

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 81 OF 2017

1. Shri Ganu Naik,
(Treasurer Dhavali Sarvajanik Ganeshotsav Mandal),
of major age,
residing at C/o Top Hotel,
Close to Ponda-Margao Road,
Dhavli Ponda-Goa.
2. Shri Vishnu M. Surve,
(Vice-President, Dhavali Sarvajanik Ganeshotsav Mandal)
of major age,
residing next to Panky Tiles Factory,
Close to Ponda-Margao Road,
Dhavalimol, Ponda-Goa.
3. Shri Sanjay Ghate,
(Secretary, Dhavali Sarvajanik Ganeshotsav Mandal)
of major age,
residing at B-6, Chaitannya Apartments,
Dhavali, Ponda-Goa.
4. Shri Gaurish Hede,
(Assistant Secretary, Dhavali Sarvajanik Ganeshotsav Mandal)
of major age, residing at G-3,
Ground floor, Marva Apartments,
Dhavali, Ponda-Goa.
5. Shri Monal Madhav Manerikar,
(Assistant Treasurer, Dhavali Sarvajanik Ganeshotsav Mandal)
of major age,
residing at H. No. 223,

Near Satyanarayan Temple,
Dhavali, Ponda-Goa.

6. Shri Ulhas Bhagwant Kamat,
(President, Dhavali Sarvajanik Ganeshotsav Mandal)
of major age,
residing at A-1, Laxmiraj Vihar Colony,
Dhavali, Ponda-Goa.
7. Shri Vijendra K. Dhavalikar,
of major age,
residing at Varachawada,
Dhavali, Kavale, Ponda-Goa.
8. Shri B. N. Bhat,
of major age,
residing at Dhavli Mal,
Ponda-Goa.
9. Sou Vishakha G. Dhavalikar,
of major age,
residing at Dhavali, Ponda Goa.
10. Shri Datta Damodar Hegde,
of major age,
residing Flat no. 2,
Tip Top-II, Dhavali,
Ponda-Goa.
11. Shri Devidas L. Ghate,
of major age, residing at Khandepar,
Ponda Goa.
12. Shri Jaiprakash Laxmikant Ghate,
of major age, residing at Chaitannya Apartments,

Dhawali, Ponda-Goa.

13. Shri Yeshwant Nilkant Naik,
of major age,
residing at H. No. 190,
Dhawali-Mol, Kawale, Ponda-Goa.
14. Sou Shilpa Gaurish Hede,
of major age,
residing at Flat no. G-3, Marwa Apartments,
Dhawali, Ponda-Goa.
15. Sou Shubadha J. S. Hede,
of major age,
residing at Flat no. G-3, Marwa Apartments,
Dhawali, Ponda-Goa.
16. Shri Harshvardhan S. Behare,
of major age,
residing at House no.93,
Dhawali, Ponda-Goa.
17. Shri Madhukar Vernekar,
of major age,
residing at Krishnakamla Apartments-3,
Dhawali, Ponda-Goa.
18. Sou Mohini Vernekar,
of major age,
residing at Krishnakamla Apartments-3,
Dhawali, Ponda-Goa.
19. Shri Mahesh Vernekar,
of major age,
residing at Krishnakamla Apartments-3,

Dhavali, Ponda-Goa.

20. Shri Prasad S. Parkar,
of major age,
residing at H. No. 312,
Parimal Housing Co-operative Society,
Dhavali, Ponda-Goa.
21. Shri M. B. Lava,
of major age, residing at
Dhavali, Ponda-Goa.
22. Shri Shashidharan,
of major age,
residing at Tip Top Mansion,
Dhavali, Ponda-Goa.
23. Shri Jaiprasad Khandeparkar,
of major age,
residing at EMVI Enterprises,
Dhavali, Ponda-Goa.
24. Shri Yatin Yeshwant Naik,
of major age,
residing at H. No. 190, Dhavali-Mol,
Kavale, Ponda-Goa.
25. Sou Nalini Kumbhar,
of major age,
residing at Dhavali, Ponda-Goa.
26. Shri Amir Kumbhar,
of major age,
residing at Dhavali, Ponda-Goa.

