

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 84 OF 2003**

Mr. Ismail Adam Khan,
R/o Valpoi, Sattari, Goa.
(Since deceased through
his legal heirs)

1(a) Mrs. Jahid S. R. Amin;

1(b) Mr. S. R. Amin;

1(c) Miss Sahida Ismail Khan;

1(d) Mr. Hinayatulla Ismail Khan;

1(e) Mr. Rahimantulla Ismail Khan;

1(f) Mrs. Halimabi Ismail Khan

All major of age,
All residents of Valpoi,
Sattari, Goa.

... Appellants

Vs.

(1) Mr. Kashinath Govind Naik,
(since deceased)
son of Govind Naik,
of major age, married,
and his wife,

1(a) Laxmi Kashinath Naik,
wife of deceased respondent no.1,
Already on record as respondent no.2,

1(b) Chandan Kashinath Naik,
Son of deceased respondent no.1,
And his wife,

- 1(c) Maushmi Chandan Naik,
Daughter in law of deceased respondent no.1,
- 1(d) Pragati Pradip Raikar,
Daughter of deceased respondent no.1,
And her husband,
- 1(e) Mr. Pradip V. Raikar,
- 1(f) Mahima M. Mandrekar,
Daughter of deceased respondent no.1,
And her husband,
- 1(g) Mahesh R. Mandrekar,
All major of age,
All resident of Nagargao Road,
House No. 292, Near New
Bus Stand, Valpoi, Sattari, Goa.
- (2) Mrs. Laxmi Kashinath Naik,
of major age, married,
Both residing at Valpoi Taluka,
Sattari, Goa.
- (3) Government of Goa,
through the Chief Secretary,
Secretariat, Panaji, Goa. ... Respondents.

Mr. Prasheen Lotlikar, Advocate for the Appellants.

Mr. Guru Shirodkar, Advocate for the Respondent Nos. 1(a) to 1(g)
and 2.

None for Respondent No. 3.

CORAM:- M. S. SONAK, J.

DATE:- 17th MAY, 2017

JUDGMENT:

1. Heard Mr. Prasheen Lotlikar for the appellants and Mr. Guru Shirodkar for the respondent nos. 1(a) to 1(g) and 2.

2. This Second Appeal was admitted on 11.12.2003 on the following substantial questions of law:

I. Whether the First Appellate Court could have declared that the appellants had no right, title or possession in respect of Survey No. 46/3, merely on the strength of the boundaries mentioned in the Sale Deed dated 20.08.1973:

a. in the absence of any evidence to show that the property surveyed under Survey No. 46/3 belonged to the Vendors of the Respondents no. 1 and 2 ?

b. in the absence of any identification of the area of 500 square metres admittedly purchased by the respondents no. 1 and 2, with reference to any plan or crocky ?

c. in the face of the fact that the Survey no. 46/3 had been separately surveyed from Survey No. 46/4 with the name of the Government as 'occupant' ? and

d. in the face of the fact that in the Old Cadastral Survey the Plots bearing No. 29 and 30 to which

undisputably the Survey No. 46/3 corresponded alongwith other survey number, was recorded in the name of the Government ?

II) Whether the learned First Appellate Court misdirected herself in taking into account the weakness of the defence, instead of ascertaining whether the Respondents no. 1 and 2 had established the case pleaded by them ?”

3. The appellants and the respondent no. 3 i.e. Government of Goa were the original defendants in Special Civil Suit No. 19/1991/A, instituted by the respondent nos. 1 and 2 in the Court of the Civil Judge Senior Division at Bicholim. In the civil suit, the plaintiffs had prayed for the following reliefs:

a) For declaration to the effect that, the land under the Survey No. 46/3 of Valpoi, Taluka Sattari-Goa, is not a separate strip of land but is the part and parcel of the Eastern portion of the property "Canvalacodil" purchased by them from Mr. Vassudeo Mukund Kanekar and his wife Mrs. Asha Vassudeo Kanekar, by the Sale Deed dated 20.08.1973, registered in the Office of the Sub-Registrar of Sattari, Valpoi-Goa, under No.38 of Book No.1 Volume-I, at pages 106 to 211, dated 25.8.1991 and that the Defendant has no

right, title and possession over the same.

b) For a permanent injunction restraining the Defendant its agents, servants or any other person acting on its behalf in any manner from disturbing the possession of the plaintiff in respect of the suit property surveyed under No. 46/3 and 46/4.

c) For an order to delete the name of the defendant from survey No. 46/3 and to record the names of plaintiffs therein.

d) For any other order which is deemed fit and proper in this suit.

e) For the costs to be awarded to the plaintiffs.

