

IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO. 56 OF 2015.

AND

APPEAL FROM ORDER NO. 57 of 2015.

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| <p>1 Shri Damodar Narsinva Naik,
Son of Narsinva Naik,
Aged about 79 years,
And his wife,</p> <p>2 Smt. Indira Damodar Naik,
Wife of Damodar N. Naik,
Aged about 72 years, married,
Both residents of H.No. F11-03150,
Monte Hill, Talsanzor,
Margao, Goa.</p> | <p>..... Appellants/
Orig.
Defendant No.
1 & 3.</p> |
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V/s.

- | | |
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| <p>1 Mrs. Liberata Philomena Moraes e Perira,
aged about 52 years, occupation –
service,
Both r/o House No. 6/3, Issorcim- Kholi,
Velcao – Pale, Salcete, Goa.</p> | <p>..... Respondent /
Orig.Def. No.2.</p> |
| <p>2 Mr. Bruno Francisco Pereira,
Aged about 58 years, Occupation –
service, and his wife;</p> <p>3 Mrs. Maria Piedade Fatima
Fernandes e Pereira (Deceased),</p> <p>4 Mr. Romeo Agnelo Pereira,
Aged about 52 years,
Both r/o House No. 6/3,
Issorcim-Kholi, Velcao-Pale,
Salcete, Goa.</p> <p>5 Mrs. Gracy Luisa Pereira e D'Souza,
Aged about 49 years, housewife,
and her husband;</p> <p>6 Mr. Franklin D'Souza,</p> | |

- Aged about 55 years, occupation-
Service,
Both r/o House No. 1929,
Soncrem, Shiroda,
Ponda, Goa.
- 7 Mrs. Bena Pereira e da Costa,
Aged about 45 years, occupation-
service,
Resident of Zuarinagar, Sancoale, Goa,
and his wife;
- 8 Mr. Paul Silvestre D'Costa,
Aged about 45 years, occupation-
service,
Both r/o Flat No. S-1,
House No.429/C, 2nd floor,
Pietonio Residency, Zuarrinagar,
Sancaole, Goa.
- 9 Mr. Luna Matheus Gregory Pereira,
Aged about 46 years, occupation
-service,
And his wife;
- 10 Mrs. Priya Piedade Souto e Pereira,
Aged about 41 years, Occupation-
housewife,
Both r/o house No.6/1, Issorcim- Khol, Respondent/
Velcao- Pale, Salcete, Goa. Orig. Plaintiffs

Shri Sudesh Usgaonkar with Ms. R. Pereira, Advocate for the appellants.

Shri Gaurish Agni, Advocate for the respondents.

AND

APPEAL FROM ORDER NO. 57 of 2015.

- 1 Shri Damodar Narsinva Naik,
Son of Narsinva Naik,
Aged about 79 years,
And his wife,
- 2 Smt. Indira Damodar Naik,

Wife of Damodar N. Naik,
Aged about 72 years, married,
Both residents of H.No. F11-03150,
Monte Hill, Talsanzor,
Margao, Goa.

..... Appellants/
Orig.
Defendant No.
1 & 3.

V/s.

- 1 Mrs. Liberata Philomena Moraes e
Pereira,
aged about 52 years, occupation –
service,
Both r/o House No. 6/3, Issorcim- Khol,
Velcao – Pale, Salcete, Goa.

.... Respondent /
Orig.Def. No.2.

- 2 Mrs. Maria Monica Pereira e Rodrigues,
aged about 55 years, service, and

- 3 Mr. Amiato Nepomuceno Rodrigues,
Aged about 61 years, married,
Both r/o H. No. 345/B, near Dias Flats,
Alto Mangor, Vasco-da-Gama-Goa.

.... Respondent/
Orig. Plaintiffs

Shri Sudesh Usgaonkar with Ms. R. Pereira, Advocate for the appellants.

Shri C. A. Coutinho, Advocate for the respondents.

CORAM : NUTAN D.SARDESSAI, J.

RESERVED ON : 17th JUNE,2016.

PRONOUNCED ON : 22nd JULY,2016.

JUDGMENT:

Heard.

2. Admit.

3. Shri Sudesh Usgaonkar, learned Advocate appearing on behalf

of the appellants in both the appeals came to be heard and Shri Gaurish Agni, learned Advocate waived service of notice on behalf the respondents in the Appeal from Order no.56 of 2015 and Shri C. A. Coutinho, learned Advocate waived service of notice on behalf of the respondents in the Appeal from Order No.57 of 2015.