27. Sou. Dipti Yeshwant Naik,
of major age,
residing at H. No. 190, Dhavali-Mol,
Kavale, Ponda-Goa.
28. Shri M. Venkoba Rao,
of major age,
residing at B-2, Chaitanya Apartments,
Dhavali, Ponda-Goa.
29. Shri Somnath D. Kumbhar,
of major age,
residing at Dhavali, Ponda-Goa.
30. Shri Shyam V. Shinkre,
of major age,
residing at Dhavali, Ponda-Goa.
31. Smt. Vitorina Pereira,
of major age,
Residing at Dhavli, Ponda-Goa.
32. Shri Anil K. Dessai,
of major age,
residing at C-5, Chaitannay Apartments,
Dhavali, Ponda-Goa.
33. Shri Mayur Vernekar,
of major age,
residing at Krishnakamal Apartments 3,
Dhavali, Ponda-Goa.
34. Shri S. V. Korde,
of major age,
residing at Dhavali, Ponda Goa.

35. Shri Manohar Dessai,
of major age,
residing at Sankalpana,
Dhaval, Ponda-Goa.

36. Sou Anjali Lava,
of major age,
residing at Krishnakamal Apartments II,
Dhaval, Ponda Goa.

37. Shri Gajanan D. Naik,
of major age,
Residing at C/o Top Hotel,
Dhavli, Ponda, Goa.

... Appellants

Versus

1. Krishnakamal Apartments,
Co-operative Housing Society Ltd.,
Apartment-1, Dhavli, Ponda, Goa,
Through its Secretary,
Shri Shashikant Anant Raikar,
of major age,
Residing at Flat No. 5, First Floor,
Krishnakamal Apartment I,
Dhavli, Ponda, Goa.

2. Shri Shivaji D. Naik,
of major age, General Merchant,
residing at Dhaval,
Ponda Goa.

3. Shri Lavu R. Konduskar,
of major age,
residing at Flat no. S-7, Tip Top Mansion IV,

Dhavali, Ponda Goa.

4. Shri Vinayak L. Konduskar,
of major age,
residing at Flat no. S-7, Tip Top Mansion IV,
Dhavali, Ponda Goa.
5. Shri Mohan M. Gude,
of major age,
residing at Seikera Apartments,
Opp. Syndicate Bank,
Dhavali, Ponda Goa.
6. Shri Hiru V. Naik,
of major age,
residing at H. No. 270,
Dhavali-Mol,
Kawale, Ponda Goa.
7. Shri Krishna V. Tadadikar,
of major age,
residing at Febina Apartments,
III Floor, Dhavali, Ponda Goa.
8. Shri Alphose Joseph,
of major age,
residing at Dhavali, Ponda Goa.
9. Shri Abhinay G. Naik,
of major age,
residing at Chaitannya Apartments,
Dhavali, Ponda Goa.
10. Sou Meena K. Tadadikar,
of major age,

residing at 3rd floor, Febema Apartments,
Dhawali, Ponda Goa.

11. Shri Damodar G. Naik,
of major age,
residing at C/o Deepa Bar,
Dhawali, Ponda Goa.

12. Shri Mahesh A. Konkar,
of major age,
residing at Flat no. F-2,
Saurabh Apartments,
Dhawali, Ponda Goa.

13. Shri K. B. Ghasari,
of major age,
residing at C/o Goa Coach,
Dhawali, Ponda Goa.
(since expired represented by his L.R's)
13(a) Smt. Krishna Ghasari.
13(b) Shri Sanjay Krishna Ghasari
Both of major ages,
residing at Gokul Smruti,
Near Dhawali Bus Stop,
Dhawali, Ponda Goa.

