

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 67 OF 2004**

Shri Saunsthan Gokarn Partagal
Jivottam Mutt, a religious body,
with office at Partagal, Canacona,
Goa, represented by its Attorney,
Shri Vasudev Venkatesh Phal Dessai
Aged 71, agriculturist,
residing at Velvada, Poinguinim,
Canacona-Goa.

.... Appellant/
Original Plaintiff

V e r s u s

1. Shri Narayan Raghunath Dessi,
residing near Police Station,
at Canacona, Goa,
(Since deceased represented through
legal representatives)

- 1.a. Shri Santosh Narayan Dessai
- 1.b. Sugandh S. Dessai,
- 1.c. Divakar Narayan Dessai
- 1.d. Uday Narayan Dessai
All residents of Mastimol, Canacona.

- 1.e. Mrs. Shoba Ashok Dessai
- 1.f. Mr. Ashok Vaikunt Dessai
Both resident of Bhivshem, Cuncolim

2. Shri Soiru Raghunath Dessai
residing at Thalnem,
Gaondonrem, Canacona, Goa
(since deceased represented through
legal representatives)

- 2.a. Smt. Laxmi Soiru Dessai
- 2.b. Shri Pramod Soiru Dessai

2.c. Shri Dayanand Soiru Dessai,
(Respondent nos.2a. And 2c are deleted
as per order dated 1.2.2008 passed in
C.A No.160/2004 and MCA no.36/2008)

2.d. Shri Sandeep Soiru Dessai,

2.e. Miss Prema Soiru Dessai,
All residents of Thalnem,
Gaodongrem, Canacona.

2.f. Shri Jivottam Soso Dessai

2.g. Mrs. Sharad Jivonttam Dessai

Both resident of Bhivshem,
Cuncolim, Goa.

3. Shri Ratnakar Datta Naique Dessai,
residing at Thalnem,
Gaodongrem, Canacona, Goa,
(Since deceased represented through
legal representatives)

3.a. Smt. Mayavati Ratnakar Dessai,

3.b. Miss Babi Ratnakar Dessai,

3.c. Miss Mali Ratnakar Dessai,

3.d. Mr. Jova Ratnakar Dessai alias
Premanand

3.e. Miss Ujwala Ratnakar Dessai,

All residents of Thalan Wadda,
Gaundongrem, Canacona, Goa.

4. Shri Manju Datta Dessai,
residing at Thalnem, Gaondongrem,
Canacona, Goa (expired) through Lrs
a) Mrs. Mamata Manju Dessai
b) Mr. Datta Manju Dessai,
c) Mr. Umesh Manju Dessai,
d) Smt. Saila Manju Dessai,
e) Kum. Nailini Dessai,
f) Kum. Prafula Manju Dessai,
g) Smt. Jeevan Dessai,

all residents of Tarna,
Gaundongrim, Canacona,
House No.380,
(Amendment carried out as per order
dated 14/9/2005 and order dated
28/10/2005 in MCA no.793/2005.)

5. Shri Krishna Devappa Dessai,
residing at Thalnem,
Gaongongrem, Canacona, Goa and

6. Shri Anandu Raghunath Dessai,
residing at Thalnem,
Gaondongrem, Canacona, Goa

..... Respondents/
Original Defendants

Shri Sudesh Usgaonkar with Ms. R. Pereira for the Appellant.

Shri P. Rao, Advocate with Adv. Ravi Anand for the Respondents no.3(a) to
3 (e), 5 and 6.

CORAM: C. V. BHADANG, J.
Reserved on : 14/06/2018
Pronounced: on 19/06/2018.

J U D G M E N T:

The challenge in this appeal, at the instance of the appellant/original plaintiff, is to the concurrent finding of dismissal of the suit filed by the appellant, by the Courts below.

2. The appellant had filed Regular Civil Suit No.81/88 (Old R.C.S. No.39/1984) against the respondents before the learned Civil Judge Junior

Division at Canacona for injunction restraining the respondents from cutting or transporting any trees from the suit property and from interfering with the same in any manner. In paragraph 1 of the plaint the suit property is described as under :

(a) “XEDIFOND” or 'DEODICHO FONDO” described in the Land Registration office under No.21317 and enrolled in the Land Revenue Office under No.610. It is bounded on the east by Thalnintil Ran registered in the Revenue Roll under No.599 and on the west and south by sweet water river and on the north by Tisreanch Nhoi (river) .

(b) “PALIEM” or “PALIEM VAINGONA' described in the Land Registration Office under No.19438 and in the Land Revenue Office under No.609. It is bounded on the east, west and south by sweet water river and on the north by the property “XEDIFONDO” of the plaintiffs and “USMOSTAL” off the defendants

These two properties are hereinafter referred to as “the suit properties”.

3. According to the appellant the whole of “Paliem” or “Paleim Vaingona” and a part of property “Xedifondo” or “Deddicho Fondo” lies in the western portion of survey no. 228/1 of Gaondongrem village of Canacona Taluka and the remaining part of “Xedifondo” or “Deddicho Fondo” lies in survey no. 229 of the same village. Some other persons are also having their lands which are part of survey no.228/1 and survey no 229.

