

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NOS. 90 AND 120 OF 2016

1. Shri Vidhyadhar Vithal Naik,
Age 79 years,
Resident of House No.397/C/13,
"Gangotri", Near Youth Hostel,
Miramar, Panaji-Goa.
(original defendant no. 2).
(Registered address)

... Appellant

V e r s u s

1. Shri Namdev Vishnu Salgaonkar,
(since deceased) through his legal
representatives.
1(a) Maria Angelica Fernandes,
age 80 years,
1(b) Luiza Maria Pereira,
1(c) Roque Cajetan Fedric Pereira,
1(d) Minguel Antonio Cardoso,
1(e) Monica Maria Anes Cardoso,
1(f) Maria De Fatima Cardoso,
1(g) William Filomena Gonsalves,
1(h) Menino Feleciano Cardoso, 49 years,
1(i) Fatima Telflin Cardoso,
1(j) Maria Mystica Cardoso,
1(k) George B. M. Cardoso,
All major,
All residing at Carambolim, Ilhas, Goa.
(original plaintiffs).

2. Shri Jaybahadur Thapa
Age 58 years, service,
Resident of Alto Porvorim,
Bardez, Goa.
(original defendant no. 1)

... Respondents.

Mr. S. D. Lotlikar, Senior Advocate with Ms. M. Furtado, Advocate for the Appellants.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. V. Korgaonkar, Advocate for the Respondent nos. 1(a) to (k).

Coram :- F. M. REIS, J

Date : 6th March, 2017

ORAL ORDER

Heard Mr. S. D. Lotlikar, learned Senior Advocate appearing for the Appellant and Mr. J. E. Coelho Pereira, learned Senior Advocate appearing for the Respondent nos. 1 (a) to (k).

2. Both the above Appeals were taken up together as they challenge the same Judgment and Decree passed by the Courts below.

3. The parties shall be referred to in the manner they so appear in the cause title of the impugned Judgment of the Trial Court.

4. The above Appeal challenges the Judgments passed by the Courts below, whereby the Suit filed by the Plaintiffs was decreed and the Defendants were directed to vacate the Suit house situated in the property bearing survey no. 174/5 of Penha da Franca, Village Bardez Taluka and handover its vacant and peaceful possession to the legal heirs of the Plaintiff and further the Defendant, their family members, their agents, servants or any person acting on his behalf were permanently restrained from interfering in the suit house and the property in any manner whatsoever. The Counter Claim filed by the Defendant for specific performance of the oral Agreement came to be dismissed.

5. Briefly, it is the case of the Defendant no. 2/Appellant herein, that the Suit was filed by the Original Plaintiff Namdev Vishnu Salgaonkar, against the Defendant no. 1 and the Defendant no. 2 to vacate the suit house and handover the vacant and peaceful possession to the original Plaintiff and also for a permanent injunction not to interfere with the suit house and the property. It was the case of the Plaintiff that he has initiated Inventory Proceedings bearing no. 78/1998 before the Court of Civil Judge, Senior Division at Panaji, upon the death of his brother Prabhakar Vishnu Salgaonkar and amongst others he left a property known as "Aforamento" at Serula admeasuring 100 square metres and surveyed under no. 174/5 of Penha de Franca Village wherein there exists an incomplete house. The said property came to be owned by his deceased brother in view of a Will dated 02.02.1954 left by Ramchandra Krishna Salgaonkar and that an application was filed in the said proceedings under Article 429 of the Portuguese Civil Procedure Code read with Article 2010 of the Portuguese Civil Procedure Code to safeguard the interest of the assets left behind by the said deceased wherein an auto-de-arrolamento was ordered on 30.11.1988. Originally, the suit was filed against the sole defendant no. 1 wherein it was contended that the said Defendant was found illegally occupying a room in an incomplete house located in the suit property. It is further contended that the possession was delivered by the Clerk of the Court appointed in the said Inventory Proceedings pursuant to a panchanama dated 16.03.1989. It is further his case that after such possession was delivered, the original Defendant had threatened the Plaintiff of dire consequences if he did not vacate the house and to avoid the worse, the Plaintiff kept himself away from the said Defendant. It is further their case that after the

filing of the suit somewhere on 21.09.1989, the Defendant no. 2 filed an application praying that he may be joined as a Defendant as he was a necessary party as he was in possession and enjoyment of the said house and that the Defendant no. 1 was his employee. Such Application came to be allowed. It is further their case that written statement was filed by the Defendant no. 2(a), inter alia, stating that in the year 1973, the property bearing survey under no. 174/5 which had an incomplete building standing thereon and which belonged to late Prabhakar Vishnu Salgaonkar was agreed to be sold by virtue of an Oral Agreement to sell which was entered into for which a sum of Rs.8,000/- was already paid by the Defendant no. 2 said Prabhakar Vishnu Salgaonkar as part payment of the consideration and pursuant to the said Agreement on payment of the said sum of Rs.8,000/-, the Defendant no. 2 was put in exclusive possession of the said property with an incomplete structure thereon. It is also their case that for preparing of the Sale Deed, the Defendant no. 2 purchased the stamp papers but, however, the execution of the Sale Deed remained to be completed due to some reasons or the other as the late Prabhakar could not obtain the Certificate from the concerned Department but, however, the said Prabhakar Vishnu Salgaonkar expired before the Sale Deed could be executed. It is further pointed out that the house existing in the suit property was allotted house no. 587 by the Local Panchayat and the name of the Defendant no. 2 was recorded as Tax Payer. It was also pointed out that the Plaintiff never objected to the possession of the Defendant no. 2 and with the full knowledge of the Plaintiff, the Appellant enjoyed his property as his own. The Defendant no. 1 adopted the written statements filed by the Defendant no. 2. Thereafter, in the year 1994, the Plaintiff sought for amendment of the plaint which came to be allowed on