14. Kum. Shailendra G. Babshet,
of major age,
residing at H. No. 227, Kanaka Niwas,
Dhawali, Ponda Goa.

15. Shri Ajay Dhiman,
of major age,
residing at Febema Apartments,
Dhawali, Ponda Goa.

16. Shri Santosh D. Hegde,
of major age,
residing at Flat no. 2, Tip Top 2,
Dhawali, Ponda Goa.
17. Smt. Bharati D. Hegde,
of major age,
residing at First Floor,
Room no. 2, Tip Top Mansion,
Dhawali, Ponda Goa.
18. Shri Sunil Rama Gawade,
of major age,
residing at C/o Top Hotel,
Dhawali, Ponda Goa.
19. Shri Kiran Limaye,
of major age,
residing at House no. 212,
Dhawali, Ponda Goa.
20. Shri Gopal R. Babshet,
of major age,
residing at House no. 227,
Kanaka Niwas, Dhawali,
Kawale, Ponda Goa.
(since deceased represented by his L.R's)
20(a) Pavan G. Babshet of major age,
20(b) Pankaj G. Babshet, of major age,
20(c) Mrs. Gopal Babshet, of major age,
All residents of House No. 227,
Kanaka Niwas, Kavale, Ponda Goa.
21. Shri Jivaji P. S. Hede,
of major age,

residing at flat no. G-3,
Marwa Apartments,
Dhawali, Ponda Goa.
(since deceased represented by his L.Rs')

21(a) Sou Jyoti Jtvaji Hede
alias Jyoti Sarvash,
of major age and her husband

21(b) Shri Sarvesh Ambe,
of major age,
both are residing at Savarkuttai Cuncolim, Salcette, Goa.

22. Sou Rajani M. Shetye,
of major age, residing at Tip Top II, Room no. 2,
Dhawali, Ponda Goa.

23. Shri Damodar P. Naik,
of major age,
residing at C/o Deepa Bar and Restaurant,
Dhawali, Ponda Goa.

24. Shri Umesh M. Kenkre,
of major age,
residing at Swapna Gandha,
Dhawali, Ponda Goa.

25. Sou Vinaya G. Sardessai,
of major age,
residing at H. No. 190, Dhawali-Mol,
Kawale, Ponda Goa.

26. Smt. Indira U. Kenkre,
of major age,
residing at Swapna Gandha Building,
Dhawali, Ponda Goa.

27. Shri Jeevan Kumbhar,
of major age,
residing at Dhavali, Ponda Goa.
28. Shri Shrinivasa Kamat,
of major age,
residing at Flat no. T-7, Tip Top Mansion,
Dhavali, Ponda Goa.
29. Shri M. V. Khandeparkar,
of major age,
Residing at Flat no. F-1,
Tip Top Mansion IV, Behind Syndicate Bank,
Dhavali, Ponda Goa.
(since expired through his L.R's)
- 29(a) Mrs. Mohini Mohan Khandeparkar,
resident of Flat no.F-1, Tip Top Mansion 4,
Behind Syndicate Bank, Dhavali, Ponda Goa.
30. Shri Suhas G. Havaladar,
of major age,
residing at Dhavali, Ponda Goa.
(since deceased, represented, by his legal heir/widow)
- 30(a) Smt. Anjali Havaladar,
of major age,
residing at Ground floor, Shubham Building,
Dhavali, Ponda Goa.
31. Shri Shashikant R. Naik,
of major age,
residing at H. No. 61/1,
Kalchawada, Dhavali, Ponda Goa.