According to the appellant, the respondent without any right, title or interest started felling trees in the suit property on 11/2/1984 which led the appellant to file the suit as aforesaid.

4. The respondents filed a written statement and resisted the suit. The respondents denied the description/identification of the property as set out in para one of the plaint. According to the respondents, the property of the appellant lies only in survey no.229/1 and not in any other survey number. It was claimed that the defendant no.3 cut and transported 20 truck loads of fire wood in the month of September-October 1983 under licence issued by the Forest Department on 7/7/1983. It was contended that the forest produce was cut from the property known as "Usmostal" alias "Peddamol". In short, according to the respondents all their property is surveyed under survey no.228/1 and 229. The forest produce was not cut from the property belonging to the appellant.

5. On the basis of the rival pleadings, the learned trial court framed as many as 10 issues and except issue nos.6, 7 and 8 answered all other issues in the negative. The learned trial court came to the conclusion that the appellant had failed to establish that he is the owner in possession of the property described in para one of the plaint and on the contrary found that the original

defendant no.3 had established that the forest produce was cut under licence from the forest department from the property known as “Usmostal” alias “Peddamol”. In that view of the matter the suit came to be dismissed by judgment and order dated 21/4/1994.

6. The appellant carried the matter in appeal before the learned District Judge in Regular Civil Appeal no.33/1994. The learned District Judge framed two points for consideration, namely, (I) whether the appellant/plaintiff proves that the suit properties are surveyed under survey no.228/1 and (II) Whether the appellant/ plaintiff is entitled for injunction as claimed. The District Judge answered both the points in the negative and dismissed the appeal, which brings the appellant to this Court.

7. I have heard Shri Usgaonkar, the learned counsel for the appellant and Shri Rao, the learned counsel appearing for the respondents. With the assistance of the learned counsel for the parties, I have gone through the record.

8. It is submitted by Shri Usgaonkar, the learned counsel for the appellant that the dispute between the parties essentially is about the identification of the property. It is submitted that the Courts below were not justified in

placing reliance on the Form No.III which cannot be said to be a Record of Rights, within the meaning of Section 94 of the Goa Land Revenue Code (Code, for short). It is submitted that unlike Form I (which is a Record of Right), no presumption can arise on the basis of Form No.III which is not a Record of Rights. It is thus submitted that the presumption under section 105 of the Code cannot be called into aid on the basis of Form No.III. It is submitted that the Courts below ought to have appointed a Commissioner having regard to the fact that there was a genuine and a bona fide dispute about identification of the property.

Reliance in this regard is placed on the decisions of this Court in the case of (i) **Kashinath (s/o Ramkrishan Chopade Vs. Purushottam Tulshiram Tekade and others 2005 (4) Mh. L.J.** (ii) **Bento Antonio Gomes alias Antonio Bento Gomes Vs. Rosario Salvador Carneiro and others 2014 (4) Mh.L.J,** (iii) **Fatima Gomes Furtado and others Vs. Indirabai Vinayak Lotlikar and others 2016 (2) Mh.L.J.,** (iv) **Comunidade of Balli, Quepem, Goa Vs. Vithoba Mahadev Desai and others (F.A.NO.131 of 2005)** and (v) **Smt. Indumathiben Chimnlal Desai Vs. Union of India and anr. AIR 1969 Bom. 423,.**

Reliance is also placed on the decisions of the Supreme Court in the case of **Haryana Waqf Board Vs. Shanti Sarup an others (2008) 8 SCC 671** and **REMCO Inds, Workers House Bldg. Co-op. Vs. Lakshmeesha**

M. and others AIR (2003) SC 3167, in order to submit that where there is a dispute about the identification/encroachment of the property, the Court ought to appoint a Court Commissioner under Order 26 Rule 9 of C.P.C.

9. On the contrary it is submitted by Shri Rao, the learned counsel for the respondents that the Courts below on appreciation of the oral and documentary evidence on record have rightly come to the conclusion that the appellant has failed to establish that the forest produce was cut from the suit property as described in the plaint. It is submitted that the judgments are not only based on the Form III, however, the Courts below have considered the entire oral and documentary evidence on record which do not call for interference.

10. I have carefully considered the rival circumstances and the submission made.

11. The Second Appeal was admitted on the following substantial question of law:

(a) Whether the appellate court erred in holding in para 9 page 13 of the judgment that:

“the suit which is filed simplicitor for injunction without claiming any declaration of title or correction of survey

records is not maintainable". ignoring the well settled principle that declaration is implicit in the suit for injunction as held in the case of **Indumatiben v. Union of India** (AIR 1969 Bom.423); **State of Orissa v. Sailabehari** (AIR 1963 Orissa 73) **Tanaji Shetkar v. Rukmini Shetkar** GLT 1991 (2) 153, **Corporation of Bangalore City v. M. Papaia** (AIR 1989 SC 1809)?

