EV

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 95 OF 2005

1. **Ramakant Kalangutkar**,
major of age, married, and his wife

2. **Mrs. Shoba Kalangutkar**,
major of age, housewife, both residents of Santarxette, Aldona, Bardez, Goa. … Appellants

~ versus ~

Mr. Giridhar Deusekar,
major of age, Santaraxette, Aldona, Bardez-Goa. …Respondent

Appearances

FOR THE APPELLANTS **Mr. Ashwin D. Bhobe**, *Advocate*

FOR THE RESPONDENT **Mr. S. Desai, Senior Advocate** *with Mr. Anoop Gaonkar, Advocate*

CORAM : G.S.Patel, J.

DATED : 7th August 2017

ORAL JUDGMENT:

1. The Second Appeal was admitted on 01.09.2005 on the following question of law:

> "Whether when the plaintiff (respondent) himself having acknowledged and admitted of one metre access all along the western boundary being left for the use of the public and the defendants, the District Court could hold that the plaintiff (respondent) had not violated any of the civil rights of the defendants (appellants) and that the plaintiff (respondent) was under no obligation to reserve the said access?

2. Mr. Desai for the respondent argues that no such question of law arises. Having heard him at some considerable length, including on that aspect of the matter, and Mr Bhobe for the appellant, I am unable to agree.

3. The respondent was the original plaintiff to the suit. The dispute was about access to and through the plaintiff's property. The plaintiff brought suit in the Court of the Civil Judge Junior Division of Bardez at Mapusa, alleging that the defendants (the appellants before me) were interfering with the plaintiff's possession of his property. This is a tract of land of about 850 square metres at Survey No. 15, Sub-Division No. 20, situated at Santarxett in the Village Aldona, within the limits of Aldona Village Panchayat, Taluka and Sub-District of Bardez, District of Goa.

4. The plaintiff claimed to have purchased the property on 2nd June 1987 under a registered document. The plaintiff then had his name entered on the relevant survey records, following which he

commenced construction of a house with the necessary permissions. This construction involved the erection of a compound wall along the property. The plaintiff's case was that in early January 1995, when the wall construction began, the defendants obstructed the plaintiff. They filed police complaints. Work on the compound wall resumed in mid–May 1995. Despite previous warnings, the defendants once again interfered with the construction. The plaintiff sought police protection and a copy of that application is also annexed. Paragraphs 10 and 11 of the plaint say this:

> "10. That the plaintiff has partly completed the construction of the suit compound wall and partly is remaining as the defendants are obstructing from completing the same.
>
> 11. That the defendants are trying to use muscle power and force in order to stop the construction of the suit compound wall. **The plaintiff has also left 1 mt. pathway all along the western boundary as an access for public use and also for the use of the defendants.**"
>
> (*Emphasis added*)

5. These were the main prayers in the suit:

> a) That the defendants be directed to stop interfering with the plaintiff in any manner with respect to the suit property;
>
> b) That the defendants be directed not to interfere with the construction of boundary wall of the suit property and the plaintiff be allowed to construct the same as per the permission obtained by him;

6. Issues were struck on 5th December 2001, thus:

> 1. Whether the plaintiff proves that he is owner in possession of survey no.15/20?
>
> 2. Whether the plaintiff proves that he was trying to construct a compound wall after obtaining necessary permission?
>
> 3. Whether the plaintiff proves that due to the defendants obstruction he could not complete the construction of the compound wall?
>
> 4. Whether the defendants show that they have right of access through the plaintiff's property?
>
> 5. Hence, what relief? What order?

7. Obviously, issue no. 4 lies at the centre of the present dispute. The Trial Court took evidence and delivered a judgment on 1st December 2003. It answered issues 1, 2 and 3 in the affirmative, but, importantly, answered issue no. 4 in the negative. Ultimately, the Trial Court decreed the suit in the following terms:

> "The plaintiff is permitted to construct the suit compound wall after leaving the one metre wide access on the western side of the suit property. The defendants are restrained from interfering with the construction of the suit compound wall or the suit property enclosed by the suit compound wall. The defendants shall pay the costs."