32. Shri R. R. Pawar,
of major age,
residing at Omkar, Navdurga, Garden,
Borim, Ponda Goa.
33. Shri Prakash D. Bawe,
of major age,
residing at Khalchawada H. No. 495,
Dhawali, Ponda Goa.
34. Shri Ashok Anant Kamat,
of major age,
residing at Dhawali, Ponda Goa.
35. Sou Priyanka I. Singh Gaikwad,
of major age,
residing at H. No. 2,
Dhawali, Ponda Goa.
36. Shri Surjeesh M. Nambiar,
of major age,
residing at Dhawali, Ponda Goa.
37. Sou Ajura Haldankar,
of major age,
residing at House No.2,
Indira Nagar, Dhawali-MOI,
Dhawali, Ponda Goa.
38. Shri Anand I. Singh Gaikwad,
of major age,
residing at H. No. 2,
Dhawali, Ponda Goa.
39. Shri Indrajeet A. Singh Gaikwad,

of major age,
residing at H. No. 2,
Dhawali, Ponda Goa.

40. Shri S. S. Pawar,
of major age,
residing at Vishambhar Nagar,
Near Forest Dept.,
Dhawali, Ponda Goa.

Mr. Shashikant N. Joshi, Advocate with Ms. Aditi Kamat, Advocate
for the Appellants.

Mr. Vinoj K. Daniel, Advocate for Respondent no. 1

Mr. Sanjay Ghate, Representative of Respondent no. 2 to 40.

Coram : N.M. Jamdar, J.

Date : 24 November 2017.

ORAL JUDGMENT:

Heard Mr. S. N. Joshi, learned Counsel for the Appellants and Shri V. K. Daniel, learned Counsel for the Respondent no. 1. Though the learned Counsel on behalf of Respondent no. 2 to 40 is not present today, Mr. Sanjay Ghate, the representative of Respondent no. 2 to 40 is present and the learned Counsel for the Appellant states that the interest of the Appellants and the Respondent no. 2 to 40 is the same which has been confirmed by the representative of Respondent no. 2 to 40, and the other Advocates.

2. Admit. Question of law has already been framed by an earlier order. The filing of paperbook is dispensed with. By consent, taken up for hearing forthwith.

3. The Original Defendants have filed the Second Appeal being aggrieved by the Judgment and Decree dated 18 April 2017 passed by the District Judge, Panaji in Civil Appeal no. 23/2012. The learned District Judge by the impugned Judgment had allowed the Appeal and set aside the Judgment and Order passed by the learned Civil Judge Junior Division, Ponda in Regular Civil Suit no. 59 of 2004.

4. The Respondent-Plaintiff which is a Co-operative Society, filed Regular Civil Suit no. 59 of 2004 in the Court of the Civil Judge Junior Division, Ponda seeking a relief of permanent injunction and consequently directions. According to the Plaintiff-Society, it occupies a building known as Krishnakamal Apartments, and the building/plot admeasuring 855 sq.mts is near the Ponda-Margao National Highway. According to the Respondent-Plaintiff, its members are in possession of the building and the plot, however, the Defendants, taking advantage of the absence of the Plaintiffs due to Ganesh Chaturthi celebration, sought to encroach upon the property and disturb the possession of the complainant and therefore

a suit for injunction had to be filed. The Defendants contested the suit by filing written statements and disputed that the area claimed by the Plaintiff-Society is forming part of the open area between the Ponda-Margao highway and sub-divided plot existed and that the Plaintiffs have no right whatsoever to the area. The learned Civil Judge framed issues as to the ownership of the suit plot, whether the Plaintiffs have been conducting the Ganesh festival on the suit plots and whether there existed any shed on the suit plot and disturbance was caused by the Defendants. The learned Civil Judge answered these issues in the negative and by Judgment and Order dated 30 December 2011, dismissed the suit. In the Appeal filed by the Plaintiff, the learned District Judge by Judgment and Order dated 18 April 2017 reversed the findings of the learned Civil Judge and decreed the suit. The learned District Judge accordingly granted injunction against the Defendants some of them have filed the present Second Appeal.

5. Having heard the learned Counsel for the parties, on 18 August 2017, the learned Single Judge of this Court, (*G. S. Patel, J*) has framed the following questions of law for consideration:

I. Whether the learned First Appellate Court misconstrued the pleadings, evidence and documents on record, resulting in miscarriage of justice as against the Defendants?

