

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 28 OF 2018

1 Mr. Basilio Fernandes
son of late Pedro
Fernandes, Major, married,
aged 79, (since deceased)
through legal
representatives

a) Jeffery Crispin Fernandes,
R/o. 5th floor, Office Court
Bldg., Oud Mehta Road,
P.O. Box 33166, Dubai –
U.A.E.

b) Gillian Fernandes,
R/o. H.No. 72 B-5,
Bas Villa, Altinho,
Mapusa, Bardez- Goa.

2 Mrs. Lily Alcina Fernandes,
wife of Appellant No.1,
Major, R/o. H.No.72 B-5
Bas Villa, Altinho, Mapusa,
Bardez- Goa.

.....

Appellants.

Versus

1 Shri Pandurang Alias
Pritam Yeshwant
Malgaonkar,
Son of Yeshwant
Malgaonkar, Major,
Married.

2 Smt. Priti Pritam
Malgaonkar,
wife of Respondent No.1,
Major, married.

Both residing in House
No.72/C, Property
surveyed under Chalta
No.11-C, P/T. Sheet
No.125 of City Survey
Mhapsa, Altinho, Goa. Respondents.

Shri Parag Rao, Advocate for the appellants.

Shri A.F. Diniz and Ms. G. Almeida, Advocate for the respondents.

CORAM: NUTAN D. SARDESSAI, J.

Reserved on: 12th December, 2018.

Pronounced on: 20th December, 2018.

J U D G M E N T:

1. Heard Shri P. Rao, learned Advocate for the appellants and Shri A.F. Diniz, learned Advocate for the respondents.
2. The appeal challenges the judgments passed by the Courts below whereby the suit filed by the plaintiff for the relief of permanent injunction simplicitor was dismissed and the appeal filed at their instance too came to be dismissed by the learned First Appellate Court.
3. It was the contention of Shri P. Rao, learned Advocate for the appellants that they had purchased a plot of land admeasuring 494 sq.mts. vide the Sale Deed dated 04/03/1972 and an area admeasuring 402 sq.mts. was encircled within the compound wall

leaving a strip of land of the width of 1.5 mts. on the northern side admeasuring 28.5 sq.mts. to be used for the purposes of storing manure and other articles. There was a dispute concerning the boundary of the property belonging to the appellants and therefore the Trial Court and the learned First Appellate Court ought to have appointed a Commissioner for its demarcation. It was his contention that there were ample powers in this Court to appoint a Commissioner and in that context placed reliance in **Bento Antonio Gomes alias Antonio Bento Gomes v/s. Rosario Salvador Carneiro and others** [2014(4) Mh.L.J. 366]. He adverted to the judgment of the Trial Court where the learned Trial Court despite the examination of the expert witnesses by the appellants had not taken into the consideration their evidence in a proper perspective while non-suiting the plaintiffs and also adverted to the judgment of the First Appellate Court which again had committed an error in not appreciating the evidence of the expert in its proper perspective.

4. Shri P. Rao, learned Advocate for the appellants placed reliance in **Kashinath s/o. Ramkrishna Chopade v/s. Purushottam Tulshiram Tekade and others** [2005(4) Mh.L.J. 471] and **Fatima Gomes Furtado and others v/s. Indirabai Vinayak Lotlikar** [2016 (2) Mh.L.J. 905] to substantiate his case

qua the appointment of a Commissioner. It was next his contention that an application was moved under Order XLI Rule 27 CPC on behalf of the appellants and yet the learned First Appellate Court despite taking the reply of the respondents had still not chosen to give any finding thereon. On that count too this was a fit case to quash and set aside the judgment under challenge and to remand the matter to the learned First Appellate Court for consideration and decision appropriately. Reliance was placed by him in **Malayalam Plantation Ltd. v/s. State of Kerala and another** [(2010) 13 SCC 487].

5. It was further the contention of Shri P. Rao, learned Advocate for the appellants that the written submissions were placed on record on behalf of the appellants in which reliance was placed on atleast 15 judgments but the learned First Appellate Court had not at all considered any of the judgments while passing the impugned order. He also adverted to the roznama of the case before the learned First Appellate Court and submitted that despite the assertions by the appellant to orally canvass arguments in the matter, the learned First Appellate Court had not considered the same which had caused a serious prejudice to the appellants and on that premise too the impugned judgment was vitiated which was passed only on the written synopsis. Reliance was placed in

Antonio Jose Da Silva v/s. Horizon Realtors [2015 (4) Mh.LJ 771]. Shri P. S. Rao, learned Advocate for the appellants therefore prayed for formulating the substantial questions of law for deciding the appeal as reproduced in the memo of appeal.

