

**IN THE HIGH COURT OF BOMBAY AT GOA**

**FIRST APPEAL NO. 60 OF 2005**

M/s. Shri Purnanand Farms,  
a partnership firm formed and  
duly registered under the  
Indian Partnership Act, 1932  
with their Office at Ponda, Goa  
represented by their Partner,  
Shri Anant Vaman Prabhu Tendulkar  
Son of late Vaman Vishwanath Prabhu  
Tendulkar,  
aged 53 years, resident of  
Shiroda, Goa.

..... Appellant

***V e r s u s***

1. Union of India  
through :
  - a) The Administrator of Goa,  
Daman and Diu,  
with his office at  
Secretariat, Panaji, Goa.
  - b) The Secretary to the  
Government of India,  
Ministry of Home Affairs,  
New Delhi.
2. Conservator of Forests,  
South Goa Division,  
with his Office at  
Margao, Goa.
3. Deputy Conservator of Forests,  
South Goa Division,  
with his Office at  
Margao, Goa.
4. Shri Jagannath Gopal Gaonkar,
5. Smt. Jagannath Gopal Gaonkar,  
  
both major of age,  
residents of Canacona, Goa.

..... Respondents/  
Defendants

6. Shri Anantraï Kalidas Parekh,
7. Shri Nilesh Ramniklal Parekh,
8. Shri Vinay Ramniklal Parekh,
9. Shri Praful Ramniklal Parekh  
(Appeal stands abated as against  
Respondent no. 9 in view of  
Order dated 28.01.09 passed  
by this Hon'ble Court)

All major of age,  
residents of Parekh Niwas,  
34, Sarojini Road,  
Mumbai 400 056.

..... Respondents/  
Plaintiffs

Mr. J. P. Mulgaonkar and Ms. Anusha Kaisukar, Advocates for the Appellant.

Ms. Priyanka Kamat, Addl. Government Advocate for the Respondent nos.1, 2 and 3.

**Coram :- F. M. REIS, J**

**Date : 15<sup>th</sup> March, 2017**

### **ORAL JUDGMENT**

Heard Mr. J. P. Mulgaonkar, learned Counsel appearing for the Appellant and Ms. Kamat, learned Addl. Government Advocate appearing for the Respondents.

2. The challenge in the above Appeal is to the Judgment and Decree passed by the learned District Judge, South Goa, Margao, dated 27.10.2004 in Civil Suit no. 33/1981 whereby the Suit filed by the Appellant came to be dismissed.

3. Briefly, the facts of the case material to decide the matter in

controversy and considering the view I propose to take in the above Appeal, are that the Appellant filed a suit for declaration and permanent injunction, inter alia, claiming that the property registered in the Land Registration Office under no. 2190 belongs to the family of the Appellant based on an Aforamento granted in the year 1869 and thereafter purchased by the Appellant pursuant to a Sale Deed dated 21.08.1980. The cause of action according to the Appellant to file the said Suit was on the ground that a portion of the property bearing Land Registration no. 2190 falls in the property surveyed under no. 37/1, 44, 45, 46 and 47 as, according to the Appellant, the Respondents-Forest Department issued a tender notice for erecting coupes in the portion of the property belonging to the Appellants. It is further stated that after the suit was filed, the Appellants amended the Suit and restricted their claim to the portion of the property surveyed under nos. 44, 45, 46, 47 and part of 37/1 which was marked in the plan produced on record by Mr. Bhende/Pw.6. The Respondents filed their written statements, inter alia, contending that the property belonging to the Appellant is restricted to the property surveyed under no. 47 only.

4. During the course of the hearing of the Suit, with the consent of both the parties, a Court Commissioner, Advocate Ramesh Sardessai was appointed, inter alia, to identify the property of the Appellant in the context of the boundaries as shown in the Land Registration Office. The learned Commissioner after a local inspection and recording the statement of the parties, by a report at exhibit 20 which is placed on record in CMA no. 22/1981, dated 27.04.1982, along with the plan has identified the property claimed by the Appellant. The learned District Judge after recording of evidence and examining the witnesses of both the parties,

by the impugned Judgment dated 27.10.2004 dismissed the Suit filed by the Appellants.