II. Whether the learned First Appellate Court misconstrued the open space in the road widening area between the suit plot and the tar road to be the statutory open space as contemplated under Regulation 12.4 of the Goa Land Development & Building Construction Regulation 2010?

III. In absence of any title or possession in favour of the Plaintiffs, whether the First Appellate Court erred in granting permanent injunction against the Defendants, their agents, servants, etc, acting through or under them from celebrating Sarvajanik Ganesh Utsav in the road widening area between the boundary of the suit plot and Ponda-Margao bypass road?

6. I have heard the Counsel for the parties on the questions of law so framed. As the learned Counsel for the parties agree that the entire dispute revolves around the strip of land in which the Ganesh Utsav is stated to be conducted. As to the location of the strip of land, the character and ownership, as the learned Counsel for the parties agree, will have to be ascertained with reference to survey maps and other such official documents. It is clear from the decisions of both the Courts that what essentially is before the Court is a boundary dispute.

7. In the suit filed for injunction where the boundaries and the location of the land is in dispute, this Court in the case of

*Manohar Mahadeorao Pagrut v. Sunanda Ramdas Tharkar*¹; *Sou. Ashatai w/o. Vijayrao Warekar & Ors., v. Champatrao Laxmanrao Kale & Anr*² and *Niranjanabai Chandrakant Vira v. Pramilabai Balkrishna Zade & another*³ has held that in cases of disputes relating to boundaries, the ocular evidence cannot be sufficient and for a speedy resolution of disputes a survey through independent witness, preferably a Government surveyor is a proper course of action to be taken. In the present case there is no such Court appointed Commissioner in both the Courts. Both the Courts could have directed the appointment of a government surveyor who could have submitted the report and who could have been then cross-examined. Though Patel, J, by Order dated 7 September 2017 and 6 October 2017 has directed that the Directorate of Settlement & Land Records to carry out the survey, the evidentiary value of such report will have to be decided as the learned Counsel for the parties are not *ad-idem* regarding the veracity of this report. It is not possible in a second appeal to appreciate evidence which is placed before the Court for the first time. The learned Counsel for the parties agree that the evidence of the Court appointed Surveyor can be called for by the Trial Court. Thus, the Trial Court will have to direct the survey by a Government Surveyor whose report can be placed on record and the surveyor can be called as witness and cross-examined.

1 2008(3)BCR 4

2 2011(5) All MR 658

3 2004(6) BCR 829

The learned Counsel for the parties agree that such course of action will put an end to the long standing dispute and the same can be resolved conclusively.

8. In these circumstances, the question of law framed will have to be answered accordingly and the Judgment and Decree passed by both Courts will have to be set aside and the suit will have to be restored to file. In view of the arguments made by the learned Counsel for the parties, which are noted above, either of the parties can make an application for appointment of a Court Commissioner/official surveyor to the Trial Court and the Trial Court can then follow the methodology indicated in the decisions supra.

9. Accordingly, the Appeal is disposed of by the following Order:

- i. The Judgment and Decree dated 18 April 2017 in Regular Civil Appeal no. 23/2012 passed by the District Judge-2, Panaji, and the Judgment and Decree dated 30 December 2011 in Regular Civil Suit No. 59/2004/C passed by the learned Civil Judge, Junior Division, Ponda are quashed and set aside.
- ii. The Regular Civil Suit bearing no. 59 of 2004/C stands

restored on the file of the learned Civil Judge, Junior Division, Ponda.

iii. The parties will appear before the learned Civil Judge on 5 December 2017 at 02:30pm wherein the learned Civil Judge will give further directions.

iv. All contentions of the parties on merits are kept open.

10. In view of the disposal of the Appeal, the pending Civil Application no. 132 of 2017 stands disposed of.

N.M. Jamdar, J.