4. By the present common judgment both these appeals are disposed off which have been filed at the instance of the original defendants no.1 and 3 assailing the judgment dated 29/04/2015.

5. Shri S. M. Usgaonkar, learned Advocate for the appellants came to be heard on their behalf who invited attention to the impugned judgment and submitted that there was not a single finding by the learned Appellate Court on the judgment passed by the trial Court and yet it had quashed and set aside the trial Court's judgment and remanded the file to the trial Court with a direction to the parties to lead evidence afresh and to appoint a commissioner without even framing any issue in that regard. The impugned judgment was not at all fitting in the predicates of Order XLI Rule 23A, Rule 24 and 25 of the Civil Procedure Code ('C.P.C.', for short) and therefore a serious question arose whether the Appellate Court could at all pass the order to remand in the circumstances of the case. He distinguished the judgment relied

upon by the learned Appellate Court as not being applicable in the circumstances of the case.

6. Since however a dispute was raised in the course of arguments by Shri C. A. Coutinho, learned Advocate for the respondents that no substantial grounds were carved out in the appeal and the appeal was not maintainable, in that context Shri S.M. Usgaonkar, learned Advocate for the appellants sought leave to amend the grounds and to formulate substantial questions of law and which were allowed pursuant to the amendment. In that context Shri Usgaonkar, learned Advocate placed reliance in **P. Purushottam Reddy and another v/s. Pratap Steels Ltd.** [(2002) 2 SCC 686], **Sayed Akbar S/o. Sayed Noor V/s. Dhondiba S/o. Namdeo Bhosale and another** [2011(1) ALL MR 791], **Subhash S/o. Narayanrao Moralwar v/s. Vilas s/o. Pandurang Wankhede and others** [(2013) 4 Mh.LJ 862], **Narayanan v/s. Kumaran and others** [(2004) 4 SCC 26] and **Jegannathan v/s. Raju Sigamani and another** [(2012) 5 SCC 540] to buttress his case that the appeal had to be heard as a Second Appeal and by formulating substantial questions of law.

7. Shri C. Coutinho, learned Advocate for the respondents adverted to the pleadings viz-a-viz the case carved out by the

plaintiff and the defendants qua the suit property, submitted that the identity of the property was in dispute and the learned Appellate Court was amply justified in appointing a Commissioner and remanding the file to the trial Court for a decision afresh. He relied in **Vasant Tukaram Prabhu v/s. Xalinibai Borcar alias Smt. Shalinibai Borkar** [(2014) 4 AllMR 726], **Haryana Waqf Board v/s. Shanti Sarup and others** [2008(8) SCC 671] and an unreported judgment in **Girish Vasantrao Bhoyar and another v/s. Nimbaji Warluji Bambal** [Writ Petition no.4577 of 2008], **Vencu Gopal Tari and others v/s. Nilconta S. Xete and others** [AIR 1975 GOA, DAMAN & DIU 32], **Maria Margarida Sequeira Fernandes and others v/s. Erasmo Jack De Sequeira (Dead) through LRs.** [(2012) 5 SCC 370] and an unreported judgment of this Court in **Mrs. Veenaben R. Parekh v/s. Atmaram Dhuri** [Civil Revision Application no 40 of 2015] to justify the order of the Appellate Court.

8. Shri G. Agni, learned Advocate for the respondents submitted that the order was made by consent and therefore on that premise no appeal was maintainable at the instance of the appellants. No fault could be found with the impugned judgment and therefore the appeals had to be dismissed. Shri S. M. Usgaonkar, learned Advocate denied the contention about the order

being an outcome of the consent of the parties and submitted that it could never be countenanced to be a judgment by consent. Paragraph 10 of the impugned judgment merely referred to the submissions made by the Advocates during the course of hearing and that the Appellate Court did not at all apply its mind in that context and ordered the appointment of a Commissioner with a simultaneous order of remand and a trial afresh. i would consider their contentions while dealing with the appeals at large.

9. i would first deal with the aspect of the appeals being akin to a Second Appeal and a necessity to formulate the substantial questions of law by adverting to the relevant provisions of C.P.C. The Appeals from Order have been maintained in terms of Order XLIII Rule 1(u) C.P.C. i.e. an Order under Rule 23 or Rule 23A remanding a case. Order XLI Rule 23 C.P.C. deals with the situation where an appeal is against the decree on a preliminary point which has been reversed in appeal empowering the Appellate Court to remand the case and further direct what issue or issues have to be tried in the case so remanded with directions to rehear the suit under its original number and proceed to determine the suit and the evidence (if any) recorded during the original trial subject to all the just exceptions in the evidence during the trial after remand.

