

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.6 OF 2014**

1. Shri Francisco Fernandes,
aged about 70 years,
retired seaman and
resident of House no. 121/1,
Zambaulimol, Village Zambaulim,
Sanguem, Goa.
 2. Smt. Augusta Fernandes,
major in age, married, housewife
resident of House no. 121/1
Zambaulimol, Village Zambaulim
Sanguem, Goa.
- ... Appellants.

V/s

1. The Comunidade of Sirvoi,
represented herein by its Attorney
C/o. The Administrator of Comunidade,
Comunidade Building
Margao, Salcete, Goa.
2. Shri Seguna Krishna Naik Kurade,
son of late Krishna S. N. Kurade,
major, widower, landlord (deceased)
3. Shri Naguesh Seguna Naik Kurade,
son of Seguna Krishna Naik Kurade,
major, married and his wife;
4. Smt. Tejaswini Naguesh Naik Kurade,
major, married,
5. Shri Vallabh Seguna Naik Kurade,
son of Seguna Krishna Naik Kurade,
major, married and his wife;
6. Smt. Nilima Vallabha Naik Kurade,
major, married,

7. Shri Krishna Seguna Naik Kurade,
son of Seguna Krishna Naik Kurade,
major, married and his wife;
8. Smt. Jyoti Krishna Naik Kurade,
major, married, 2 to 8 are all
Indian Nationals,
all r/o. H.No. not known
near Figueredo ground, Pontemol
Curchorem, Taluka Quepem,
Post: Curchorem.
9. Smt. Radha Narcinha Pissurlekar,
widow of late Narcinha Pissurlekar,
major, widow,
10. Jaya Narcinha Pissurlekar,
daughter of late Narcinha Pissurlekar,
major,
11. Priya Narcinha Pissurlekar,
daughter of late Narcinha Pissurlekar,
major 9 to 11 are all Indian Nationals,
all resident of F-3, II phase,
Rajvihar Housing Society
Aquem, Margao, Goa.
12. Smt. Josefa Eufemiance de Souza,
widow of late Ernesto D'Costa,
major, widow, housewife; and
13. Concy D'Costa,
daughter of late Ernesto D'Costa,
major,
14. Shri Marcele D'Costa,
son of late Ernesto D'Costa,
major,
15. Shri Normen D'Costa,
son of late Ernesto D'Costa,
major,

16. Shri Carry D'Costa,
son of late Ernesto D'Costa,
major,
 17. Shri Agnelo D'Costa,
son of late Ernesto D'Costa,
major, 12 to 17 are all Indian
Nationals, all r/o House no. 26
Deulmol, Shirvoi, Quepem,
Post: Quepem.
 - 18(a) Shri Medisetti Gopi Murali,
Krishna, son of Medisetti Ramamurthy,
major, Indian National and his wife;
 - 18(b) Mrs. Medisetti Sujana Krishna,
major, housewife, Indian National,
both resident of Village Curchorem
taluka Quepem, House no. not known
 19. Shri Viranjan Datta Shetkar,
major, married, occupation service,
and his wife.
 20. Smt. Mali Viranjan Shetkar,
major, married, occupation service,
both r/o. H.No. Not known
Cotto-Amona, Quepem,
Post : Quepem
- ... Respondents.

Shri Rohit Bras De Sa with Shri Jude Sequeira, Advocate for the Appellants.

Shri Prakash A.G. Desai, Advocate for Respondent No.1.

Shri S.D. Lotlikar, Senior Advocate with Ms. G. Xettigar, Advocate for Respondents No.3 to 11.

Shri C.A. Coutinho, Advocate for Respondents No.12 to 17.

Ms. Asha Desai, Advocate for Respondent No.19.

CORAM : C.V. BHADANG, J.

Reserved on : 23rd September, 2015

Pronounced on : 30th September, 2015

ORDER :

By this appeal, the appellants/original plaintiffs are challenging the concurrent finding of dismissal of their suit being Regular Civil Suit No.203/2000/A by the learned Civil Judge, Senior Division at Quepem.

