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IN THE HIGH COURT OF BOMBAY AT PANAJI, GOA
SECOND APPEAL NO. 98 OF 2013
IN REGULAR CIVIL APPEAL NO. 83/2012/FT-I

SURESH G RAMNANI

s/o Gobindram J Ramnani, about 59 years
old, married, Indian national, resident of
Wing E, Room No. 19, 4th floor Mithul
Enclave, Opp. Jijamata, Mahul Rd.
Chembur, Mumbai- 400 074, through his
Constituted Attorney, Smt Rekha Gawri,
Major, Indian National, resident of 9/4,
Shivpuri Chembur Naka, Mumbai 400 071 ...

APPELLANT

~ VERSUS ~

**1. AURELIA ANA DA PIEDADE
MIRANDA**

alias Araiya Alvares, SEFAA
Vidyanagar, Aquem, Margao, Goa
(*expired, rep LRs*)

1(i) IAN KARL ALVARES,
major of age, r/o Scotland, Great
Britain, and c/o Mario Alvares,
SEFAA Vidyanagar, Aquem,
Margao, Goa

1(ii) LALITA ALVARES,
major of age, Aquem, Margao, Goa

**2. MARIO JOSE ARAIYA
ALVARES,**
major of age, SEFAA Vidyanagar,

Aquem, Margao, Goa

3. **MARIA AMELIA DA PIEDADE
MIRANDA E PINTO,**
major of age, 417, Rua Abade Faria,
Margao, Goa
4. **JOSE SAVIO DA PIEDADE
ALBUQUERQUE PINTO,**
major of age, 417, Rua Abade Faria,
Margao, Goa
5. **KRISHNAPATI RAIA,**
Son of Yabheya Prassad Shrivastava,
aged about 45 years, resident at Junta
Quarters, C-2-20, Pajifond, Margao,
Goa
6. **BUDASAB MULLA,**
Age about 50 years, resident at
Guirdolim, Chandor, Goa

... **RESPONDENTS**

APPEARANCES

FOR THE APPELLANT **Mr Sanjay Jain, i/b Mr Mahesh Amonkar**

FOR RESPONDENTS NOS **Mr AF Diniz**
1(i), 1(ii), 2 TO 4

CORAM : **G.S.Patel, J.**

JUDGMENT RESERVED ON : **12th October 2017**

JUDGMENT PRONOUNCED ON : **30th January 2019**

JUDGMENT:

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A. PARTIES & QUESTIONS OF LAW IN THE SECOND APPEAL

1. The Appellant (“**Ramnani**”) is one of the heirs and legal representatives of the original 1st Defendant to the suit, Gobindram Jethanand Ramnani (“**Gobindram**”), and was himself Defendant No.1(c) in the amended plaint. Respondents Nos. 1 to 4 were the original four Plaintiffs in the suit. Respondent No. 1 having passed on, her heirs are on record as Respondents Nos. 1(i) and 1(ii). Respondents Nos. 5 and 6 were original Defendants Nos. 3 and 5 in the suit. Original Defendant No.2 in the suit died and his name was deleted from the array of parties. Original Defendant No.4 was a

partnership firm, and this party, too, was deleted pursuant to an order of 10th November 2000.

2. This Second Appeal was admitted on 17th December 2013, on the following questions of law:

- i) Whether declaratory Regular Civil Suit No. 21/1985/C is inherently not maintainable in the absence of impleadment of all co-owners of the suit property as necessary parties either as Plaintiffs or Defendants more particularly Diogo Miranda, Avelino Miranda and Luis (Jr) Miranda or their heirs the suit property being joint and undivided?
- ii) Whether Plots Nos. 8, 10, 11 and 12 sold to the deceased Defendant No.1 by various sale deeds totally admeasuring 96,068.95 sq mts constitutes 1/8th of the entire property totally admeasuring 3,58,722.80 sq mts?

