

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 30 OF 2013

- 1] Shri. Antonio Dourado
Son of Andre Dourado, aged 75 years
married, occupation landlord,
R/o. House No. 397, Gabriel Cruz Waddo,
Utorda, Salcete, Goa.
- 2] Smt. Joana Ancessa Rocha
wife of Shri. Antonio Dourado,
aged 65 years, occupation housewife
R/o. House No. 397, Gabriel Cruz Waddo,
Utorda, Salcete, Goa.
- Appellants/
Ori. Plaintiffs.

V e r s u s

- 1] Shri. Gaspar Antao,
Major, married and his wife,
- 1a) Smt. Gaspar Antao
Major, married, occupation – housewife
Both R/o. B2, Garden view,
Near Post Office, Margao, Goa.
- 2] Shri. Rosario Antao
major married, and his wife
- 2a) Smt. Raosario Antao
major, married, occupation – housewife
- 3] Shri. Joao Batista Dourado,
since deceased through his legal representatives;
- 3a) Shri. James Dourado (deceased)
major, bachelor,
R/o House No. 398, Gabriel Cruz Waddo,
Utorda, Salcete, Goa.
- 3b) Shri. Agnelo Dourado
since deceased through his legal representatives
- 3c) Shri. Antonio Dourado
major, married and his wife
- 3d) Smt. Antonio Dourado
major, married, occupation – housewife,

Both R/o. C/o. Tony Dourado,
Quatar Fertilizers Co. (QAFCO),
Doha Qatar (A.G.)

- 4] Shri. Sonat Kumar Kontok
major, married and his wife,
- 4a) Smt. Sonat Kumar Kontok
major, married occupation – housewife
Both residing at Flat No.225, Jolly Makers Apts.,
Coffe Parade, Mumbai – 400 005.
- 5] Smt. Florina Dourado
major, married, occupation – housewife
R/o. Gabriel Cruz Waddo,
Behind Lourdes Church, Utorda,
Salcete, Goa.
- 6] Shri. Adriano Dourado
major, married and his wife.
- 6a) Smt. Adriano Dourado
major, married, occupation – housewife
Both r/o. Gabriel Cruz Waddo,
Behind Lourdes Church,
Utorda, Salcete, Goa.
- 7] Shri. Peter Dourado (deceased)
major, married and his wife,
- 7a) Smt. Peter Dourado
major, married, occupation – housewife
Both r/o. Behind Lourdes Church,
Utorda, Salcete, Goa.
- 7b) Smt. Laveena D'souza,
daughter of alte Peter Dourado alias
Pedro Francisco Dourado,
major of age – married, and her husband
- 7c) Shri. Manish D'souza,
husband of Laveena D'souza,
major of age, married
- 7d) Shri. Lucan Dourado,
son of late Peter Dourado alias Pedro
Francisco Dourdo,
major of age, married and his wife,

- 7e) Smt. Asha Dourado
wife of Lucan Dourado,
major of age, married
All R/o. H.No.471/1, Curilo ward,
Majorda, Salcete, Goa.
- 8] Shri.Macklin Dourado,
major,
R/o. Babriel Cruz Waddo,
Behind Lourdes Church, Utorda,
Salcete, Goa.
- 9] Shri. Lourenco Dourado,
major,
R/o. Babriel Cruz Waddo,
Behind Lourdes Church, Utorda,
Salcete, Goa.
- 10] Smt. Rosy Dourado,
major, married, occupation – housewife,
and her husband,
- 10a) Shri. Agostinho Fernandes
major, married
both R/o.Odlem Bhat, Utorda,
Salcete, Goa.
- 11] Shri.Martinho Filipe Dourado (deceased)
major, married and his wife,
- 11a) Smt. Antonieta Fernandes (deceased)
major, married, occupation – housewife
Both R/o. Behind Lourdes Church,
Utorda, Salcete, Goa.
- 11a(1) Shri. Roque Dourado
major, married and his wife
- 11a(2) Smt. Ines Fernandes Dourado,
major, married
Both respondents No.14a and 14 respectively
R/o. Gabriel Cruz Waddo,
Utorda, Goa.
- 11a(3) Shri. Vicente Dourado
major, married and his wife

11a(4) Smt. Celeste Dourado,
major, married,
R/o. Gabriel Cruz Waddo,
Utorda, Goa.