09.02.1995. But, however, the amendment was not carried out in the plaint which was allowed to be carried out by the learned Judge on 01.12.2007. It is further their case that on 13.08.2010, additional written statement was filed by the Defendant no. 2 and an application for amendment was also filed on 05.12.2007 to, inter alia, incorporate Paras 19, 20, 21, 22 and 23. The application to amend the written statement to introduce the counter claim, was allowed on 11.12.2007 and in the meanwhile, the original plaintiff expired and the legal representatives were brought on record who opposed the application for amendment. A challenge to the Order allowing the amendment was rejected by this Court on 13.08.2008 and a Special Leave Petition preferred by the Apex Court was also rejected. After evidence was recorded, the learned Trial Judge by Judgment dated 09.12.2011, dismissed the Suit filed by the Plaintiff as well as the Counter claim filed by the Defendant no. 2.

6. Being aggrieved by the said Judgment, the legal representatives of the deceased-Plaintiffs filed an Appeal bearing no. 69/2012 before the Lower Appellate Court. In his turn, the Defendant no. 2 also preferred a challenge to the dismissal of the Counter Claim. The Lower Appellate Court by two Judgments dated 29.01.2016, the Appeal preferred by the legal representatives of the deceased-Plaintiff was allowed and the Appeal filed by the Defendant no. 2 came to be dismissed. Being aggrieved by the said Judgments, the Defendant no. 2 has preferred two Appeals, one challenging the Judgment decreeing the Suit filed by the Plaintiff and the other challenging the Decree dismissing the Counter Claim.

7. Mr. S. D. Lotlikar, learned Senior Advocate appearing for the Appellant

has pointed out that the Counter Claim filed by the Defendant no. 2 was dismissed by the learned Trial Judge on an erroneous ground that the Counter Claim is barred by limitation. The learned Senior Advocate further pointed out that though the learned Trial Judge came to the conclusion that the Oral Agreement has been established, nevertheless, on the ground that such Agreement was executed in the year 1973 and the Counter Claim was filed only in the year 2007, the Counter Claim for specific performance was barred by limitation. Learned Senior Advocate further pointed out that the evidence of the witness Dr. Fernando Colaco was not considered in view of the provisions of Section 176 of the Indian Evidence Act though there was no privilege claimed by the Defendant no. 2 in terms of the said provisions. It is further pointed out that the learned Trial Judge has minutely examined every piece of material on record to conclusively hold that the Oral Agreement was duly established. It is further submitted that the possession of the Defendants was also acknowledged by the learned Trial Judge but however refused the relief sought by the Plaintiff. The learned Senior Advocate further submits that the Lower Appellate Court has erroneously interfered with the findings of the Trial Court that the Oral Agreement has not been established. It is further submitted that the persons who were witnesses to such oral transaction were respected persons whose integrity cannot be doubted and, as such, according to him, there was no reason to disbelieve the evidence adduced by the Defendant no. 2 in support of his claim for specific performance. It is further pointed out that the learned Judge has erroneously drawn inferences for non-examination of persons who were already dead which would itself vitiate the finding of fact arrived at by the learned Judge that the Oral Agreement has not been established. It is further

submitted that the Defendant no. 2 was in possession of the subject property as he was parking his trucks pursuant to the possession being delivered to the Defendant no. 2 by the deceased Prabhakar Vishnu Salgaonkar. Learned Senior Advocate further pointed out that the Oral Agreement is clearly reflected in the draft of the Sale Deed whereby the averments corroborates the case of the Defendant no. 2 of such Oral Agreement. Learned Senior Advocate further submits that as the amendment was carried out asserting a right to the property in the year 2007 by the Plaintiff and the written statement was thereafter filed immediately in the same year by no stretch of imagination, it can be said that the claim for performance in the Counter Claim is barred by limitation. Learned Senior Advocate further submitted that only after the original Plaintiff asserted his right to the property and reputed the oral Agreement executed by the deceased Prabhakar it gave a cause of action to file for specific performance to the Defendants. Learned Senior Advocate further pointed out that as such the finding arrived at by the Courts is perverse and calls for interference. Learned Senior Advocate further pointed out that the Defendant no. 2 by adducing cogent evidence on record have conclusively established the Oral Agreement and the particulars thereof were clearly noted in the additional pleadings filed by the Defendant no. 2. It is further pointed out that both the Courts below have misconstrued the evidence on record and have erroneously rejected the evidence of Dr. Fernando Colaco which would itself show the perversity in the finding of fact arrived at by the learned Judge. Learned Senior Advocate has thereafter taken me extensively through the Judgment of the Lower Appellate Court to point out that the finding of possession as well as the Oral Agreement are perverse by misreading the evidence and ignoring the vital