B. THE PROPERTY IN DISPUTE

3. South-west of the Zuari River, on the north-western banks of the Kushawati River and east of the town of Margao in village Guirdolim lies the area known as Chandor in South Goa. There is here a substantial tract of land of 336,475 sq mts (over 83 acres). It is known as “*Ilharga a Cabeceira de Modonoviro*” or “*Modonoviro*” or “*Caldas Miranda*”. To this land’s east are some privately held lands and the property of the Comunidade of Chandor; to the West, some private properties and the boundary of Curtorim Village; to the North, another private property and Prodialechire de Chigalli of

Comunidade; and, to the South, Modonviro of Comunidade, a hilltop, private property and a pathway to a chapel. This is known as ‘the larger land’ in the dispute. This land has Land Registration No 9031 and Revenue Nos. 450, 452 and 453, Survey Nos. 17/1, 20/1 to 4, 25/32, 25/34, 27/1, 32/1, 32/2 and 32/3. There are, also, in the litigation record at least two plans, marked PW1/A and PW1/W (captioned “Plan 4”). I use this at this juncture only to describe the property. On the plans, we see 12 plots marked, numbered 1 through 12. The land itself is roughly L-shaped with a long north-south stretch and then a wide horizontal stretch at the bottom. A railway line — and this, as we shall see, assumes immense significance — runs through the land. On one plan, Plot No 8 is shown to the north of this railway line, with Plots 10, 11 and 12 entirely, and Plot No. 9 partly, below it. Plot Nos. 1, 2, 3, 4 5, 6, 7 and 9 are said to be unsold. Ramnani says Plot Nos. 8, 10, 11 and 12 were sold to Gobindram. So do the Plaintiffs.

C. CHRONOLOGY OF EVENTS

4. The journey to this Second Appeal has been long and tortuous, with head-spinning twists and turns along the way. I propose to divide this chronology, both for convenience and for clarity, into distinct parts. I begin with a much abbreviated history of the litigation from the decision of the Trial Court to the Second Appeal. I will have to return to parts of the litigation history before the Trial Court a little later, as part of the transactional history that led to these disputes. The background and litigation history are not in dispute (which is as it must be, given that this is a Second

Appeal). Mr Jain for the Plaintiffs has taken me through a comprehensive chronology, and Mr Diniz for the Respondents Nos. 1(i), 1(ii), and 2 to 4 has made his own submissions on these.

(I) BRIEF LITIGATION HISTORY TO THE SECOND APPEAL

5. The four original Plaintiffs filed RCS 21/1985/C in the court of the Civil Judge, Junior Division on 11th January 1985.¹ Plaintiff No.2 was the husband of Plaintiff No.1. Plaintiffs Nos. 1(i) and 1(ii) are their children, and were impleaded after Plaintiff No.1 died. Plaintiff No.3 and Plaintiff No.1 are sisters. Plaintiff No.4 is the husband of Plaintiff No.3. There were five defendants to the suit. The 1st Defendant was Gobindram. The Plaintiffs sought these reliefs:

(a) For a declaration that the Defendants have no right or interest in the said property namely plot No. 1, 2, 3, 4, 5, 6, 7 and 9 and **that the Plaintiffs are the absolute owners in the possession** and;

(b) For permanent injunction restraining Defendants from entering the said property and from cutting down any trees or plants there from or doing any work or from agreeing to sell or selling them.

(Emphasis added)

¹ Volume I, *p.* 168.

6. Defendants Nos. 1 to 4 entered their Written Statement on 28th February 1985.² An interim application for a temporary injunction failed, the Trial Court holding that Gobindram was in possession of the larger property.³ Gobindram died on 19th December 1986. Ramnani and other heirs were impleaded as Defendants Nos. 1(a) to (c). Meanwhile, the Plaintiffs appealed the order on the interim application. The appellate order⁴ partly allowed the appeal: while rejecting the application for a restraint against the 1st Defendant from entering the property, on a finding that the 1st Defendant was in possession, the appellate court restrained the 1st Defendant from creating third party rights over the larger property.⁵

7. On 11th February 1993, the Trial Court framed the following 12 issues in the suit:

(1) Whether the Plaintiffs prove that they are the absolute owners in possession of plot nos. 1, 2, 3, 4, 5, 6 7 and 9?

(2) Whether the Plaintiffs prove that the property survey under the survey nos. 17/1, 20/1, 20/l, 20/2, 20/3, 20/4, 25/32, 25/34, 27/1 28/1, 32/1, 32/2 and 32/3 has been wrongly recorded in favour of M/s. G. Ramnani and associates in survey record?

(3) Whether the Plaintiffs prove that the Defendants are in possession of plot nos. 8, 10, 11 and 12 only?