11a(5) Shri. Lino Baptista Dourado,
major, married and his wife

11a(6) Smt. Connie Dourado,
major, married
Both R/o. Gabriel Cruz Wado, Utorda.

11a(7) Shri. Xavierino Dourado,
major, married and his wife

11a(8) Smt. Virgilia Dourado,
major, married
Both R/o. Wilhelmstr 33, 5543 Bad
Kreuznach, West Germany

12] Shri. Inacia Maria Estella Dourado
Since deceased, represented by her
legal representative; the Respondents
Nos.3(a), 3(c) and 3(d).

13] Shri. Ganesh Nilkonta Kontok
major, married and his wife,

13a) Smt. Ganesh Nilkonta Kontok
major, married, occupation – housewife
Both presently residing at Artur Viegas Bungalow,
Caranzalem, Panaji, Goa.

14] Smt. Luis (Ines) Fernandes Dourado
major, married, occupation – housewife
and her husband

14a) Shri. Roque Dourado
major, married,
Both R/o. Gabriel Cruz Waddo,
Behind Lourdes Church, Utorda,
Salcete, Goa.

.... Respondents/
Ori. Defendants.

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

Mr. M. P. Almeida, Advocate for the Respondent nos. 1, 1a, 2, 2a, 4, 4a, 11a(1) to

11a(8), 13 and 13a.

Mr. C. A. Coutinho, Advocate for the Respondent nos. 5, 6, 6a, 8 and 9.

Coram :- F. M. REIS, J

Date of Reserving Judgment : 15th December, 2014

Date of Pronouncement : 23rd January, 2015

ORAL JUDGMENT

Heard Shri Sudesh Usgaonkar, learned Counsel appearing for the Appellants, Mr. M.P. Almeida, learned Counsel appearing for the Respondent nos. 1, 1a, 2, 2a 4, 4a, 11a(1) to 11a(8), 13 and 13a and Shri C. A. Coutinho, learned Counsel appearing for the Respondent nos. 5, 6, 6a, 8 and 9.

2. At the outset Shri M.P. Almeida, learned Counsel appearing for the Respondent no. 4, upon instructions of the Respondent no. 4, seeks leave to withdraw the Counter Claim filed by the Respondent no. 4 against the Appellants herein in respect of the portion of the property surveyed under no. 79/2010 without prejudice to his defence in the suit.

3. Briefly, the facts of the case as stated by the Appellants are as follows :

The Appellants filed Regular Civil Suit No. 57/1986/D, for a declaration, demarcation and injunction on the ground that they are the owners in possession of the property known as "*Peddachem Orda quarta-parte e quarta-parte de casas de morada com seu patio e quinta*", situated at Utorda, registered

in the Land Registration Office under no. 11413 in the Book B-43 old, wherein the residential house of the Appellants is located. During the pendency of the suit, the Appellants moved various applications for amendment, inter alia, to introduce a claim to remove the encroachments carried out by the original defendant no. 14 and also on the ground that the Respondent nos. 1 to 4 had cut trees from the property of the Appellants on 27.09.1995 and new plantations were carried out by the original defendant nos. 6 and 8. The Appellants relied upon documents of title in support of their case and, inter alia, alleged that the Respondents were interfering with their property and, consequently, prayed for demarcation, declaration and an injunction in respect of the said property.