evidence produced on record. Learned Senior Advocate further pointed out that there are no averments in the pleadings as against the Defendant no. 2 nor does the plaint disclose any cause of action against the Defendant no. 2 and, as such, according to him, the learned Appellate Court was not justified to grant relief of restoration of possession filed by the Plaintiff. Learned Senior Advocate further pointed out that unless the Defendant no. 2 has knowledge and has been notified about the names of the legal representatives of the deceased Prabhakar or any act done to repudiate the Oral Agreement, no cause of action would accrue to the Defendant no. 2 to file the Suit/Counter Claim for specific performance. It is further pointed out that the evidence of Dw. 7/Dr. Fernando Colaco, was not hit by the provisions of Section 176 of the Evidence Act and, as such, the Courts were not justified to reject such evidence of Dw. 7. Learned Senior Advocate further pointed out that there is no evidence on record to show that the Plaintiff or any other legal representatives of the said Prabhakar were in possession of the suit property either prior or after the institution of the Suit and, as such, granting the relief sought by the Plaintiff in the Suit by the Lower Appellate Court is erroneous and deserves to be quashed and set aside. It is further pointed out that as grave injustice has occasioned to the Defendant no. 2 as there are no pleadings as against the Defendant no. 2 with regard to the subject property, the Defendant no. 2 has been deprived to claim a right to the property based on the possession delivered to the Defendant no. 2 by the said Prabhakar. The learned Senior Advocate further pointed out that the learned Trial Judge has rightly come to the conclusion that the possession of the suit house and the property by the Defendant no. 2 was not unlawful which was from the year 1973 pursuant to an Oral Agreement executed

between him and the said late Prabhakar. The learned Senior Advocate further submits that the learned Trial Judge has erroneously refused to rely upon the Judgment of this Court reported in AIR 1925 Bom 6, wherein it has been held that such privilege under Section 176 of the Evidence Act, is not available when the Advocate appears for both the parties. Learned Senior Advocate further pointed out that there are substantial questions of law which arise in the present Appeal for consideration with regard to the perverse findings of fact arrived at by the Lower Appellate Court; that the Oral Agreement has not been established without examining the evidence of Dw.7/Dr. Fernando Colaco and erroneously holding that the suit was barred by limitation when the limitation to file the Counter Claim for specific performance arose only after the Plaintiff asserted his right over the subject property in the year 1997.

Learned Senior Advocate has relied upon the Judgment of the Apex Court reported in **(1996) 1 SCC 639** in the case of **Mohan Lal Vs. Mirza Abdul Gaffar & anr.** and the Judgment of the Full Bench of this Court reported in **1994 Mh. L. J. 1145** in the case of **Mahadeo Nathuji Patil vs. Surjabai Khushalchand Lakkad & Ors.**

8. On the other hand, Shri J. E. Coelho Pereira, learned Senior Advocate appearing for the original plaintiff has disputed the contentions raised by the Defendant no. 2. It is further pointed out that the Decree passed by the Lower Appellate Court is on the basis of appreciating the evidence on record and coming to the conclusion that the Oral Agreement has not been established. Learned Senior Advocate further pointed out that the contradictions highlighted by the Lower

Appellate Court to come to the conclusion that the Oral Agreement has not been established is based on the evidence on record which cannot be interfered by this Court in a Second Appeal under Section 100 of the Civil Procedure Code. It is further pointed out that the alleged Agreement was executed in the year 1973. It is contended that the draft of the Sale Deed was prepared by Dw.7 Dr. Fernando Colaco in the year 1978 and, admittedly, said Prabhakar expired in the year 1988. This sequence and the yawning gaps itself shows according to the learned Senior Advocate the suspicious claim put forward by Defendant no. 2 to allege that a Oral Agreement was entered into by late Prabhakar. It is further pointed out that in case said deceased Prabhakar wanted to execute the Sale Deed and the draft thereof was prepared in the year 1978, there is no reason why for such a gap of ten years such Sale Deed could not be executed on a spurious pretext that 230 A certificate was not obtained by said deceased Prabhakar. It is further pointed out that this conduct of Prabhakar would itself show that the alleged claim of Defendant no. 2 is fictitious, malafide and unsustainable in law. Learned Senior Advocate further pointed out that an Oral Agreement has to be established by cogent, reliable and clinching material on record which the Defendant no. 2 has failed to produce and, as such, on mere fictitious surmises, no Oral Agreement can be acknowledged by the Court of Law. Learned Senior Advocate further pointed out that the Plaintiff who is the brother of the deceased Prabhakar has never accepted the alleged claim of the Defendant no.2 of any Oral Agreement executed by the deceased Prabhakar with the Defendant no. 2. Learned Senior Advocate further pointed out that since the year 1989, when the Suit was filed, the original Plaintiff has never shown any willingness on his part to execute any alleged Agreement and, as such, the