5. Mr. J. P. Mulgaonkar, learned Counsel appearing for the Appellants, has assailed the impugned Judgment essentially on the ground that though the Court Commissioner who was examined by the Respondents as Dw. 4 had categorically stated that coupe nos. 18A, 18B and a small portion of coupe no. 18C form part of the property of the Appellants, nevertheless, whilst dismissing the said Suit, the learned Judge has lost sight of the fact that the said portions of the property form part of the property surveyed under no. 37/1. The learned Counsel further pointed out that the claim of the Appellants is much beyond the coupes as identified by the said Commissioner as, according to him, the property of the Appellants has been rightly identified by the Surveyor examined by the Appellants namely Pw. 6 who has produced a plan which clearly shows that besides the area as identified by the Commissioner, a large portion of the property beyond the said area and surveyed under no. 37/1 forms part and parcel of the property of the Appellants. Learned Counsel further submits that the learned Trial Judge erroneously found that the case of the Respondents that the property of the Appellants is restricted to the property surveyed under no. 47 stands proved though, according to him, the learned Judge has failed to examine the import of the finding of the Commissioner. Learned Counsel has thereafter taken me through the boundaries as shown in the Land Registration Office at exhibit P-3 to pointed out that there are fixed and natural boundaries therein which would clearly show that the property of the Appellants is within the boundaries as shown by the Surveyor

Pw.6. Learned Counsel further pointed out that the Appellants may be given an opportunity to file an application to appoint a Commissioner to identify the property of the Appellants in accordance with the boundaries as shown in the Land Registration Office in order that the Appellants may establish the claim of the Appellants in terms of the identification by Pw. 6. Learned Counsel further submits that the learned Judge has misconstrued the evidence of Dw.4 to come to the conclusion that the property of the Appellants is restricted to the property surveyed under no. 47, Khotigao Village. Learned Counsel has thereafter pointed out that issue no. 3 which was cast on the Respondents has been decided in the negative which clearly shows that the claim of the Appellants is restricted to the property surveyed under no. 47 has not been proved. The learned Counsel further pointed out that the claim of the Respondents to that effect is misplaced as the property surveyed under no. 47 does not correspond to the boundaries as disclosed in the Land Registration Officer. Learned Counsel as such submits that the impugned Judgment passed by the learned Judge deserves to be quashed and set aside. and the Appellants be permitted to lead further evidence to establish their case.

6. On the other hand, Ms. P. Kamat, learned Addl. Government Advocate appearing for the Respondent nos.1, 2 and 3 has supported the impugned Judgment. Learned Addl. Government Advocate pointed out that the claim of the Appellants that the property belonged to the Appellants includes the substantial portion of the property surveyed under no. 37/1 has been disbelieved by the learned District Judge and there is no reason to interfere with such finding arrived at by the learned Trial Court. It is further pointed out that the Court Commissioner

appointed by the Court has clearly stated that the property claimed by the Appellants is a forest land and, as such, according to her, such portion of the property belongs to the Respondents. Learned Addl. Government Advocate has thereafter taken me through the inscription of the property claimed by the Appellants to point out that the Appellants have failed to establish that the property as described in the Land Registration Office exclusively belongs to the Appellants. Learned Addl. Government Advocate further pointed out that the Court Commissioner has categorically shown the property of the Appellants and the coupes erected in the property surveyed under no. 47 and, as such, the contention of the learned Counsel appearing for the Appellants that the coupes are located in the property surveyed under no. 37/1 deserves to be rejected. Learned Addl. Government Advocate has taken me through the Judgment passed by the learned Judge to point out that the learned Judge has minutely examined the material on record to come to the conclusion that the Appellants have failed to establish their claim that a substantial portion of the property surveyed under no. 37/1 forms part and parcel of the property of the Appellants. Learned Addl. Government Advocate further submits that the Appeal be rejected.

7. Based on the rival contentions and the material on record, the following point for determination arises for my consideration in the present Appeal :

**POINT FOR DETERMINATION**

(1) Whether any portion of the property surveyed under no. 37/1 forms part and parcel of the property claimed by the Appellants at para 17 and 25 of the plaint ?

8. On perusal of the findings of the learned Judge, I find that the learned Judge has come to the conclusion that according to the Court Commissioner Mr. Ramesh Sardessai, Dw. 4, who was examined by the Respondents as their witness, the property of the Appellants is restricted to the property surveyed under no. 47. But, however, on minutely examining the report prepared by the Commissioner, I find that the conclusive observations of the Commissioner states thus :

"I have therefore no hesitation to accept the western boundary of the property of the plaintiff is the same shown as western boundary of the survey number 47. Therefore the extent of the plaintiff's property is as shown by me in the plan annexed to these conclusions which was drawn on my instructions. However, within the said area there are survey numbers 44, 46/1, 47/1, 47/2, 47/3, 47/4, 47/5, 47/6, 47/7 and 47/18 belonging to some other persons. Therefore considering the area of the plaintiff's property the area covered by above survey numbers should be excluded from the area covered under the plan produced by me showing extend of the plaintiff property. Coupe 18-B/80-81 of serial number 9, Coupe 18-A/80-81 of serial number 10 and small part of 18-C/80-81 of serial number 16 as mentioned in para 23 of the plaint will be included in plaintiff's property."