6. Shri A.F. Diniz, learned Advocate for the respondents adverted to the plaint in the suit filed by the appellants where there were clear pleadings at the appellants' instance that they had built a compound wall enclosing an area of 402 sq.mts. after purchasing the suit property apart from the pleading that a strip of land was kept of the width of 1.5 mts. and length of 19 mts. beyond the northern side of the compound wall and admeasuring 28.5 sq.mts. He referred to the promulgated survey records which showed an area of the plot in question as 402 sq.mts., the order passed by the City Survey Officer as early as 15/01/1996 in which the title and possession of the property surveyed under Chalta No.11 PT Sheet No.125 and bearing a distinct Chalta No.11A being confirmed in the name of the appellants in an area of 402 sq.mts. The survey records and the order of the City Survey clearly belied the case of the appellants that the plot purchased by him was admeasuring 494 sq.mts. Moreover the Official Survey Plan clearly showed the existence of a 3 mts. access on the northern side of the suit property which too belied the case of the appellants that a 1.5 mts.

lane was kept by them beyond the compound wall.

7. The Survey Plan, survey records and the order of the City Survey were not at all disputed by the appellants in their pleadings. Therefore all these documents clearly belied the appellants' case of their claim to an area of 494 sq.mts. as against the area of 402 sq.mts. shown in the survey records. Insofar as the objection on behalf of the appellants was concerned that no opportunity was given to them for oral hearing, he too invited attention to the Roznama dated 08/11/2016 where it was clearly indicated that an opportunity for oral hearing was given but which was not availed of on behalf of the appellants. Even otherwise, it was not open to the appellants to question the Roznama in the Second Appeal and therefore the substantial question proposed at the instance of the appellants at Serial No.2 did not arise for consideration. On his part he placed reliance in the Division Bench Judgment in **Progressive Education Society v/s. Nitin Krishnarao Nimabalkar and others** [2006(6) Bom.C.R. 165]. Insofar as the application under Order XLI Rule 27 CPC not being decided by the First Appellate Court, it was the contention of Shri A.F. Diniz, learned Advocate for the respondents that a bare reading of the application would indicate that it was not one as provided for under the Order XLI Rule 27 CPC. In any event, the respondents had

moved an application to summon an Officer of the Mapusa Municipal Council to prove their documents and in which context an Engineer was deputed and the Chief Officer of the Council was also summoned by the Trial Court. The purpose thereof was only to identify the signature of the Chief Officer of the Council and not to give any opinion on the matter. The gist of the application was to summon and allow the cross-examination of the Engineer and the Chief Officer of the Council and to produce a letter issued by the Council and to confront the witness with the letter.

8. The application did not meet any of the predicates of Order XLI Rule 27 CPC and therefore the documents accompanying the application was not at all relevant to the appellants' case. He referred to Section 99 CPC which provided that no decree was to be reversed or modified for error or irregularity not affecting the merits or jurisdiction and submitted that there was no scope for a remand of the case to the learned First Appellate Court. The appellants had also not sought leave to produce any documents and therefore this application styled as that under Order XLI Rule 27 CPC and its adjudication could not affect the merits of the appeal. Shri A.F. Diniz, learned Advocate for the respondents insofar as the appointment of a Commissioner was concerned contended on behalf of the appellants that the plaintiffs had

examined the expert in support of their case. Even otherwise no application was moved for the appointment of a Commissioner before the Trial Court nor before the First Appellate Court. In any event it was not a case of boundary dispute between the appellants and the respondents and there was no necessity for the Court to appoint a Commissioner.