contention of the learned Senior Advocate appearing for the Defendant no. 2 that the cause of action arose in the year 2007 is totally misplaced and clearly without any foundation. The learned Senior Advocate further submitted that the alleged possession is not established by any writing and, as such, the claim of the Defendant no. 2 that such possession is referable to the Oral Agreement for Sale, is totally erroneous and, in any event, the Defendant no. 2 cannot claim the benefit of any equitable title under Section 53-A of the Transfer of Property Act. Learned Senior Advocate further pointed out that the Courts below have rightly come to the conclusion that the Counter Claim filed by the Defendant no. 2 for specific performance is hopelessly barred by limitation and these findings of facts arrived at by the Courts below cannot be re-appreciated by this Court in a Second Appeal. Learned Senior Advocate further pointed out that in any event, without prejudice, grant of specific performance is a discretion and the admission by the Defendant no. 2 would itself suggest that no such discretion can be exercised in favour of the Defendant no. 2. It is further pointed out that the Defendant no. 2 has failed to plead or prove his readiness or willingness throughout to be entitled for specific performance of an alleged Oral Agreement. It is further submitted that even the alleged amount paid to deceased Prabhakar of Rs.8,000/- has not been established by the Defendant no. 2 and the Lower Appellate Court has rightly found that the Oral Agreement alleged by the Defendant no. 2 has not been proved or established by any reliable evidence on record. Learned Senior Advocate as such pointed out that there are no substantial questions of law which arise in the present Appeal for consideration and, as such, the Appeal be rejected.

9. I will first deal with the arguments advanced by the learned Senior Advocate appearing for the respective parties on the dismissal of the Counter Claim filed by the Defendant no. 2 for specific performance of the Oral Agreement.

10. On perusal of the Judgment of the learned Trial Judge with regard to the Counter Claim filed by the Defendant, an additional issue was framed as to whether the Defendant no. 2 proves that he is entitled for a Decree of specific performance of the Agreement for Sale and also an issue as to whether the Counter Claim filed by the Defendant is within the period of limitation. Whilst dealing with such issue, the learned Judge has noted that the subject Oral Agreement was executed in the year 1973 whereas the Counter Claim was filed on 05.12.2007 after a lapse of more than 33 to 34 years from the date of such Agreement. The learned Judge took note of the provisions of Article 54 of the Limitation Act and noted that the performance of the Contract has to be within a reasonable time. The learned Judge further noted that there is no material on record to show that the Defendant no. 2 offered to pay the balance amount within the period of three years from the year 1973 or approach the concerned party to persuade him to execute such Sale Deed. The learned Judge also noted that it is the case of the Defendants that the Deceased Prabhakar was asked to obtain the Income Clearance Certificate from the Income Tax Department somewhere in the year 1979. The learned Judge further noted that no such certificate was produced or obtained within a reasonable time and the conduct of the Defendant no. 2 shows total inaction for 8 years from 1980 to 1988. The learned Judge also noted that said Prabhakar expired on 20.01.1988 and, as such, it was crystal clear that

the Certificate would never be secured and specific performance of the Contract is frustrated. The learned Judge as such found that the Suit was hopelessly barred by Limitation and deserves to be dismissed on this ground alone. The Lower Appellate Court whilst dealing with the Appeal of dismissal of the Counter Claim in Regular Civil Appeal no. 69/2012, has framed three points for determination. As far as point nos. 1 and 3 are concerned, I shall deal with such aspects whilst examining the companion Appeal challenging the Judgment of the Lower Appellate Court dismissing the Appeal filed by the Defendant no. 2 challenging the Decree in favour of the Plaintiff for restoration of possession and injunction. Dealing with the finding on limitation arrived at by the learned Trial Judge in dismissing the Counter Claim for specific performance filed by the Defendant no. 2, the Lower Appellate Court noted that even after 1979 till the death of said Prabhakar Salgaonkar in the year 1988, admittedly, the Defendant no. 2, did not write any letter or insisted upon late Prabhakar Salgaonkar to execute the Sale Deed. The learned Judge further noted the averments in the affidavit of the Defendant no. 2/Dw. 1, that no steps were taken before filing of the Suit or even thereafter by the Defendant no. 2 to get the Sale Deed executed in his favour based on the subject oral Agreement. Dealing with the contention of the Defendant no. 2 that such cause of action arose only after the amendment was incorporated in the year 2007, the learned Judge noted that when an application was filed to exclude the Counter Claim, this Court made an observation that the issue with regard to Limitation would be examined on the basis of the evidence which would be adduced by the parties in the proceedings. The learned Judge further noted that the evidence of Dw.1 shows that the deceased-Original Plaintiff had knowledge of the Oral Agreement between