4. The defendants to the suit i.e. the appellants herein and the Government of Goa denied the case pleaded by the plaintiffs. Upon consideration of the rival pleadings, the Trial Court framed the following issues:

(1) Whether the plaintiffs prove that the survey no. 46/3 of village Valpoi Taluka Sattari is not a separate strip of land but part and parcel of the property "Convalocodil" purchased by the plaintiffs from Shri Kanekar and that he is in possession of the same ?

(2) Whether the defendants prove that the property

known as "Xellichem Gallaum" in the old survey of village Massordem of Sattari Taluka is surveyed under No. 46/3, 46/4, 46/2 and originally all these properties were one and the same is belonging to Government of Goa and the same is recorded in survey record in the name of Government of Goa ?

(3) Whether the plaintiffs prove that defendant No.2 is claiming right of way through the suit property surveyed under No. 46/3 and is trying to lay down water pipe line in it in collusion with defendant no.1 ?

(4) Whether the plaintiffs prove that defendant no.2 is having an access and way through his own property from the main road which is the part of survey No. 46/4 joining his property under survey No. 46/1 ?

(5) What relief ?

5. The Trial Court, by judgment and decree dated 30.08.2000 was pleased to decide issue no. 1 against the plaintiffs and on that ground, dismissed the suit. However, issue nos. 2, 3 and 4 were decided against the defendants and in favour of the

plaintiffs.

6. The plaintiffs, thereupon, instituted first appeal being Regular Civil Appeal No. 169/2000 before the First Appellate Court. Significantly, neither the present appellants, nor the Government of Goa chose to institute any cross objections in relation to findings on issue nos. 2, 3 and 4 as recorded in the judgment and decree dated 30.08.2000 made by the Trial Court. Even without filing cross objections, the defendants did not even attempt to question the findings on issue no(s).2,3 and 4 as aforesaid.

7. The First Appellate Court by judgment and decree dated 07.08.2003, has allowed the appeal and decreed the suit instituted by the plaintiffs i.e. respondent nos. 1 and 2 herein.

8. The appellants herein as well as the Government of Goa instituted Second Appeal Nos. 84/2003 and 111/2003 to question the impugned judgment and decree made by the First Appellate Court. However, it is pointed out by Mr. Shirodkar, the learned Counsel for the plaintiffs that Second Appeal No. 111/2003 instituted by the Government of Goa stands dismissed for want of

prosecution.

9. Mr. Prasheen Lotlikar, the learned Counsel for the appellants in the present appeal instituted by the original defendants nos. 1 and 2 (legal representatives of original defendant nos. 1 and 2) submits that the findings recorded by the First Appellate Court are vitiated by perversity. He submits that there is absolutely no evidence on record to establish that the suit property purchased by the plaintiffs vide deed of sale dated 20.08.1973 corresponds to property admeasuring 339 or 329 square metres in survey no. 46/4 and 171 square metres in survey no. 46/3. He submits that in order to establish this vital fact, it was necessary for the plaintiffs to have produced on record proper plan or at least, a crocky and examined some Surveyor to co-relate such plan, the property described in the sale deed dated 20.08.1973 and further juxtapose the same with the survey numbers, survey plans and the position at the site. He submits that since, nothing of this sort has been done by the plaintiffs, the Trial Court, was entirely justified in answering the first issue against the plaintiffs and on the basis of the same, dismissing the suit in its entirety.