2 Volume II, *p.* 181.

3 Volume III, *p.* 548.

4 Volume III, *p.* 577.

5 There then intervenes another suit by the Plaintiffs, but I will take this up later as the order on it, though material and much argued by both sides, is not strictly a part of this abbreviated chronology.

(4) Whether the Plaintiffs prove that the Agreement dated 09/04/1973 stood terminated for failure of Defendants to perform their part of the contract?

(5) Whether the Plaintiffs prove that the Defendants without any right or authority are trying to sell the plot no. 1, 2, 3, 4, 5, 6, 7 and 9?

(6) Whether the Defendants prove that the suit is bad for misjoinder of Plaintiffs No. 2 and 4?

(7) Whether the Defendants prove that the suit is bad for non-joinder of necessary parties?

(8) Whether the Defendants prove that the suit is bad for misjoinder of parties, viz. Defendant Nos. 2, 3 and 5?

(9) Whether the Defendants prove that they acquired title to the suit property by adverse possession?

(10) Whether the Defendants prove that the Defendants are put in possession of whole property under survey nos. 17/1, 20/1, 20/1, 20/2, 20/3, 20/4, 25/32, 25/34, 27/1 28/1, 32/1, 32/2 and 32/3 in the same year of 1972 by Mr. Miranda for developing the same?

(11) Whether the Defendants prove that D1 could not perform his part of contract under the Agreement dated 09/04/1973 on account of default on the part of the Plaintiffs to make out a marketable title?

(12) What relief? What order?

8. Later, in 1994, some of the Defendants were deleted and cross-examination of PW1 began. Gobindram's widow died in 1995, though her name was not deleted until 2000. In 1998, the Plaintiffs sought to implead 19 persons as co-plaintiffs. The application was

rejected (and while this is yet again the centre of a set of submissions crucial to this Second Appeal, I will not interrupt the present narrative with details, but will return to them later). In 2001, Gobindram's other son, Prakash, died. His heirs were not brought on record.

9. We come now to the events of 2002 and 2003. It seems that between April and June 2003, Ramnani's lawyer was absent on at least one occasion. The Evidence Affidavit of PW5 was taken on record. He was not cross-examined. On 1st July 2003, the Evidence Affidavit of PW6 was filed, and this witness too was not cross-examined. On 26th August 2003, the Trial Court decreed the suit. Ramnani says this was *ex parte*. The court gave the Defendants time to file written submissions. The Trial Court answered all issues in favour of the Plaintiffs, and, according to Ramnani, decreed the suit not in terms of its two prayers, but granted a relief never sought. Ramnani filed an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 ("CPC") to set aside the *ex parte* decree. This failed on 7th August 2004. Ramnani filed a Miscellaneous Civil Application in the District Court assailing the order of 7th August 2004 rejecting the Order IX Rule 13 application. He also filed a substantive First Appeal challenging the decree, accompanied with a Civil Miscellaneous Application to condone the delay in filing that First Appeal. On 26th April 2007, the District Court dismissed the Miscellaneous Civil Application in regard to the order on the Order IX Rule 13 application. Ramnani filed a writ petition. On 22nd April 2008, the District Court dismissed the Civil Application seeking a condonation of delay in filing the First Appeal, which, consequently, also stood dismissed. Ramnani filed another writ petition against the

22nd April 2008 order. On 18th October 2010, this Court dismissed both writ petitions as not maintainable and held that the decree was appealable. The delay in filing a Second Appeal stood condoned. Ramnani filed Second Appeal No. 81 of 2011 against the dismissal of his substantive appeal. On 2nd March 2012, this Court allowed that Second Appeal and directed the lower court to dispose of the First Appeal in three months.

10. The First Appellate Court framed the following three points for determination:

1. Whether the plaintiffs have proved before the trial Court that they are the absolute owners in possession of the suit property i.e. plots no. 1, 2, 3, 4, 5, 6, 7 and 9?
2. Whether the defendants have proved before the trial Court that they have the title to the suit property by adverse possession?
3. Whether the defendants have proved before the trial Court that they have any right or interest over the suit property?

By an order and judgment dated 9th July 2012, the ad hoc District Judge-1, FTC-I, South Goa at Margao dismissed Ramnani's First Appeal. The Learned Judge answered the first point for determination in the affirmative, i.e. in favour of the original Plaintiffs, and the second and third points in the negative, i.e. in favour of the Plaintiffs and against Ramnani, who then filed the present Second Appeal.