10. Rule 23A C.P.C. deals with the remand in other cases where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is reversed in appeal and retrial is considered necessary than the Appellate Court shall have the same powers as it has under Rule 23. Rule 24 stipulates an eventuality where the evidence on records is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may after resettling the issues, if necessary, finally determine the suit notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

11. Rule 25 provides a situation where the Court from whose decree the appeal is preferred has omitted to frame any issue or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit on merits, the Appellate Court may, if necessary, frame issues and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence if required; and such Court shall proceed to try such issues and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within

such time as may be extended by it from time to time.

12. In **P. Purshottam Reddy**(supra), the Trial Court had decreed the suit filed by the respondents for specific performance of the agreement to sell against which the appellant had filed the First Appeal before the High Court. The High Court allowed the appeal setting aside the judgment and decree of the Trial Court and remanded the case after framing three additional issues to the Trial Court and therefore to decide the case afresh. Their lordships examined the legality and propriety of the order of remand made by the High Court and considered Rule 23A in Order XLI C.P.C. prior to its insertion by the C.P.C. Amendment Act 1976, there being only two provisions contemplating remand by the Court of Appeal under Order XLI C.P.C. and Rule 25 of C.P.C. Their Lordship observed that in the case at hand the High Court had not disposed off the suit upon a preliminary point. The suit was decided by recording the findings on all the issues. By its appellate judgment the High Court had recorded its findings on some of the issues not preliminary and then framed three additional issues leaving them to be tried and decided by the Trial Court. It was not a case where a retrial was considered necessary. Neither Rule 23 nor Rule 23(A) of Order XLI was applicable. None of the conditions contemplated by Rule 27 existed so as to justify the production of additional

evidence by either party under that Rule. Hence the validity of the remand had to be tested by reference to Rule 25 and set aside the order of remand made by the High Court.

13. **Sayed Akbar** (supra), challenged in appeal the judgment and order dated 05/04/2007 passed by the Ad-hoc District Judge-1, at Udgir. The appellant had filed a suit for perpetual injunction with a declaration of ownership which was decreed by the Trial Court after framing as many as nine issues, appreciating the evidence on record and considering the rival submissions of both the parties. The Trial Court considered the matter on various aspects including the ownership and possession apart from the valuation and Court fees for the jurisdiction but the Appellate Court without going into any other aspects framed only one point for its consideration namely whether it was a fit case to remand to the Trial Court for inquiry about the valuation of the suit land. It was contended on behalf of the appellant that it was not proper for the Appellate Court to remand the matter back to the Trial Court and relied in **P. Purushottam Reddy**(supra). It was further canvassed that the impugned judgment and order was in contravention of the provisions of Order XLI Rule 23 , 23-A, 25 and 33 of C.P.C. The learned Single Judge considered the Apex Court judgment in **Narayanan** (supra) which considered the provisions of

order XLIII Rule 1(u) of C.P.C. and concluded that the Appeal from Order was required to be heard only on the grounds enumerated in Section 100 of C.P.C. In other words only substantial questions raised for consideration before it, the Court could not entertain the Appeal from Order.

14. In **Subhash S/o. Narayanrao Moralwar**(supra), the Appeal from Order took exception to the judgment and order dated 15/02/2012 passed by the Adhoc District Judge -2, Nanded whereby the lower Appellate Court had remanded the matter to the trial Court quashing and setting aside the judgment and decree dated 09/12/2001 passed by the Joint Civil Judge, Junior Division with a direction to decide the suit afresh by taking into consideration the issue nos.1 to 8 framed by the lower Appellate Court. The learned Single Judge observed that an order of remand passed under Order XLI Rule 23-A C.P.C. is amenable to appeal under Order XLIII Rule 1(u) of C.P.C. and could be heard only on the grounds enumerated in Section 100 of C.P.C., as held by the Apex Court in **Narayanan** and **Jegannathan** (supra).

15. In **Subhash S/o. Narayanrao Moralwar**(supra), it was submitted before the learned Judge that the suit was filed in 1998, the written statement filed in 1999 and issues were framed

by the learned Judge after considering the rival contentions. The learned Judge observed that the Trial Court had considered the issues and decreed the suit and there was no application by the defendants contending that no proper issues have been framed by the Trial Court. The learned Single Judge considering the judgment in **Jegannathan** (supra), formulated substantial questions of law for determination of the Appeal from Order, admitted the appeal and heard the matter.

