

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 49 OF 1999

1. Mr. Bhikaji Ladu Naik,
2. Mrs. Satyawati Bhikaji Naik (Since deceased)
Through legal representatives
 - 2a. Vaman Bhikaji Naik (son)
 - 2b. Sujita Vaman Naik (daughter in law)
 - 2c. Shobha Gurudas Narvekar (daughter)
 - 2d. Rajendra Gurudas Narvekar
 - 2e. Sunanda Rajendra Narvekar,
 - 2f. Prakash Gurudas Narvekar,
 - 2g. Sunita Prakash Narvekar,
 - 2h. Pravin Gurudas Narvekar,
 - 2i. Rasika Pravin Narvekar,
All major, all r/o H. No.141,
Ward No.13, Khorlim,
Mapusa Goa.
 - 2j. Prashila Phandhari Gauns,
 - 2k. Phandari Mahadev Gauns,
Both major,
Both r/o H.No.142, Pimplewada,
Amona, Bicholim Goa.
 - 2l. Anusuya Sakharam Redkar,
Both major,
Both r/o Warchawada, Morjim,
Pednem Goa.
Pin 403 512.
3. Mrs. Indumati Vishnu Naik, (since deceased)
widow of late Vishnu Naik,
4. Mr. Harishchandra Vishnu Naik,
5. Mr. Chandrarekha Harischandra Naik,
6. Mr. Ladu Vishnu Naik,
7. Mr. Sanjay Vishnu Naik,
All of major in age,
All Indian Nationals,
All residence of Khalchawada, Mencurem,

Bicholim.

8. Mrs. Sitabai Ramnath Gauns (since deceased)
9. Mr. Ramnath Babulo Gauns,
Both of major in age,
Both Indian Nationals,
Both residents of Navelim, Sakhelim,
10. Mrs. Radhabai Krishna Sawant,
11. Mr. Krishna Vishnu Sawant,
12. Mr. Sitaram Ladu Naik (since deceased)
All of major in age,
All Indian Nationals,
All residents of Shirigal, Aroba,
Pernem Goa.
13. Mrs. Vanita Sitaram Naik, (since deceased)
13.a. Mr. Sitaram Ladu Naik,
13.b. Mr. Subhash Sitaram Naik,
13.c. Mrs. Pranita Subhash Naik,
13.d. Mr. Samir Sitaram Naik,
All of major in age,
All Indian Nationals,
All residents of Morjim,
Pernem.
14. Mrs. Tarawati Dattaram Naik, (since deceased)
of major in age, Indian National,
resident of Khalchawada, Mencurem,
Bicholim.
15. Mr. Rajaram Dattaram Naik, (since deceased)
of major in age,
Indian National,
resident of Viraj, 2nd floor, block No.25,
Amrut Nagar, Near Indian Oxygen,
Ghatkopar, Bombay – 86.
16. Mrs. Pushpa Rajaram Naik,
of major in age,

Indian National,
resident of Viraj, 2nd floor, Block No.25,
Amrut Nagar, Near Indian Oxygen,
Ghatkopar, Bombay – 86.

17.Mr. Madhukar Dattaram Naik,
18.Mrs. Hema Madhukar Naik,
of major in age,
both Indian Nationals,
both residents of Khalchawada, Mercurem,
Bicholim.

19.Mr. Eknath Dattaram Naik,
of major in age,
Indian National,
resident of Viraj, 2nd floor, Block No.25,
Amrut Nagar,Near Indian Oxygen,
Ghatkopar, Bombay – 86.

20.Mr. Ramchandra Shiva Naik,
(Since deceased)
through his legal representatives
20a. Mr. Anant Ramchandra Naik,
20b. Mrs. Anandi Anant Naik,
20c.Mr. Shiva Ramchandra Naik,
20d. Mrs. Shalini Dyaneshwar Gad,
20e. Mr. Namdev Ramchandra Naik,
All of major in age,
All Indian Nationals,
All residents of Khalchawada,
Mercurem, Bicholim.