(b) Whether there is jurisdictional error on the part of Courts below and the Courts below acted contrary to law in dismissing the suit solely based on the entry in Form No.III in favour of defendant no.3 in respect of Survey No.228/1.?

(c) Whether the appellate Court though accepted the principle laid down in **Remco Inds. Workers House Bldg. Co-op. Society v. Lakshmeesha M.**, AIR 2003 Supreme Court 3167 case, failed to order the remand as prayed by the appellant?.

(d) Whether there is a breach of procedure on the part of the Courts below inasmuch as the proper judicial approach would have been that comparison ought to have been done in respect of boundaries of document of registration and of the Land Revenue Records of the appellant on one side and of the respondents on the other?

(e) Whether the appellate Court lost sight that the respondent/defendant having secured an ex-parte injunction in the suit no.31/84 and the trial Court having not obtained an undertaking from respondent no.3 not to fell the trees until the disposal of the application, the respondents/defendants have ripened the benefits of the

interim injunction allowed the previously instituted suit i.e Suit No.31/84 to be dismissed for default?

The trial Court had not even taken the undertaking as prescribed under Order 39 Rule 2(2) of the Civil Procedure Code which is otherwise in consonance with the principle laid down in Shiv Kumar Chadha v. Municipal Corporation of Delhi and others, 1993 (3) SCC 161 para 36 (iii) which reads:

“While passing an ex-parte order of injunction the Court shall direct the plaintiff to give an undertaking that he will not make any further construction upon the premises till the application for injunction is finally heard and disposed of.”

(f) Whether the appellate Court even though agreeing in para 17 of its judgment with the principle that entries in Record of Rights are not evidence of title, dismissed the appeal giving entirely full credence to those entries and more so based upon entry in Form III of the Record of Rights which do not even create presumption under Section 105 of the Land Revenue Code?

(g) Whether the judgment and decree of the appellate Court dated 27/1/2004 is nullity because it has been passed despite the fact that the respondent no.4 died during the pendency of the appeal?

(h) Whether the Decree passed by the appellate Court dismissing the appeal is a nullity in view of the death of the respondent no.4 on 22/9/1996 during the pendency of the appeal?

12. After hearing the learned counsel for the parties the following additional substantial questions of law came to be framed on 14/6/2018:

Whether in terms of the provisions of Order XXVI, Rule 9 of CPC and the law laid down by the Hon'ble Apex Court in the case of **Haryana Waqf Board Vs. Shanti Sarup and others (2008) 8 SCC 671**, the Courts below were duty bound to appoint the Survey Authority as the Commissioner to decide the issue of identity of the property?

13. The parties were put to notice that the second appeal shall also be heard on the aforesaid additional substantial question of law.

14. I have accordingly heard Shri Usgaonkar, the learned counsel for the appellant and Shri Rao, the learned counsel appearing for respondent nos.3(a) to 3 (e), 5 and 6. With the assistance of the learned counsel for the parties, I have gone through the record and I find that the appeal has to succeed on the additional substantial question of law as framed on 14/6/2018.

15. Order XXVI Rule 9 of Code of Civil Procedure (CPC, for short) empowers the Court to direct local investigation if the Court finds that such local investigation is requisite or proper for the purpose of elucidating any matter in dispute etc. Under Rule 10-A of Order XXVI of C.P.C., the Court

can issue commission for scientific investigation. It is now well settled that where there is a dispute about identification and/or encroachment of the land it would be appropriate for the Court to take assistance of the survey authorities who are best equipped in the matter, who can submit a report which would undoubtedly help the Court in deciding the controversy. It is not necessary to multiply authorities on the point. However, if we need one, the same can be found in the case of **REMOCO Inds. Workers House Bildg and Rajendra Prasad and Others (supra)**. A similar view has also been taken by this Court in the case of **Kashinath Chopade, Bento Antonio Gomes and Fatima Gomes Furtado (supra)**. Thus on a careful consideration of the circumstances and the submissions made, I find that it would be appropriate that the matter is remitted back to the first appellate Court which can take assistance of a Commissioner from the office of the Inspector of Survey and Land Records and then decide the appeal afresh in accordance with law.

16. In view of the above, the following order is passed:

ORDER:

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and decree dated 27/1/2004 is hereby set aside. Regular Civil Appeal No.33/1994 is restored back to the file of the learned

first appellate Court.

(iii) The first appellate Court shall appoint a Commissioner directing the Inspector of Survey and Land records to depute a competent surveyor as a Commissioner to identify the disputed property and to submit report to the first appellate court. Needless to mention that the parties will be at liberty to file objections to the report of the Commissioner, if so advised. If such objections are filed, the learned first appellate court shall deal with the same, in accordance with law.

(iv) The first appellate court shall then decide the appeal on its own merits and in accordance with law.

(v) The first appellate court shall also decide all pending applications in the appeal, including the application dated 4/3/2002 to bring on record the heirs of deceased respondent no.4.

(v) The parties are directed to remain present before the lower appellate court on 2/7/2018 at 10a.m.

(vi) The rival contentions of the parties on merits are left open.

C. V. BHADANG, J.

Ap/