16. In **Narayanan** (supra), the Hon'ble Apex Court held that it was clear from Rule 1(u) of Order XLIII(1) of C.P.C. that an appeal would lie from an order of remand only in those cases in which an appeal would lie against the decree if the Appellate Court instead of making an order of remand had passed the decree on the strength of the adjudication on which the order of remand is passed. The test is whether in the circumstances an appeal would lie if the order of remand were to be treated as a decree and not a mere order. In these circumstances, it was quite safe to adopt that an appeal under Order XLIII Rule 1 clause (u) C.P.C. should be heard only on the ground enumerated in Section 100 of C.P.C. The appellant under an appeal under Order XLIII Rule 1 Clause (u) of C.P.C. is not entitled to agitate questions of facts. In an appeal against an order of remand under this clause, the High Court

should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass the findings arrived at by the lower Appellate Court.

17. In **Jegannathan** (supra), it was the plaintiff who with two others had filed a suit against the respondent no.1 for declaration, permanent injunction and mandatory injunction which was contested by the respondents on diverse grounds. The Trial Court decreed the suit for the permanent injunction on hearing the parties giving rise to the First Appeal at the instance of the respondent no.1 before the Subordinate Judge, Tiruchirapalli. The first Appellate Court allowed the appeal, setting aside the judgment of the Trial Court and remanded the suit to the Trial Court with a direction to give an opportunity to the parties to lead evidence and to then decide the suit afresh on merits. This order of remand was challenged by the appellant and the respondent no.2 by filing a Misc. Appeal before the High Court under Order XLIII Rule 1(u) of C.P.C. The appellant and the respondent no.2 then filed the petition before the High Court seeking review of its order which was dismissed giving rise to the appeal before the Apex Court.

18. In **Jegannathan** (supra), Their Lordships of the Apex Court considered the cases of remand under Order XLI Rule 23 and

Order XLI Rule 23A of C.P.C. and held that under these rules, remand of the suit to the Trial Court is permissible even though such suit has been disposed off on merits. Insofar as Order XLI Rule 25 of C.P.C was concerned, the Appellate Court continues to be in seisin of the matter; it calls upon the Trial Court to record the finding on some issue or issues and send that finding to the Appellate Court. Insofar as the case at large was concerned the Trial Court had disposed off the suit on merits and not on preliminary issues which was set aside by the first Appellate Court directing the Trial Court to decide the suit afresh after giving the parties an opportunity to lead evidence oral as well as documentary. The nature of the order passed by the Appellate Court left no manner of doubt that such order had been passed by the Appellate Court in exercise of its power under Order XLI Rule 23-A of C.P.C. The High Court had relied upon the decision of this Court in **Narayanan** (supra), holding that the Civil Miscellaneous Application from the order of remand was not maintainable and the High Court was clearly in error. It had been held in **Narayanan** (supra), that an appeal under Order XLIII Rule 1(u) should be heard only on the ground enumerated in Section 100 of the Code.

19. The impugned order of the Appellate Court remanding the file to the Trial Court clearly attracted the appeal under Order

XLIII Rule 1(u) r/w. Order XLI Rule 23A of C.P.C. and therefore substantial questions would arise for consideration and determination in the appeal. The questions which therefore arise for determination are formulated as below:

- 1) Whether the first Appellate Court was right in setting aside the judgment and decree of the Trial Court and remanding it without following the mandates of Order XLI Rule 23, Rule 23A and Rule 25 of C.P.C.?
- 2) Whether the Appellate Court order is vitiated inasmuch as it set aside the final order without reversing the finding of the trial judge on any issue and consequently the order of remand based on such setting aside of the judgment is without jurisdiction?
- 3) Whether the first Appellate Court erred in remanding the matter to lead additional evidence even considering the amendment was to merely change the Matriz number when the Matriz Certificate bearing No.95 was already on record and there was no scope and no any request from the appellants and no case was made out by the respondents for additional evidence to be led?
- 4) Whether the first Appellate Court had wrongly remanded the suit to the Trial Court holding that the issue being of identification of the boundaries of the suit property

vis-a-vis the Land Registration documents on record when the issue was not of identification but of proving the correspondence between the property mentioned in the Certificate of Description and that under Survey No. 2/19?