8. At this stage, I must note paragraphs 31 and 32, the concluding paragraphs of the Trial Court's judgment:

"31. **The ld. Advocate for the plaintiff, Shri F. Braganza, has argued that since the defendants have not proved their right to way through the suit property, the plaintiff is not obliged to leave a one metre wide access on the western side of the suit property, as stated in the plaint. In the circumstances of this case, it is not possible to accept this argument. Injunction is an equitable relief.** The plaintiff must act in a clean and transparent manner. **The plaintiff had stated in his plaint that he was leaving one metre wide access along the western boundary of the suit property and constructing a compound wall. It is on this premise that the trial started.** Now at the time of arguments, the plaintiff cannot be heard to say that he need not do so. Such an argument if allowed, would mean that the plaintiff has not come to this Court with clean hands. **The plaintiff said he would leave a one metre wide access on the western side of the suit property. He must do what he said.**

32. **The plaintiff wants to construct a compound wall after providing for one metre wide access along the western boundary of the suit property for the benefit of the defendants and the general public. For this purpose, he is seeking permission to construct the suit compound wall and for the relief of permanent injunction, to restrain the defendants from interfering with the construction and the suit property. Such an action cannot cause anybody any harm.**"

(*Emphasis added*)

9. From this, it is clear that prayer (b) of the plaint, seeking a direction against the defendants not to interfere with the plaintiff's construction of the boundary wall, and liberty to the plaintiff to construct the wall, was one that the Trial Court read in conjunction

with paragraph 11. Particular emphasis was placed on the last sentence of paragraph 11, which, at the cost of repetition, I reproduce below:

> "**The plaintiff has also left one metre pathway all along the western boundary as an access for public use and also for the use of the defendants.**"
>
> (*Emphasis added*)

10. Throughout it has been Mr Desai's endeavour on behalf of the respondent to urge that this was a mis-statement or, at any rate, a statement that was inaccurate and was misunderstood. What the plaintiff really meant to say was *not*, Mr Desai says, that there was a one metre pathway left from the plaintiff's land, but that there was a one metre pathway available along the western boundary in the neighbour's land.

11. I do not think it is remotely possible to accept any such submission. Even if Mr Desai is right in saying that only an Englishman understands English (a somewhat unwieldy submission in this day and age), we non-Englishmen must, at the very least, guard against allowing violence being done to the language — especially at our own hands. The explanation offered now stands wholly outside any evidentiary record. No attempt was ever made by the plaintiff before the Trial Court to explain this statement. No attempt was made to amend the plaint to delete this statement. In oral arguments before the Trial Court, it was urged that since the defendants had not proved any easementary or prescriptive rights through the plaintiff's property, therefore the plaintiff was not

required to leave the one metre access road on the western side; i.e., that the plaintiff should be absolved of the obligation mentioned in paragraph 11.

12. This is the real difficulty with the argument that the statement in paragraph 11 of the Plaint was inaccurate or was incorrect. That was not even the submission before the Trial Court, as noted in paragraph 31 of the Trial Court judgment. What was urged before the Trial Court, the record reflects, is only this: that the defendants not having proved any right of access, the plaintiff should be absolved of any commitment made in the plaint; not that the plaintiff did not intend to, or did not in fact, make the statement at all. I have every confidence that this distinction, with all its subtlety, would not be lost on any Englishman, even of the stripe we might find aboard the Clapham omnibus.