2. The brief facts necessary for the disposal of the appeal may be stated thus:

That the appellants filed Regular Civil Suit No.203/2000 (old Special Civil Suit No.8/1998) against the respondents for declaration, correction of survey record and permanent and mandatory injunction. According to the plaint allegations it was contended that the appellants have acquired the right to the suit property in the year 1970 in which the appellant no.1 purchased the suit property from its original proprietors of the Domino Util by Sale Deed dated 9/09/1970 and the subsequent deed of rectification dated 24/07/1972. According to the appellants, the suit property was originally an afromento land granted to the predecessor of the appellants by the first respondent, Comunidade of Sirvoi. After the purchase of the suit property, they applied to the Comunidade for transfer of the Domino Util on payment of 20 annuities and got the matriz and other records of the suit property transferred in their name.

3. The appellant no.1 is a seaman while the appellant no.2 who is the wife of the appellant no.1 is a housewife. The appellants were not aware of the survey records. They were physically in possession and enjoyment of the property and were under bonafide impression that the survey has been properly done and the property has been duly recorded in their names. According to the appellants they even sold some plots out of the suit property bearing Survey No.56/1 to one Shashikant Gopi Naik, Taramati Harishchandra Naik and Shantaram Gana Chari by Deeds of Sale. It was contended that on verification of the survey records, the property bearing Survey No.56/1 was found in the name of the respondent no.2/original defendant no.2 (since deceased) Seguna Naik Kurade and one Ernesto D'Costa, who were recorded as its occupants. Seguna Naik Kurade being the widower, the original defendants no.3 to 11 were arrayed as defendants to represent the deceased wife of Seguna Naik Kurade. The original defendant no.12 is the widow of Ernesto D'Costa while the respondents no.13 to 17 are the successors of said Ernesto D'Costa.

4. It was contended that now deceased Seguna Naik Kurade or Ernesto D'Costa or any other respondents including the respondent no.1

has no right, title or interest, whatsoever as owners of the paddy portion of the suit property bearing Survey No.56/1 of Village Sirvoi. It was contended that however, Ernesto D'Costa was allowed to cultivate the said portion of the property bearing Survey No.56/1 as its tenant and, as such, the name of Ernesto D'Costa is recorded in the tenancy column of the suit property.

5. It was next contended that Seguna Naik Kurade approached the appellants sometime in the year 1972 and upon payment of some money, took possession of the portion of the suit property, which now bears Survey No.56/2 (part). Since then Seguna Naik Kurade and his family was in possession of the said portion of Survey No.56/2 of Sirvoi Village and enjoyed the same as its owners, on account of which the appellants even considered Seguna Naik Kurade and his family as the southern boundary owners of the northern side of the suit property when the plaintiffs sold plot from Survey No.56/5 (part). The appellants subsequently learnt that Seguna Naik Kurade and his family members had laid various plots in the said portion and sold them to different persons. The respondents no.18 (since deceased), 19 and 20 are the purchasers. It was specifically contended in para 14 of the plaint that the defendants no.18(a) and 18(b) as also the defendants no.19 and 20 are

made formal parties to the suit, their names being recorded in the Survey No.56/2, who are the purchasers and no relief whatsoever is claimed against them.

6. It was contended that in any event the name of Ernesto D'Costa which is recorded in the occupants column of the record of rights of Survey No.56/2 is erroneous.

7. In para 16 of the plaint it was contended that the subject matter of dispute is basically, portion of Survey No.56/2 admeasuring 4140 square metres which was shown delineated and marked in red lines in the plan annexed as Exhibit "A" to the plaint. Thus, in short, the portion of the suit property admeasuring 4140 square metres shown in the red on Exhibit "A" was said to be the subject matter of dispute.

8. It was contended that the appellants were not aware of the erroneous recording of the name of occupants qua survey record of suit portion bearing Survey No.56/2 as also Survey No.56/1. It was contended that "sometime in the past" one surveyor from the Land Survey Department took signature of the appellant no.1 informing that

the entire suit property is recorded in the name of the appellant no.1 and the signature was obtained in confirmation. The appellant no.1 being in hurry to go on ship did not pay much heed to the said matter and the appellants apprehended that the signature might have been misused for creating false evidence in favour of Ernesto D'Costa.

