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IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 34 OF 2008

1. Shri Rama Dattu Gaonkar,
major, r/o Bamanwada,
Sanvordem Goa.
2. Shri Dev Ravalnath of Panchistan of
Village Sanvordem Goa. ... Appellants

V e r s u s

Shri Bhaurao Vithal Ghaisas
(since deceased, through his legal heirs)
1a. Smt. Sulba Bhaurao Ghaisas, widow,
1b. Shri Vithaldas Bhaurao Ghaisas, son,
1c. Shri Laximiprasad Bhaurao Ghaisas, son,
1d. Shri Shreyas Bhaurao Ghaisas, son.
All r/o H.No.51, Sanvordem Goa. ... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. A. Naik, Advocate for
the appellants.

Mr. V. P. Thali, Advocate for the respondents.

Coram:- F. M. REIS, J.

Date:- 12th March, 2015

ORAL JUDGMENT

Heard Mr. S. D. Lotlikar, learned Senior Counsel
appearing for the appellants and Mr. V. P. Thali, learned counsel
appearing for the respondents.

2. The above appeal was admitted by this Court by an

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order dated 24.10.2008 on the following substantial questions of law.

1. Whether the First Appellate Court could have struck off the name of the defendant no.2 from the cause title of the suit and further struck off the written statement filed by the defendant no.2 in RCS No. 43/86, on the plea that the Managing Committee was not defending the suit in a representative capacity, and there was non compliance of the provisions of the Order I Rule 8 of the Civil Procedure Code, notwithstanding the fact that no such objection was raised/taken before the Trial Court or the First Appellate Court ?
2. Whether the finding recorded by the First Appellate Court that the plaintiff was in exclusive possession of the suit property is perverse ?
3. Mr. Lotlikar, learned Senior Counsel appearing for the appellants in support of the aforesaid substantial questions of law has pointed out that the learned Judge has deleted the name of the appellant no.2 who was the defendant no.2 in the suit on the ground that his impleadment in the suit filed by the respondents is not justified as the suit was not filed under Order I Rule 8 of the

Civil Procedure Code. The learned Senior Counsel further pointed out that the suit filed by the respondents was essentially seeking for a permanent injunction due to the construction activity started by the appellant no.1 in the suit property which is surveyed under Nos. 11/5, 7, 8 and 9 of Sanvordem Village. The learned Senior Counsel further pointed out that the disputed construction was put up in the property surveyed under no. 11/8 which was a paddy field portion which according to the appellants belongs to the appellant no.2. The learned Senior Counsel further submits that the appellant no.2 filed an application to be impleaded in the suit on the ground that they were the owners and in possession of the suit property and such application was allowed by the Trial Court after hearing the respondents. The learned Senior Counsel further submits that thereafter written statement was filed by the appellant no.2 disputing the claim put forward by the respondents inter-alia contending that the suit property surveyed under No. 11/8 was a part of the property inscribed in Matriz No. 60 and also part of the property which is shown in the cadastral survey no.81. The learned Senior Counsel further pointed out that besides the said documents the appellants have also produced the copy of Registo Do Agrimensor from the State Government to show that the property was granted to the temple of the appellant no.2. The learned Senior Counsel further submits that the

learned Judge has erroneously deleted the name of the appellant no.2 when there was no challenge to the order impleading the appellant no.2 before the learned Trial Court. The learned Senior Counsel further submits that the first substantial question of law is to be answered in favour of the appellants.

4. With regard to the second substantial question of law, Mr. Lotlikar, learned Senior Counsel appearing for the appellants has extensively gone through the judgment passed by the learned Lower Appellate Court to contend that the learned Judge has not at all scrutinized the material on record nor appreciated the oral and documentary evidence produced by the appellants and as such, has rendered perverse findings that the respondents are in exclusive possession of the property. The learned Senior Counsel further pointed out that the learned Judge has only relied upon Form No. III which is an unpromulgated survey record to draw a presumption under Section 105 of the Land Revenue Code. The learned Senior Counsel further pointed out that the learned Judge has only considered a part of evidence on record and has not at all appreciated the effect of all the material to come to the conclusion that the appellants have failed to establish their possession in respect of the disputed property. The learned Senior Counsel thereafter has taken me through the cadastral survey plan bearing

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no. 81 to show that such plan corresponds to the property surveyed under Nos. 11/5, 7, 8, and 9 of the said Village. The learned Senior Counsel has taken me through the area statement of the said survey records as well as the area shown in the cadastral survey to point out that the area prima facie correspond to each other. The learned Senior Counsel as such submits that the learned Judge has erroneously come to the conclusion that the appellants are in possession of the disputed property.

5. On the other hand, Mr. V. P. Thali, learned counsel appearing for the respondents has supported the impugned judgment. The learned counsel has pointed out that the appellant no.2 is not a legal entity and as such according to him the learned Judge has rightly deleted the name of the appellant no.2. The learned counsel however does not dispute that there was no challenge to the order impleading the appellant no.2 as the defendant no.2 in the suit by the learned Trial Court. The learned counsel further pointed out that as the appellant no.2 is not a legal entity, the question of such party being a party to the suit is not justified. The learned counsel thereafter has taken me through the judgment of the learned Lower Appellate Court to contend that the learned Judge has rightly deleted the name of the appellant no.2 from the cause title.

