

**IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEALS NO.122 & 126 OF 2004**

SECOND APPEAL NO. 122 OF 2004

- 1 MR. SAMIRO ALCANTARA
 VAZ alias Francisco Samiro
 Alcantara da Piedade Vaz and
 his wife.

- 2 SMT. MARIA LOURDES GAMA
 PINTO E VAZ
 both deceased and now
 represented by their common
 legal representative:

- 1a. SHRI FRANCISCO ADOLFO
 ALCANTARA DA PIEDADE
 VAZ,
 major of age, married
 according to the regimen of
 separation of assets, Landlord,
 r/o. Margao, near Holy Spirit
 Church, H.No. 178. Appellants

Versus

- 2a. SMT. ANA RITA ROSALINA
SULOCHANA VAZ,
major of age, spinster,
bank employee,
- 2b. SMT. MARIA ZORAIDA
SAROJINI VAZ,
major of age, spinster, teacher,
All residents at House No. 176,
Near Holy Spirit Church,
Margao.
- 2c. SMT. MARIA ESTER JUDITH
NINETTE SACUNTALA VAZ E
SHARMA,
major of age, married,
housewife and her husband.
- 2d SHRI KEVAL KUMAR
SHARMA,
major of age, Government
Officer, both residents of
Altinho, Panjim.
- 3 SHRI. DIAGO FELICIANO
MANUEL JACINTO DO
ROSARIO PEREIRA and his
wife.

- 4 SHRI MARCELINA
 SEBASTIANA FERNANDES,
 both from Margao,
 now deceased and represented
 by their common legal heirs.
- 3a. SHRI CARMO FRANCISCO
 PAULO PEREIRA,
 major of age, married , service
 (since deceased), legal
 representatives are already on
 record as respondent no.3(b).
- 3b. SMT. PRESENTACAO
 FILOMENA PEREIRA,
 major of age, widow,
- 3c. SHRI CYRIL ANTONIO
 PEREIRA,
 major of age, service,
 (Since deceased), represented
 by L.R.s:
- 3c(i) SMT. ANGELA PEREIRA,
 major of age, housewife,

- 3c(ii) SHRI DIAGO PEREIRA,
major of age, service,
both r/o Mestabata,
Near Lawry Pub bar,
New Market, Margao.
- 3d. SHRI JOSE VICTOR PEREIRA,
major of age, service,
(Since deceased)
L.Rs. are already on record
as respondents no. 3(b), 3(e)
and 3(f).
- 3e SMT. EZMERALDA JULIA
PEREIRA,
major of age, married to
- 3f SHRI LOURENCO PAULO
FERNANDES,
major of age, service.
- 3g. SMT. MARIA FATIMA
PEREIRA,
major of age, housewife,
(since deceased),
L.Rs are already on record
as respondents of Mestabata,
Near Lawry Pub bar,

New Market, Margao.

- 5 SMT. SALAMBI,
 major of age,
 widow of Xec Ahmed Haji
 Abdul Rahim, housewife, now
 deceased and represented by
 her Legal representatives.
- 5a. XEC JAMALADIN,
 major of age, married and his
 wife, (since deceased),
 L.R. Is already on record as
 Respondent no.5(b).
- 5b. MRS. CULSAMBI,
 housewife, both r/o Majorda,
 behind railway station.
- 5c XEC ISMAIL, WIDOWER,
 tinmaker, now deceased
 and represented by his
 Legal representatives:
- 5c(1) SMT. HASSINA, widow,
 resident of Vasco-da-gama.

- 5c(2) KATIJAMBI, widow,
resident of Pajifondi,
- 5c(3) SAFIAM BI, major of age,
housewife and her husband.
- 5c(4) SHRI ABDUL KARIM,
both residents of Pajifond,
Margao.
- 5c(5) SMT. SAFURA,
major of age, resident of
Pajifondi.
- 5c(6) SHRI. SHAIK USSEIN,
major of age, resident of
Pajifondi.
- 5c(7) SHRI SHAIK ASSAN,
major of age, resident of
Pajifondi.
- 5c(8) KAIRUM, major of age,
resident of Pajifondi.
Since deceased represented
through the respondent nos.
5c(3), 5c(5), 5c(6) and 5c(7)