9. Shri A.F. Diniz, learned Advocate for the respondents placed reliance in **Kazi Mohamad Issac and others v/s. Nagesh Babusso Gaudo** (WP 804/2015). It was his further contention that although the appellants had relied upon the Deed of Sale, no plan was produced alongwith it. Therefore the entire case of the appellants of having left a land of 1.5 mts. width beyond their northern compound wall to a length of 19 mts. was without any basis and quite on the contrary it was a 3 mts. access as evident from the survey records drawn as early as 1970 or thereabout. He met the last contention on behalf of the appellants that the various citations relied upon in the written synopsis not being referred to, by inviting attention to the judgment under challenge where the learned First Appellate Court had clearly held that the judgments were not found relevant to the case and hence had departed from relying on them. Both the Courts below had concurrently held that the appellants had failed to prove the existence of a 1.5 mts wide

lane to the length of 19 mts. being in his possession beyond the compound wall on the northern side. Such being the position, no substantial questions of law arose for determination and hence the appeal had to be dismissed. He placed reliance in **Kondiba Dagadu Kadam v/s. Savitribai Sopan Gujar** [1999 AIR(SC) 2213] to substantiate his contention. None of the questions as raised in the memo of the appeal arose for determination as substantial questions of law and hence the appeal had to be dismissed.

10. Shri P. Rao, learned Advocate for the appellants in reply submitted that the judgment in **Kazi Issac** (supra) was clearly distinguishable and did not apply to the case of the appellants. It was next his contention that survey documents were prepared for fiscal purposes which did not create or extinguish any right and at the most had presumptive value. He placed reliance in **Mahadev Sitaram Sinai Kakodkar v/s. Conservator of Forests and others** [2016(3) Mh.L.J. 335] and submitted that the Deed of Sale in their favour was a document of title which had prevalence over the survey records and in the event of any discrepancy in the area, the area in the Sale Deed would have prevalence over that in the survey records. Hence there was every reason for the appellate Court to have appointed a Commissioner and therefore the

proposed first substantial question arose for consideration. He also submitted that the application under Order XLI Rule 27 CPC which was at large before the learned First Appellate Court was not decided and not being a frivolous application, had to be decided by the First Appellate Court. A substantial question of law thus arose in the absence of its determination. It was therefore his contention that the appeal had to be admitted on the substantial questions of law proposed by him.

11. i have carefully considered their submissions and besides gone through the records.

12. The appellants had laid a claim in their suit for permanent injunction that they were the owners of the property admeasuring 494 sq.mts. surveyed under PT Sheet No. 125, Chalta No.11A in the office of City Survey Mapusa pursuant to the Sale Deed dated 04/03/1972 executed in their favour and bearing distinct boundaries. It was their case that after purchasing the said suit property in or about 1972 they had built a compound wall enclosing an area of **402** sq.mts. and keeping a lane of the width of 1.5 mts. on the northern side beyond the compound wall to a length of 19 mts. admeasuring **28.5** sq.mts. being the suit strip in question which was used for storing garden soil, manure and other materials

etc. They had constructed the first storey in the year 1995. It was their case that the respondents who were using the 1.5 mts. access beyond the suit strip to go to their property bearing Chalta No.11C after its purchase in 2005 or thereabout tried to prevail on the Mapusa Municipal Council to pave the suit strip with tiles to use the same as a motorable access and therefore the appellants felt threatened by their acts of physical force and intimidation and were constrained to maintain the suit for injunction restraining the respondents from entering or interfering with the suit strip in any manner whatsoever.

13. The respondents had vehemently opposed the suit as not being maintainable, filed only to harass them putting the appellants to strict proof insofar as their claim of ownership of an area of 494 sq.mts. was concerned and disputing their case of having built a compound wall enclosing an area of 402 sq.mts. keeping a lane of the width of 1.5 mts. to a length of 19 sq.mts. beyond their compound wall on the northern side of their house. It was their specific case in defence that the appellants had shown a 3 mts. road towards the northern side of their plot while getting approval in the year 1995 as well as in 2010 and therefore they were estopped from putting up a case of denial of an access of 3 mts. It was further the case of the respondents in defence that the

concerned authorities while approving their plan of construction of a structure had verified the existence of a 3 mts. access at site and only thereafter approved the plan followed by the construction of the house by the respondents. Their house was completed and even an Occupancy Certificate was issued as early as **08/05/1994** and the respondents were in possession of a four wheeler in 1994 which was being used from that time to go to his old house and also to ferry his mother from time to time. Thereafter the respondents were using their Wagon-R car in the year 2006 and followed by a Ritz car in 2009 through the said 3 mts. access without obstruction from anyone and pressing for the dismissal of the suit with costs.