4. The suit was resisted by the Respondents by filing their written statements and denying that any part of the Appellants' property is included in the property surveyed in the Survey Records under the Land Revenue Code. As pointed out herein above, the Respondent no. 4 along with his written statement also filed a Counter Claim to demolish the structures put up by the Appellants in the property surveyed under no. 179/10 belonging to him together with the consequent relief of restoration of possession. The suit went for trial after issues were framed and by the impugned Judgment dated 03.10.2004, the learned Trial Judge dismissed the suit, inter alia, on the ground that Appellants have failed to prove that the property is wrongly surveyed and further on the ground that the boundaries of the suit property were not established by the Appellants at loco. The learned Trial Judge however decreed the Counter Claim filed by the Respondent no. 4 and directed the restoration of the portion of the property surveyed under no. 179/10.

The Appellants preferred an Appeal before the Lower Appellate Court which came to be disposed of by Judgment and Decree dated 10.12.2004 thereby dismissing the Appeal preferred by the Appellants. A Second Appeal was filed in this Court being Second Appeal no. 63 of 2008 whereas Respondent no. 4 also preferred the Second Appeal no. 74 of 2008. The Second Appeals were disposed of by Judgment dated 16.07.2010 thereby setting aside the Judgments passed by the Lower Appellate Court and remanding the matter to the learned District Court for deciding the appeal afresh. The learned District Judge by Judgment and Decree dated 29.10.2012, dismissed the Appeal and thereby the Counter Claim was decreed. Being aggrieved by the said Judgments, the Appellants have preferred the present Second Appeal.

5. Shri Sudesh Usgaonkar, learned Counsel appearing for the Appellants has extensively taken me through the Judgments passed by the Courts below and pointed out that the Courts below have misconstrued the land registration document as well as the title documents produced by the Appellants to erroneously come to the conclusion that the Appellants have failed to establish their title in respect of the disputed portion of the property. The learned Counsel further points out that the Courts below have relied upon an alleged demarcation produced by the Respondents which was not even registered nor can any rights be surrendered in respect of any portion of the property of the Appellants on the basis of such documents. Learned Counsel further pointed out that the evidence of the expert Shri Anton Colaco has been erroneously examined by the Courts below to defeat the claim of the Appellants in respect of the disputed portion of the property.

Learned Counsel further pointed out that the property which was the subject matter of the suit has been erroneously surveyed in the new Survey Records and, as such, the Appellants were forced to file the suit for demarcation to identify the boundaries in respect of the property of the Appellants and the Respondents. The learned Counsel further pointed out that the demarcation has to be affected on the basis of the documents of title of the parties and, as such, the Courts below were not justified to refuse such reliefs sought by the Appellants. Learned Counsel further points out that the separating boundary line between the suit property and the plot surveyed under no. 179/3 belonging to Luis Antonio Dourado now his heirs, is shown in the plan relied upon by the Appellants which is not correctly shown on the survey plan as it is a straight line in continuation of the mound till the northern eastern corner of the stone fence of the courtyard of the Appellants. The learned Counsel further points out that the separating line between the suit property and the plot surveyed under no. 179/1 belonging to Martinho Filipe Dourado and Inacia Maria Estella Dourado is not shown correctly in the Survey Plan but is shown in the plan produced by the Appellants which runs from north west corner of the stone fence of the Appellants yard till the stone boundary of the western side property on the higher level. The learned Counsel further points out that the excluded part of the property belonging to the Appellants is shown in the sub-division nos. 1, 2, 3, 4, 11, 5 and 12 of survey no. 179 in a line towards northern side in the property surveyed under no. 179/14 while sub-division 8 is lying towards the south. The learned Counsel further points out that the findings of the learned Judge that the Appellants have failed to establish the area which was missing from the property is by misreading the documents on record which is form no. III at exhibit Pw. 1/C