- 5c(9) SHRI ABDUL GANI,
now deceased, represented by
heirs.
- 5c(10) SHAIK AHMED, major of age,
resident of Pajifondi.
- 5c(11) SHAIK GANI, major of age,
resident of Pajifondi.
Since deceased represented
through the Respondent no.
5c(10).
- 5c(12) XEC UMEAR, major of age,
now deceased and represented
by his heirs:
- 5c(13) XEC KAMRUDIN,
major of age, resident of
Pajifondi.
- 5c(14) XEC SHAMASUDIN,
major of age, resident of
Pajifondi.
- 5c(15) HABI BABI, major of age,

housewife, married to,

- 5c(16) SHRI XEC SHEKAT,
major of age, resident of
Pajifondi.
- 5c(17) SHAKI RABI, widow
resident of Pajifondi,
- 5c(18) SMT. ZEHRABI,
major of age, married to
- 5c(19) SHRI AJIT AZOOZULLA KHAN,
(deceased)
both residents of 57/14,
19th A Cross Jayanagar,
6th Block, Bangalore,
- 5c(19) Shri Ajir Azoozulla Khan
(since deceased represented
through Respondent no. 5C
(18) and 5C(19)a
- 5c(19)a Mr. Afsar Khan
r/No. 13, Fcross, Bismilla
Nagar, Banarkati Road,
Bangalore – 29.

- 5c(20) SMT. ZUBEDABI,
major of age, married to.
- 5c(21) SHRI. XEC MUTALIB,
both residents of Mezdin,
Intek Menzil Patangat
Aurangabad.
- 5c(22) NURJANBI, major of age,
resident of Pajifondi.
- 5c(23) SMT. SAHIDABI, major of age,
married to.
- 5c(24) SHRI GULAM MOHAMED,
major of age,
both residents of Angol,
Bandur Galli, Belgaum,
Karnataka State

All the addresses of the parties

are their Registered addresses. Respondents

Mr. Sudesh Usgaonkar with Ms. R. Pereira, Advocate for the
Appellants.

Mr. Mahesh Amonkar, Advocate for Respondents No.5(c)2 &
5(c)7.

WITH
SECOND APPEAL NO. 126 OF 2004

1 Ana Rita Rosalia Solochana
 Vaz

2 Maria Zoraida Zajorini Vaz

3(a) Smt. Maria Esther Judith
 Ninette Sacuntala Vaz e
 Sharma

4 Mr. Samiro Alcanatara Vaz
 alais Francisco Samiro
 Alcantara da Piedade Vaz
 (now deceased)

5 Mrs. Maria de Lourdes
 Gama Pinto e Vaz
 (Now deceased)
 both represented by their
 legal representatives

..... Appellants

Versus

1(a) Carmo Francisco Paulo
 Pereira (Now deceased)

1(b) Smt. Presentacao Filomena
Pereira

2 Shri Cyrial Antonio Pereira
(now deceased)

2a Mrs Angela Pereira

2b Diogo Pereira

3 Shri Jose Victor Pereira

3a Smt Esmeralda J. Pereira

4 Shri Lourenca Paulo
Fernandes

5 Smt Maria Fatima Pereira
(now deceased)
1 to 5 all residing near
Lawry Pub, New Market,
Margao, Goa.

6 Smt. Hassina, resident of
Vasco da Gama, Goa.

- 7 Smt. Katijambi, residents of Pajifondi, Margao, Goa.
- 8 Shri Sheik Ahmed, residents of Pajifondi, Margao, Goa.
- 9 Shri Sheik Gani
resident sof Pajifondi,
Margao, Goa.
Since deceased, represented
through legal representative
respondent no.8
- 10 Shri Shaik Akbar
residents of Pajifondi,
Margao, Goa.
- 11 Smt. Sabiabi and her
husband
- 12 Abdul Karim
both residents of Pajifondi,
Margao, Goa.
Since deceased represented
through legal representative
no.11.