14. The parties had gone to trial and the appellants examined the appellant No.1 in support of their case which was abandoned since he expired in the meantime. The next witness examined on their behalf was the constituted attorney of the appellant No.2 who had no personal knowledge of the facts of the case and two other witnesses to prove their case. The Trial Court had examined the Sale Deed produced on record at the instance of the appellants which showed the area of 494 sq.mts. purchased by the appellants with specific dimensions on the south and the west apart from the Surveyor who had earlier worked in the Survey Department,

Government of Goa. The Trial Court on a considering the arguments canvassed on behalf of the appellants and the respondents and on a consideration of the evidence of the expert found that the appellants had shown a 3 mts. access as a road and had made representation before the Authorities at the time of approval of his plan in 1995 for the construction of the first floor to his house. The learned Trial Court had also found that despite the admission of the existence of such a road of the width of 3 mts., the appellants had tried to explain that the Architect had shown a 3 mts road which was wrong and should be read as 1.5 mts.

15. The Trial Court for that matter was equally seized off the fact that such a statement was forthcoming at the instance of the appellants for the first time in the evidence and was not a part of their pleadings as pointed out on behalf of the respondents. The learned Trial Court on that premise concluded that the appellants had clearly admitted the existence of a 3 mts. access on the northern side of their plot and that there was no basis in the explanation tendered by their witness that it was a mistake of the Architect as contended for the first time in the cross-examination. The Trial Court had further recorded in its judgment that the appellants had got his plans approved in 1995 and also in the year 2010 showing the access of 3 mts. beyond his compound wall and

therefore he was estopped from claiming ownership of the open space outside the compound wall. There is another aspect which had escaped the attention of the Trial Court inasmuch as although the appellants claimed an area of 494 sq.mts. pursuant to the Sale Deed of 1972, it was equally their case that an area of 402 sq.mts. was enclosed within the compound wall and that there was a space of the width of 1.5 mts. and length of 19 mts. admeasuring 28.5 sq.mts. beyond the northern compound wall belonging to them. The appellants had however not accounted for an area of approximately 63.5 sq.mts. accepting their case for a moment that an area of 28.5 sq.mts. of the width of 1.5 mts. and length of 19 mts. was lying beyond the compound wall on the northern side of the suit property. There was no explanation forthcoming at the appellants instance also to account for this deficit area of 63.5 sq.mts. What emerges from an examination of the evidence on record is that the Trial Court had rightly discarded the evidence of Pw1 who had expired during the pendency of his cross-examination and Pw2 examined as an attorney had no personal knowledge of the fact and therefore found his testimony unworthy of weightage and rightly so. The learned Trial Court had therefore clearly arrived at a finding based on the evidence on record that there was a failure by the appellants/plaintiffs to prove the existence of a

1.5 mts. lane beyond the compound wall to a length of 19 mts. as belonging to them.

16. The First Appellate Court had formulated one point for determination whether the appellants had proved before the Trial Court that they were in lawful possession of the suit strip and in that context examined the material at large before it. At the outset, the First Appellate Court found that the appellants had not prayed for the relief of declaration of ownership over the suit strip particularly when there was a cloud over the title of the appellants over the suit strip and being vehemently denied by the respondents and in consideration of the defence that there was a 3 mts. wide access which they had from the road reaching to their property lying beyond the boundary of the appellants' property. The learned First Appellate Court had further on examination of the evidence led by the appellants found that Pw1 had approached the City Survey Office to get a separate survey number in respect of the plot purchased by him as early as 1972 and obtained a license for the construction of the first floor in 1995 and at which time had attached the Property Card of Chalta No.11A alongwith the plan.

17. The First Appellate Court found that though the appellants had received the orders from the City Survey as early as 1986

identifying the suit plot as 402 sq.mts., that order was never challenged by the appellants though a separate survey number was obtained for the same and thereafter a plan submitted to the appropriate authority for carrying out the construction and by showing the 3 mts. access later claimed in the suit as the suit strip of the width of the 1.5 mts. and the length of 19 mts. The First Appellate Court had also found from the evidence on record that there was a clear admission at the appellants' instance that though he had obtained a license for the construction of the compound wall, no such license was produced on record much less any reference made to it in the pleadings and in that context found favour with the contentions on behalf of the respondents that there was suppression of material documents at the instance of the appellants. The learned Appellate Court was fortified in its conclusion that the appellants had not given any explanation in their pleadings and in their case that an access was shown in the plan for approval and that there was no representation made by them to the concerned authority pointing out any errors therein.