the Defendant no. 2 and late Prabhakar and also had knowledge that the Defendant no. 2 was put in possession of the subject property yet, according to him, said Prabhakar Namdeo-Original Plaintiff was trying to get possession of the suit property without adding him as a party and that he was added as a party by the Court only at his instance. The learned Judge noted that despite of filing the Suit and not accepting the existence of the Agreement in the year 1989 when the Suit was filed, no steps were taken by the Defendant no. 2 in praying for specific performance of a contract and chose to file a Counter claim only in the year 2007. The learned Judge also noted that in the year 2001, a legal notice was addressed to the Plaintiff, inter alia, claiming that the Defendant no. 2 would enforce specific performance of the Oral Contract through the Court in the execution and registration of the Sale Deed drafted in the year 1979. The said notice at exhibit 74 also stated that Defendant no. 2 would file a suit for specific performance. It is further noted that the Plaintiff filed the present suit in the year 1989 and the said notice was issued in the year 2001 seeking specific performance and the Counter Claim itself was filed in the year 2007. Even assuming the date of the said notice, such suit ought to have been filed up to the year 2004 and, consequently, the Counter Claim introduced in the year 2007 for a specific performance was barred by law of limitation.

11. Mr. S. D. Lotlikar, learned Senior Advocate appearing for the Appellant, as pointed out herein above, contended that the cause of act arose only after the year 2007 when the amendment which was allowed to be incorporated in the year 2001 was carried out as, according to him, the cause of action arose in

the year 2007 when the amendment was carried out. The said contention of Learned Senior Advocate, cannot be accepted. Merely because a Counter Claim is allowed to be introduced, does not by itself suggest that the cause of action claimed by the Defendant to file the Counter Claim, cannot be disputed by the Plaintiff by raising the point of limitation and producing material on record that the Suit is barred by limitation in terms of Article 54 of the Limitation Act. In the present case, it is alleged by the Defendant no. 2 himself that the subject Oral Agreement was of the year 1973; the draft Sale Deed was prepared in the year 1979 when Income Tax Certificate was asked to be obtained by the deceased Prabhakar. Admittedly, said Prabhakar did not produce such Income Tax Certificate up to his death in the year 1988. The suit was filed by the Plaintiff without accepting the alleged Oral Agreement somewhere in the year 1989. Though it is alleged by the Defendant no. 2 that the original Plaintiff had knowledge of the said Oral Agreement, this itself would suggest that the Plaintiff who is admittedly the legal heir of the deceased Prabhakar had never accepted the existence of such Agreement. Apart from that, the legal notice was addressed to the Plaintiff in the year 2001 which admittedly the Plaintiff did not accede wherein the Defendant no. 2 called upon the Plaintiff to execute the Sale Deed which he failed to execute. The Counter Claim was introduced only in the year 2007. Besides that, it was pointed out by learned Senior Advocate appearing for the Plaintiff that in the Original written statement filed to the original plaint, there was an averment by the Defendant no. 2 that he intends to file a suit for specific performance based on an Oral Agreement. All these aspects show the correction of the concurrent finding of fact arrived at by the Courts below that the Suit is barred by limitation as the

Plaintiffs always repudiated the alleged Oral Agreement and, in fact, disputed the existence thereof. In such circumstances, I find that there is no reason for any interference in the concurrent finding of fact arrived at by the Courts below on this aspect and, consequently, the Appeal preferred by the Defendant no. 2 challenging the dismissal of the Counter Claim on the ground of being barred by limitation, does not call for any interference by this Court in the present Second Appeal. There is no perversity in the findings arrived at by the Courts below. In such circumstances, I find that the Second Appeal no., 120 of 2016 deserves no consideration and is accordingly rejected.

12. I shall now deal with the contentions of Defendant no. 2 with regard to the Decree granted by the Lower Appellate Court for restoration of possession as well as for permanent injunction. To examine such aspect, the claim of the Defendant no. 2 to contend that he is entitled to remain in possession of the subject property is based on the alleged Oral Agreement executed by deceased Prabhakar with the Defendant no. 2. Whilst dealing with this aspect, the learned Trial Judge has upon appreciating the evidence found that the Oral Agreement has been duly established. But, however, the Lower Appellate Court whilst re-appreciating the evidence on record and upon hearing both the parties, has noted that the pleadings of the Defendant no. 2 to claim such Oral Agreement are based on allegations that a sum of Rs.8,000/- was paid to the said deceased Prabhakar in the year 1973 and that pursuant thereto, the possession of the subject property was delivered by deceased Prabhakar to the Defendant no. 2. It is further contended that there was an incomplete structure in the subject property and that the Sale Deed was to be

