

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 43 OF 1997.

1. Gregorio Pereira
(since deceased) through
L.Rs.

1a. Shri Savio Pereira,
major, resident of
Betalbatim, Gonsua,
Salcete, Goa.

2. Mrs. Elisa Pereira,
residing at Betalbatim
Salcete, Goa.

... Appellants.

VERSUS.

1. Damazio Bento Pereira,
major, bachelor.

2. Lira Pereira,
widow.

3. Simona Flavia Pereira,
major, spinster.

4. Sonia Vinant Pereira,
major, spinster.

5. Edward Antonio Pereira,
major, bachelor,
all landowners and
residing t Gonsua, Betalbatim,
Salcete, Goa.

... Respondents.

Mr. S.D. Lotlikar, Senior Advocate with Mr. A.D. Bhobe,
Advocate for the Appellants.

Mr. M.S. Usgaonkar, Senior Advocate with Mr. Sudin
M. Usgaonkar, Advocate for the Respondents.

CORAM: V. G. PALSHIKAR, J.

DATE: 16TH OCTOBER, 2003.

J U D G M E N T.

This appeal is directed against the judgment and

decree dated 15th February, 1997 passed in Regular Civil Appeal No. 19 and 21 of 1993.

2. Regular Civil Suit No. 101/75/C was filed in the Court of Civil Judge J.D., Margao by the original plaintiffs/present appellants against present respondents/original defendants in the Civil Suit. Reference was thereafter made to the present appellants as the original plaintiffs and the present respondent as the original defendants.

3. Regular Civil Suit No.101/75/C was filed by the original plaintiffs claiming the following reliefs:-

" (a) For the judgment and order of this Hon'ble Court directing the defendants to demolish the illegal and unauthorised construction or erection of the extension or addition to the existing house at the rear side.

(b) For a permanent mandatory injunction restraining the defendants from making /or erecting or constructing the illegal and unauthorised erection /or construction of the extension /or addition to the existing house at the rearside at any time hereinafter;

(c) For a temporary injunction restraining the defendants, their agents, & servants /or persons claiming through them from continuing with the illegal and unauthorised erection for construction of the extension or addition to the existing house at the rearside till the final

disposal of the suit;

(d) For costs of the suit;

(e) And for such other and further relief/s that this Hon'ble Court may deem fit and proper in the circumstances of the case.

4. It will be seen from the above prayers that the original plaintiffs claimed a mandatory injunction against the defendants directing them to demolish certain construction, which according to the plaintiffs, was unauthorised. It was also prayed that they be restrained by appropriate injunction order from making hereafter any such illegal unauthorised construction. As an interim relief, temporary injunction was claimed preventing them from further constructing or making any illegal or unauthorised construction. This Suit was duly resisted by the defendants by filing written statement. All the allegations made in the plaint were denied. Issues were therefore framed and evidence was to be led thereafter.

5. During the pendency of this Suit, original defendants filed Regular Civil Suit No.45/82/C in the year 1982 claiming in their suit that the original plaintiffs in the earlier suit had effected certain constructions which were not in accordance with law and claimed that the demarcation of the properties belonging to the original plaintiffs and the original defendants be decreed and ordered. This Suit was also pending

before the same Civil Judge J.D., Margao. After evidence was led in this case also both the suits, one filed by the original plaintiffs and the other filed subsequently by the defendants were decided by the learned Judge by separate orders on 5th February, 1993. Regular Civil Suit No.45/82/C was dismissed by the learned Trial Judge and Regular Civil Suit No.101/75/C filed by the original plaintiffs was decreed as aforesaid by the learned Judge.

6. Being aggrieved by the decree granted in favour of the plaintiffs in Regular Civil Suit No.101/75/C Regular Civil Appeal was filed by the original defendants. It was registered as Regular Civil Appeal No.19/93. Regular Civil Appeal No.21/93 was filed by the original defendants against the dismissal of their Suit being Regular Civil Suit No.45/82/C. Both these appeals were allotted for decision to the same Additional District Judge and he, by his Order dated 15th February, 1997 dismissed the appeal filed by the original plaintiffs in Civil Appeal No.19/1993 and allowed the Appeal filed by the original defendants in Civil Appeal No.21/93, decreed the suit filed later on by the original defendants and dismissed the suit earlier filed by the original plaintiffs. The learned lower Appellate Court therefore ordered that both the Civil Appeals No.19 and 21/1993 are hereby allowed and

Regular Civil Suit No.101/75/C is dismissed and Regular Civil Suit No.45/82 is allowed. He made consequential decrees also.