18. The learned First Appellate Court had examined the statement of Pw1 though the same could not have been done as he had expired in the meantime and found there from that there was material variance in the version of Pw1, the Architect had shown a

3 mts. road which was wrong and that it should be read as 1.5 mts. road instead. The Appellate Court for that matter found favour with the contentions on behalf of the respondents that the appellants' plea could not be countenanced that their Architect had committed a mistake in showing a 3 mts. access instead of 1.5 mts. while submitting the plans for approval and in that context concluded that the documentary evidence was contrary to the pleadings qua the suit strip. The First Appellate Court for that matter found on an examination of the evidence of expert surveyor that it did not inspire confidence apart from the evidence of Pw2 and in that backdrop held against the appellants on their right to a 1.5 mts. width strip beyond the northern boundary of their property. The Appellate Court also took cognizance of the fact that the Sale Deed being a document of title, the plaintiff ought to have been considered to be in possession of the area mentioned therein. However although Shri P. Rao, learned Advocate for the appellants tried to buttress a plea further in that regard that the Sale Deed as a document of title would prevail over the survey records and that it was open to the appellants at any point of time to seek for the correction of the Sale Deed viz a viz the area and/or to pay the deficit consideration, it was not shown on the basis of the facts at large that since 1972 till the parties went to trial in the year 2010

that the plaintiffs had at any point of time asked for the correction of the Sale Deed and/or the payment of any deficit consideration as the case may be. In that view of the matter the learned First Appellate Court rightly concluded that the appellants had failed to establish that they were in lawful possession of the suit strip and in that view of the matter did not feel it appropriate to interfere with the findings rendered by the Trial Court and dismissed the appeal with the costs.

19. **Bento Gomes** (supra), held that wherein a question of boundary dispute or an encroachment arises it is appropriate that the court should exercise the power under Order XXVI Rule 9 CPC. Section 75 and specifically clause (b) thereof empowers the Court to make local investigation. Rule 9 of Order XXVI CPC enables the Court where it provides that local investigation is requisite or proper for the purpose of elucidating any matter in dispute, to issue a commission to such person as it thinks fit to make such investigation and report thereof to the Court. In the brief facts of that case, the appellants had filed a suit claiming to be owners in possession of the property situated at Mandopa, Navelim bearing Land Registration No.44875 and enrolled under Land Revenue No.915 with the property of the defendants being bounded on the south. The case of the plaintiff was that the defendants, property

described in the Land Registration Office was admeasuirng 5,532 sq.mts. and that the suit property of the plaintiff and the defendants had been separated from the time immemorial by a mud-ridges, which existed at the site even on that day. This judgment is clearly distinguishable in the facts of the case inasmuch as it was never the case of the appellants/ plaintiffs that they had any boundary dispute with the respondents. It was their constant case throughout that there was 1.5 mts. strip of the length of 19 mts. reserved by them beyond their compound wall on the northern side used for storing material etc and being an integral part of their property purchased by the sale Deed of 1972. The respondents had no boundary dispute with the appellants who had their property beyond the eastern boundary of the appellants' property while the dispute was restricted to a 1.5 mts. strip of the length of 19 mts as claimed by the appellants and a 3 mts access being claimed by the respondents apparent also on the survey plan. The judgment in **Bento Gomes** (supra) therefore does not substantiate the appellants' case.

20. In **Kashinath Chopade** (supra), the plaintiffs filed a suit for declaration and to restrain the defendants from interfering with their possession over the suit site contending that the father of plaintiff No. 1 had left behind him the suit site of his ownership and

possession and size is 12 feet east west and southern side is of 12 feet of measurement apart from north south eastern side is 26 feet and north south western side is 26 feet. The house and open land of the defendant was towards the eastern side of the house of the plaintiff. The open land described by letters A-3, A-4, A-10, A-1, A-2, A-3 is the subject-matter of this suit. The other walls and house and the open land in front of the house of plaintiff were described in the suit map and the defendant without any right or interest encroached upon the open land of the plaintiffs shown by letters A-3, A-4, A-10 and A-2 in the map and started construction of wall on the land shown by letters A-3, A-4 and A-18. The defendant also removed 3 or 4 layers of bricks from the plaintiffs' wall described by letters A-1, A-2, A-10 and A-12 in the map. Since the defendants failed to remove the encroachment despite the notice to vacate, the plaintiffs were constrained to file suit against them.