executed only after the balance of the total amount of consideration of Rs. 75,000/- was paid by the Defendant no. 2 to the said deceased Prabhakar. It is now well settled that when a suit for specific performance is based on an Oral Agreement, heavy burden is placed on the Plaintiff to establish all the necessary and substantial terms of such Agreement. Though it is contended by the Defendant no. 2 that the Sale Deed was to be executed only after the balance amount was paid by Defendant no. 2 to said deceased Prabhakar, the period within which such payment was to be made has not been pleaded. The Lower Appellate Court upon appreciating the evidence on record has found that the Defendant no. 2 has failed to establish that a sum of Rs.8,000/- was in fact paid by the Defendant no. 2 to the said deceased Prabhakar. The learned Judge has also noted that the evidence of Dw. 7 Dr. Fernando Colaco cannot be relied upon in view of Section 126 of the Indian Evidence Act. The Lower Appellate Court has even proceeded to examine such evidence and found that the evidence would not in any way establish the essential terms of the existence of the Oral Agreement. Admittedly, when the alleged sum of Rs.8,000/- was paid to the deceased Prabhakar, there is no receipt evidencing such payment. No material has been produced by the Defendant no. 2 to establish that in fact such amount was paid to the deceased Prabhakar. The Lower Appellate Court has also discussed the evidence of the witnesses examined by the Defendant no. 2 to point out the contradictions in the evidence which did not disclose any cogent material to establish the existence of an Oral Agreement. The Defendant no. 2, who is stated to be a builder cannot be expected to enter into an Oral Agreement for Sale with the deceased Prabhakar who is stated to be his friend without obtaining a receipt of such amount of Rs.8,000/-. There is no

corroborative material produced on record to establish that in fact in the year 1973, such amount of Rs.8,000/- was paid to said deceased Prabhakar. The finding of fact arrived at by the Lower Appellate Court to come to the conclusion that the Oral Agreement has not been established, cannot be re-appreciated by this Court in a Second Appeal under Section 100 of the Civil Procedure Code. This Court in a Second Appeal cannot re-appreciate the evidence unless there is any perversity arrived at by the fact finding Court. Admittedly, in the present case, there is nothing pointed out that the findings arrived at by the learned Appellate Court were based on no evidence or misreading of evidence or not examining the material document which would go to the root of the issue in controversy. In the present case, the material sought to be relied upon by the Defendant no. 2 is with regard to some house tax receipts which the Lower Appellate Court found, came into existence during the pendency of the suit.

13. The Apex Court in a Judgment reported in **2016 (1) SCC 762** in the case of **K. Nanjappa vs. R. A. Hameed & anr.** has observed that heavy burden lies on the Plaintiff to prove the existence of an Oral Agreement and there should be cogent material to establish that there was consensus ad idem between the parties for the concluded agreement for sale of immovable property. The Apex Court has observed in this connection at paras 22, 23 and 24 thus :

“22. However, in a case where the plaintiff comes forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement or a written contract, heavy burden lies on the plaintiff to prove that there was consensus ad idem between the parties for the

concluded agreement for sale of immovable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties.

23. In a suit for specific performance of a contract, the court has to keep in mind Section 20 of the Specific Relief Act, 1963. This Section preserves judicial discretion to grant decree for specific performance. However, the court is not bound to grant specific performance merely because it is lawful to do so. The court should meticulously consider all facts and circumstances of the case and to see that it is not used as an instrument of oppression to have an unfair advantage not only to the plaintiff but also to the defendant.

24. In *Surya Narain Upadhyaya v. Ram Roop Pandey*, this Court while considering Section 20 of the Specific Relief Act held as under: (SCC pp. 543-44, para 4)

“4. Though the decree for specific performance is a discretionary power, yet the court is not bound to grant such a relief merely because it is lawful to do so; but the discretion of the court is not arbitrary, but sound and reasonable, guided by judicial principles of law and capable of correction by a court of appeal. Therefore, the discretion should be properly exercised keeping in view the settled principles of law as envisaged in Section 20 of the Act. This case demonstrates that the High Court took

irrelevant consideration into account to refuse to grant the decree for specific performance. It also committed manifest illegality in reversing the concurrent finding of facts recorded by the trial court as well as the first appellate court, namely, the appellant has always been ready and willing to perform his part of the contract.”

14. Taking note of the observations of the Apex Court as pointed out herein above, in the present case, the fact finding Court has found that the Defendant no. 2 has failed to establish the existence of a concluded Agreement between the said deceased Prabhakar and the Defendant no. 2. As already pointed out herein above there is no perversity in such finding of fact arrived at by the fact finding Court. In such circumstances, I find that the Defendant no. 2 has failed to establish the existence of a Oral Agreement with the deceased Prabahakar. Apart from that, granting specific performance is a judicial discretion of the Court under Section 20 of the Specific Relief Act. Even in cases in which the Plaintiff may be entitled for grant of specific performance, the Court has a discretion to refuse such relief to the Plaintiff. No doubt, such discretion cannot be exercised arbitrarily. In this connection, in the present case, admittedly, the alleged Oral Agreement was executed in the year 1973, the parties allegedly approached the Dw. 7 in the year 1979 when a draft Sale Deed was prepared and deceased Prabhakar was asked to obtain an Income Tax Clearance Certificate, from the year 1979 up to the year 1988, there is nothing pleaded or established by the Defendant no. 2 to show his readiness and willingness to perform his part of the contract. There is no material on record even to show that in fact deceased Prabhakar had applied to the Income Tax Department to get a Income Tax Clearance Certificate.