which indicates the area of the property surveyed under no. 179/14. The learned Counsel thereafter has taken me through the report prepared by Pw. 2 which is marked as exhibit Pw.2/B as well as the plan prepared by him at exhibit Pw.2/A to advance his contention that the area encroached and belonging to the Appellants has been clearly depicted therein. The learned Counsel as such points out that the findings of the learned Judge that the area which is encroached has not been identified, is a perverse finding which calls for interference by this Court in the present Second Appeal. The learned Counsel further pointed out that there is a residential house of the Appellants and the compound wall just along side the north of the boundary of the property surveyed under no. 179/10 and, as such, the northern boundary is well identified at loco. The learned Counsel further points out that these clinching material has been overlooked by the Courts below which discloses that the findings arrived at by the Lower Courts on these counts are perverse. The learned Counsel further points out that the Courts below have also failed to note that the Appellants have established their possession in respect of disputed portion and, as such, the question of dismissing the suit of the Appellants would not arise. The learned Counsel has thereafter taken me through the relevant provisions of the Portuguese Civil Code to point out that demarcation of the property is to be carried out in accordance with the title Deeds of each of the parties and, in case such documents are not sufficient, the demarcation would have to be effected in accordance with the limits established by possession. The learned Counsel as such pointed out that the Courts below have failed to examine the relevant provisions whilst dismissing the suit filed by the Appellants. The learned Counsel further points out that the Courts below have lost sight of the said

provisions of the Portuguese Civil Code to erroneously dismiss the suit filed by the Appellants. The learned Counsel further submits that the alleged Deed of demarcation dated 10.05.1969 was executed after the Transfer of Property Act came into force and, as such, no rights could be accrued therefrom as the document was not registered under Section 17(1) of the Indian Registration Act. The learned Counsel in any event points out that there is a misconstruction of the said Deed of Demarcation which is exhibit Pw. 1/D2 whilst dismissing the claim put forward by the Appellants. The learned Counsel has also pointed out that both the Courts below have erroneously decreed the counter claim of the Respondent no. 4 when there was no document of title produced by the Respondent no. 4 to establish that the property surveyed under no. 179/10 belonged to the Respondent no. 4 and, as such, the question of decreeing the Counter Claim is erroneous. The learned Counsel further points out that the Courts below have also discarded the evidence of Pw. 2 on erroneous considerations and, as such, there are substantial questions of law which arise in the present Appeal for consideration by this Court.

6. On the other hand, Shri M. P. Almeida, learned Counsel appearing for the Respondent nos. 1, 1A, 2, 2A, 4, 4A, 11A(1) to 11A(8), 13 and 13A and Shri C. A. Coutinho, learned Counsel appearing for the Respondent nos. 5, 6, 6A, 8 and 9, have supported the impugned Judgments. Learned Counsel point out that both the Courts below upon appreciating the evidence on record, have concurrently come to the conclusion that the Appellants have failed to establish their claim and that any portion of the property of the Appellants has been excluded in the new Survey Records prepared under the Land Revenue Code. Learned Counsel further

pointed out that though the Plaintiffs were parties to the Deed of Demarcation produced at exhibit Pw. 1/D-2, there was no reference to such document by the Appellants in the plaint. Learned Counsel further pointed out that there is no relief sought by the Appellants to dispute the correctness of the said Deed of Demarcation or that such Deed did not establish the demarcating line between the properties of the Appellants and the Respondents. The learned Counsel further pointed out that the contention of the Appellants that the said Deed of Demarcation was not acted upon is totally frivolous as, according to him, the new Survey Plan prepared under the Land Revenue Code is in consonance with the demarcation as shown in the said document at exhibit Pw. 1/D2. Learned Counsel further pointed out that since such exercise of fixing the boundaries of the properties separating the properties of the Appellants and the Respondents were carried out when the Land Revenue Code came into force somewhere in the year 1970 and, as such, the contention of Mr. Usgaonkar, learned Counsel appearing for the Appellants that the Appellants were in possession of the disputed portion is totally erroneous. Learned Counsel further pointed out that the Appellants have no claim to any portion of the property as claimed by them in the suit and, as such, the question of any interference in the impugned Judgment would not arise. Learned Counsel further pointed out that all the substantial questions of law proposed by the Appellants are essential questions of fact which cannot be re-appreciated by this Court in the present Second Appeal under Section 100 of the Civil Procedure Code. Learned Counsel further submit that there are no substantial questions of law which arise in the present Appeal which would call for an interference in the impugned Judgments. Learned Counsel as such point out that the Appeals be rejected.