21. In **Kashinath Chopade** (supra), the defendant contested the suit and contended that his father had purchased the suit site on 23/3/1945 in a constructed position and since then this land is as it is and none of its portion was open land. The portion described by letters A-13, A-14, A-15, A-10 was never an open land nor in possession of the plaintiffs and quite on the contrary there was a tin shed of the defendants from which the tin shed was removed

for a new pucca construction. The defendant contended that the wall described by letters A-3 and A-2 in the plaint map was the joint wall of the plaintiffs and defendant and disputing the ownership of the plaintiffs on the entire portion of the suit map. The portion shown by letters A-13, A-14, A-15, A-10 in the plaint map was never an open land. The suit was decreed by the Trial Court and the defendants challenged it in appeal before the District Judge unsuccessfully giving rise to the Second Appeal at their instance. In those sets of circumstances, it was contended that as no commissioner was appointed for the purpose of local investigation as required under Order XXVI Rule 9 CPC and in the absence of an accurate map, the judgment and decree passed by the courts below was clearly on the basis of presumptions and assumptions and liable to be set aside. The learned Single Judge considered the judgment in **Krishnarao v. Mahadeorao** [1953 N.L.J. Note 230], Order XXVI Rule 9 CPC dealing with the discretion of the Court to order local investigation or not and in the circumstances found it appropriate that a city surveyor ought to have been appointed to determine the question whether any encroachment has been made or not and remanded the suit to the Trial Court with a direction to appoint a commissioner. This judgment too is clearly distinguishable on facts.

22. The judgment in **Mahadev Sinai Kakodkar** (supra), is clearly distinguishable and cannot find any applicability to the facts of the case.

23. In **Saunsthan Gokarn Partagal v/s. Narayan Raghunath Dessai** [2018 SCC Online Bom 1299] the appellants had filed a suit for injunction restraining the respondents from cutting or transporting any trees from the suit property and from interfering with the same in any manner describing the property in paragraph 1 of the plaint and bearing distinct Survey No.229 and 228 part. The respondents in their written statement denied the case of the plaintiffs restricting their rights to survey No 229 alone and no other and that they had cut and transported truckloads of firewood under license issued by the Forest Department and cut from the property not belonging to the appellants. The suit was basically about the identification of the property and in that context it was submitted that the Courts below ought to have appointed a Commissioner having regard to the fact that there was a genuine and a bonafide dispute about the identification of the property and reliance was placed in **Kashinath** and **Bento Gomes** (supra) apart from the judgment of the Apex Court in **Haryana Waqf Board**(supra). The learned Single Judge on a consideration of Order XXVI Rule 9 CPC and that there was a dispute about the

identification of the property and encroachment therein and considering the judgments in **Kashinath** and **Bento Gomes** (supra) allowed the appointment of the Commissioner. This judgment too is distinguishable unlike the facts at large before this Court where there was no boundary dispute or dispute of encroachment between the parties.

24. **Haryana Waqf Board** (supra), had filed the suit for declaration and injunction. The High Court in Second Appeal had summarily dismissed the appeal on the ground that it was concluded by the concurrent findings of facts arrived at by the Courts below. The dispute that was raised by the parties before the Courts whether the respondent had encroached upon any land belonging to the appellant Board and in that situation it was observed that there cannot be in dispute that the dispute was in respect of the encroachment of the suit land. Moreover unlike the case at large before this Court, an application was filed under Order XXVI Rule 9 CPC which was rejected by the Trial Court. Even in the appeal before the Appellate Court, an application for the appointment of the local commissioner for the demarcation of the suit land was filed. It was in those set of circumstances that the Apex Court found that the High Court ought to have considered whether in view of the nature of the dispute and facts of the case

whether a local Commissioner should be appointed for the purpose of demarcation and in that light allowed the appeal with appropriate directions to the High Court. This judgment too does not advance the case of the appellants qua the appointment of a Commissioner by this Court.

