

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 4 OF 2017**

1. Shri Venkatesh Vithal Kharangate,
Son of Vithal Kharangate,
Major in age,
Retired, resident of H. No.124,
Velsao, Mormugao, Goa (deceased)
through legal heirs:

1.a. Ms. Kussum Kharangate
age 69

1.b. Ms. Puspa Kharangate,
age 62

1.c. Mr. Suresh Kharangate,
age 66.

1.d. Mr. Vilas Kharangate,
age 56

1.e. Mr. Pradip Kharangate,
age 52.

All major in age, Indian National,
Residing at H. No. 124,
Velsao, Mormugao, Goa.

2. Maria Amalia Agonizante Basilia Dos
Reis Perrira alias
Maria Amalia Pereira Kharangate,
Major, housewife,
residing at H. No. 124, Velsao,
Mormugao, Goa (Deceased)
The L.Rs. 1,2, 3 and 5 are
represented herein by their

duly constituted Attorney
Shri Vilas Kharangate, the L.R. no.4
above named, the true copies of the
Power of Attorneys are annexed

.... Appellants.
(Original Plaintiffs)

V e r s u s

1. Shri Balaji Datta Naik,
son of Datta Naik,
major in age, teacher,
resident of Padmawati, Near Sagar Society,
Dona Paula, Tiswadi, Goa
and his wife
2. Smt. Nilla Balaji Naik,
Major in age, housewife,
Residing at Padmawati,
Near Sagar Society,
Dona Paula, Tiswadi, Goa.
3. Shri Anand Datta Nail,
son of Datta Naik,
Major in age,
Residing at Laxmi Niwas,
Nanu Palms, Betalbatim,
Salcete, Goa.
4. Shri Prashant Anand Naik,
son of Anand Naik,
Major in age,
Residing at Laxmi Niwas,
Nanu Palms, Betalbatim,
Salcete, Goa.
5. Shri Sanjeev Vassant Pilgaonkar,
Son of Vassant Pilgaonkar,
Major in age,
Residing at Campo Verde,
BG-4, Caranzalem, Ilhas, Goa.

6. Shri Rajiv Vasant Pilgaonkar,
Son of Vasant Pilgaonkar,
Major in age,
Residing at Campo Verde,
BG-1, Caranzalem, Ilhas, Goa
7. Shri Nandan Vasant Pilgaonkar
Son of Vasant Pilgaonkar,
Major in age,
Residing at Campo Verde,
BG-1, Caranzalem, Ilhas, Goa.
8. Shri Rama Krishna Prasad Rao,
Major in age and residing at 'Muppana'
Opp. Chowgule Bungalow,
Plot No.93, Nagali,
Dona Paula, Tiswadi, Goa.
9. Shri Ram Krishna S. Tare,
Son of Surya Sakaram Tare,
Major in age,
Residing at Plot 14 A,
Kachaya Group,
Ahilya House, Next to Football Ground
Alto Betim, Bardez, Goa.

..... Respondents
(Original Defendants)

Shri H. D. Naik, Advocate for the Appellants.

Shri A. D. Bhobe, Advocate for the Respondent nos. 1 to 7 and 9.

Shri A. R. Kantak, Advocate for the Respondent no.9.

CORAM: C. V. BHADANG, J.
DATE: 8TH February, 2018.

ORAL ORDER:

The challenge in this appeal is to the concurrent finding recorded by the Courts below dismissing the suit of the appellants/plaintiffs.

2. The brief facts are that; the appellants had filed a suit against the respondents claiming that a portion of the property “Santorem” or “Santorem Grande” was included in survey no.14/1 and 15/1 and the balance area, which is subject matter of dispute is included in survey no.11/49 and 11/84 of village Issorcim. The appellants, therefore, sought a declaration that they are the absolute owners and are in possession of the suit property and the respondents have no right, title or interest in the same and for consequential relief for allotting a separate survey number to the suit property by carrying out demarcation.

3. The learned trial court framed as many as eleven issues. The parties led evidence. The learned trial court found in para 32 of the judgment that the issues no.2, 3, 8 and 9 were not relevant for deciding the dispute. Hence these issues came to be deleted. On appreciation of the oral and documentary evidence on record the learned trial court came to the conclusion that the appellants have failed to prove that they are the owners in possession of the

suit property bearing survey nos.11/84 and 11/49 of village Issorcim and they have also failed to establish that there was any manipulation in the survey record of the property bearing survey nos. 11/49 and 11/84.

