested in the first appellate court.

48. In this case, as noted earlier, even upon re-evaluation of the evidence on record, it is difficult to hold that the findings concurrently recorded by the Trial Court and First Appellate Court suffer from any perversity and, consequently, warrant interference in a Second Appeal by framing additional substantial question of law.

49. The Defendants' pleadings referred to continuous (uninterrupted) open use of the motorable access for over 50 years. The two Courts have concurrently held that this aspect is proved based on the evidence led by both parties. Merely because there is a reference to deviation from the original access in or around the year 1984 and that too at the request of the Plaintiffs and to enable the Plaintiffs to build their house, no inference can be drawn that the continuous user was interrupted. Even otherwise, the owner of a property affected by an easement can always request the easement holder to shift the easement so that the owner can optimally enjoy his or her property. Merely because the easement holder may have agreed to such shifting, it is not open to the owner to turn back and claim that the use has been interrupted by such marginal shifting and, therefore, the easementary right that had already been perfected, can no longer be claimed or insisted upon.

50. The two Courts, based on the evidence led by the parties, have concluded that there was continuous user, but in 1984 or thereabout, at the request of the Plaintiffs themselves, a portion of the motorable access was shifted so as to enable the Plaintiffs to build the house. In such circumstances, it is not possible to hold that the ingredients of Section 15 of the Easement Act were not fulfilled. Therefore, the first substantial question of law would also be answered against the Plaintiffs.

51. Mr. Agni's contention about the Plaintiff's undertaking to maintain a three-metre wide access being a result of coercion or undue influence cannot be accepted, particularly in a Second Appeal and in the absence of any question being framed on such issue. Firstly, there are no clear pleadings, and secondly, there is no evidence to support this. Instead, it appears reasonable that the Defendants objected to the blockage of their motorable access, and the Plaintiffs gave a written undertaking to the Panchayat that they would maintain this three-metre width access if they were granted permission to build their house. It is at this stage that the Plaintiffs requested for a deviation so that they could build their house and, at the same time, could leave a three-metre wide access to the Defendants or use as a motorable access.

52. Mr. Agni's contention, based on the plan annexed to the undertaking, is also neither here nor there. This was not even a clear case pleaded by the Plaintiffs in their plaint. The Plaintiffs simply denied the defendant's case about the three-metre motorable access. In any case, the impugned Judgment and Decree only requires the Plaintiffs to provide access three metres in width by making some adjustments to a portion of the compound wall put up by them.

53. The contention about the Defendants having alternate motorable accesses is, again, purely an issue of fact involving no

substantial question of law. The two Courts have disbelieved this defence of the Plaintiffs. There is no perversity in the factual findings recorded by the two Courts concurrently. As a Second Appellate Court, it would not be appropriate to re-assess or re-evaluate the evidence as if this Court was exercising first appellate jurisdiction. Such an approach is impermissible, as held by the Hon'ble Supreme Court in **Narayanan Rajendran & Anr. vs. Lekshmy Sarojini & Ors.**²

54. The First Appellate Court was justified in decreeing the Counterclaim in terms of prayer clause (c) because the Trial Court, after declaring that the Defendants had proved that they had a three-metre motorable access on the western boundary of the Plaintiff's property, declined this relief which was almost consequential. No reason was cited for the denial of this relief.

55. During the pendency of this Appeal, this Court made attempts to see if the parties could amicably resolve the matter. However, the efforts were not successful. These efforts were made because Mr. Agni pointed out that the first Plaintiff had expired and the second Plaintiff, i.e. his widow, was now staying in the house.

56. In Municipal Committee, Hoshiarpur vs. Punjab State Electricity Board & Ors.³, which was referred to by the Hon'ble

² (2009) 5 SCC 264

³ (2010) 13 SCC 216

Supreme Court in **Bhagyashree Anant Gaonkar vs. Narendra alias Nagesh Bharma Holkar & anr.** (supra), it is held that a second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, and this is something distinct from a substantial question of fact. Besides, such matters cannot be decided only on sympathetic grounds, particularly where the two Courts have recorded concurrent findings of fact.

57. The above facts are noted because though mediation attempts before this Court may have failed, there is no harm in the parties once again exploring the possibility of some settlement. The Executing Court may also make attempts to see whether the Defendants can use the motorable access by causing minimal damage to the Plaintiffs' property/compound wall on the western boundary.

58. Accordingly, for all the above reasons, this appeal is liable to be dismissed and is hereby dismissed. There shall be no Order for costs.

59. Misc. Civil Application No. 1893 of 2023 (F), stands disposed of.

M. S. SONAK, J