25. In **Fatima Furtado** (supra) another learned Single Judge of this Court held that in case of encroachment it is always open to the Court to appoint a Commissioner in exercise of its power under Order XXVI Rule 9 CPC and to examine alleged claim of the parties based on documents of title. In the brief facts the appellants claimed the ownership on the basis of the Sale Deed of 1916. The respondents No.1 and 4 to 12 also claimed a title based on the same Sale Deed and the properties purchased by the respective parties or their ancestors are also depicted in the Comunidade plan. All these documents would have to be reconciled to examine whether there is in fact any encroachment as claimed by the appellants. In those facts the learned Single Judge felt it appropriate to appoint a Commissioner. This judgment too is clearly distinguishable and does not advance the case of the appellants any which way.

26. **Kazi Issac** (supra), challenged in the Writ Petition the order

passed by the District Judge dismissing the application for the production of the additional documents and amendment of the plaint at the appellate stage. In the brief facts the petitioners had filed the suit for correction of the survey records claiming an area of 7600 sq.mts. forming a part of Survey No.88/0 being wrongly included in the survey no.81/0. They came with the case that the property corresponds to Matriz No.1077 and 1978 and Old cadastal Survey No.70 and on verification from survey records I and XIV they had found that the survey records were not correct. In that context the plaintiffs /appellants had sought for the production of the report of the expert who had drawn the Certificate showing the area falling in the distinct survey numbers. In that context the learned single Judge considered Order XLI Rule 27 CPC, the submissions on behalf of the petitioner qua the recent trend of judicial opinion in a dispute of the present nature, under consideration involving the appointment of the commissioner for local investigation and sought for the production of the Certificate issued by the expert. In that context reliance placed in **Haryana Waqf Board** (supra), was found to be misplaced by the Single Judge and as the case was clearly distinguishable on facts which is the position presently. Therefore on a conspectus of all the judgments relied upon by Shri P. Rao, learned Advocate for the

appellants, there is no scope whatsoever for the appointment of the commissioner by this Court even considering the fact that no application was moved for such an appointment before the Trial Court or the First Appellate Court and no necessity being felt even in the Second Appeal for the appointment of such a Commissioner.

27. In **Malayalam Plantation Ltd** (supra), it was contended on behalf of the State that though separate applications were filed for reception of material documents and additional evidence by filing application under Order XLI Rule 27 CPC, the High Court while deciding the Regular First Appeal failed to consider the same though adverted to in the course of discussion. It was further contended that though the High Court adverted to the same, it did not consider the same and no order was passed thereon. It was however contended on behalf of the appellant that in case this Court scrutinizes each and every document, the claim of the State was to be rejected in toto and the stand of the appellant was to be accepted. In that context it was observed that when an application for reception of additional evidence under Order XLI Rule 27 of CPC was filed by the parties, it was the duty of the High Court to deal with the same on merits. If any petition is filed under Order XLI Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider at the time of hearing the appeal on merits so as

to find out whether the documents or evidence sought to be adduced have any relevance/bearing on the issues involved. It was however shown by the respondents that the application styled as one under Order XLI Rule 27 CPC was positively not under Order XLI CPC nor did it fulfil any of the predicates of Order XLI Rule 27 CPC. Besides even considering that it was an error, defect or irregularity in the proceedings before the First Appellate Court, the same was not affecting the merits of the case or the jurisdiction of the Court and there was no justification for a reversal or modification of the Decree for error or irregularity not affecting the merits of jurisdiction in terms of Section 99 CPC. On that premise too there is no scope for the remand of the appeal to the First Appellate Court for deciding the so called application under Order XLI Rule 27 CPC when even otherwise no document is sought to be produced at the instance of the appellants.

28. In **Antonio Jose Da Silva** (supra), the learned Single Judge of this Court held in the facts at large that the appeal was fixed for clarification on 19/03/2013 and then adjourned to 30/04/2013. Even subsequently, when the matter was fixed on 20/06/2013, the records did not suggest that an opportunity was given to the appellants to advance oral arguments. Considering that the learned Counsel for the parties had advanced oral arguments before the

then Presiding Judge, the learned Presiding Judge in the interest of justice ought to have given an opportunity to the parties to advance oral arguments or at least for clarification if any, with regard to the contentions raised by the parties in the written arguments while reiterating that the First Appeal is a valuable right of the parties as it is the last Court of fact finding and law involved in the Appeal to be decided. In that view of the matter the learned Single Judge found that the judgment passed by the First Appellate Court was not sustainable and quashed and set aside remanding the matter to the Lower Court to give an opportunity of oral and written arguments, if any, to the parties.