7. I have carefully considered the submissions of the learned Counsel and with their assistance, I have also gone through the records. The main controversy between the parties is with regard to the common boundary separating the property of the Appellants and the respective Respondents. The records reveal that somewhere in the year 1969, the boundary between the Appellants and some of the Respondents were clearly demarcated on the basis of seven boundary marks which were put up at loco. The contention of Mr. Usgaonkar, learned Counsel appearing for the Appellants, is that such document does not create any rights in favour of the Respondents. But, however, before we examine the said contention, we will have to examine at loco the demarcating line as per the said document. It is the case of the Appellants that their property is registered under no. 11413 which fact has otherwise not been disputed by the Respondent no. 4. It is the case of the Respondents that the property belonging to the Appellants has been correctly depicted in the survey Records under no. 179/14 in its precise shape, size and configuration. The records further reveal that the property known as "*Peddachem Orda*" of about twelve edition which includes different properties registered under different numbers.

8. The learned Trial Judge, whilst examining the evidence on record, has found that evidence of Pw. 1 was shaken in the cross examination and that he could not give any details in respect of his claim. The learned Judge also noted that Pw.1 also could not tell what area of the property is surveyed under no. 179/1, 179/2, 179/3, 179/4, 179/11, 179/5 and 179/8, was part of his property. The learned

Judge also found that it is admitted position that the Respondents had been in open and peaceful possession of the property by name of *Peddachem Orda* from their respective vendors/ancestors and further that the original defendant no. 8, Luis Dourado had purchased by Sale Deed dated 04.06.1968, the portion of the property now corresponding to the property surveyed under no. 179/2, 179/7, 179/5 and 179/3 from among the plots purchase by the father of the defendant no. 8. The learned Judge further found that the Appellants have failed to show as to how much of the area is missing from his property vis a vis the Sale Deed and vaguely stated that some of the property is missing from the suit property. The learned Judge also examined the evidence of Pw. 2 along with the plan and the report prepared by him and noted that it is the contention of the said witness in his examination in chief that there was an encroachment carried out by Shri Joao Batista Dourado into an area of around 95 square metres but, however, he has been shaken in the cross examination. The learned Judge noted that he had admitted in the cross examination that exhibit Pw. 1/D-2 which is an instrument of demarcation of the common boundary was not shown to him. He has also admitted that there was a demarcation made of the suit property with seven stone marks and he did not try to trace the stone marks mentioned in the said document. He has also admitted that the document at exhibit Pw. 1/D-2 shows that the stone marks at no. 5 and 7 represent the separating boundary line on the north between the property of the second part and the property of Nilconta Contoco. The learned Judge as such found that this shows that prior to the said demarcation, the question of encroachment by the defendants' and the Plaintiffs' property being wrongly shown does not hold good. The witness also admitted that the sketch prepared by him

was contrary to the said document at exhibit Pw.1/D-2 which is an instrument of demarcation. The learned Judge also appreciated the evidence of Pw. 3 who is also a Civil Engineer and examined the report at exhibit P.w.3/A along with the Plan. The learned Judge noted that in the cross examination he has stated that his demarcation was not in accordance with the documents based on the said marks. He has also stated that he does not know which is the property of the original defendant. The learned Judge as such noted that the western boundary of the property surveyed under no. 179/14 is the property belonging to Mariano Moraes which is presently surveyed under no. 1/14. The learned Judge also took note of the amendment made in the year 1908 as well as in the Auto de Conciliacao dated 20.06.1910 and that by a Deed of Gift dated 20.11.1968, Nilconta Sinai Contoco and his wife gifted to defendant no. 13-Respondent no. 13. The learned Judge also noted that the witnesses have admitted the boundary stone marks found at the sight depicting the different sub-divisions. The learned Trial Judge as such found that the Appellants have miserably failed to prove that the property is surveyed wrongly and without accuracy under sub-division 14 of survey no. 179 and also failed to prove that the plan attached by them represents the suit property. The learned Judge consequently found that the Plaintiffs are the owners in respect of the property surveyed under no. 179/14 only wherein they have their residential house, well and courtyard and the property is bounded by old ruins. The learned Judge also noted that since the year 1955, the properties were in possession of their respective owners on the basis of their title in their respective portions on the basis of the documents on record. The learned Judge also examined the document at exhibit Pw1/D-2 dated 10.05.1969 and noted that Pw.1 had admitted that the