9. Sometime in the first week of November 1997, the respondent Marcus D'Costa and his family members made an attempt to interfere in the suit portion by cutting few cashew trees existing therein. This was objected to by the appellants whereupon they stopped the illegal cutting, however, threatened that they will continue interfering in the suit portion.

10. It was contended that the appellants "thereafter got alarmed and on collection of the survey plans and survey records shockingly learnt for the first time" as under:

(i) That in the survey records of survey no.56/1 name of the plaintiff no.1 is erroneously not recorded while on the contrary name of defendant Seguna Naik Kurade and that of Ernesto D'Costa is erroneously recorded as occupants.

(ii) That survey no.56/2 comprises of portion allotted to defendant no.1 (shown in green on exhibit 'A') and suit portion shown in red. Further, the name of plaintiffs is erroneously not found recorded while

that of defendants no. 2, 18(a) and 19 and that of Ernesto D'Costa erroneously found recorded as its occupants.

Thereafter, sometime on 20/01/1998 and 21/01/1998 the respondent Marcus D'Costa forcibly demolished a part of the compound wall existing on the northern side of the portion of the appellants and started raising compound wall in an attempt to illegally encroach upon and grab the suit portion taking undue advantage of the wrong survey record. It was contended that the appellants apprehend that taking undue advantage of the erroneous survey record, defendants no.11 to 16 may interfere with the suit portion in order to forcibly dispossess the appellants from the suit portion. In such circumstances, the suit came to be filed on or about 31/01/1998 for the following material reliefs:

31. The plaintiffs in the aforesaid circumstances pray:-

(a) For a declaration that the suit portion bearing survey no.56/2 (Part) of Village Sirvoi of Quepem Taluka admeasuring 4140 sq. metres as shown in the plan exhibit 'A' delineated and marked in red, as, the part and parcel of suit property of the plaintiffs.

(b) For permanent injunction restraining the defendants 12 to 17, their family members friends, agents, relatives, servants or whomsoever acting or purporting to act on behalf of defendants from interfering in suit portion or any part thereof in any manner whatsoever.

(c) For mandatory injunction directing the defendants 12 to 17 to demolish, remove and take away the compound wall erected around the suit

portion and to restore the land thereof to its original position.

(d) For direction to the Dy. Collector of Quepem and/or authorised Officer under Land Revenue Code to allot a separate sub-division member to the suit portion and to record the same exclusively in the name of plaintiffs as its owners.

(e) For direction to the Dy. Collector of Quepem and/or authorised Officer under Land Revenue Code to delete and strike out the names of Defendant No. 2 and said Ernest D'Costa from the column, the name of occupant from the survey record of the part of suit property bearing survey no.56/1 of Village Sirvoi and to record exclusively the name of plaintiffs therein as occupants.

11. The suit was resisted on behalf of the respondents including the defence that the suit was barred by limitation under Article 58 of the Indian Limitation Act.

12. It appears that in all there were four applications for amendment filed by the appellants dated 17/02/2000, 19/11/2002, 7/03/2007 and 25/08/2008. In the application filed on 25/08/2008, it was contended that the plan Exhibit "A" annexed to the plaint was drawn by engineer Shailesh Sanzgiri, who was reluctant to appear before the Court for evidence. It was contended that there was mistake in production of plan.

It was contended that the plaintiffs being old were confused earlier and forgot with the lapse of time the fact as to whether they had engaged surveyor Shri Shirvoikar or engineer Shri Sanzgiri to draw Exhibit "A" and, as such, there were several mistakes made in filing earlier application (as there was yet another application for amendment dated 7/03/2007). It was contended that the appellants finally realised that it was Shri Shailesh Sanzgiri who had drawn the plan (Exhibit "A"). The plaintiffs therefore proposed to incorporate para 16-A which reads as under:

16-A – The plaintiffs state that Exhibit 'A' was drawn by Engineer Shri Shailesh Sanzgiri. Said Exhibit 'A' is produced by the plaintiffs through evidence and is marked for identification. The plaintiffs later engaged Shri Tito D'Cunha, Retired Superintendent of survey and Land records of Goa Government to identify the suit portion. Said Shri Tito D'Cunha after verifying the documents and making actual survey at loco drew a plan showing suit portion which is produced and marked as “Exhibit B” to the plaint.