4. The respondent nos.1 and 2 resisted the suit on the ground that the property is known as “Maranchi Udi” which originally belonged to one Ranum Datta Naik and his wife Mathuri Naik and that the defendant nos.1 and 2 have inherited the same and are the owners thereof. In the face of such a finding the suit came to be dismissed.

5. In appeal before the learned District Judge, apart from challenging the findings of fact, it was contended that the trial court could not have deleted issues nos. 2, 3, 8 and 9. A perusal of the judgment of the first appellate court would show that the appellate court framed the following points for determination:

- i) Whether the plaintiffs are required to be allowed to produce the additional documents?
- ii) Whether the plaintiffs had proved that they were the exclusive owners in possession of the property “Santorem” or “Santorem Grande”?
- iii) Whether the plaintiffs had proved that a part of the property “Santorem” or “Santorem Grande” was included in survey nos, 11/49 and 11/84”

iv) Whether the impugned judgment is required to be interfered in appeal?

6. The learned First appellate court disallowed the production of the documents at the appellate stage and thus answered point no.1 in the negative. The trial court also answered the points nos. 2 and 3 in the negative and dismissed the appeal. Feeling aggrieved the appellants are before this Court.

7. I have heard Shri Naik, the learned for the appellants and Shri Bhobe, the learned counsel for the respondent nos.1 to 7 and 9 and Shri Kantak, the learned counsel for the respondent no.8. Perused record.

8. It is submitted by Shri Naik, the learned counsel for the appellants that the trial court could not have deleted issues no. 2, 3, 8 and 9 at the stage of deciding the suit, which is in breach of the provisions of Order 14 Rule 5 of C.P.C. Secondly, it is contended that the finding that the appellants have failed to establish that about 62,000 sq.mtrs of land from out of survey no.11/1 is wrongly included in survey no.11/49 and 11/84 is in correct and perverse. Except these, there are no other contentions raised.

9. The learned counsel for the respondents have supported the impugned

judgment. It is submitted that both the Courts below have rightly come to the conclusion that the property has not been properly identified and that no specific case was made out by the appellant that 62,000 sq.mtrs of land from out of survey no.11/1 was wrongly included in the survey no.11/49 and 11/84. It is submitted that out of the four issues deleted the burden in respect of issue nos.2 and 3 was on the appellants/plaintiffs and thus the appellants cannot have any exception for deletion of these issues. Even so far as issues nos. 8 and 9 are concerned, it is contended that once the appellant having failed to identify the property, no prejudice is caused whatsoever to the appellants by deletion of issues no.8 and 9.

10. I have carefully considered the rival circumstances and the circumstances and I do not find that the appeal raises any substantial questions of law. As noticed earlier, the case made out by the appellants was that 62,000 sq.mtrs of land from out of survey no.11/1 of village Issorcim has been wrongly included in property bearing survey no.11/84 and 11/49. A perusal of the plaint shows that there is no specific reference to 62000 sq.mtrs. of land as having been wrongly included in the other two survey numbers which according to the respondents is the property known as “Maranchi Udi” and not “Santorem Grande” The learned trial court and the appellate court after threadbare considering the oral and the documentary

evidence on record including that of a private surveyor examined by the appellants have come to the conclusion and to my mind rightly so that the appellants have failed to establish their case as set out. The learned appellate Court in para 64 of the judgment has found that the total area of property “Santorem” which according to the appellant was included in survey no.14/1 and 15/1 and the balance area were material facts which were required to be pleaded which they have failed to do. Shri Bhobe, the learned counsel for the respondent nos. 1 to 7 and 9 has pointed out that the boundaries which the plaintiffs have described as “non magnetic boundaries” as set out in the plaint, the matríz certificate and the evidence led by the appellants do not match. In my considered view there is a finding of fact recorded by the courts below that the plaintiffs have failed to establish that 62,0000 sq.mtrs of land out of survey no. 11/1 has wrongly been included in survey no.11/49 and 11/84. It is now well settled that unless a finding of fact is shown to be perverse it does not partake of the nature of a substantial question of law.

11. Coming to the submission based on deletion of four issues, the learned counsel for the respondents are right that in respect of issue nos.1 and 2 the burden was on the appellant. The consideration of the other two issues i.e. issues nos. 8 and 9 would arise only when the appellants succeed in proving their primary case as made out in the plaint. On a careful consideration of the

judgment of the trial court and that of the first appellate court, I do not find that any exception can be taken to the same. The second appeal is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

Ap/