5) Whether the first Appellate Court erred in relying on various judgments inasmuch as those judgments related to the plea of encroachment which had necessitated the filing of local investigation and not involved in the present case?

6) Whether the order of remand passed by the first Appellate Court and directing to lead fresh evidence had been passed in a perfunctory manner without carrying out any of the functions of the Appellate Court?

7) Whether the first Appellate Court had failed in its duties to formulate points, adjudicate the issues, consider the rival submissions and take decision one way or the other when there was sufficient material on record and remanding the matter to the Trial Court in terms of Section 107 sub-section 2 of C.P.C.?

8) Whether the first Appellate Court had not considered the legal and preliminary issue that the suit was barred by limitation?

20. The case of the plaintiff before the Trial Court was that

there was a property known as "Palmalem alias Borchem Cantem" situated at village Issorcim with distinct boundaries, bearing Survey no.2/19, Land Registration no.6230 and Matriz nos.21 and 25 later corrected to 21 and 95. The plaintiffs had carved out a case that they were in absolute physical possession and enjoyment of the suit property as its owners and having found that the name of the defendant no.1 was wrongly recorded in the survey records who had no rights to the suit property were thus constrained to file the suit for the relief of declaration and injunction. The contesting defendant had taken a specific plea that the property "Palmalem" also known as "Borchem Cantem" was not surveyed under no.2/19 and quite on the contrary the property bearing Survey no.2/19 bore distinct boundaries from those carved out by the plaintiff. Besides the land under Survey no.2/19 did not bear the Land Registration no.6230. Their specific cause in defence was that the land under Survey nos.2/18 and 2/19 were denominated as "Catuddo" bearing Land Registration no.36884. The land denominated as "Borchem Cantem" bearing Land Registration nos.36867 and 36869 were belonging to the defendant no.1. The name of the defendant no.1 was rightfully entered in the Survey Records of 2/19 and he was enjoying the said property as an absolute owner thereof while pressing for the dismissal of the suit.

21. The Trial Court had examined the case of the parties at length, framed issues for determination, recorded its findings on each of the issues and gave its findings appropriately ultimately holding that the plaintiff had failed to prove their case and dismissed the suit with costs. Quite on the contrary the Appellate Court had referred to the issues framed by the learned Trial Court but had thereafter acted at a tangent and referred to the amendment carried out at the instance of the plaintiffs merely to incorporate the change in the Matriz number from 25 to 95 and that of the written statement which was in pure denial thereof and thereafter recorded that both the parties had submitted before it that the evidence would have to be led afresh as the plaint and the written statement of the defendants no.1 and 3 were amended and hastily concluded without assigning any reasons on these submissions that as the evidence had required to be led afresh, the matter was required to be remanded to the Trial Court .

22. The learned Appellate Court had nonetheless considered that the Trial Court had discarded the evidence of the surveyor examined by the plaintiff and considered a host of judgments suo motu to conclude that the impugned judgment was required to be quashed and set aside and ordered it to be quashed and set aside and remanded to the Trial Court with a direction to permit the

parties to lead evidence afresh and also appointed the commissioner from the Survey Department primarily to verify whether the property bearing Survey no.2/19 corresponds to the property bearing Land Registration no.6230 bearing matriza no.21 and 95. At this juncture therefore it would be necessary to consider the judgments which the first Appellate Court in its wisdom considered suo motu while remanding the file to the Trial Court with the stated directions and whether the judgments in the first place did apply to the case at large before it.

23. In **Kashinath Chopade** (supra), the plaintiffs filed the suit for declaration that the suit site described by the distinct letters A-3, A-4, A-12, A-2 and A-3 in the suit were belonging to them and sought to restrain the defendants from interfering with their possession. The house and the open land of the defendant was located towards the eastern side of the house of the plaintiffs while it was the open land described by the letters A3, A-4, A-10, A-1, A-2 and A-3 which was the subject matter of the suit. The plaintiffs carved a case that the defendant without any right or interest encroached upon the open land of the plaintiffs and started construction of the wall on the land shown by letters A-3, A-4 and A-18 and besides removed 3 of 4 layers of bricks from the plaintiffs' wall and the defendant was called upon to vacate the

portion of the plot on which encroachment was made and on his failure resulting in the suit.