**(II) HISTORY OF TRANSACTIONS AND DEALINGS
WITH THE LAND**

11. One Luis Miranda (“**Luis**”) owned what is called the larger property, described above. After he died (we do not know the exact date), in the inventory proceedings that followed in regard to his estate under Portuguese law applicable, the entire property came to the share of his widow, Aurelia Miranda (“**Aurelia**”). She, too, passed on and her date of death is also not on record. The starting point of the history of this litigation is a Deed of Partition of 9th January 1950.⁶ The parties to this were Aurelia’s four sons, Diogo (or Diego) Miranda (“**Diogo**”), Avelino Miranda (“**Avelino**”), Luis (Jr) Miranda (“**Luis Jr**”) and Aureliano Miranda (“**Aureliano**”). Plaintiffs Nos. 1 and 3 are Aureliano’s children. In what is called the ‘twenty fourth property’ described in this document, the four Brothers Miranda agreed that the larger property belonged to them all. In the partition, Aureliano was allotted a 7/8th identified portion of the larger property *except* for an identified 1/8th part.⁷ This excluded 1/8th portion was allotted to all four Brothers Miranda, viz., Aurelia’s four sons. Each thus took a 1/32 share in this 1/8th part. This is how the relevant parts of the Partition Deed read:

Twenty fourth Property named Modonoviro or Caldas Miranda, situated at Chandor, enrolled in the Land Revenue Records under Nos.450, 452 and 453 and described in the Land Registration Office of Salcette under 9,031 old under the name of Ilharga and Cabeceira de Modonoviro, these properties were also assigned to the

6 Exhibit PW1/1, Volume II, *p.* 358.

7 Volume II, *p.* 376.

said Aurelia in the same inventory, **all these assets abovementioned belong actually and solely to the parties Diogo, Avelino, Luis and Aureliano.**⁸

They further assigned to the party Aureliano the property described under item No.24, excluding one eighth part consisting of palmgrove, fruit trees, two residential houses, all springs with the respective bathrooms, ponds, paddy field with valley of bamboos, *bounded, as a distinct property,*

to the East with remaining part of the said property and others,

to the West with the storm water drain and road,

to the South with the railway line after which there is the remaining part of the said property, and

to the North with the water drain and the remaining part of the property

and they assign this eight part, in equal parts, to the same Diogo, Avelino, Luis and Aureliano, and agreed that all these four have a right the warehouse existing in the said property of number 21, all of them having to contribute towards the expenses of upkeep and cleanliness of the said warehouse.⁹

(Emphasis added)

12. This would indicate the following:

8 Volume II, *p.* 374.

9 Volume II, *pp.* 376–377.

- (a) Caldas Miranda, or the larger property, was the 24th property in this Partition Deed;
- (b) A 7/8th portion of Caldas Miranda was allotted to Aureliano;
- (c) A 1/8th portion was retained in equal shares by the four Brothers Miranda.
- (d) The 1/8th portion lies entirely to the *north* of the railway line; the rest of the 7/8th portion continues to the south of the railway line. In other words, the railway line forms the southern boundary of the 1/8th portion.

This is stated not for any real factual dispute, but because the first question of law — that of maintainability and non-joinder — is tied hand and foot to the issue of ownership or co-ownership of these identified 7/8th and 1/8th portions.

13. The 1st Plaintiff was born in March 1950, and the 3rd Plaintiff in September 1952. Aureliano died a few years later, in 1955. He was survived by his widow Alba Miranda (“**Alba**”), and their two daughters, Plaintiff No.1 and Plaintiff No.3. Inventory proceedings for Aureliano’s estate commenced. Alba took a moiety in her husband’s estate, and her daughters the remaining one-half. On 17th September 1963, in these proceedings, Aureliano’s entire share in the larger property was allotted to Alba, and this, according to Ramnani, was to the exclusion of Plaintiff No.1 and Plaintiff No. 3. This property is shown under Item No.29.¹⁰ Alba took a moiety in