For the present purpose and as referred by the learned District Judge, we are concerned with the applications dated 17/02/2000 and 19/11/2002 which were rejected on 1/08/2001 and 23/10/2003, respectively.

13. It appears that the amendment applications dated 17/02/2000 and 19/11/2002 were rejected on 1/08/2001 and 23/10/2003, respectively. Be that as it may, on the basis of the rival pleadings the learned Trial Court raised as many as 17 issues including an issue about limitation in view of the dispute case no.33/Sirvoi. The parties went to trial in which on behalf of the appellant no.1 Francisco Fernandes was examined as PW1 along with Shri Rosario Carvalho as PW2, Shri Sadanand Bhagat as PW3, Shri Shantaram Paik Velip as PW4 and Surveyor Tito D'Cunha as PW5. The appellants also produced certain documents.

14. On behalf of the defendants Vallabh Naik Kurade was examined as DW1 and respondent no.19 Shri Viranjan Datta Shetkar was examined as DW2. The learned Trial Court in an elaborate judgment answered the issue numbers 1 to 12 in the negative and against the appellants. The learned Trial Court answered the issues no.13 to 16 in the affirmative which includes issue no.14 thereby holding that the respondents no.12 to 17 (defendants no.12 to 17) were the exclusive owners of the property bearing Survey No.56/2. The learned Trial Court also held that the suit was barred by limitation.

15. Feeling aggrieved, the appellants challenged the same in Regular

Civil Appeal No.170/2011 before the learned District Judge at Margao. In the appeal, apart from merits the challenge was also raised to the order of dismissal of the applications for amendment dated 17/02/2000 and 19/11/2002 by orders dated 1/08/2001 and 23/10/2003, respectively. The First Appellate Court found that the appellants had failed to prove that they are the owners of the suit property bearing Survey No.56/1 and 56/2 (part) of village Sirvoi, Taluka Quepem. The First Appellate Court refused to hold that the applications for amendment were wrongly dismissed. The First Appellate Court also concurred with the Trial Court that the suit was barred by limitation. In the face of such finding, the First Appellate Court found that no case for interference was made and dismissed the appeal. Feeling aggrieved, the appellants are before this Court.

16. I have heard Shri Rohit Bras De Sa, the learned Counsel for the appellants, Shri Prakash Dessai, the learned Counsel for respondent no.1, Shri S.D. Lotlikar, the learned Senior Counsel for the respondents no.3 to 11, Shri C.A. Coutinho, the learned Counsel appearing for the respondents no.12 to 17 and advocate Ms. Asha Desai, the learned Counsel for respondent no.19. With the assistance of the learned Counsel for the parties, I have perused the impugned judgments.

17. At the outset, it may be mentioned that the appellants have set out the draft substantial questions of law at para 7(I) to 7(X) in the appeal memo which according to the appellants arise in the appeal. However, during the course of the arguments, the learned Counsel for the appellants has furnished a copy of the following draft substantial questions of law:

1. Whether the first accrual of cause of action, as envisaged under Article 58 of Schedule I of the Indian Limitation Act, would take into its ambit mere adverse entry in the Record of Rights ?

OR

Whether accrual of such cause of action would require a specific threat to the title by the adversary ?

2. Whether the findings of the lower Appellate Court that the inscription of the property described under number 216/2 is not in the name of the plaintiff and therefore the plaintiff cannot contend that they are deemed users in possession thereof is perverse being based on non consideration of the relevant and material facts that the said inscription number 15759 stood in the name of Narayan Vital Xete Kokar who was predecessors in title of the plaintiff ?