10. Mr. Lotlikar, submits that the First Appellate Court has failed to discharge the duties required to be discharged by the First Appellate Court in terms of the law laid down by the Hon'ble Supreme Court in **Santosh Hazari Vs. Purushottam Tiwari, 2001 (3) SCC 179**. He submits that the First Appellate Court has virtually proceeded to independently assess the evidence and substitute its findings, with the findings recorded by the Trial Court. He submits that the First Appellate Court in the present case has not bothered to examine the reasoning of the Trial Court or to come into close quarters with such reasoning and thereafter, state its own reasons for taking a different view in the matter. He submits that such error of approach is required to be corrected by this Court in exercise of its jurisdiction under Section 100 of CPC.

11. Mr. Lotlikar, also submits that it is settled position in law that the plaintiffs are required to stand or fall on the basis of strength of weakness of their case. He submits that the plaintiffs, are not entitled to draw any sustenance from the alleged weakness of the case of the defendants. Mr. Lotlikar, submits that this principle has been ignored by the First Appellate Court in making

the impugned judgment and decree. He submits that there is virtually no evidence produced by the plaintiffs in support of the case pleaded by the plaintiffs. In such circumstances, the learned First Appellate Court has incorrectly drawn sustenance from the alleged weakness, in the evidence produced by or on behalf of the defendants. Mr. Lotlikar, submits that in such circumstances, substantial question no. II was rightly framed and required to be answered in favour of the appellants.

12. Mr. Lotlikar, also submits that this was not really a case of serious discrepancies between the area of the suit property and the boundaries and therefore, there was no reason to rely on the principle that in case of any discrepancies between the area and the boundaries, it is the boundaries which will prevail. He submits that in the present case, there was no evidence on record to correlate the property purchased by the plaintiffs vide sale deed dated 20.08.1973 and the property from out of survey nos. 46/3 and 46/4 at the site. In the absence of any such evidence, the judgment and decree made by the Trial Court was required to be sustained.

13. Mr. Lotlikar, also submits that Exhibit-45, which is the Commissioner's Report, upon which, the First Appellate Court has placed reliance, was in fact never admitted in evidence. In any case, he submits that the Report of the Commissioner was in some other suit and in the absence of examination of the said Commissioner, there was no question of taking of cognizance of such Report. He submits that there is no material on record to establish the purpose for which the Commissioner was appointed and the circumstance in which such Commissioner's Report had to be made. He therefore, submits that Exhibit-45 can hardly be regarded as legally admissible evidence.

14. Mr. Lotlikar, relying upon the decision of the Hon'ble Supreme Court in **Rajasthan State Road Transport Corporation & Another Vs. Bajrang Lal, (2014) 4 SCC 693** and **Sebastiao Luis Fernandes, through LRs & Others Vs. K.V.P. Shastri, through LRs & Others, 2015 (2) ALL MR (SC) 930**, submits that a finding of fact, which is vitiated by perversity can always be interfered with, in the exercise of jurisdiction under Section 100 of CPC. Relying upon the decision in **Sebastiao Luis Fernandes** (supra), he submits that this decision is an authority

for the proposition that the plaintiff has to stand or fall on his own feet and cannot draw any sustenance from the alleged weakness of the case of the defendants. For all these reasons, Mr. Lotlikar, submits that this Second Appeal is liable to be allowed and the impugned judgment and decree made by the First Appellate Court be reversed.

15. Mr. Guru Shirodkar, the learned Counsel for the respondent nos. 1(a) to 1(g) and 2 i.e. legal representatives of the original plaintiff, submits that there is no infirmity whatsoever in the impugned judgment and decree made by the First Appellate Court because, the First Appellate Court has not only re-appreciated the evidence on record, but, also examined in details the judgment and decree rendered by the learned Trial Judge in terms of the law laid in **Santosh Hazari** (supra). He submits that the main dispute is really in regard to survey no. 46/3, admeasuring about 171 square metres, which is erroneously recorded in the name of the Government of Goa. He submits that even the Government of Goa filed its written statement, but, failed to lead any evidence in the matter. He submits that both, oral and documentary evidence was lead by and on behalf of the original