10 Volume I, *pp.* 331–346, Exhibit PW1/G in evidence; at *p.* 344.

her husband's estate, and Plaintiffs Nos. 1 and 3, their daughters Aurelia and Maria, took a 1/4th share each; but this was in his estate, not this particular property. Item 30 spoke of a one-fourth share in the one-eighth share of the larger property. The inventory proceedings make it clear that *the whole of item 29*, Aureliano's share in the larger property, came to Alba. She is described as the moiety sharer. She got a part of item 1 of the estate (with which we are not concerned); and the whole of items 2, 3, 5, 7, 10 and 11; half of item 13; the whole of item nos. 14, 15, 16, 17, 21, 23, 27, 28, *29 and 30*, she thus being settled with Rs.72,870 on a valuation. Thus, Alba took the whole of the 7/8ths and Aureliano's one-fourth in the remaining 1/8th personally.

14. On 25th September 1968, Aurelia's heirs, including Alba, executed a 'Deed of Rectification' to the Deed of Partition. By this document, the parties allotted the larger property, Caldas Miranda, to *all four of Aurelia's sons*, viz., the Brothers Miranda; and Alba, as the widow of one of the deceased brothers (Aureliano), became entitled to only a one-fourth share in the larger property. This is important, because in the 1985 suit that led to this Second Appeal, there is no mention at all of this Deed of Rectification. Later, in cross-examination in the suit, the 1st Plaintiff, (confusingly also named Aurelia), admitted the existence of this Deed of Rectification, and that it was done to change the shares allotted under the Partition Deed so that all four Brothers Miranda took an equal share in the larger property.¹¹ She also said that she did not know who the parties were to this Deed of Rectification.

11 Volume II, p. 211.

15. Alba died on 28th July 1971. Sometime in 1972, Gobindram advertised in local newspapers expressing interest in purchasing and developing properties in Goa. There is apparently an unproved document, but it seems Gobindram later claimed (in his written statement) that he was put in possession of the larger property on 9th September 1972. In that month, he began development on the larger property. He submitted subdivision and layout plans, sought boundary demarcations, a survey and the creation of plots across the property. He also had prepared plans for the Chandor Housing Colony on the larger property. Again, there are some intervening events and documents that were not proved.

16. There is then an agreement for sale dated 9th April 1973.¹² The vendors were Diogo and his wife Ida; Avelino and his wife Berta; Mario and his wife Wilma; Antonio and his wife Flavia; Servulo and his wife (yet another Aurelia); the 1st Plaintiff, Aurelia; and her sister, the 3rd Plaintiff, Maria. These were, thus, two of the four original Brothers Miranda, and the heirs of the other two brothers. By this agreement, the vendors agreed to sell Caldas Miranda, the larger property, to Gobindram, the original 1st Defendant, as the proprietor of G Ramnani & Associates, for a total consideration of Rs.4.30 lakhs. The 1st Defendant paid Rs.21,000/-. The agreement records that the larger property admeasures 358,722.20 sq mts.¹³

12 Volume II, p. 397, Exhibit PW1/T.

13 Inexplicably, the plaint mentions a much smaller area of 336,475 sq mts and the Plaintiffs never explained the difference.

17. On 5th June 1973, Plaintiffs Nos. 1 and 3, Aurelia and Maria succeeded to the estate of their mother, Alba.¹⁴ That document says that Alba held only some investments but no other property. Pursuant to the Sale Agreement, Gobindram's name was entered on the revenue records of the larger property as the occupant.¹⁵ This has not been rectified or subjected to any challenge. In April 1973, Gobindram through his architect submitted a layout proposal for the larger property, with bungalows proposed on some survey numbers.

18. Exhibit PW1/V in evidence is a collective marking assigned to four sale deeds dated 13th February 1974, 15th February 1974, 26th April 1974 and 26th October 1978. These were in regard to, respectively, Plots Nos. 12, 8, 10 and 11, and these were all sale deeds of these plots by *all co-owners* to Gobindram. The sale deeds in evidence have no plans, but the descriptions are clear, and it seems to be agreed that the original sale deeds, now very old, did in fact have plans attached and mentioned these plot numbers. Gobindram claimed to have paid an aggregate amount of Rs.1,29,765.55 for these plots. He said they admeasure 89,680.675 sq mts, about a quarter of the larger property of 358.722.70 sq mts. The consideration, Gobindram claimed, was also about a fourth of the total consideration agreed for the larger property.