- | | | |
|----|---|-------------------------------|
| 13 | Shri Xec Kamruddin
residents of Pajifondi,
Margao, Goa. | |
| 14 | Shri Xec Shamasuddin,
residents of Pajifondi,
Margao, Goa. | |
| 15 | Smt. Habibabi and her
husband | |
| 16 | Shri Xec Shekat
both residents of Pajifondi,
Margao, Goa. | |
| 17 | Smt. Shakibi, resident of
Pajifondi, Margao, Goa. | |
| 18 | Smt. Zeharabi and her
husband | Appeal
stands
dismissed |
| 19 | Shri Aziz Azoozulla Khan
both resident so f57/14 19 th
A Cross Jayanagar, 6 th
Block, Bangalore,
Karnataka. | Appeal
stands
dismissed |

- 20 Smt. Zubedabi and her husband
- 21 Shri Xec Mutalib
both residents of Mezdin
Intek Manzil, Patangat,
Aurangabad, Maharashtra.
- 22 Smt. Nurjahanbi, Pajifondi,
Margao, Goa.
- 23 Smt. Sahidabi and husband
- 24 Shri Gulam Mohamed
both residents of Angod,
Bahadur Galli, Belgaum,
Karnataka.
- 25 Shri Xec Jamaldin (now
deceased)
- 25a Shri Xec Abdul Karim and
his wife
- 25b Shaik Nasifa, both residents
of H.No.1148, Near

Jawarharlal College,
Chandrawaddo, Fatorda,
Goa.

25c Shaik Zaibun Bi

25d Majhar Shaik

25e Mrs. Salima Bi and her
husband

25f Fairoz Shaik
25c to 25f residents of
Room No.8 Dawood Chawl,
1st Floor, Aquem, Goa.

25g Shaik Mohidin
H.No.79, Near Railway
Station, Majorda, Goa.

25h Miss Taira Bi Shaik
resident near Railway
Station Majorda, Goa.

25i Katija bi Shaik and son

25j Shaik Ahmed

both residents of H.No.1148
near Jawaharlal College,
Chandrawaddo Fatorda
Goa.

25k Shaik Hyder and his wife

25l Yasmeeen Babu Shaik
both residents of H.No.79
near Railway Station
Margao, Goa.

26 Smt. Culsumbi, residing
behind Railway Station
Majorda, Goa.

27 Smt. Safura resident of
Pajifond, Margao, Goa.

28 Shri Xec Assan, resident of
Pajifond Margao, Goa.

29 Shri Xec Ussein, resident of
Pajifond, Margao, Goa

30 Smt. Kairun, resident of
Pajifond, Margao, Goa.

Since deceased, represented
through respondents
no.11,27,28 and 29.

31a Shri Francisco Adolfo
Alcantara da Piedade Vaz

31b Smt. Maria Ruth Noronha e
Vaz
both residents of H.No.176,
Near Holy Spirit Church,
Margao.

.... Respondents

Mr M.B. Da Costa, Senior Advocate with Ms. Karishma
Betquecar, Advocate for the Appellants.

Mr. M. Amonkar, Advocate for Respondents No.25(i) & 28.

CORAM : N.M. JAMDAR, J.

DATE : 28 JANUARY 2015

ORAL JUDGMENT :

These two second appeals challenge the judgment and order passed by the 1st Additional District Judge, South Goa, Margao dated 26 July 2004 dismissing the appeals and confirming the order passed by the Civil Judge, Senior Division, Margao dated 20 March 1998 dismissing the suit filed by the Appellants.

2. The issues arising in these two appeals are common. These two appeals are filed by two branches of the appellants'-plaintiffs' family. They have been argued together and are taken up together for hearing and are disposed of by this common judgment.

3. The suit was filed by the Appellants in the year 1965. The suit was for declaration as regards ownership of the Appellants, eviction of Respondents and demolition of the structure. When the suit was filed Portuguese law prevailed as regard the civil disputes. The suit was drafted as per the procedure and practice of drafting plaint prevalent at that time. The defendants were in two groups. First one claiming through Diogo Feliciano Manuel Jacinto do Rozario Pereira and the second one claiming through Xec Amod Haji Abdul Rahim.

4. Facts leading to this appeal begin almost a century ago. In the year 1913, one Francisco Pereira applied for a grant of an aforamento from the Comunidade of Margao. The application was granted on 13 May 1914. Sometime in December, 1920, Francisco Pereira agreed to sell the aforamento, both of himself and his daughter Carlota, to one Xec Ahmed Haji Abdul Rahim and put Xec Ahmed Haji Abdul Rahim in possession. The document of 1920 was allegedly destroyed by white ants and a fresh document was executed on 16 January 1929, recording the contents of 1920 agreement. The plots in question were registered as no.28577 and 28578.