3. Whether in view of the nature of the dispute and in the facts of the present case whether the local commissioner ought to have been appointed by the learned lower Appellate Court to ascertain as to whether survey no. 56/2 formed the part of the property described under land inscription number 21612 as claimed by the plaintiff or whether it form the part of the property described under land inscription number 18648 and 21962 as claimed by the defendants no. 2 and 11 ?

18. It was submitted by Shri De Sa, the learned Counsel for the appellants that the Courts below were in error in holding that the suit was barred by limitation. The learned Counsel would submit that mere adverse entries in the record of rights cannot afford a cause of action for filing the suit for declaration, in the absence of there being a clear and unequivocal threat infringing the right of the appellants. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of *Daya Singh & Anr. V/s Gurdev Singh (Dead) by LR's. & Ors.* reported in *(2010) 2 SCC 194*. It is submitted that thus the finding by the Courts below and particularly the reliance placed on the proceedings and the order passed in the dispute case no.33/Sirvoi was clearly misplaced.

19. It was next contended that the finding by the First Appellate Court that inscription of the property described under no.21612 is not in the name of the appellants would be perverse being based on non-consideration of the relevant and material fact that the said inscription no.15759 stood in the name of Narana Vitol Xete Lotlecar, who was the predecessor in title of the appellants.

20. It was next contended that having regard to the nature of the dispute it was necessary for the First Appellate Court to have appointed a local Commissioner to ascertain as to whether Survey No.56/2 formed part of property described under land registration no.21612 as claimed by the appellants, or whether it formed part of the property described under land registration no.18648 and 21962, as claimed by the original defendants no.2 & 11. Reliance in this regard was placed on the decision of the Judicial Commissioner in *Vencu Gopal Tari & Ors. V/s. Nilconta S. Xete & Ors.* reported in *AIR 1975 Goa 32*. He, submitted that the appeal be allowed.

21. On the contrary, it is submitted on behalf of the contesting respondents that the Courts below have recorded the findings on proper appreciation of the oral and documentary evidence on record. It is submitted that in the absence of the findings being shown to be perverse the same would not partake of the nature of a substantial question of law. In so far as the issue of limitation is concerned, it is submitted that the appellant no.1 was a party to dispute case no.33/Sirvoi in which the order was passed on 20/07/1976, copy of which was produced before the Trial Court at Exhibit 123. The statement of the appellant no.1 who was examined as PW1 therein was produced at Exhibit 68. It was contended

that the appellant no.1 was aware of the survey record when the order came to be passed on 20/07/1976 and, as such, the suit ought to have been filed latest by 19/07/1979 i.e. within three years. The learned Counsel for the parties have also taken me through the statement of PW1 Francisco Fernandes which was recorded on 4/03/1976 in order to submit that no exception can be taken to the finding recorded by the Court below about the suit being barred by limitation. Reliance in this regard is placed on a decision of this Court in ***Rejendra Vasudev Porob Dessai Deshprabhu Rauraje (since deceased by LR's) & Anr. V/s. Smt. Sitadevi alias Jaya Raghuraj Deshprabhu & Ors.*** reported in ***2006 (5) AIR Bom R 792***. It is submitted that the appeal does not involve any substantial question of law.

22. The learned Counsel for the respondent no.19 had nothing much to add as no relief as such is claimed against the said respondent.

23. I have considered the rival circumstances and submissions made. It would be necessary to examine the issue of limitation first as it would go to the root of the matter. From the contents of the plaint and the relief claimed as set out above, it would be clear that the appellants are seeking a declaration and correction of the survey record and the short dispute

appears to be that a portion of Survey No.56/2 admeasuring 4140 square metres delineated by red lines in the plan is part of the suit property. It is undisputed that the appellant no.1 was a party to the dispute case no.33/Sirvoi in which by an order dated 20/07/1976 (Exhibit 123) the survey record in respect of survey No.56/2 and 56/5 came to be corrected. In the statement recorded in the said case PW1 has stated thus:

“I know the applicant. I know the properties under S.No. 56/2 and 5. I have inspected the corrected plan under S.No. 56/2 and 5. I do agree with the corrected plan in which the boundary line between plot No. 56/5 and 2 has been shifted and then my area is decreased by 425 sqm. My present area of the plot under S.No. 56/5 comes to 1.21.50 which I agree. I signed the corrected plan under S.No. 56/2 and 5 in token of its acceptance.