19. The Plaintiffs claimed that sometime in 1980 they terminated the agreement for sale for the larger property. Gobindram maintained that they had no right remaining in them to do so; and

14 Deed of Succession, Exhibit PW1/G, Volume II, p. 353.

15 Exhibit PW1/B, Volume II, p. 256.

that the other vendors to the suit agreement of 1973 (for the larger property) had not joined in any termination nor raised any dispute. There then followed, a few years later in 1983 and 1984, public notices by Plaintiffs Nos. 1, 2 and 3 in the local newspapers.¹⁶ On 8th January 1985, Gobindram advertised sale of the property.¹⁷ The Plaintiffs then filed the instant suit on 11th January 1985.

20. In the course of the suit, there are two events of significance. The first was the filing, in parallel, on 29th November 1991 of another Civil Suit No. 352/91/D by these very Plaintiffs against the other parties to the 1968 Rectification Deed, seeking a declaration that it was void. Mr Jain says this suit was entirely fraudulent, and indeed he uses this descriptor even in his notes. The challenge to the Rectification Deed was mounted on the basis that Plaintiffs Nos.1 and 3, Aurelia and Maria, the daughters of Aureliano and Alba, were not parties to it. Mr Jain says this is a charade, for Alba was very much alive at the time of the 1968 Rectification Deed, and was a party to it; and the larger property had been allotted to her in her deceased husband, Aureliano's, inventory proceedings. I believe this is a sound submission, but there is yet more. The second suit was of 1991. Yet, by then there was the suit agreement of 1973 by which the original parties to the Rectification Deed sold their rights in the larger property to Gobindram; and there were also the four plot sale agreements of 1974 to 1978. At the very least, therefore, Gobindram ought to have been joined as his rights were directly affected, and he was, by act of parties, by then a successor-in-

16 Exhibits PW1/J and PW1/K, Volume II, *p.* 383, notices dated 17th January 1983, 3rd February 1983 and 31st May 1984.

17 Exhibit PW1/N, Volume II, *p.* 390.

interest, at least in part. It is alleged that several defendants to this 1991 suit were never served with the Writ of Summons. It is true, however, that not a single defendant entered a written statement. The suit went uncontested. The defendants to the 1985 suit (the present suit from which this Second Appeal stems) were given no notice of the 1991 suit, though the later suit directly affected the question of title to the property. The 1991 suit came to be adjudged *ex parte* on 29th August 1992.¹⁸ Mr Jain submits that the decree is a result of a fraud on the court; inventory proceedings were not disclosed and which would show that Aureliano's entire share had gone to his widow Alba (as described above in relation to his inventory proceedings); the Rectification Deed found no mention in the 1985 suit; and therefore the decree of 29th August 1992, being obtained by fraud, is a nullity and cannot bind the appellant.¹⁹

21. The second intervening litigation factor of consequence is that on 27th January 1998, the Plaintiffs filed an amendment application in the 1985 suit seeking the impleadment *as fellow Plaintiffs* of 19 others, proposed to be added as Plaintiffs Nos. 5 to 23. These were said to be the heirs of Diogo and his wife Ida (proposed Plaintiffs Nos 5 to 13); the widow and children of Avelino (proposed Plaintiffs Nos 14, 13, 15 and 16); Antonio was proposed as Plaintiff No.17, and his children as Plaintiffs Nos. 18 to 21; and Aurelia Carmen and her husband as proposed Plaintiffs Nos. 22 and 23. The assertion was that proposed Plaintiffs Nos. 5 to 13 (Diogo's

18 Volume II, *pp.* 540–547.

19 Mr Jain also points out that as late as her evidence in the 1985 suit, taken in 1994 and 1995, the 1st Plaintiff made no mention of the 1991 suit or the decree in that suit.

branch) had no share, right, title and interest in the larger property. Gobindram opposed the application. It was rejected on 10th March 1998. This is actually central to the first question of law framed in this Second Appeal; and even the First Appellate Court has commented on it, as we shall see. Shortly stated, Mr Jain's submission is that the court had inherent powers under Order I, Rule 10 of the CPC to add any parties it thought were 'necessary', and that nothing in the CPC prevented the original Plaintiffs from making an appropriate application to seek relief *against* the other co-owners. But, in his submission, without joining other co-owners, the entire 1985 suit was bad and not maintainable, and it could not acquire maintainability because the 1st Defendant opposed an application of this nature and framed in this fashion.