This would further suggest that the existence of the concluded contract as alleged by the Defendant no. 2 is itself obscure as records do not show that at any point of time, deceased Prabhakar took any steps to obtain such Income Tax Clearance Certificate. This disinclination on the part of deceased Prabhakar to obtain the Income Tax Certificate from the year 1979 up to his death in the year 1988, would itself suggest that said Prabhakar had no intention of executing any Sale Deed in favour of the Defendant no. 2. Apart from that, the Lower Appellate Court whilst examining the evidence on record has found that the Defendant no. 2 has failed to establish his readiness and willingness to perform his part of the alleged Agreement. On perusal of the averments of the plaint, the only allegation therein is that the Defendant no. 2 was willing to perform his part of the contract throughout. The particulars of his readiness and willingness have not been pleaded nor any material produced on record to substantiate such aspect. In such circumstances, I find that in any event the Lower Appellate Court was justified to refuse to exercise discretion in favour of the Defendant no. 2 for specific performance of the subject contract. As pointed out herein above, the fact finding Court has found that the concluded contract has not been established by the Defendant no. 2 and, in any event, granting specific performance on the basis of a Counter Claim filed in the year 2007 when the alleged Agreement was executed in the year 1978, would itself be a ground to refuse to exercise discretion in favour of such party for specific performance considering the provisions of Section 20 of the Specific Relief Act, 1963.

15. In this connection, the Apex Court in a Judgment reported in **(2016) 1**

SCC 653 in the case of ***Ramesh Chand vs. Asruddin & anr.***, has observed at Para 8 thus :

“8. Section 20 of the Specific Relief Act, 1963, provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so. However, the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles. Sub-section (2) of Section 20 of the Act provides the three situations in which the court may exercise discretion not to decree specific performance. One such situation is contained in clause (a) of sub-section (2) of Section 20 which provides that where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant, the decree of specific performance need not be passed. It is pertinent to mention here that in the present case, though execution of the agreement dated 21-6-2004 between the parties is proved, but it is nowhere pleaded or proved by the plaintiff that he got redeemed the mortgaged land in favour of Defendant 2 in terms of the agreement, nor is it specifically pleaded that he was ready and willing to get the property redeemed from the mortgage.”

15. Taking note of the said observations of the Apex Court, I find that the Lower Appellate Court was justified to refuse the relief of specific performance in favour of the Defendant no. 2.

16. The only aspect which remains to be examined is the contention of Mr. S. D. Lotlikar, learned Senior Advocate appearing for the Defendant no. 2 that the Appellate Court was not justified to direct the relief of restoration of possession and the relief of injunction as granted by the Lower Appellate Court. In this connection, the learned Senior Advocate has pointed out that there is no averment in the plaint that the Defendant no. 2 was in possession of the subject house and property which has to be restored in favour of the Plaintiff. The learned Senior Advocate further pointed out that the ownership of the property devolved upon the Plaintiff only after the homologation of the partition which occurred in the year 2001. The said contention cannot be accepted. In terms of Article 2011 of the Portuguese Civil Code and Section 13 of Goa Succession Act 2012, the transmission of the right of inheritance devolves simultaneously upon the death of the Estate Leaver. In such circumstances, the ownership and the possession of the inheritance of the deceased Prabhakar devolved upon the Plaintiff and the other co-heirs immediately upon his death in the year 1988. Mere disposal of the Inventory Proceedings cannot extend the devolution of the rights which were transmitted in favour of the legal representatives upon the death of said Prabhakar. Apart from that, the learned Trial Judge whilst refusing the relief of restoration of possession, has found that the Defendant no. 2 was in lawful possession of the subject property. But, however, the Lower Appellate Court whilst examining the claim of possession of the

Defendant no. 2 found that the Defendant no. 2 has failed to establish his claim that he was in possession of the subject property. In fact, on perusal of the pleadings of the Counter Claim as well as defence in the written statement filed to the original Suit, apart from alleging that the Defendant no. 2 was in possession of the property, there were no particulars of any such possession of the subject property. It is not in dispute that only an incomplete structure was existing in the subject property and there is material on record to show that the remaining portion of the land was open land. The contention of the Defendant no. 2 that he was parking the trucks in the subject property has not been accepted by the Lower Appellate court whilst disposing of the Appeal preferred by the Plaintiff. It is very pertinent to note that the particulars of possession were sought to be placed on record only by an additional affidavit in the year 2011. Prior to that, when the Plaintiff had entered the witness box, there were no specific acts placed by the Defendant no. 2 of his alleged possession referable to the parking of trucks in the property since the year 1973. The Lower Appellate Court has also rejected such evidence as it was beyond the pleadings.