24. In **Kashinath Chopade** (supra), the defendant had contested the suit contending that his father had purchased the suit site on 23/03/1945 in a constructed position and since then it was as it is and none of its portion was an open land. The portion described by the letters A-3, A-4, A-12 and A-3 as mentioned in the plaint plan was never an open land nor in possession of the plaintiffs and there was a tin shed of the defendant from which the tin shed was removed for a new pucca construction. In this particular case there was a dispute about the encroachment or dimension of the site and the first essential was to get an agreed map and if the parties could not agreed on one, a Commissioner had to be appointed to prepare the same.

25. In **Kashinath Chopade** (supra), the learned Single Judge quoted Order XXVI Rule 9 of C.P.C. in the matter of appointment of the Commissioner for local investigation emphasizing the object not being so much to collect evidence which can be taken in Court but to obtain evidences which from its peculiar nature can only be had on the spot and observing that ultimately that the cases of boundary disputes and disputes about

the identity of the lands are instances when a Court should order a local investigation under this Rule. Therefore merely tearing out statements out of context that cases of disputes about the identity of the land being instances when the Court should order local investigation under Order XXVI Rule 9 of C.P.C. would not buttress the case of the defence that the Appellate Court was justified in relying upon the judgment to order local investigation.

26. In **Yashwant** (supra), another learned Single Judge of this Court while dealing with the Second Appeal against the decree of the Trial Court confirmed by the first Appellate Court held that it was settled position that court has discretion to order local investigation to obtain evidence which by its peculiar nature can be had on the spot. But in the cases of boundary disputes it is always desirable to get fields measured by the experts and unless deem it appropriate to remand the matter to the lower Appellate Court with a direction to appoint the commissioner in terms of order XXVI Rule 9 of C.P.C. to have joint measurement in the presence of the parties to prepare authentic map and file a report and thereupon the Trial Court would decide the matter afresh. This was also a case of encroachment where it was so held by the learned Single Judge.

27. **Ramchandra** (supra), was a case of encroachment where the learned Single Judge of this Court took a view that it was always desirable to get the fields measured by an expert and find out the area encroached in order to determine whether there has been encroachment. In **Vasant Prabhu** (supra), the plaintiff claimed to be the owner in possession and enjoyment of the property "Borodo Dongrachim Advona" described under distinct land registration numbers and bearing distinct survey numbers being the suit property. There were cases of trespass and interference by the defendants of cutting of trees, making plantation etc. without any right, title or interest necessitating a suit for the permanent and mandatory injunction.

28. In **Vasant Prabhu** (supra), the defendant no.1 carved out a case denying that of the plaintiff to the effect that the piece of land bearing registration no.4828 and matrize no.799 did not correspond to with the lands surveyed under the old Cadastral Survey no.23B and new Survey nos.100/1, 101/0 and 103/0. He had exercised the right of possession in respect of the Survey no.100/1, 101/1 and 103/0 apart from exploiting granite while denying that he had trespassed in the suit property. The Trial Court found that the plaintiff had not proved her ownership, possession and that though the defendant had not established its

ownership, there was evidence of possession. The matter travelled in appeal to the District Court which framed one point for determination whether an expert ought to have been appointed to identify the suit property and recording an affirmative finding on the point holding that if the Trial Court was of the opinion that the identity of the suit property vis-a-vis the old Cadastral survey plan had not been done by an expert or technical person with the knowledge of survey, therefore it was incumbent upon the Trial Court to have appointed a commissioner to resolve the dispute about the identity of the land while remanding the file to the Trial Court to appoint a surveyor to identify the property.

29. In **Vasant Prabhu** (supra), did not lay down as a proposition of law that recourse to Order XXVI Rule 9 of C.P.C. is the means to identify the property and it was held that the appointment of the surveyor was necessary in the facts at large and in view of the findings of the Trial Court. In that case too it was submitted on behalf of the appellant that the first Appellate Court had to frame all the points for determination, must record its decision in respect of each of the points and should support the conclusion by giving reasons and with decision on the impugned judgment and order of remand, the learned District Judge had acted completely contrary to the law and failed on this count.

Besides, it was not a case of purely a boundary dispute warranting the appointment of the Commissioner and the entire burden was on the plaintiff to prove her ownership and possession of the suit property.

Smt. Shamlata wd/o Manohar Raut and others v/s. Vishweshwara Tukara Giripunje and another [AIR 2008 BOMBAY 155] too was a case where there were allegations of the plaintiff that the defendant had encroached upon his land. The measurement map prepared by the retired Talathi was not reliable as the site was not measured scientifically and after notice to opposite party and it was held that the appointment of the commissioner for measuring of the plot of the plaintiff and defendant is necessary. In the brief facts the suit was initially instituted by one Surendrasing Ramarao Naik through his attorney and sold to his attorney while the defendant was the neighbour of the plaintiff who was having his house towards the north of the land bearing Municipal Corporation No.342/1.