... Appellants

V e r s u s

1. Mr. Shankar Ante Porob (Since deceased through Lrs.)
 - 1a. Shri Anant Yeshwant Porob,
r/o Mercurem, Bicholim North Goa.
2. Mr. Shiva Balkrishna Porob,
3. Mrs. Rukmini Shiva Porobo,

4. Mr. Krishna Fatti Porob (since deceased through Lrs.)
 - 4a. Shri Suresh Parab,
Major, r/o H.No.1,
Sakailwado, Mencurem,
Bicholim Goa.
 - 4b. Shri Ramesh Parab,
major, r/o H.No.1,
Khalchawada, Mencurem,
Bicholim Goa. 403 503.
 - 4c. Shri Subhash Parab,
S/o Shri Krishna Parab,
major, r/o H.No.1,
Khalchawada, Mencurem,
Bicholim Goa, 403 503
 - 4d. Santosh Parab,
major, r/o H.No.1,
Sakailwado, Mencurem,
Bicholim Goa.
5. Mrs. Satyawati Shrikrishna Porobo
 - 5(a) Shri Santosh Shrikrishna Parab,
son, age 50 years, married,
 - 5(b) Smt. Savita Santosh Parab,
Daughter in law, age 44 years,
 - 5(c) Shri Suresh Shrikrishna Parab,
son, age 44 years,
 - 5(d) Smt. Sunita Suresh Parab,
Daughter in law, age 40 years,
 - 5(e) Shri Ramesh Shrikrishna Parab,
son, age 42 years,
 - 5(f) Smt. Rachana Ramesh Parab,
daughter in law, age 38 years,
 - 5(g) Shri Subhash Shrikrishna Parab,
son, age 40 years,
 - 5(h) Smt. Kalpara Subhash Parab,
Daughter in law, age 36 years,
All resident of Khalchawada,
Mencurem, Bicholim Goa.
6. Mr. Purushottam Arjun Porob,

7. Mrs. Prabhavati Purushottam Porob,
All of major in age,
All Indian Nationals,
All residents of Khalchawada,
Mencurem, Bicholim Goa. Respondents

Mr. S. D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar,
Advocate for the appellants.

Mr. V. Menezes, Advocate for the respondents.

Coram:- F. M. REIS, J.

Judgment reserved on : 21.10.2016.

Judgment pronounced on : 27.10.2016

J U D G M E N T

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

2. The above appeal came to be admitted by order dated 04.12.1999 on the following substantial question of law.

“ Whether, the Regular Civil Suit No. 14/1988 which was filed for demarcation of the property under Article 2340 of the Portuguese Civil Code, could be said to be barred by res judicata under Section 11, or

constructive res judicata of Order 2, Rule 2 of the Civil Procedure Code, on the ground that the earlier suit being Regular Civil Suit No.32/1969, in which the plaintiffs had prayed for recovery of possession of an area of 3 metres x 6 metres, and permanent injunction for demolition of encroachment, came to be dismissed on the ground that the Appellants had not established the demarcation line, between the two properties, and that they had failed to establish possession of the encroached portion of the property.”

3. Briefly, the case as stated by the appellants/plaintiffs is that there is a property known as 'Gharacodil Tucdo' or 'Gharbhat' or 'Gharbatlem' situated in the village of Mencurem, in Bicholim Taluka described in the Land Registration Office under No. 1842 and enrolled in the Revenue Office under Nos. 353, 670 and 680 and surveyed under Old Cadastral Survey No.374 and having new Survey Nos. 37/3, 37/4 and 37/12 and 87/11 and 87/18 of the said village.

4. It is further contended that the said property belonged to the ancestors of the appellants and by way of a sale deed dated 19.03.1917, a

part of the said property consisting of two plots were sold by the ancestors of the appellants to the ancestors of the respondents. It is further contended that the plots which were sold admeasuring an area of 130 cubits x 40 cubits and 130 cubits x 45 cubits and that the old houses of the respondents were located in the said two plots. It is further their case that the respondents illegally extended their houses and encroached in the remaining property of the appellants on the eastern and southern side of the plots sold. The appellants instituted a suit in the Court of Civil Judge Senior Division, Bicholim being Regular Civil Suit No. 32/69 in which the appellants inter alia prayed for restoration of possession of the encroached area to the extent of 3 metres X 10 metres and also for a mandatory injunction to demolish the unauthorised structure. It is further their case that the said suit came to be dismissed by judgment and decree dated 10.01.1983. It is further their case that the learned Judge came to the conclusion that the appellants had proved that they were owners in possession of the suit property but however, the issue no.1 was decided against the appellants and the issue no.2 in favour of the respondents on the ground that the demarcation of the property between the appellants and the one sold to the respondents was of prime importance and that the appellants had not stated in the plaint that the same had been divided and the suit was not for demarcation under Article 2340 of the Portuguese Civil Code but for the restoration of possession. The learned Judge also found

