

Mr. Lawrence Pereira & ors. Vs Mateus Avelino Pereira & ors.

Court: BOMBAY HIGH COURT

Date of Decision: March 7, 2017

Acts Referred: [Code of Civil Procedure, 1908](#), [Order 16 Rule 1](#)

Hon'ble Judges: F. M. Reis

Bench: SINGLE BENCH

Advocate: S. G. Desai, Anoop Atchut Gaoker, M. B. Da Costa, Karishma Custa Betquecar

Judgement

1. Heard Mr. S. G. Desai, learned Senior Counsel appearing for the appellants and Mr. M. B. Da Costa, learned Senior Counsel appearing for

the respondent nos. 1 & 3(a).

2. Admit on the following substantial question of law : Whether the judgments passed by the Courts below stand vitiated for refusal to examine a

witness to prove the document marked "X" for identification during the course of the evidence of PW1 ?

3. Ms. K. Betquecar, learned counsel waives service on behalf of the respondent nos. 1 & 3(a).

4. Mr. Desai, learned Senior Counsel appearing for the appellants has pointed out that the property belonging to the appellants is surveyed under

No.41/6 whereas the property belonging to the respondents is surveyed under no.41/7 situated at Mercurim of Village Agacaim. The learned

Senior Counsel further pointed out that the property of the respondents is located towards the eastern side of the property of the appellants as

according to him there is a wall constructed by the respondents on the boundary line separating the property of the appellant and the respondents.

The learned Senior Counsel further pointed out that somewhere in 1998, the western wall of the house of the respondents was reconstructed by

masonry stones and according to him buttresses were placed in the property belonging to the appellants on the western side of the property of the

respondents to support the mud wall which was likely to be collapsed. The learned Senior Counsel further pointed out that such buttresses placed

by the respondents at the time of the said reconstruction of the western wall of the house were not removed despite of request made by the

appellants. It is further pointed out that placing such buttresses is an encroachment into the property of the appellants which the appellants are

entitled to get withdrawn. The learned Senior Counsel further pointed out that at the time of the reconstruction of the said western wall, the

respondents have also extended the eaves drops of the house thereby further encroaching into the property of the appellants. The learned Senior

Counsel further submits that in support of their claim that the buttresses are located in the property of the appellants, the appellants filed an

application under Order XVI Rule 1 of the Civil Procedure Code to examine the surveyor Mr. Prazares Gonsalves who had prepared the plan

which was marked "X" for identification during the course of the evidence of PW1. The learned Senior Counsel further pointed out that this

application was rejected by the learned Judge on erroneous consideration which was challenged before the learned Lower Appellate Court. It is

further submitted that the challenge was not examined by the learned Lower Appellate Court and on the contrary it is recorded by the learned

Appellate Court that such order has become final. It is further submitted that the evidence of the said witness is very material to establish the

encroachment in the property of the appellants and due to such failure, it led to failure of justice to the appellants. The learned Senior Counsel

thereafter has taken me through the judgments passed by the Courts below to point out that though the Courts below have found that the survey

line is not in accordance with the survey plan, nevertheless, as the said plan was not proved the appellants were precluded from establishing their

claim. The learned Senior Counsel as such points out that the judgments passed by the Courts below are vitiated and deserve to be quashed and

set aside and the matter be remanded to the learned Trial Judge to decide the suit afresh.

5. On the other hand, Mr. M. B. Da Costa, learned Senior Counsel appearing for the respondents has pointed out that there is a boundary dispute

over the boundary as shown in the survey plan and the respective titles of the appellants and the respondents. The learned Senior Counsel further

submits that as the dividing line between the properties of the appellants and the respondents is not correctly depicted in the survey records, the

appellants are not entitled for any relief as the appellants have failed to establish the extent of their boundary line as per their title documents. The

learned Senior Counsel further submits that the buttresses which are alleged to have been put up by the respondents were in existence for more

than 50 years. The learned Senior Counsel further submits that such buttresses were in existence for such a long period and in any event,

irrespective of the other contentions the respondents have acquired a right by prescription over the subject property on that count. The learned

Senior Counsel further pointed out that though the respondents have not raised a specific plea to that effect, nevertheless, the evidence on record

would establish this aspect and in any event, the respondents be given liberty to file an appropriate application for leave to raise this plea in the

written statement. The learned Senior Counsel further pointed out that at the time of the reconstruction of the western wall of the house of the

respondents, such wall has been put up at the same place and the eave drops are at the same position and as such, the contention of the appellants

that the buttresses were put up at the time of the reconstruction is an erroneous plea taken by the appellants. The learned Senior Counsel has

thereafter taken me through the judgments passed by the Courts below and pointed out that both the Courts below have rightly come to the

conclusion that the appellants have failed to establish the extent of their property separating the property of the appellants and the respondents and

consequently, the appeal deserves to be rejected.

6. I have considered the submissions of the learned Senior Counsel and I have also gone through the records. The dispute in the present case is

with regard to the legal effect of the buttresses existing adjoining the western wall of the house of the respondents. Though it is contended by the

appellants that such buttresses are located in the property belonging to the appellants, nevertheless, the Courts below while examining such aspect

have come to the conclusion that there is a boundary dispute as shown in the survey records separating the property of the appellants and the

respondents. In such situation, the evidence of the surveyor sought to be examined by the appellants would be material to consider the extent of the

property of the appellants vis-a-vis the property of the respondents. Apart from that, the contention of Mr. Da Costa, learned Senior Counsel

appearing for the respondents that in any event the subject buttresses were in existence for more than 50 years and has acquired a prescriptive

right in favour of the respondents is a matter which would have to be considered only after the appropriate defence/pleadings are raised by the

respondents in the written statement. As such, the question of granting leave to the appellants at this stage without giving an opportunity to the

parties to lead further evidence with regard to their respective claims would not at all be justified. Apart from that, the extent of the property of the

appellants would determine whether there is any encroachment as claimed by the appellants on account of the eave drops from the roof put up by

the respondents while reconstructing the western wall. In such circumstances, without going into the merits of the rival contentions, I find that in the

interest of justice the impugned judgments passed by the Courts below dated 31.07.2014 and 28.09.2015 deserve to be quashed and set aside.

The appellants are given an opportunity to examine the said witness Mr. Prazares Gonsalves. The respondents are also given leave to file an

application for amendment of the written statement and if so advised even to raise a counter claim on the pleas sought to be raised by the

appellants. Needless to say, the respondents are entitled to file an additional written statement, if any, and both the parties are at liberty to lead

further evidence in support of their respective stands after the Court frames the additional issue, if any. The learned Senior Counsel appearing for

the appellants upon instructions points out that the appellants shall maintain the status quo with regard to the subject dispute in the suit.

7. In view of the above, I pass the following :

(i) The judgment passed by the learned Trial Court dated 31.07.2014 and the judgment passed by the learned Lower Appellate Court dated

28.09.2015 are quashed and set aside.

(ii) Regular Civil Suit No.40/1998/C is restored to the file of the learned Civil Judge Junior Division, at Panaji.

(iii) The learned Judge is directed to decide the said suit afresh in the light of the observations made herein above in accordance with law.

(iv) All contentions of both the parties on merits are left open.

(v) Needless to say, considering that the matter is of 1998 the learned Judge shall try and dispose of the suit as expeditiously as possible.

(vi) The appeal stands disposed of with no order as to costs.