30. In **Shamlata** (supra), the plaintiff's case was that the defendant had committed encroachment shown by the letters HBCDNPT as shown in the plaint map to the extent of 159 square feet by constructing a Well in the year 1980. There was a dispute regarding the land ABCDEFGH covered in the lines in the plaint map

with the Nazul Department and who claimed that the land belonged to the said Department and therefore the suit was filed by the plaintiff against the Collector of Nagpur which was decreed in his favour and he was declared as an owner. The appeals preferred by the said Department before the District Court and the High Court were rejected. It was the plaintiff's case that since he was out of Nagpur for quite some time on account of the fact that he had shifted his residence to the village Kawatha, the defendant took advantage of the fact and committed encroachment for which he sought a decree for possession.

31. In **Shamlata** (supra), the defendant in the written statement did not dispute the ownership of the plaintiff of the area known as Naikwadi but denied that he was the owner of the plot shown by letters ABCDEFGH and committed encroachment on the site as contended by the plaintiff. He also denied that there was any dispute between the plaintiff and the Government for the suit land and /or that the proceedings ended in favour of the plaintiff. He carved a specific case that he had purchased the house in the year 1935 from one Sitabai Giripunje and he was in possession of the property for more than 40 years adversely and to the knowledge of the plaintiff and the suit was barred by limitation. Moreover, it was his further case that in 1982 there was a

measurement by the City Survey Department in which it was found that he had not committed any encroachment and no appeal too was preferred by the plaintiff.

32. In **Shamlata** (supra), the Trial Court came to a finding that the plaintiff was the owner of the suit plot ABCDEFGH and the defendant had committed an encroachment and besides he was not in adverse possession and decreed the suit. The Appellate Court concurred with the findings recorded by the Trial Court giving rise to the Second Appeal. The learned Single Judge of this Court found that the plaintiff did not have a sale deed but had placed on record two documents being the Record of Rights showing the area of 124.2 square meters. The learned Judge was however of the view that a question arose whether the plaint map prepared by the retired Talathi could be relied upon to hold that there was an encroachment on the plaintiff's land and to what extent. The learned Judge found that it would not be proper to rely on this measurement map since the site was not measured scientifically and after notice to the defendants and therefore in the circumstances held that the Courts below should have appointed the commissioner to measure not only the plot of the plaintiff but that of the defendant as referred to in his sale deed and the survey map.

Each of these judgments would therefore substantiate the contention of Shri S.M. Usgaonkar, the learned Advocate that the appointment of the commissioner in the given facts of each case would determine the nature and extent of the encroachment and or the overlapping boundaries and they were not in the context of confirming the identity of any plot in dispute.

33. In **Vencu Gopal Tari** (supra), it was held by the learned Judicial Commissioner that whether there is a dispute as regards the identity of the suit property allegedly bearing two distinct registration numbers, the Trial Court should appoint a Commissioner preferably a trained surveyor to examine whether the property bearing two different registration numbers is in fact the same. In **Haryana Waqf Board** (supra), the High Court in the Second Appeal had summarily dismissed the appeal of the plaintiff on the ground that it was concluded by the concurrent findings of fact arrived at by the Court below and that it would appear that the Board had failed to prove that the respondents had encroached into any land belonging to the appellant Board. The dispute that was raised by the parties before the court was whether the respondent had encroached upon any land belonging to the appellant-Board.

34. In **Haryana Waqf Board** (supra), an application was

filed before the Trial Court under Order XXVI Rule 9 of the C.P.C. which was rejected by the Trial Court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner under Order XXVI Rule 9 of the C.P.C. The Hon'ble Apex Court held that the High Court ought not to have dismissed the suit summarily merely on the ground that the Second Appeal was concluded by the concurrent findings of facts. The High Court had not gone into the aspect that the appellant-Board had filed an application for the appointment of a local commissioner for demarcation of the suit land and ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the Local Commissioner should be appointed for the purpose of demarcation of the suit land.

This judgment too relied upon by Shri Coutinho, the learned Advocate does not advance his case that the appointment of the commissioner was essential to confirm the identity of the suit property or that a property with a specific land registration number corresponded to a specific survey number considering the case carved out by the parties to the proceedings, hence the respectful departure.