that the appellants have not established the possession of the encroached area while dismissing the suit filed by the appellants. An appeal preferred before the Appellate Court came to be dismissed by the learned District Judge by judgment and decree dated 29.11.1984. Thereafter, in February, 1988 the appellants filed another suit being Regular Civil Suit No. 14/1988 against the respondents inter alia praying for the relief to demarcate the eastern and southern boundary lines of the property belonging to the respondents and also directions to the respondent nos. 1 and 2 to remove any encroachment made in the property of the appellants. The record of rights were also sought to be rectified accordingly. The learned Trial Judge after framing issues, answered the issue nos.3, 5, 6 against the appellants inter alia stating that the appellants had failed to prove that the portion of their property is wrongly included in the property surveyed under No.37/3 and that the respondents have proved that the suit was barred by principle of res judicata. Aggrieved by the said judgment, an appeal was preferred by the appellants being Regular Civil Appeal No. 35/1996 which came to be dismissed by the judgment and decree dated 31.12.1998. Being aggrieved by the said judgment, the appellants have preferred the above Second Appeal which came to be admitted on the aforesaid substantial question of law.

appellants has pointed out that originally the suit was filed only for restoration of possession of the encroached area on the ground that the respondents had proceeded to put up an unauthorised structure in the portion of the property belonging to the appellants. It is further pointed out that the suit was defective as there was no relief of demarcating the line separating the property of the appellants and the two plots sold by the ancestors of the appellants to the respondents herein. It is further pointed out that both the Courts below have erroneously come to the conclusion that the suit filed by the appellants is barred by principle of res judicata when according to him the relief sought in the present suit is for a substantive relief to demarcate the property of the appellants and the respondents towards the eastern and southern side in terms of the document of title of the respondents. The learned Senior Counsel has taken me through the judgments of the Courts below and pointed out that both the Courts below have failed to examine that the present suit was not barred by principle of res judicata and further pointed out that the judgments of both the Courts below be set aside and the matter may be remanded to the learned Trial Judge to carry out the demarcation in accordance with law.

6. On the other hand, Mr. V. Menezes, learned counsel appearing for the respondents has pointed out that the earlier suit was with regard to

the same structure and as such the suit was barred by principle of res judicata. The learned counsel further pointed out that there is a specific finding in the earlier suit that the appellants have failed to establish their title to the subject property and to the alleged unauthorised structure put up by the appellants and as such the finding in the present suit is an abuse of the process of law besides being hit by principle of res judicata. The learned counsel further pointed out that the appellants have resorted to an illegal expedient camouflaging the relief to say that the relief is for demarcation. The learned counsel thereafter has also taken me through the judgments of the Courts below and pointed out that both the Courts below have rightly examined the matter and dismissed the suit filed by the appellants.

7. I have considered the submissions of the learned counsel and I have also gone through the records. On perusal of the judgment passed by the learned Appellate Court while disposing of the earlier appeal preferred by the appellants challenging the judgment and decree dated 10.01.1983, I find that the learned District Judge in the judgment dated 29.11.1984 came to the conclusion that the appellants have failed to establish the demarcation line between their property and that of the respondents. The learned Judge also examined the Commissioner report at Exhibit 39 to note that there is no material to establish that the boundary shown by the

appellants is the boundary line separating the two properties. The learned Judge also noted that though the appellants have proved their title to their property, it is immaterial for the decision as the demarcation line has not been proved. On going through the judgment passed in the subsequent suit filed by the appellants which is the judgment dated 31.01.1996, I find that the learned Judge while deciding the issue no.3, has noted that the relief of demarcation could have been claimed in the earlier suit No.32/1969 and hence, the suit is barred under Order II Rule 2 of the Civil Procedure Code. Consequently, the learned Judge found that the appellants have failed to prove that the witnesses examined by them have not shown the encroached area in the property surveyed under No.37/3. The learned Judge while examining the issue no.5 has found that first three issues had already covered in the earlier suit and as such dismissed the suit as being barred by principle of res judicata.

8. In the appeal preferred before the learned Lower Appellate Court, the learned Judge has framed two points for determination. While examining the first point for determination, the learned Judge appreciated the evidence on record and found that the appellants have produced two plans, one Cadastral plan at Exhibit PW1/A and the other is the survey plan at Exhibit PW1/B. The learned Judge further noted that it is not the case of the appellants that the plan is not available when the earlier suit was filed.

The learned Judge also took note of the provisions of Order II Rule 2 of the CPC and noted that the learned Trial Judge has rightly restricted herself on this provisions of law by holding that the appellants have relinquished the right in the said suit for demarcation as otherwise nothing prevented them from claiming such right in the earlier suit. The learned Judge further noted that the cause of action for filing the earlier suit was when the respondents laid foundation for the construction whereas in the present suit, it was on the day when the decision in the said suit was passed. The learned Judge further noted that the appellant is bound to make the whole claim available to him and if he fails to do so he shall not afterward sue in that respect. The learned Judge also noted that under Article 2340 of the Portuguese Civil Code, the appellants had right in filing the suit for demarcation and nothing prevented them from laying such claim in the earlier suit.