9. Looking into such observations, it clearly states that coupes nos. 18A, 18B and small portion of coupe no. 18C forms part of the property of the

Appellants. In fact, the location of the said coupe as shown in the plan attached to the Court Commissioner's report has not been disputed by the Respondents. The findings of the learned Court Commissioner, Dw. 4, have also not been disputed by the Respondents. As a matter of fact, the Respondents themselves have examined the Court Commissioner in support of their defence to the claim put forward by the Appellants. Though Mr. J. P. Mulgaonkar, learned Counsel, has seriously objected to the said observations and the findings of the Court Commissioner, I find that on examining the report, the learned Commissioner has minutely examined the boundaries of the property claimed by the Appellants as shown in the Land Registration Officer under no. 2190 and on the basis of the statements recorded of the witnesses and the vestiges found at the site has located the boundary of the property of the Appellants. The identification as carried out according to Mr. J. P. Mulgaonkar, learned Counsel for the Appellants is far less than the one as shown by the Surveyor examined by the Appellants as Pw.6. The Court Commissioner has in fact examined Pw.6 and found that the plan prepared by Pw.6 was based on local information to identify the hillock which belongs to the Respondents. Mr. J. P. Mulgaonkar, learned Counsel appearing for the Appellants, however pointed out, that this Court may examine a Commissioner in terms of Order 46 of the Civil Procedure code to identify the property as claimed by the Appellants. The said contention cannot be accepted at this stage when the matter has been argued at length. In any event, the Court Commissioner appointed by the learned Judge by consent of the Appellants and the Respondents, has in fact minutely considered the relevant material and the documents relied upon by the Appellants to identify the property of the Appellants as described in the said Land Registration Office under

no. 2190. The Commissioner has been extensively cross examined by the Appellants and on perusal of the findings in the report, there is no reason to discard the report of the Court Commissioner. The Court Commissioner himself has located the boundary in the presence of both the Appellants and the Respondents and has recorded evidence in their presence whilst submitting the Report. In such circumstances, I find that the report of the Commissioner has to be accepted and the property of the Appellants is to be restricted to the area as shown by the Court Commissioner in the said plan attached to the said Report.

10. In this connection, Mr. J. P. Mulgaonkar, learned Counsel, submits that part of the property as shown by the Court Commissioner falls in the property surveyed under no. 37/1. In support of such contention, Mr. J. P. Mulgaonkar, learned Counsel, has brought to my notice the certified plan of the property surveyed under no. 37/1. Ms. Kamat, learned Addl. Government Advocate, strenuously objects to the production of such Survey Plan as, according to the learned Addl. Government Advocate, the same does not form part of the records. On bare perusal of the plan, it is not possible to come to a categorical finding as to whether the property as shown by the Court Commissioner by hatched line in the plan attached to the Survey Report, falls in any portion of the property surveyed under no. 37/1. In such circumstances, though the property of the Appellants is restricted to the portion as shown by the Court Commissioner in the plan attached to the Commissioner's Report, nevertheless, whether such portion extended to any portion of the property surveyed under no.37/1 is an exercise which the learned District Judge would have to examine after hearing the parties and allowing the

parties to adduce evidence to this limited extent.

11. The claim of the Appellants that the property of the Appellants corresponds to the plan produced at exhibit Pw.6/A, cannot be accepted. The property of the Appellants is restricted to the area as shown by the Court Commissioner as identified in the said plan attached to the Commissioner's Report. Only for the purpose of examining whether the area shown by the hatched line in the plan produced by the Commissioner, I am of a considered opinion that the matter would have to be remanded to the learned District Judge to decide this aspect only afresh. The learned District Judge would have to consider whether any portion shown by the Court Commissioner falls in the property surveyed under no. 37/1. This becomes more material as the learned Court Commissioner has not shown in his plan the property surveyed under no. 37/1. The point for determination is answered accordingly.

12. Mr. J. P. Mulgaonkar, learned Counsel appearing for the Appellants, however pointed out that though there was no issue raised with regard to the title of the property granted in favour of the ancestors of the Appellants of the property registered in the Land Registration Office under no. 2190, the learned Judge whilst passing the impugned Judgment has made an observation with regard to the claim of title of the Appellants herein. It is pertinent to note that admittedly the property is registered in the Land Registration Office in the name of the Predecessor-in-title of the Appellants and, as such, the consequence in law in terms of Article 953 of the Portuguese Civil Code would flow in favour of the Appellants.

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

**ORDER**

(I) The Appeal is partly allowed.

(II) The impugned Judgment and Decree dated 27.10.2004 stands modified and the Suit of the Appellants is partly decreed thereby declaring that the property claimed by the Appellants registered under no. 2190 corresponds to the property shown in the report of the Court Commissioner dated 27.04.1982 at exhibit 20.

(III) The learned Judge is directed to identify the said portion of the property vis a vis the survey no. 37/1 in the light of the observations made herein above.

(IV) Appeal stands disposed of accordingly with no Order as to costs.

(V) The parties are directed to appear before the learned District Judge on 25.07.2017 at 10.00 a.m.,

**F .M. REIS, J.**

arp/\*