Salimabi, widow of Xec Amod sold the plots to one Aluisio Caetano Barreto Xavier by Sale Deed dated 14 March 1940. On 22 February 1943, Francisco Pereira gifted property to one Diogo Pereira.

5. There was a civil dispute between Aluisio Caetano Barreto Xavier and one Joaquim Jose Almeida, which resulted in a decree against Aluisio Caetano Barreto Xavier. In execution of the decree the property in question was put up for sale in a Court auction. On 29 October 1945, the original plaintiff, father of the present appellants - Samiro Alcantara Vaz, purchased the property in the Court auction. The Plaintiffs i.e. appellants were put in possession of the property. Sometime in the year 1961, they were forcibly dispossessed by Salimabi, the widow of Xec Amod. They filed a suit for restoration of possession, which was decreed on 30 September 1961 and possession was handed over to the Appellants. The legal representative of Xec Amod continued to interfere with the possession of the Appellants. A criminal case was filed by the plaintiffs in respect of theft on their property in which one of the legal representatives of Xec Amod was convicted. In the year 1964, Diogo Pereria, based on a gift deed in his favour by Francisco, sought to interfere with the possession of the Appellants and also carried on construction in the part of the property. Thereupon, the present suit no. 3544/1965 was filed by the Appellants.

6. In the suit the Appellants asserted their right for declaration as to the ownership of the property on two

grounds. Firstly that they have acquired the title through a court auction and they hold a valid title. Secondly that they have acquired title in the property in view of prescriptive possession for more than 30 years. The Trial Court framed Specifications, as was the practice prevailing then. By framing 'Specifications', court crystallised admitted facts and thereafter framed 'Queries', which are akin to 'issues' under the present procedure.

7. The Specifications i.e. the admitted position found by the Trial Court, is reproduced as under:

1. *By Deed of 14/03/1940, the defendant Salimabi and her children sold to Aluisio C. Barreto Xavier the property “Aforamento”, situated at Pagifondi, not registered, bounded on the east by a road left by the Comunidade of Margao, on the west by the Rua de Saudades, on the north by the urban property of Diogo P.C. Rodrigues and on the south by the road left by the Comunidade of Margao.*
2. *The property “Aforamento”, identified above, is registered under the number 37.032 and was bought by the plaintiff in judicial public auction held in the execution suit filed by Joaquim Salema against Aluisio C. Barreto Xavier and wife.*
3. *The plaintiffs filed against the defendant Xec Ismail and others a suit for restitution of possession and, as a consequence, the*

possession of the said property was awarded to him.

4. The rustic property aforamento, bounded on the east by a road, on the west by Rua de Saudades, on the north by Diogo Rodrigues and on the South Aluisio C.J. Barreto Xavier, existing in an urban property (house), is registered in the Revenue Office property Registration (Matriz) under the number 510, the urban property being under the number 570.

5. Two properties Pagifondi are registered; one under the number 28.577, bounded on the east and south by the property of the Comunidade on the north by the plot marked out at the petition of Francisco Paulo Pereira, and on the west by a road which starting from the door of the cementery of the town (villa) of Margao, goes to the village Aquem, and another registered under the number 28.578, bounded on the east by the property of the comunidade, on the west by a road which starting from the cementery goes to the village Aquem, on the north by the plot leased to Pedro Fernandes Pereira, and on the South by the plot of the Comunidade, being registered in favour of Diogo Feleciano N.J. do R. Pereira, in view of the gift made by Francisco Paulo Pereira.

6. The defendant Diogo Feleciano started a

construction on 2/09/1964, occupying an area indicated in the croquis of folio 7, under Letter 'B'.

7. *The documents at folios 16, 28, 68, 72, 95,101 and 105 prove their contents.*

Thus two facts which are most material were admitted. That the Appellants had purchased the property in a court auction, and that the possession of the property was given to the Appellants.