13. From this order, one that I should have thought called for no interference, it was the successful plaintiff who appealed. The defendants were perfectly content with the suit as decreed. In paragraph 8 of its order, the First Appellate Court noted that the short point that fell for consideration was whether the plaintiff was liable to leave an access of one metre width on the western side of the suit property. The answer to this, the First Appellate Court said was had to be in the negative. After examining the material on record, the First Appellate Court concluded, *inter alia* on the basis of documents in evidence, that the defendants had no right of access through any part of the plaintiff's property. In paragraph 10 of the Appellate's order, there is an extensive discussion of the evidence

from the Court below including the available access and its width. The relevant portion of paragraph 10 reads thus:

> "A perusal of the document at Exhibit 36 and 37 amply proves that though the original owners had kept an access of 1.5 mtrs. along the eastern boundary of their property, the present owner Santan has entered into an agreement with the defendants whereby he has reduced the width of the access to 1 mtr. and has constructed the compound wall on all sides of his property. The consequence of this agreement is that the width of the access is reduced from 1.5 mtrs. to 1 mtr. and is not increased from 1.5 mtrs. to 2.5 mtrs. as alleged by the defendants. Thus the evidence on record indicates that the defendants have right to use 1 mtr. wide access which is passing through the property under survey no.15/18, and which is more particularly delineated in the sketch annexed to the agreement at Exhibit 36. It is not the case of the defendants that they have access through the suit property or that the plaintiff has encroached upon this 1 mtr. wide access which is passing through the property under survey no.15/18. On the contrary the defendants have stated that the width of the access is reduced to 1.5 mtrs, which fact indicates that apart from 1 mtr. wide access which is in the property under survey no.15/18, the plaintiff has also kept .50 mtr. access along the western boundary of the suit property thereby increasing the width of the access from 1 mtr. to 1.5 mtrs."

14. Thereafter, in paragraph 11 the First Appellate Court said this:

> "11. The plaintiff is admittedly the owner of the property under survey no.15/20. The defendant has failed to prove that he has any right of way through the property under

> survey no.15/20 or that the plaintiff is encroaching upon 1 mtr. wide access existing in the survey no.15/18. **The learned Trial Judge failed to consider that the plaintiff had not violated any of the Civil rights of the defendants and was under no obligation to reserve any access through the suit property and as such the Trial Judge could not have directed the plaintiff to reserve 1 mtr. wide access on the western side of the suit property, merely because the plaintiff had averred in the plaint that he had left 1 mtr. wide access along the western boundary of the suit property**. The judgment and decree to that extent needs to be modified."
>
> (*Emphasis added*)

15. This, as Alice said, gets curiouser and curiouser, and one might be forgiven for feeling one has just stepped through some looking glass into a place where nothing is quite what it seems, albeit one singularly bereft of even a solitary Englishman. The plaintiff said one thing in his plaint. He now says before me he meant another thing altogether. He did not say this to the Trial Court, nor to the First Appellate Court but only, at a very late stage in the proceedings, sought to distance himself from his averment in the plaint. The Trial Court took the plaintiff at his word. It held him to it. It had to. No principle of pleading allows a party to disavow a statement made on affirmation in this fashion.

16. With respect, I am unable to appreciate how the First Appellate Court could have completely exonerated the plaintiff from fulfilment of the very condition on which the relief in the suit was almost entirely predicated. The statement in question occurs in the

plaint itself. It is not an admission that comes at a late stage of the trial, or one that was elicited in cross-examination. It is not a statement that was offered in the form of rebuttal evidence either. The foundation of the plaint was that the defendants had no right to obstruct the plaintiff's construction of the boundary wall *because* the plaintiff had left the defendants a one metre pathway along the western boundary as an access; and this was available not only to the defendants but to the public at large. In short, according to the plaintiff, because of this one metre pathway, the defendants had no cause for complaint. It was most emphatically not the case of the plaintiff that since the defendants had some other access route, the defendants could not insist on this access along the western wall.

17. The finding in the First Appellate Court that since the plaintiff's had not violated the defendants' civil rights, therefore there was no obligation on the part of the plaintiff to reserve any access, seems to me to have proceeded on an incorrect premise. If the civil rights of the defendants were not defeated, it was because of the access that was reserved to them in the plaint, not despite it. If the defendants did have a right, then the reservation or concession was redundant and otiose. There is no doubt that the plaintiff himself recognised that providing a right of access was necessary; and it must follow that but for that admission, the defendants did have cause for complaint.