stones were planted by him and Gaspar on 10.05.1969 and that such document was proved in the cross examination of Pw.1. The witness had also admitted that the stones were put as per the averments in the said document and that the said Anton Dourado and Gaspar Antao have common boundary of each other on the east north and west in respect of the property known as "*Peddachem Orda*" and that it was also admitted that this property is accordingly shown recorded in the Survey Records surveyed under no. 179/14. The learned Judge also noted that on perusal of Survey Plan, the first stone mark is put as shown in the plan exhibit Pw.1/B. The second stone mark is on the western side and it at point 2 on the said exhibit and others as identified in the Survey Plan which is at exhibit Pw.1/B from numbers 1 to 7. The learned Judge also noted that point nos. 5 and 7 represent the separating line between the property of the Appellants and that of Nilconto Sinai Contoco. The learned Judge also noted that Pw. 2 also admitted that he has marked on the said plan at exhibit Pw. 1/A the stones under nos. 1, 2, 3, 4, 5, 6 and 7 which stones have been marked by him as those mentioned in the Agreement at exhibit Pw.1/D-2. He has also admitted that the northern property of Anton Dourado is indicated by him by stones at serial nos. 5 and 7. He has also admitted that documents suggests that stones at serial nos. 5 and 7 represent the separate boundary on the north between the property of the second part Anton Dourado and the property of Nilconta Sinai Contoco. The witness has also admitted that the property indicated by him towards the southern side of the stones marked 1, 2, 3, 4 and 6, is the property of Gaspar Antao and that the property located towards the east of the stone marks 6 and 7, belongs to Gaspar Antao as per the said Agreement at exhibit Pw.1/D-2. The witness has also admitted that the property

located on the southern side marked at serial nos. 1, 2, 3, 4 and 6 presently stands surveyed under survey no. 179/8. The area adjoining the stone marked 5 and 7 on the plan at exhibit Pw. 1/A is presently surveyed under no, 179/12. The witness has also superimposed the Survey Plan and pointed out that as per his plan, the line which existed between the stone marked 5 and 7 is having a raised mound at the site, which is more or less coinciding with the line. The learned Judge as such found that the Appellants have failed to establish the identity of their alleged claim that any portion of the property was included in the survey holdings of the properties recorded in the names of the Respondents and, consequently, dismissed the suit filed by the Appellants though allowing the Counter Claim filed by the Respondent no. 4.

9. The Lower Appellate Court whilst re-examining the evidence on record and considering the submissions of the learned Counsel appearing for the parties, by Judgment dated 29.10.2012, has confirmed the findings of the learned Trial Judge with regard to the failure on the part of the Appellants to establish their claim that any portion of their property was included in the Survey Records standing in the name of the Respondents. The learned Lower Appellate Court has also noted that Pw. 1 had also admitted that the property which is surveyed under no. 179/3 in the name of the father of the defendant no. 6-Respondent no. 6 herein, was being enjoyed by them since the time of the land survey. Pw.1 has also admitted that the defendant no. 13 had also enjoyed the property surveyed under no. 179/12 from the time the Survey Records were conducted. The Lower Appellate Court also found that the learned Trial Court rightly came to the