8. Thereafter the Trial Court considered the Queries framed. The Trial Court found that the case of title by prescriptive possession was not pleaded with particulars, in the plaint. According to the Trial Court such case ought to have been specifically pleaded. The Trial Court also came to the conclusion that the deed of 1929 was suspicious and there was no lawful conveyance in favour of Xec Amod. Trial Court held that what could not be owned by Xec Amod could not be sold by him to Xavier and, therefore, no title passed to the Appellants through a Court auction. Accordingly, the Trial Court dismissed the suit by judgment and order dated 20 March 1998.

9. The Appellants thereafter filed a civil appeal no.27/1998 in the District Court, South Goa. The Appellants contended that no steps were taken by the aggrieved party at any time to raise any objection to the Court auction, nor any attempts were made to get it set aside and, therefore, valid title had

passed in favour of the Appellants. The Appellants also contended that in view of their continuous possession for 30 years they acquired right in the property by prescriptive possession. The Appellate Court, after considering the record and the arguments of both the sides, went in detail of the transactions prior to the Court auction. The Appellate Court examined the transactions of December, 1920 and January 1929 and the documents of that period at great length. The Appellate Court found that since Xec Amod could not have sold the property to Xavier there was no question of passing any title in respect of the property to the Appellants as Xavier could not be held as an owner. The Appellate Court found that the transactions prior to the court auction were not valid and, therefore, though the property had been put up in Court auction, no valid title could be conferred upon the Appellants. The Court found that inscription in favour of Diogo Pereira prevailed over the one in favour of Xavier and, therefore, Xavier did not have any title to the property. The Appellate Court found that there was no error in the decree passed by the Trial Court and, accordingly, dismissed the Appeal. Thereafter these two second appeals have been filed.

10. I have heard Mr. M.B. Da Costa, the learned Senior Counsel for the Appellants in Second Appeal No.122/2004 and Mr. Sudesh Usgaonkar, the learned Counsel for the Appellants in Second Appeal No.126/2004, and Mr. M. Amonkar, the learned Counsel for the respondents no. 5(c)2 & 5(c)7 in Second Appeal no.122 of 2004 and for respondents no.25(i) & 28 in Second Appeal No.126 of 2004. None appears on behalf

of the other respondents.

11. Mr. Da Costa sought leave to amend the appeal memo to place on record the additional substantial questions of law, which were tendered in the Court earlier. The additional questions of law are regarding the claim of the Appellant based on Court auction and the fact that he was a stranger to the execution proceedings and bonafide purchaser for value, and the second based on the registration of the property in the land registration office and the claim of the Appellants of acquiring title of prescription in view of Article 526 of Civil Code. As far as the first additional ground is concerned, it was urged before the Appellate Court. General claim of title by prescription on the basis of continuous possession was mentioned in the plaint. In the interest of justice, and for completeness of proceedings, Appellants are permitted to amend the appeal memo. Amendment to be carried out forthwith. In Appeal no. 126 of 2004 one of the above questions of law is already allowed to be amended.

12. The questions of law as framed in the Appeal are as under :

(a) Whether the Original plaintiff (Mr. Samiro Vaz), being a stranger to the execution proceedings and a bona fide purchaser for value at a court auction sale, has acquired a protected title to the property.

(b) Whether in view of the title certificate granted by Court Order on 26th February 1946 (page 172 to 177) and the consequent inscription of the property in the Land Registration Office in his name (page 178), the Original Plaintiff (Samiro Vaz) has at any rate acquired title by prescription upon the expiry of 10 years therefrom in view of Article 526 of the Civil Code.

Mr. Da Costa and Mr. Usgaonkar for the Appellants have argued the matter based on the above mentioned questions of law. The claim of the Appellants is based on on these two foundations. Firstly purchase through the court auction and secondly acquiring title by prescription.

13. First the question regarding the claim based on court auction will be taken up for consideration. The court auction took place in the year 1945. It is an admitted position that Appellants are strangers to the Court auction. The property was put to sale by the court and the same was validly purchased by the Appellants by bidding in the proceedings. At the time when the auction took place, Portuguese Civil Code was applicable. Mr. Da Costa has placed on record the text of Article 890 of Portuguese Civil Procedure Code which deals with the Court auction. Article 890 reads as under:

The day and the time for the auction or opening the proposals shall be fixed, with the required

antecedence, to give to the event, by proclamations and notices, the maximum publicity.