35. In **Girish Bhojar** (supra), the respondent had filed the

suit against them for restoration of possession and recovery of damages and also to remove the encroachment and to place the respondent in vacant possession of the suit field as prayed for in the suit. The petitioners in their written statement disputed the plaintiff's case as well as that they had encroached upon their property. During the course of the proceedings, the respondents filed an application under Order XXVI Rule 10A r/w. Section 151 of C.P.C., stating that there was a dispute regarding the area and boundary of the field of the respondent-plaintiff and it was necessary to appoint an expert Commissioner to investigate the boundaries in respect of the field of the petitioners as well as of the respondent which was opposed by the petitioners.

36. In **Girish Bhoyar** (supra), the learned Civil Judge, Junior Division, allowed the application appointing the Court Commissioner to measure the land and to carry out the joint measurement of the land at the earliest on payment of the requisite expenses which was sought to be impugned in the Writ Petition. It was contended on behalf of the petitioners that the learned Judge had exceeded its jurisdiction while passing the impugned order inasmuch as by such order, it would amount to collecting the evidence for the respondent. The learned Judge relied upon **Haryana Waqf Board** and **Kashinath Chopade**

(supra) and dismissed the petition. **Maria Margarida Sequeira Fernandes** (supra), held that (i) No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property. (ii) Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand. (iii) The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant. (iv) The protection of the Court can only be granted or extended to the person who has a valid, subsisting rent agreement, lease agreement or license agreement in his favour. (v) The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.

37. In **Veenaben Parekh** (supra), the learned Single judge of this Court found that it was a case wherein the identity of the flat allegedly unlawfully occupied by the defendant (petitioner) was in dispute. The defendant did not dispute the ownership and possession of the plaintiff in respect of the flat No.F-1 i.e the suit

property but the defendants seriously disputed the averment that this flat was unlawfully occupied by him. The petitioner claimed that she was the owner in possession of the flat No.M-1 situated in the same building, which was the flat on the mezzanine floor and entirely different from the suit property i.e. F-1 situated on the first floor of the same building. Therefore, what was necessary for the Trial Court to see as to whether or not the plaintiff had proved his case that the defendant was in unlawful possession of the flat No.F-1 situated on the first floor and the best evidence to bring the contention would have been in the nature of report of a Court Commissioner while reiterating the law that whenever in a suit, identification of the suit property is in doubt or in serious doubt or in serious dispute, a Court commissioner must be appointed to inspect the suit property and submit his report so that the facts relating to the identity of the suit property are clearly brought on record and the controversy is set at rest completely and finally.

38. From a consideration of the judgments relied upon by the first Appellate Court and those referred to above, it necessarily emerges that the appointment of commissioner in the circumstances was not justified at the instance of the Appellate Court more so when there was a dispute about the identity of the property, the plaintiff claiming it to bear Land Registration no.6320

corresponding to the Survey no.2/19 and the defendants claiming that the Survey no.2/19 bore altogether different boundaries and distinct Land Registration nos.36884, 36867 and 36869.

39. Besides the Appellate Court had not at all discussed the material on record vis-a-vis the issues framed by the Trial Court though a reference was made to the issues in the impugned judgment. The Appellate Court and nonetheless without any discussions thereon and marshalling of the evidence had deemed it appropriate to appoint the commissioner and hastily concluded to quash and set aside the impugned judgment and to remand the file to the Trial Court with a direction to permit the parties to lead evidence afresh without in any manner spelling out the issue on which the evidence had to be led afresh and further appointing a commissioner to verify whether the property bearing Land Registration no.6230 with Matriz no.21 and 95 corresponded to the Survey no.2/19. There was therefore no confusion in the mind of the Appellate Court that what was required for the Trial Court to do was to find out the correspondence of the survey numbers with the Land Registration number claimed by the plaintiff and it was not a case of any boundary dispute or encroachment which would have necessitated the appointment of the commissioner.

40. The impugned judgment and decree is therefore vulnerable to challenge in these appeals and therefore the substantial questions formulated for determination are answered in the affirmative. i therefore pass the following :

O R D E R

1. The Appeals are allowed and the impugned judgment and decree is set aside.
2. The application filed on behalf of the respondents under Order XLI Rule 27 of C.P.C. shall be disposed off in accordance with law and without being influenced by the observations made by this Court. The parties are directed to appear before the First Appellate Court on 05/08/2016 at 10.00 hours.

NUTAN D. SARDESSAI, J

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