17. Mr. S. D. Lotlikar, learned Seniro Advocate appearing for the Defendant no. 2, has further pointed out that the party has only to plead facts and not evidence and, according to him, the fact that the Defendant no. 2 was parking his vehicles was in support of the pleadings that the Defendant no. 2 was in possession of the subject property. Though it cannot be disputed that evidence may not be pleaded but when the Defendant no. 2 is seeking to defeat the right of the legal representatives based on the alleged possession delivered by the

deceased Estate Leaver, it is incumbent upon such party to disclose all his alleged acts of possession so that the legal representatives can have notice of these aspects whilst dealing with such allegations in the Suit. Admittedly, in the present case, no such pleadings were found in the written statement and, as such, the Lower Appellate Court was justified to reject the allegations made in the additional written statement which was filed only in the year 2011 much after the evidence of the Plaintiff had concluded.

18. The next contention of Mr. S. D. Lotlikar, learned Senior Advocate that even assuming the suit for specific performance is barred by limitation, it does not preclude the purchaser to seek protection of possession in terms of Section 53-A of Transfer of Property Act. It is further pointed out by the learned Senior Advocate that it is contended by the learned Counsel that though an oral Agreement was entered nevertheless the draft of the Agreement prepared by Dw. 7 allegedly at the instance of the Defendant no. 2 and the said Prabhakar, can be considered to be a writing which would protect possession under Section 53-A of the Transfer and Property Act. The said contention of Mr. S. D. Lotlikar, learned Senior Advocate appearing for the Defendant no. 2, cannot be accepted. In order to get protection under Section 53A of the Transfer and Property Act, the writing has to precede the delivery of possession. In the present case, it is alleged by the Defendant no. 2 that such possession was delivered in the year 1973 and the alleged draft of the Agreement prepared in the 1979 which cannot assist the Defendant no. 2 to take a plea of part performance in terms of Section 53A of the Transfer and Property Act.

19. In this connection, the Apex Court in a Judgment reported in **2002(2) SCC 612** in the case of **Mool Chand Bakhru v. Rohan**, has observed at Paras 15 and 16 thus :

“15. Statutorily the emphasis is not on a written agreement only. In addition, the emphasis is on the terms of the agreement as well which can be ascertained with reasonable certainty from the written document. There was no meeting of minds. Admission made by Mool Chand of an oral agreement to sell does not spell out the other essential terms of the agreement to sell such as the time-frame within which the sale deed was to be executed and as to who would pay the registration charges etc. The letters written by Mool Chand cannot be taken to be an agreement to sell within the meaning of Section 53-A spelling out the terms of an agreement for sale. In our view, the High Court fell in error in coming to the conclusion that the letters written by Mool Chand, referred to above, constituted an agreement to sell, the terms of which have been reduced in writing. Terms necessary to constitute the transfer with reasonable certainty could not be ascertained from the letters written by Mool Chand to his uncle. At the most, it is an acknowledgment that there was an oral agreement to sell but the same could not be construed to be a written agreement to sell, the terms of which have been reduced into writing. Written agreement has to precede the putting of the proposed vendee in possession of the property. Bhagwan Dass was never put in possession of the property in pursuance of the

written agreement arrived at between the parties.

16. For the reasons stated above, the appeal is accepted. Judgment of the High Court is set aside and the suit filed by the plaintiff-appellants for possession and mesne profits of their property is decreed.”

20. Taking note of the said observations, as admittedly in the present case, there is no writing which preceded the alleged delivery of possession, it is not open to the Defendant no. 2 to claim protection under Section 53A of the Transfer and Property Act. In such circumstances, in view of the allotment in favour of the Plaintiff, he is the owner in possession of the subject property and, consequently, is entitled for the relief sought in the Suit and the Defendant is not entitled for the relief sought in the Counter Claim. Mr. S. D. Lotlikar, learned Senior Advocate has also raised the contention that if a proper suit was instituted against the Defendant no. 2 by the Plaintiff, he could also raise the point that he was in adverse possession of the subject property. Though the fact finding Court found that the Defendant no. 2 was not in possession of the subject property, nevertheless the observations of the Apex Court in the case of **Mool Chand Bakhru v. Rohan** (supra) clearly show that the Apex Court at Para 9 has clearly observed that the pleas of adverse possession and retaining the possession by operation of Section 53A of the Transfer Property Act, are inconsistent with each other, and such a plea is not available to a proposed Vendee. In the present case, the claim of the Defendants rests upon their alleged Oral Agreement with deceased Prabhakar Vishnu Salgaonkar who, according to the Defendant, had permitted them to occupy the subject premises which for the reasons stated above, has not

been established by the Defendants. In such circumstances, the question of claiming any adverse possession by the Defendants/Vendees on the basis of an alleged Agreement would not at all arise.

21. In view of the above, I find that there is no merit in the above Appeal. The substantial question of law proposed by the Appellant would entail re-appreciating the evidence on record which cannot be carried out in a Second Appeal under Section 100 of the Civil Procedure Code. As pointed out herein above, the finding of fact arrived at by the fact finding Court is based on the material on record and there is no perversity in such finding arrived at by the Lower Appellate Court. In view of the above, the appeal stands rejected.

22. Both the Appeals stands rejected.

F .M. REIS, J.

arp/*