The proclamations shall be affixed, with the antecedence of 10 days, one on the door of the Court and the other on the door of the regedor (talathi) of the parish in which the assets are situated. In case of buildings, a copy of the proclamation shall be affixed on the door of the premises.

The notices shall be published, with the same antecedence, in two editions of the most widely read newspaper in the place of the location of the assets, or the nearest locality where there is none at the place.

In the proclamations and notices the name of the judgment debtor shall be stated, the office where the proceedings are pending and the date and time and place of auction or opening of the proposals. Where the assets are movables, their nature shall be indicated.

Para1 Outside Lisbon, Porto and Funchal the auctions shall be held on Sunday unless it is found convenient to hold it on any other day.

Para 2 Where an appeal is pending against the judgment, this fact shall also be mentioned in the proclamations.

The procedure adopted under the Portuguese Civil Code for holding a Court auction is more or less similar as the one enumerated in Civil Procedure Code of 1908. Article mandates that the day and time of auction has to be given

maximum publicity by proclamations and notices. The proclamations are to be affixed on the door of the regedor (Talathi) and also to be affixed on the door of the premises. Notices are to be published in the most widely read newspapers. In the notices, particulars of the property are to be provided.

14. Thus Article 890 provides detailed safeguards to make all concerned aware of the fact that the property is being put for sale. There is a presumption to the performance of official acts. It has to be presumed that the auction took place after following the above procedure. Nothing contrary is placed on record to show that this procedure was not followed. The parties stay in the vicinity. It will have to be presumed that all the parties had full knowledge of the Court auction. Upon receipt of notice in the newspaper or by affixing the same on the property, any person if aggrieved, can challenge the fact of putting the property in auction. Admittedly, no party came forth objecting factum of sale of property by auction. The respondents neither took any steps to question the auction nor filed any proceedings to set aside the same since long years. It is only when the suit is filed by the Appellants against the respondents, as a defence the validity of Court auction is questioned. With this factual backdrop the nature of a right acquired under a court auction needs to be considered.

15. A property is purchased by the auction purchaser from the Court under the command of the writ of *feri facias*. All that the purchaser has to do is to look at the decree and the

order of the sale. The purchaser derives the title from the Court auction. It is not for the purchaser to look beyond the decree and the order of sale. This principle needs to be strictly followed as, unless a stranger auction-purchaser is protected, sales in execution will not attract any customer which would be to the detriment of the borrower as well. The law is that even if the decree under which the property was sold in auction is ultimately set aside or modified, the sale will remain unaffected. There is however a distinction in the case of a decree holder-purchaser and a stranger-auction purchaser. A stranger-auction purchaser is placed on a different pedestal. He is a bonafide purchaser since he looks only to the decree and the order in auction, and he must be protected. This is also the legislative policy. The Courts must strive to give effect to the legislative policy and uphold the right of a stranger purchaser at the auction held by the Court. By reopening such sales casually, the Courts will introduce an element of serious uncertainty as regards validity of Court auction, which will defeat the object mentioned above. This position of law was summarised by the Apex Court in the case of ***Janatha Textiles & Ors. V/s. Tax Recovery Officer & Anr.*** reported in **(2008) 12 SCC 582** after following the decision of Privy Council in the case of ***Nawab Zain-Ul-Abdin Khan V/s. Mohd. Asghar Ali Khan*** reported in **1 (1887-88) 15IA 12** and the decision in the case of ***Janak Raj V/s. Gurdial Singh & Anr.*** reported in **(1967) 2 SCR 77**. It is therefore clear that the Appellants were bonafide purchasers and they derived their title from the Court auction.