9. With regard to the findings on the res judicata rendered by the learned Trial Judge, the learned Lower Appellate Court has further noted that the parties in the suit are same and the subject matter of the suit is identical. The competent Court has decided the earlier suit and the conduct fully justified the respondents' case that the appellants' suit was barred by principle of res judicata. The appeal was accordingly rejected. What transpired from the aforesaid findings of the Courts below is that the

earlier suit filed by the appellants was essentially dismissed on the ground that there was no claim for demarcation sought by the appellants herein. The encroachment in the property was not established by the appellants and as such the question of examining or directing to demolish such encroachment would not arise at all. The findings in the earlier proceedings to the effect that the appellants are not entitled to seek a relief of praying that the encroached area be demolished depending upon the demarcation of the property on the eastern and southern boundary of the appellants and the respondents. The demarcation as sought in terms of Article 2340 of the Portuguese Civil Code reads thus :

“Right of demarcation- The owner as also the usufructuary or possessor in his own name has the right to compel the owner of adjoining property to contribute for the demarcation of respective boundaries between his property and theirs.

10. In the judgment reported in *1999(1) Bom. C.R. 537* in the case of *Antonio Filipe Vaz and others V/s Comunidade of Margao*, taking note of the provisions of the Articles 1051 and 1057 of the Portuguese Civil Code, the learned Single Judge of this Court has observed at para 7 thus :

“7. Coming to the second contention, it relates to the maintainability of the suit. According to Shri Singh, a suit for demarcation simpliciter without any relief of declaration is not maintainable. There is, however, no substance in this contention. As rightly pointed out by Shri Usgaonkar, the relief of demarcation implies that the plaintiff claims to be the owner of the property. Consequently it is unnecessary and redundant for the plaintiff to seek the relief of declaration of his title also. Of course the plaintiff will not get the relief of demarcation unless and until he proves his title to the property which is sought to be demarcated. Hence, the second contention of Shri Singh also deserves rejection.”

11. In *Second Appeal No. 102 of 2005* by judgment dated 13.12.2011 in the case of *Shri Nilconta Gangadhar Sinai Amonkar and Anr. V/s Shri Joao Francisco Cruz Mendes & Ors*, this Court has taken note of the provisions of Article 2340 which gives a right to the adjoining owners of the property to seek for demarcation of the boundary of their respective properties. Article 2341 of the said Code inter alia provides that firstly the demarcation has to be carried out on the basis of the title documents and in their absence on the basis of possession of such respective owners of the properties. Article 2342 of the said Code provides that to avoid further controversy in the cases in which demarcation cannot

be carried out on the basis of the title documents or possession or any other means the disputed portion is to be divided into two equal halves. In such circumstances, there is an elaborate procedure contemplated in the said Code to carry out the demarcation of the property.

12. Taking note of the observations in the said judgments, the demarcation of the property essentially is in the nature of declaration. Though the appellants may not be entitled for the relief of seeking restoration of possession of the encroached area which was the subject matter of the earlier suit, the demarcation sought by the appellants is to the extent of the entire boundary line on the southern and eastern side. In such circumstances, to avoid the apprehension of the appellants that there could be further encroachment in the subject property, the right to seek demarcation in terms of Article 2340 of the Portuguese Civil Code cannot be barred by principle of res judicata. The only relief which is granted in such suit is to demarcate the property based on the title documents and respective possession of the adjoining owners as provided in the said provisions of the Portuguese Civil Code. As such, the findings of the learned Judge that the suit for demarcation is barred by principle of res judicata merely because the earlier suit for mandatory injunction to remove the encroachment has not been established as the property itself was not demarcated cannot be accepted. Nevertheless, as already pointed out

herein above, there is no question of restoring the possession of the alleged encroached area which was the subject matter of the earlier suit. To that extent, the impugned judgments of the Courts below deserve to be quashed and set aside. The substantial question of law is answered accordingly.

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

O R D E R

- (i) The appeal is partly allowed.
- (ii) The impugned judgments of the learned Trial Court dated 31.01.1996 and the learned Appellate Court dated 31.12.1998 stand modified to the extent referred to herein above.
- (iii) The learned Trial Judge shall proceed to decide the suit for demarcation in terms of the said provisions of law in the light of the observations made herein above.
- (iv) The appeal stands disposed of accordingly.

F. M. REIS, J.