plaintiffs. He submits that the neighbours were examined, who established the boundaries of the property purchased by the plaintiffs vide registered sale deed dated 20.08.1973. He submits that the Commissioner's Report at Exhibit-45 was admitted in evidence and therefore, exhibited. He points out that the Commissioner's Report was in a suit concerning the predecessor in title of the appellants. He submits that the evidence lead by the original plaintiffs and the neighbours at the site and the Commissioner's Report at Exhibit-45 amply establish the extent, identity and the location of the suit properties. He points out that the Trial Court despite granting leave for production of the Commissioner's Report at Exhibit-45 and even, exhibiting the same, failed to take cognizance of the same, while making its judgment and decree. Mr. Shirodkar, submits that in such circumstances, the First Appellate Court was very much justified in reversing the findings recorded by the Trial Court on issue no. 1 and thereafter, decreeing the suit instituted by the plaintiffs.

16. Mr. Shirodkar, submits that this is not a case where any sustenance has been drawn from the weakness of the defendants case. He submits that the First Appellate Court after recording the

findings that there was sufficient evidence to answer issue no. 1 in favour of the plaintiffs, has stated that the evidence on record in any case, was sufficient for the onus to shift upon the defendants, since, the Government of Goa led no evidence at all and since, the evidence on behalf of the defendants was not sufficient for discharge of such onus. This was an additional reason to reverse the judgment and decree made by the Trial Court. He submits that the decision in **Sebastiao Luis Fernandes** (supra), in fact, assists the case of the original plaintiffs than the appellants.

17. Mr. Shirodkar, relying upon the decision of the learned Single Judge in the case of **State of Maharashtra & Others Vs. Nathuji Lotan Dhakate, 2003 (3) ALL MR 508** and the decision of the Hon'ble Supreme Court in the case of **Corporation of the City of Bangalore Vs. M. Papaiah, 1989 (3) SCC 612** submits that the Second Appellate Court ought not to interfere with the findings of facts, recorded by the First Appellate Court, in the absence of any perversity and further, that the revenue records are not the documents of title and that the interpretation of revenue records is not even a question of law. For all these reasons, Mr.

Shirodkar, submits that the Second Appeal may be dismissed.

18. The rival contentions now fall for my determination.

19. The plaintiffs have admittedly purchased the property admeasuring 500 square metres, vide registered sale deed dated 20.08.1973. The sale deed makes no reference to the survey numbers or any plan. However, the boundaries of suit property have been described in the schedule to the sale deed.

20. The plaintiffs in their evidence have stated that a portion of the property purchased by them, vide sale deed dated 20.08.1973 is surveyed under survey no. 46/4 and this portion, according to them, admeasures 329 square metres. On account of typographical error, such portion is indicated as having an area of 339 square metres in the deposition. This is notwithstanding the fact that the entire property bearing survey no. 46/4 is shown as admeasuring 1008 square metres and the same is recorded in the names of the original plaintiffs. The plaintiffs have not only admitted but, have stated that notwithstanding such entry in the survey records, the plaintiffs own only an area of 329 square

metres from out of survey no. 46/4 and the remaining property is possessed by the appellants herein. It is also the case of the plaintiffs that the balance area of 171 square metres corresponds to the property surveyed under survey no. 46/3, which is recorded, not in the name of the appellants, but, in the name of the Government of Goa.

21. The Government of Goa did file a written statement *inter alia* stating that the entry in respect of survey no. 46/3 is correct and that no portion of the suit property form part of the property of survey no. 46/3. However, after filing such written statement, no evidence was led by or on behalf of the Government of Goa. This is however, not the only basis upon which, the First Appellate Court has decreed the plaintiffs suit. The plaintiffs, not only examined themselves, but, have also examined their neighbours for the purpose of identifying the precise location of the property purchased by them vide sale deed dated 20.08.1973. In addition, the plaintiffs, produced on record Exhibit-45, which is the Commissioner's Report identifying the suit property, with reference to the boundaries in the sale deed of 1973 and the survey numbers at the site. The Commissioner's Report was in a suit,