7. Feeling aggrieved by dismissal of their suit, the original plaintiffs have filed the above Second Appeal, being Second Appeal No.43/97 challenging the dismissal of their suit. It is liable to be noticed that this appeal is specifically directed against the Judgment and Order dated 15th February, 1997 in Regular Civil Appeal No.19/93 i.e. the appeal filed before the learned District Judge by the original defendants. By this Order the suit of the original plaintiffs was dismissed. It is pertinent to note that there is no appeal filed by the original plaintiffs against the decree of the suit filed in 1982 by the original defendants. Apparently for the reason that though two Civil Suits were decided by a common order and therefore one appeal questioning the correctness of that order is sufficient. When the matter came up for admission it was admitted on the following substantial questions of law:-

" 1) Whether under the facts and circumstances, Reg.Civil Appeal Nos. 19/93 and 21/93, could have been heard together and decided the appeals, which order resulted into one common decree only ?

2) Whether there is miscarriage of justice in conducting

the two appeals together and in the process, taking into consideration the evidence led separately in two separate suits ? "

8. When the matter came up for hearing submissions of both the learned counsel for the appellants and the respondents in the present appeal were heard and it was observed that gross miscarriage of justice has occurred by an error of law, committed by both the Courts below in trying both the suits simultaneously and both the appeals simultaneously. It was revealed that both the courts below have not taken into consideration the provisions of Section 10 of the Code of Civil Procedure and that non-consideration has resulted, in my opinion, in gross miscarriage of justice.

9. However, a question of law of substantial nature to this effect was not framed and therefore a question was raised as to whether such additional question of law can be framed. That takes me to the provisions of Section 100 of the Code of Civil Procedure which specifically provides by proviso which reads as under :-

" Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other

substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

10. I would therefore now record my reasons for framing an additional substantial question of law. It will be seen that non-consideration of a provision of law is certainly an error of law and jurisdiction committed by a Court. Provisions of Section 10 may be noted in this regard :-

" 10. Stay of suit. - No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in (India) having jurisdiction to grant the relief claimed, or in any Court beyond the limits of (India) established or continued by (the Central Government) and having like jurisdiction or before (the Supreme Court). "

11. It provides a mandate to the Court that it shall stay a subsequently instituted suit if the issues involved in both the suits are substantially the same. The provisions of Section 10 were therefore liable to be invoked when the second suit was filed in the year 1992 during the pendency of the suit filed in 1975, both raising almost identical questions of law and fact for adjudication.

12. The basic dispute between the parties is what exactly is the boundary of land belonging to each of them, i.e. the original plaintiffs and original defendants. The plaintiffs in Regular Civil Suit No.101/75/C claimed it to be one and the original defendants in their suit No.45/82/C claimed it to be something else. In the earlier Suit the issue was whether the original defendants have committed any encroachment and have made any illegal constructions. Same was the prayer in the suit filed subsequently by the defendants who claimed that the construction made by the original plaintiffs was incorrect and the boundary was liable to be determined and consequently an order was prayed for. In my opinion therefore the basic question which arose for adjudication of the trial Court was the existence of exact boundary lines of both the plots owned by the plaintiffs and defendants respectively. The learned Judge was therefore bound in law to apply the provisions of Section 10 and stay the subsequent suit. It was not so done by the learned Trial Judge, as a result of which two judgments were delivered in the two suits and two appeals were carried to the appellate Court by the respective unsuccessful parties. The appellate Court also did not notice existence of Section 10 and further committed an error while

deciding both the appeals by a common order, grievance of which is raised in the Second Appeal and on the basis of which the above quoted substantial question of law should have been framed by this Court. In these circumstances and for these reasons, in my opinion, additional substantial question of law are liable to be framed to read as under :-

Whether non-consideration of a provision of law namely Section 10 of C.P.C. has resulted in miscarriage of justice requiring interference by this Court ?