My request is that the applicant should allow me to get water from his property under S.No. 56/2 and my property under S.No. 56/5 for which the applicant is also agreeing in his statement.

I close my statement.”

It is thus clear that the appellants were aware about the survey record right from the time when the said case was decided in the year 1976. The Courts below have relied upon this aspect in holding that the suit was barred by limitation.

24. In the case of *Rejendra Vasudev Porob Dessai Deshprabhu Rauraje (since deceased by LR's) & Anr.* (supra) the suit was for a

declaration that the entry made in the revenue record was not correct. In that case, no specific date was mentioned in the plaint as to on what date the plaintiff came to know about the said entry. It was held that it has to be presumed that he was aware of the said entry when it was made or immediately thereafter and, as such, the suit which was filed 12 years thereafter was held to be barred by limitation. It would appear that in that case there were no proceedings as such for correction or otherwise in which the plaintiff therein was a party. Still it was held that in the absence of a specific date about knowledge the appellants/plaintiffs should be presumed to be aware of the said entry when it was made or immediately thereafter.

25. In the case of ***Daya Singh & Anr. V/s Gurdev Singh (Dead) by LR's. & Ors.*** (supra) the Hon'ble Apex Court has held that the mere adverse entries would not afford the cause of action for declaration of ownership under Article 58 unless there is a specific threat or cloud on the title. In my humble opinion, the present case would be distinguishable on facts inasmuch as the suit filed in this case was basically for correction of the survey records. There was a dispute case which was decided as far back as on 20/07/1976 and the survey record inter alia in respect of Survey No.56/2 came to be corrected. Not only

that the statement of PW1 as reproduced above would clearly show that he had no dispute about the said correction. If that be so certainly the appellants cannot be heard to say that there was no specific threat or cloud on the title. This is a case which goes a step further in which the appellant no.1 (PW1) was aware of the correction. In that view of the matter, I do not find that the finding recorded by the Courts below about the suit being barred by limitation needs interference.

26. In so far as the finding about the inscription no.15759 standing in the name of Narana Vitol Xete Lotlecar, the predecessor in title of the appellant is concerned, the Trial Court has in elaborate judgment considered all the relevant aspects and the First Appellate Court has concurred with the same. On a careful consideration of the same, I am unable to persuade myself to hold that the said finding of fact is perverse so as to partake of the nature of a substantial question of law.

27. This takes me to the submission that the First Appellate Court ought to have appointed a Commissioner to have local inspection. Admittedly, no such application or prayer was made before any of the Courts below and thus the said submission cannot be entertained for the first time at the stage of second appeal. The judgment of the Judicial

Commissioner in the case of *Vencu Gopal Tari & Ors. V/s. Nilconta S. Xete & Ors.* (supra) would be distinguishable on facts. In so far as the challenge to the refusal of the amendment applications are concerned, it would be worthwhile to reproduce the substantial question of law at para 7(II) in the appeal memo:

7(II). Whether the Appellate Court, in the background of the peculiar facts of the case, ought to have considered whether the contents of the plaint are so patently perverse that the same actually militate against the interest of the Appellants themselves and to have therefore ascertained whether such contents did actually represent the real case of the Appellants?

Thus, if according to the appellants themselves the contents of the plaint were patently perverse, no duty can be cast on the Courts in an adversarial litigation to ascertain whether the contents of the plaint actually represent the real case of the appellants.

Apart from the said challenge, in my considered view, once the suit is found to be barred by limitation no relief can be granted to the appellants.

28. I have given my anxious consideration to the rival circumstances and the submissions made and the finding recorded by the Courts below and I do not find that the appeal involves any substantial question of law.

In the result, the Second appeal is hereby dismissed with no order as to costs.

C.V. BHADANG, J.

NH/-