conclusion that the testimony of Pw. 1 had been shaken. The learned Judge re-appreciated the evidence of Pw.2 and found that he had admitted that the property having sub-divisions 16, 17, 18 and 19 of survey no., 179 is the southern boundary of the property having sub-division no. 14 of Survey no. 179 and that he had prolonged the southern boundary more towards the east in the sketch. The learned Judge as such found that Pw. 2 has been totally discredited in the cross examination and he had failed to prove that the property of the Appellants purchased under the Deed of Sale dated 02.09.1908 at exhibit Pw.1/A was as per the plan at exhibit Pw.2/A. The learned Judge also considered the evidence of Pw.3 and found that he had not considered any title documents of the Appellants whilst preparing the plan and made an improvement by deposing that besides the plan and the report of the Engineer Anton Colaco/Pw.2, the Appellants had given him the documents of inscription. The learned Judge as such found that the report at exhibit Pw.3/A and the falsity of the deposition of Pw.3 stands exposed as it clearly shows that no documents were examined by the said witness. The learned Judge as such found that the said evidence does not assist the case of the Appellants.

10. It is now well settled that the High Court in a Second Appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded are perverse being based on no evidence or that on the evidence on record no reasonable person could have come to that conclusion. Solely because another view is possible on the basis of the evidence, the High Court would not be entitled to exercise jurisdiction under Section 100 of the Civil Procedure Code to

interfere in the findings of fact. Keeping that in view, I find that the Courts below have rightly found that the claim of the Appellants that part of their property was included in the property surveyed in the name of the Respondents herein based on the oral and documentary evidence referred to herein above, is justified. The Courts below have correctly examined the case put forward by the Appellant and have rightly rejected the claim of the Appellants based on the material produced by the parties. As such, this Court cannot re-appreciate such evidence to draw any contrary conclusion especially when no perversity has been established by the Appellants.

11. The contention of Shri Usgaonkar, learned Counsel appearing for the Appellants that there is a misconstruction of the evidence of Pw.2, cannot be accepted. Pw.2 has clearly and unequivocally stated that the boundary marks as shown in the documents at exhibit Pw./1/D-2 coincide with the boundaries in respect of the property surveyed under no. 179/14 separating the property of the Appellants and the Respondent no. 1. The Respondent no. 1 as well as the Appellants no. 1 were parties to the said document whereby both the parties had confirmed the demarcating line between their respective properties and the separating boundary on the northern side between the property of the Appellants and the property of Nilconta Sinai Contoco. On going through the said document at exhibit Pw.1/D-2, I find that the properties have been demarcated by fixing seven stone marks confirming the common boundary separating the respective properties of the Appellants and the Respondent no. 1 as well as the northern boundary of the property of the Appellants and said Nilconta Sinai Contoco. The conduct of the

Appellants in not pursuing with the survey objections coupled with the fact that the survey records prepared under the Land Revenue Code corresponding to such demarcation confirmed by the document at exhibit Pw.1/D-2, would clearly disclose that the Appellants had accepted that the property of the Appellants is surveyed in the Records of Rights under no. 179/14. The contention of Mr. Usgaonkar that the document has been misconstrued as such cannot be accepted. The distance mentioned in the said document has been clearly confirmed by Pw.2 Engineer Anton Colaco examined by the Appellants and there is no ambiguity with that regard in the said document.

12. The contention of Mr. Usgaonkar, learned Counsel appearing for the Appellants, that the document at exhibit Pw.1/D-2 cannot affect the claim of the Appellants also cannot be accepted. The demarcation as provided under Article 2340 of the Portuguese Civil Code, inter alia, stipulates that an owner can call upon the adjoining owner of an immoveable property to fix the common boundaries of their respective properties. In the present case, the document at exhibit Pw.1/D-2 clearly stipulates that the common boundaries between the two properties were confirmed by the Appellants and the Respondent no. 1. Since demarcation can be carried out amicable and in case the parties do not agree to such exercise, they can have recourse to judicial proceedings for demarcation. In the present case, the demarcation between the properties of the Appellants and the Respondent no. 1 was carried out amicably between the parties and the parties have in fact acted upon such demarcation as noted herein above. On going through the said document at exhibit Pw.1/D-2, it clearly shows that the parties have recorded by