18. As a matter of law, I am unable to seek how a specific averment in the principal pleading, i.e., the plaint, could be entirely swept aside by the plaintiff who made it without any explanation, qualification, reservation or amendment. The argument that none of

the civil rights of the defendants had been violated and therefore there was no obligation to reserve access is not one that finds place in the plaint. Even in the evidence in lieu of examination in chief, the plaintiff did not deviate from this position. To the contrary the averments in paragraph 11 of the plaint were reproduced *verbatim* in paragraph 12 of the plaintiff's evidence affidavit. Thus, we have a reaffirmation in evidence of what was stated in the plaint. This was an opportunity for the plaintiff to explain that there was a mistake in the plaint if the plaintiff so desired, and as Mr. Desai now attempts to argue. No such attempt was ever made.

19. We therefore have a situation where a most solemn pleading was reaffirmed in evidence, and it was then only orally argued by the advocate who appeared both before the Trial Court and before the First Appellate Court that these assertions and averments of the plaintiff, binding him to a certain course of conduct, were irrelevant. It seems to me entirely incorrect to say that the Trial Court could not have directed the plaintiff to reserve a one metre access on the western side of the property. There are many reasons for this. The first is only logical. The plaintiff could not have made such a concession except in respect of his own property. He could hardly say that he had left a one metre access in his neighbour's property. He could only make that statement about his own. Second, a relief can always be moulded having regard to the facts of the case. This is clear *inter alia* from Order VII Rule 7 of the Code of Civil Procedure, 1908. Third, as we have seen, the relief in prayer clause (b) was predicated on the statement made in paragraph 11, that the boundary wall was drawn inward towards the plaintiff's property to the extent of one metre along its western side. The discussion in

paragraph 10 of the First Appellate order on any existing access paled into insignificance. Irrespective of the result of issue no. 4, the statement in paragraph 11 served as an important admission, particularly when it was reiterated in the evidence affidavit.

20. The fact that the statement in paragraph 11 of the plaint did not merely remain in the plaint but was reasserted in evidence is a matter not addressed by the First Appellate Court at all. If it is an admission, the plaintiff had an opportunity to explain it, but did not; and it is settled law that an admission unless explained always furnishes the best evidence.[1] It was most certainly not for the defendant, in whose favour the two statements were made, to elicit an explanation for that admission. An admission is substantive evidence and can be used without being put to the maker of it in cross-examination, though it may not be conclusive proof of the matters admitted.[2]

21. The defendants did not think it necessary to appeal the original decree. They were perfectly satisfied with it, and quite correctly so. It was the plaintiff who sought to distance himself from a decree passed in his favour in his own suit on a statement that he himself had made in his own plaint and evidence.

22. I do not believe that as a matter of law the original decree called for any interference.

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1 *Ramji Dayawala & Sons (P) Ltd v Invest Import*, (1981) 1 SCC 80.

2 *Bharat Singh and Anr v Bhagirathi*, AIR 1966 SC 405; *Murlidhar Sapuji Valve v Yallapa Lalu Chougule*, AIR 1994 Bom 358.

23. I have not while addressing this question attempted to re-examine any disputed questions of fact or the evidence. The limited question of law is the one that is noted at the time of admission, viz., whether once the plaintiff had acknowledged and admitted this one metre width access all along the western boundary, the District Court could have held that the plaintiff was under no obligation to provide that access? In my view, and for the reasons that I have indicated above, the question as framed must be answered in the negative. The District Court could not have held as it did.

24. In the result, the Second Appeal succeeds. The original decree is restored.

25. The Second Appeal is disposed of in these terms. There will be no order as to costs.

G. S. PATEL, J.