6. With regard to the second substantial question of law, the learned counsel has pointed out that the finding of fact arrived at by the learned Appellate Court is that the respondents are in possession of the disputed property. The learned counsel further pointed out that though the learned Judge has referred to the unpromulgated Form No. III, in fact, according to him the records have been duly promulgated. The learned counsel further pointed out that there is no co-relation between the cadastral survey no.81 with the said disputed property to assume that the property as shown in the cadastral survey is the one as shown in the survey records. The learned counsel further pointed out that the appellants have not examined any expert to establish the co-relation between the property claimed by the appellants and the disputed property in the present case. The learned counsel thereafter has pointed out that the learned Judge has rightly appreciated the evidence on record to come to the conclusion that the oral evidence was not sufficient to decide the aspect of possession and as such the presumption under Section 105 of the Land Revenue Code in favour of the respondents has not been rebutted. The learned counsel further pointed out that the survey records disclose the name of Laxminarayan Panchayatha in the occupant column who according to the respondents is a temple through which the respondents are claiming their possession. The

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learned counsel further pointed out that the appellants and the respondent no.1 are not the owners of the property and as such on the basis of the survey records the learned Lower Appellate Court was justified to grant a relief as decreed in the suit. The learned counsel as such submits that there is no case made out by the appellants for any interference in the impugned judgment.

7. I have given my thoughtful consideration to the rival contentions and I have also gone through the records. With regard to the first substantial question of law, it is an admitted position that there was no challenge to the order impleading the appellant no.2 as the defendant no.2 in the suit. In such circumstances, the learned Appellate Court was not justified to examine the correctness of such order there being no challenge nor giving an opportunity to both the parties of being heard on such count. The fact that the appellant no.2 defended the suit and filed the written statement has not been disputed. On this ground alone, the findings of the learned Judge directing the deletion of the name of the appellant no.2/defendant no.2 in the suit cannot be sustained. Mr. Thali, learned counsel appearing for the respondents however points out that the respondents are always entitled to amend the grounds of appeal to raise such contention. This aspect will be dealt with while deciding the appeal on merits.

The first substantial question of law is answered accordingly.

8. With regard to the second substantial question of law, I find that the learned Lower Appellate Court while recording portion of the deposition of the witnesses examined by the appellants and the respondents has come to the conclusion that the evidence of both the parties is balanced and consequently, rendered a finding that the respondents are in possession of the property on the basis of unpromulgated survey records. A First Appeal is a substantive right of a party. In such circumstances, it is expected of the First Appellate Court to scrutinize each and every piece of evidence produced on record while considering the correctness of the findings of the learned Trial Court. In the present case, though it is well settled that the presumption under Section 105 of the Land Revenue Code can be rebutted even by oral evidence which is tested in the cross examination. The learned Trial Judge has not examined the evidence led by the appellants to draw a conclusion that the presumption has not been rebutted keeping aside the fact that unpromulgated records do not draw a presumption under Section 105 of the Land Revenue Code. Apart from that, on perusal of the cadastral survey documents which is on record of the learned Lower Appellate Court at Exhibit DW2/B and PW1/B, I find that, prima facie, the shape of the survey

holding referred to by the respondents appears to be that shown in the cadastral survey at no. 81. Even the area prima facie coincide. In such circumstances, considering that such documents were taken on record and exhibited, it was incumbent upon the learned Lower Appellate Court to examine the oral evidence of the witnesses to consider whether the property as claimed by the respondents corresponds to the documents as shown in the said documents. Needless to say that the name of the property is mentioned in the cadastral survey as "Tollem" which also corresponds to the name 'Tollem' as referred to in the survey records. In such circumstances, I find that the learned Lower Appellate Court was not justified to come to the conclusion that the presumption has not been rebutted without minutely scrutinizing the oral evidence along with the documentary evidence produced by the appellants. In such circumstances, I find that the judgment passed by the learned Lower Appellate Court stands vitiated and deserves to be quashed and set aside and the matter be remanded back to the learned Lower Appellate Court to decide the matter afresh on its own merits after hearing the parties in accordance with law. Needless to say that any observations herein would not influence the learned Lower Appellate Court to decide the appeal preferred by the respondents on its own merits in accordance with law.

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9. At this stage, Mr. Thali, learned counsel appearing for the respondents points out that the respondents shall file an appropriate application before the learned Lower Appellate Court to amend the grounds of appeal and produce additional evidence. In case any such application is filed by the respondents, the learned Lower Appellate Court shall decide such application on its own merits after hearing the appellants in accordance with law.

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

O R D E R

- (i) The appeal is partly allowed.
- (ii) The impugned judgment dated 30.11.2007 is quashed and set aside.
- (iii) Regular Civil Appeal No. 62/2002 is restored to the file of the learned Lower Appellate Court.
- (iv) The learned Lower Appellate Court is directed to decide the said appeal afresh in the light of the observations made herein above in accordance with law.
- (v) All contentions of both the parties on merits are left open.
- (vi) The parties are directed to appear before the

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learned Lower Appellate Court on 20.04.2015 at 10.00
a.m.

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

F. M. REIS, J

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