which concerned the predecessor in title of the appellants and therefore, the appellants cannot distance themselves from the document at Exhibit-45. It is not possible to accept Mr. Lotlikar's submission that document at Exhibit-45 was never admitted in evidence. The document was admitted in evidence and marked as exhibit on the basis of an application taken out by the plaintiffs for the said purpose. Even the learned Trial Judge has made specific reference to the Commissioner's Report at Exhibit-45, but, failed to appreciate its scope and import. The Report/Plan clearly demarcates the suit property, which was identified by and with reference to the specific boundaries and the sale deed of 1973. In such circumstances, the First Appellate Court cannot be faulted for making the impugned judgment and decree, on the ground that the findings of the facts recorded by the First Appellate Court are vitiated by perversity.

22. This is clearly not a case of "*no evidence*" or the case of exclusion of vital and relevant evidence. The oral evidence on record coupled with the document at Exhibit-45, at least, by the test of preponderance of probabilities indicates that the suit property admeasuring 500 square metres, purchased by the

plaintiffs vide sale deed dated 20.08.1973 is spread over survey no. 46/4 to the extent of 329 square metres and survey no. 46/3 to the extent of 171 square metres. The evidence lead by and on behalf of the plaintiffs certainly inspires great confidence, particularly, because the plaintiffs have admitted that they own and possess only 329 square metres from out of the property bearing survey no. 46/4, which is recorded as admeasuring 1008 square meters. As noted earlier, the entire property admeasuring 1008 square meters bearing survey no. 46/4 is recorded in the name of the plaintiffs. However, the plaintiffs claim only to the portion of 329 square metres. Further, admittedly, even the name of the appellants is not recorded in the entries for survey no. 46/3. The said property is recorded in the name of the Government of Goa. The evidence on record, was certainly sufficient for the onus to shift upon the Government of Goa and upon the appellants. Such onus, has not at all been discharged by the Government of Goa or for that matter, the appellants. The principle that the plaintiffs have to stand or fall at the strength of his or her own case, admits of no dispute. However, to hold that the onus had shifted upon the defendants and the defendants have failed to discharge such onus, does not amount to grant of a decree in

favour of the plaintiffs on the basis of the weakness of the defence case.

23. In the case of **Sebastiao Luis Fernandes** (supra), the Hon'ble Supreme Court, at paragraph 25, has made the following observations in the context of burden of proof and onus of proof in terms of Sections 101 and 102 of the Evidence Act and the same are relevant and read as follows:

*"25. In the matter of onus of proof and burden of proof as per Sections 101 and 102 of the Evidence Act, we have to hold that it was upon the plaintiff-appellants to furnish proof regarding ownership of 1/3rd share of the suit schedule property and discharge their burden of proof as per the aforementioned sections. The relevant extract from **Anil Rishi Vs. Gurbaksh Singh** (supra)¹ is reproduced below:-*

"19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of

1 Anil Rishi Vs. Gurbaksh Singh, (2006) 5 SCC 558

bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

20. *In R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple² the law is stated in the following terms:*

29. *In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in Addagada Raghavamma Vs. Addagada Chenchamma³ there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has*

2 R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple, (2003) 8 SCC 752

3 Addagada Raghavamma Vs. Addagada Chenchamma, AIR 1964 SC 136

been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title.

We therefore do not find any reason whatsoever to interfere with the impugned judgment and decree passed by the High Court on this aspect of the case as well."