unconditional words such demarcation which does not suggest that it in any way extinguished the right to any portion of the property nor does it seek to confer any right title or interest on the other person relating to their respective properties. The parties to the said document admittedly had pre-existing rights to their respective properties and under the said document they have confirmed the demarcating line between their respective properties without extinguishing any right to any portion of their properties. It merely recognizes the right of the respective parties to their properties based on their ownership and possession. In such circumstances, the contention of Mr. Usgaonkar, learned Counsel appearing for the Appellants, that the document has been wrongly considered by the Courts below, cannot be accepted. In fact, on going through the plaint, there is no reference to such document by the Appellants. All these facts clearly show that the Appellants have not approached the Court by disclosing the correct facts nor have disputed the correctness of such demarcation in the plaint and, as such, the question of the Court granting any declaration of title as claimed by the Appellants would not arise at all.

12. Apart from that, both the Courts below have concurrently come to the conclusion that beyond the property surveyed under no. 179/14, the respective Respondents are in possession of their properties. This concurrent finding of fact of possession cannot be re-appreciated by this Court in the present Second Appeal. The Courts below have also concurrently found that on the basis of the material on record, the property belongs to the Appellant is surveyed under no. 179/14 and no portion of the property surveyed in the name of any of the Respondents belongs to the Appellants. In such circumstances, the Appeal

preferred by the Appellants challenging the dismissal of the suit calls for no interference and, consequently, the Second Appeal challenging the Judgment dismissing the suit, stands dismissed.

13. But, however, in view of the submission of Shri M. P. Almeida, learned Counsel appearing for the Respondent no. 4, the Appeal stands admitted on the following substantial question of law :

- (I) Whether the Courts below were justified to Decree the Counter Claim filed by the Respondent no. 4 without any document of title disclosing the correct area belonging to the Respondent no. 4 ?

14. It is the contention of Shri Usgaonkar, learned Counsel appearing for the Appellants, that the documents of title produced by the Respondent no. 4 in support of their claim do not clearly show the demarcated line between the property of the Appellants and the property of the Respondent no. 4. The document at exhibit Pw. 1/D-2 which has been relied upon whilst examining the demarcation of the eastern portion of the property of the Appellants, does not assist the case of the Respondent no. 4 as demarcating line between the property of the Appellants and the property of the Respondent no. 4 was not fixed by such document. Shri Usgaonkar, learned Counsel, as such points out that the property surveyed under no. 179/10 is in possession of the Appellants and, as such, the Courts below were not justified to decree the Counter Claim filed by the Respondent no. 4.

15. Shri M. P. Almeida, learned Counsel appearing for the Respondent

no. 4, on the other hand, points out that though the property surveyed under no.179/10 forms part of the property belonging to the Respondent no. 4 but, however, fairly concedes that the title documents of Respondent no. 4 do not clearly stipulate the demarcating line of the property between the Appellants and the Respondent no. 4 by specific measurements.

16. However, Shri M. P. Almeida, learned Counsel, upon instructions, points out that the Respondent no. 4 does not press for the Counter Claim filed by the Appellants without prejudice to his defence in the suit filed by the Appellants. Thus, the Counter Claim filed by the Respondent no. 4 stands dismissed as withdrawn. The substantial questions of law are answered accordingly.

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

ORDER

(I) The Appeal is partly allowed.

(II) The impugned Judgment dated 30.10.2004 passed by the learned Trial Judge and Judgment dated 29.10.2012 passed by the Lower Appellate Court decreeing the Counter Claim filed by the Respondent no. 4, is quashed and set aside.

(III) The Counter Claim filed by the Respondent no. 4 stands dismissed as withdrawn.

(IV) The remaining part of the said Judgments passed by the Courts below dismissing the suit filed by the Appellants stands confirmed.

(V) Appeal stands disposed of accordingly with no Order
as to costs.

F .M. REIS, J.

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