16. Both the Trial Court and the Appellate Court however went to examine the merits of the transactions in respect of the property prior to the auction sale. Both the Courts discussed the factual position in great detail to conclude that Xavier, whose property was sold, could not have acquired title as Xec Amod himself had no title to convey it. The question is whether the Court can go into the issue and reopen the Court auction which none of the parties had challenged. There is one more important aspect of the present case which has direct bearing on this question. In the present appeals the representative of Diogo Pereira have chosen not to appear even though they have been served. It is informed by the learned Counsel for the appellants that these respondents had put a structure on the property which is no longer occupied by them and it is dilapidated. Mr. Amonkar appears only for respondents no. 5(c)2 & 5(c)7 in Second Appeal no.122 of 2004 and for respondents no.25(i) & 28 in Second Appeal No.126 of 2004, who claim through Xec Amod. It is his contention that the finding of both the Courts below is correct and proper. The finding is that Xec Amod had no title. If that is the finding, then no right will flow to representative of Xec Amod i.e. respondents no.5(c)(5) to 5(c)(24) in any case. Thus, the title asserted by the Appellants is not contested in this appeal.

17. As stated earlier, none of the parties have chosen to take out proceedings to set aside the court auction. Both the Courts below have noted the fact that the Appellants have asserted their right on the basis of the court auction but have

failed to give a legal effect to the title asserted by the Appellants. Since the Appellants have purchased the property through a Court auction and that it is the policy of legislature, as emphasized by the Apex Court to protect and to give effect to the Court auction, the Courts below ought to have considered the issue seriously. It will be against the legislative policy and the mandate of the Apex Court to deprive the Appellants the benefit of their right accrued through a Court auction. There is a clear error of law committed by both the Courts in not giving effect to the legal principle underlying the Court auction and the rights accrued therein. Furthermore, the persons in whose favour the factual finding are given have chosen not to contest the matter any further. The right asserted by the Appellants under the Court auction will have to be upheld. The first substantial question of law as framed, is accordingly to be answered in affirmative in favour of the Appellants.

18. The second question of law is based on the prescription based on registration and Article 528. Contention based on prescriptive possession was rejected by the Courts below on the ground that there are no adequate pleadings. Mr. Da Costa firstly relied to the plaint wherein it is averred that the Appellants are in possession for 30 years since they were put in possession and they have acquired right of prescription. Secondly, he also relied upon factum of registration and the article 526 of the Portuguese Civil Code. Mr. Da Costa submitted that the finding of the Courts below that right of a prescription was not specifically pleaded is incorrect as in

paragraph 21 of the plaint, the factum of possession for 30 years was specifically pleaded. He also submitted that in the prayer clause the right of prescription on the ground of possession of more than 30 years has been asserted. He also submitted that the Courts below confused between right by prescription and right by adverse possession.

19. The Trial Court has not accepted the claim of the Appellants based on prescription by possession on the ground that no particulars are pleaded. It may be that the Appellants have not pleaded adverse possession but even the claim of prescription by way of possession is not a pure question of law but a question of fact as well. The Courts below have found that except for stray sentence that Appellants were in possession for 30 years the claim is not elaborated. It is difficult to find fault with the reasoning of the learned Trial Judge. Merely by way of scattered sentences in plaint a case of prescription cannot be pleaded. It is not for the Court to Suo moto take cognizance of possible arguments, but the facts must be pieced together in a proposition to be asserted.

20. As regard the argument now advanced on Article 526 of the Code, it is introduced by way of an additional question of law. It is submitted that the Appellants had registered their property in the land records on 23 July 1946 and under Article 526(2) after a stipulated period, right by way of prescription is created by continuous possession. Neither in the plaint nor in the Courts below an argument based on Article 526 of the Portuguese Civil Code is advanced. This cannot be considered

as a pure question of law and it is not permissible to raise for the first time in the second appeal. In view of this position, finding of the Courts below that the Appellants have failed to established the right by prescription cannot be disturbed. Though the additional substantial question of law has been allowed to be incorporated in the appeal memo in view of interest of justice and completeness of proceedings, it has to be seen whether this argument was made in specific terms before the Courts below.

21. In the conclusion it will have to be held that the Appellants acquired a valid title to the property by purchasing it in the Court auction, they were in possession of the same and continue to be in possession. Both the Courts were in error in declining them relief based on their right acquired through Court auction. The claim based on prescription possession cannot be accepted, however, the plaintiffs are entitled to succeed on the first ground.

22. Accordingly, the judgments and decrees passed by the learned Civil Judge, Senior Division dated 20 March 1998 and the Appellate Court dated 26 July 2004 are quashed and set aside. The suit is decreed in terms of prayer clause a,b,c & d of the plaint. No costs.

N.M. JAMDAR, J.

NH/-