(emphasis supplied)

24. The appellants, in this case, had not only denied the case pleaded by the plaintiffs, but, had pleaded the specific case to the effect that the suit property shown as "Xellichem Gallaum" in the old survey of village Massordem of Sattari Taluka bears survey nos. 46/3, 46/4, and 46/2 and originally, all these properties were one and the same and belonging to the Government of Goa and therefore, were recorded in survey records in the name of Government of Goa. Based upon this, issue no. 2 was cast, in which, the burden of proof was placed upon the appellants. Even the Trial Court in his judgment and decree dated 30.08.2000, which, the appellants seek to restore, had after assessment of

material on record, answered issue no. 2, against the appellants. To be precise, issue no. 2 was answered only partly in the affirmative and partly in the negative to the extent that originally, all the properties bearing survey nos. 46/4, 46/3 and 46/2 were composite and belonged to the Government of Goa or were recorded in the old cadastral survey record in the name of the Government of Goa. This finding, was accepted by the appellants, in as much as, no cross objections were preferred by the appellants to the appeal instituted by the plaintiffs, questioning the Trial Court's judgment and decree dated 30.08.2000. This is relevant and the consideration of the same does not amount to placing reliance upon the weakness of the appellants case.

25. Similarly, issue nos. 3 and 4, where burden was cast upon the plaintiffs have been answered by the Trial Court in its judgment and decree dated 30.08.2000, in favour of the plaintiffs and against the appellants. This means that the original plaintiffs, have proved that the appellants in collusion with the Government of Goa were attempting to lay a water pipeline in the property surveyed under no. 46/3, despite the fact that the appellants have an access/way through their own property from the main road,

which is the part of the property surveyed under no. 46/4, joining the appellants property. Again, no cross objections were preferred by the appellants or for that matter, by the Government of Goa with regard to the findings recorded by the Trial Court on issue nos. 3 and 4.

26. The First Appellate Court in the facts and circumstances of the present case, was quite justified in reversing the findings recorded by the Trial Court on issue no. 1. The Trial Court, had indeed misconstrued the evidence on record or in any case construed the evidence on record quite superficially. The statement in the deposition that the portion of suit property in survey no. 46/4 admeasures 339 square meters was unduly regarded by the learned Trial Judge as some discrepancy. It is quite obvious that this was a typographical mistake in recording the evidence. In any case, from the context, it is quite clear that the area was stated as 329 square meters and not 339 square meters. Even if the area is taken as 339 square metres from survey no. 46/4 and 171 from 46/3, that makes the area of the suit property as 510 square metres as against the claimed area of 500 square metres. Again, this is not some serious discrepancy, warranting

dismissal of the entire suit. The First Appellate Court was justified in reversing the findings of the Trial Court on issue no. 1 by noticing that excessive emphasis was unduly laid upon this so called discrepancy. Similarly, the Trial Court, unduly faulted the plaintiffs for not placing any plan/crocky for identifying the suit property or examining the Surveyor for such purpose. As noted earlier, apart from the plaintiffs themselves, the neighbours were examined and more importantly, the Commissioner's Report alongwith the plan at Exhibit-45 was produced on record. Considering all such material, it is not possible to accept Mr. Lotlikar's contention that there is any perversity on the recording of the findings by the First Appellate Court or that the First Appellate Court has failed to come into close quarters with the reasoning of the Trial Court before reversing the judgment and decree.

27. It is settled position in law that entries in revenue records are not documents of title or are not determinative of the title of the parties. The presumption which arises from the entries in the revenue records is rebuttable and in the present case, the original plaintiffs, have succeeded in rebutting the same. At least,

sufficient material was produced on record for the onus to shift upon the Government of Goa. The Government of Goa, in the present case, failed to lead any evidence before the learned Trial Judge. The second appeal instituted by the Government of Goa has been dismissed. In such circumstances, the first substantial question of law is required to be answered against the appellants.

28. Further, as discussed earlier, this is clearly not a case where the First Appellate Court has based its decision upon the weakness of the defence. The findings in the impugned judgment and decree are borne from the material evidence on record and there is no perversity with regard to findings of such facts. To say that the onus had shifted upon the defendants and the defendants had failed to discharge such onus, does not amount to relying upon the weakness of the defence. Accordingly, even the second substantial question of law is liable to be answered against the appellants.

29. In the result, this Second Appeal fails and is liable to be dismissed. However, in the facts and circumstances of the present case, there is no case made out for imposition of any costs.

30. The Second Appeal is dismissed. Interim order, if any, is vacated. There shall be no order as to costs.

M. S. SONAK, J.

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