29. In **Progressive Education Society** (supra), a Division Bench of this Court while dealing with the judgment delivered by a Single Judge considered the grounds of challenge, one of them being that no opportunity of being heard in the matter was given to the appellants/petitioners before the disposal of the appeal. Their Lordships considered the fact that the parties had chosen to file the written notes of arguments before the School Tribunal and therefore, there was no question of further oral hearing in the circumstances. In the facts of the present case written synopsis were filed on behalf of the parties. Besides, the learned First Appellate Court had made a record as on 21/01/2017 that

arguments and written submissions were taken into consideration as no oral arguments were advanced before the learned Judge and in that view of the matter pronounced the judgment. Therefore it cannot at all be heard on behalf of Shri Rao, learned Advocate for the appellants that no opportunity of hearing was given by the First Appellate Court and or that it did not consider any of the judgments. In that context though it must be said that the learned First Appellate Court had made a sweeping reference to the aspect that the judgments did not apply in the facts of the case at large before her, there was a duty on the First Appellate Court to examine the judgments. However in view of the observations made that the judgments did not apply to the facts of the case at large before her, it cannot be heard on behalf to the appellants that the learned First Appellate Court had not at all considered the judgments referred to in the written synopsis.

30. The contention of Shri P. Rao, learned Advocate that the Deed of Sale being a document of title had prevalence over the survey record and discrepancy in the area qua the Sale Deed and the Survey records all the more necessitated the appointment of the Commissioner howsoever appealing cannot advance his case when there was no dispute about the boundaries nor was it a case of encroachment at the instance of the defendants. No substantial

question of law arises in that respect nor on the point that the application under Order XLI Rule 27 CPC was at large before the First Appellate Court and was not decided by the Appellate Court.

31. In **Kondiba Kadam** (supra), the Hon'ble Apex Court held that while deciding the Second Appeal no relief can be granted merely on an equitable ground and the High Court cannot interfere with the concurrent findings even if they are erroneous. Being a substantive statutory right it has to be regulated in accordance with the law in force at the relevant time. The condition mentioned in Section 100 CPC must be strictly fulfilled before the Second Appeal can be maintained and no Court has that power to add or enlarge those grounds. It further held at paragraphs 4 and 5 as below:

"4. It has been noticed time and again that without insisting for the statement of such substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100, Code of Civil Procedure, It has further been found in a number of cases that no efforts are made to distinguish; between a question of law and a substantial question of law. In exercise of the powers under this Section the findings of fact of the 1st appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal

is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the Section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal : cannot be decided on merely equitable grounds. The concurrent findings of fact howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this Section. The substantial question of law has to be distinguished from a substantial question of fact This Court in *Sir Chunilal V. Mehta and Sons Ltd. V/s. Century Spinning and Manufacturing Co. Ltd.*, AIR (1962) SC 1314 held that :-

"The proper test for determining whether a question of law raised in the case is substantial would, in bur opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views, If the question is settled by the highest Court or the general principles to be applied in determining the question are wellsettled and there is a mere question of applying those principles or that the plea raised is palpably absurbed the question would not be a substantial question of law."

5. It is not within the domain of the High Court to investigate the grounds on which findings were arrived at,

by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court had given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the tower appellate court were erroneous being contrary to the mandatory provisions of law applicable of its settled position on the basis of pronouncements made by the apex Court, or was based upon inadmissible evidence or arrived at without evidence."

32. Both the Courts below concurrently held that the plaintiffs had failed to prove that he was entitled to a strip of land of the width of 1.5. mts and length of 19 mts. beyond the compound wall on the northern side. These concurrent findings of fact do not justify any interference. Besides, none of the questions so raised on behalf of the appellants arise for determination as substantial question of law.

33. Considering that the findings arrived by the Courts below are based on the material on record and the appellants have failed to establish any perversity in the findings, no substantial questions of law arise in the present appeal which would call for any interference of this Court. In view thereof, there is no merit in the above appeal which accordingly stands dismissed.

NUTAN D. SARDESSAI,J.

mv