13. It will be seen that evidence was independently led in both the Suit and the appellate Court has considered the evidence in one suit for rejecting the claims in the other suit, i.e. used the evidence in the second suit for non-suiting the original plaintiffs in the first earlier suit filed. The whole complaint in the second appeal is therefore miscarriage of justice by such approach. The learned counsel appearing on behalf of the present respondents/original defendants submitted that no such injustice is done. The learned Appellate Court has considered the facts and law applicable, and independently decided, both the appeals by the operative part and therefore the second appeal should

have been filed against both the orders, though given by common judgment. He heavily relied upon the operative part of the judgment to contend that there is no challenge by the original plaintiffs to the decree granted by the lower appellate Court decreeing the suit of the original defendants in the subsequently instituted suit. That being the position, rejection of the Civil Appeal dismissing the suit of the original plaintiffs is proper and no interference is called for.

14. The learned counsel appearing for the appellants on the other hand, pointed out by taking me through the judgment of the Appellate Court that mis-application of facts has resulted in miscarriage of justice to say the least. Several instances were sought to be pointed out claiming that there has been serious miscarriage of justice.

15. I have considered the rival submissions very carefully and in my opinion, the order passed by the lower appellate Court as also the orders passed by the Civil Judge J.D., Margao are liable to be set aside for non-observance of statutory provisions namely Section 10 of C.P.C. It should be seen from the provisions of Section 10 that it begins with a mandate to the Court. It says no Court shall proceed

with the trial of any suit if the issues involved are substantially the same. The Trial Court which was dealing with both the suits could not therefore proceed with the trial of a subsequent suit filed by the original defendants. The test for applicability of the provisions of Section 10 is that on a final decision being raised in the previously instituted suit, such decision would operate as res judicata in the subsequent suit. If this test is satisfied provisions of Section 10 will have to be applied. The provisions of Section 10 are for giving effect to the principle of sub judice which must be considered in the light of the principle of res judicata. Applying this test to the facts of the present case, it will be seen that the judgment and decree passed in the previously instituted Suit i.e. No.101/75 would have operated as res judicata in Suit No.45/82 because the question as to what are the boundaries of the respective plots would have been adjudicated in the earlier suit. In my opinion therefore the provisions of Section 10 were squarely attracted to the facts of the present case.

16. There can be no doubt that both the impugned orders passed by the Courts below do not take note of the provisions of Section 10 of C.P.C. and therefore suffer from illegality. The first illegality is

committed by the learned Trial Judge in proceeding to try both the suits when the law mandated that the subsequent suit should be stayed. His proceeding with the trial of both the suits is itself without jurisdiction. The entertainment of the appeals by the appellate authority of necessity must fail for the same reason. In my opinion the third substantial question framed by me above is in the circumstances liable to be answered in the affirmative i.e. gross miscarriage of justice has occurred because of the trial and conduct of the suits and appeals by the Courts below without noticing the provisions of Section 10 of C.P.C.

17. In the result the Appeal succeeds and the impugned Order dated 15th February, 1997 is liable to be set aside.

18. It will be seen that in order to do complete justice to the parties it would, in the present circumstances, be necessary that the judgments passed in both the Suits by the learned Trial Judge are also bound to be set aside. The entire process of adjudication taken up by the Trial Court and the appellate Court in ignorance of the provisions of Section 10 has to be set aside and the parties must be relegated to the basic position that existed prior

to the position by either of the two courts. As a result therefore I pass the following Order:-

(i) The judgment and decree dated 15.2.1997 impugned in the present Second appeal passed in First Appeal No.19/1993 is set aside;

(ii) As a result of this, the order allowing the appeal filed by the original defendants fails and is dismissed.

(iii) The judgment and decree passed by the Trial Court on 5th February, 1993 in Suit No.101/75/C is set aside.

(iv) Judgment and decree passed in Civil Suit No.45/82/C is set aside. Both the cases are remitted for trial to the Trial Court i.e. Civil Judge J.D., Margao.

19. The learned Judge is directed to proceed with the trial of Regular Civil Suit No.101/75/C filed by the original plaintiffs and stay the later Regular Civil Suit No.45/82/C filed by the original defendants.

20. Parties shall be at liberty to lead additional

evidence, if so advised.

Parties shall bear their costs throughout.

V.G. PALSHIKAR, J.

sl.