22. A few other facts of note in the trial of the 1985 suit must be noted, for, again, there is a comment about these in the First Appellate Order. The Defendants led no evidence of their own. They did not cross-examine PW3 or PW4. As I have noted, after the evidence affidavit of PW5 was filed on 12th June 2003, even that witness was not cross-examined. Similarly, the evidence affidavit of PW6 was filed on 1st July 2003 and, again, there was no cross-examination by the Defendants.

23. I have already set out the subsequent events after the 1985 suit was decreed on 26th August 2003.

24. I will take up the relevant pleadings, evidence, the order of the Trial Court and the order of the First Appellate Court in the

manner in which they have been addressed by Mr Jain and Mr Diniz.

D. RIVAL SUBMISSIONS AND FINDINGS

25. Mr Jain first draws my attention to paragraphs 15 to 17 of the Plaintiff in the 1985 suit. These are, he says, and I am inclined to agree, crucial. This is how those paragraphs read:

15. Thereafter Plots Nos. 8, 10, 11 and 12 were sold to the Defendant No.1, by Deeds dated 15/2/1974, 26/4/74, 26/10/19713 and 13/2/1974 respectively;

16. Plots Nos. 1, 2, 3, 4, 5, 6, 7 and 9 have not been sold to the Defendant No.1 and the same continue to belong absolutely to the Plaintiffs and the Plaintiffs are in actual possession of the same; they are predominantly a vast expanse of open, rocky land, fit for construction of buildings, and contain very few trees, some of them bearing no fruit;

17. The said Plots Nos. 8, 10, 11 and 12 comprise nearly the entire one-eighth above-referred, and includes some part of the remainder of the property which was as aforesaid exclusively allotted to the said Aureliano Bonaventura Bossuet da Piedade Miranda;

26. Mr Jain submits that Plots Nos. 1, 2, 7 and 9 are actually part of the identified 1/8th portion, of which, as we have seen, there were four co-sharers, the four Brothers Miranda. The whole of this 1/8th was carved out of the larger property, distinct from the share given to Aureliano alone (the 7/8ths portion of the larger property),

and the 1950 Partition Deed specifically retained the 1/8th — which, he says, would include Plot Nos. 1, 2, 7 and 9 — equally between all four brothers. He says that all plans show Plot Nos. 1, 2, 7 and 9 overlapping or falling with the 1/8th portion which is clearly identified by its boundaries. If this be so, he submits, the Second Appeal must succeed, for no declaration could have been sought by these four Plaintiffs alone, in the absence of the other co-sharers (or their heirs) in regard to the 1/8th portion. The plaint makes no mention of this pooling and carving up; nor does it mention the later Rectification Deed of 1968; and that only makes matters worse, for the Rectification Deed re-settled the shares and all four brothers' branches took the entire larger property equally, including these four plots. It is incorrect to suggest, he submits, that this is inconsequential or insignificant — it directly affects the maintainability of the suit itself and whether any decree at all could have been made on it; a matter squarely before this court now in view of the first question of law framed.

27. On one aspect Mr Jain is correct: correctly read, the present plaint altogether disavows by non-reference the Rectification Deed. The suit follows the separation in the Partition Deed, as if the Rectification Deed never existed as on the date of the suit. This is apparent from (i) paragraphs 7 and 8 of the plaint, and (ii) the complete elision from the plaint of all mention of the Rectification Deed of 1968. This is what paragraphs 7 and 8 of the 1985 plaint say:

7. The said property, with the exclusion of one specific eighth of it was allotted to Aureliano Boaventura Eossuet da Piedade Miranda, son of the said Mrs. Aurelia da

Piedade Coutinho Miranda and father of the Plaintiffs 1 and 3;

8. The said one-eighth contained coconut trees and other fruit bearing trees, two residential houses, all the fountains, with bathrooms, a lake, a paddy field and bamboo groves and is bounded on the East by the remaining part of the same property and by other properties, on the West by the gutter and the way, on the North by the gutter and the remaining part of the same property, and **on the South by the railway line beyond which lies the remaining part of the said property.**

(Emphasis added)

28. Mr Jain correctly says that this narrative *exactly* follows the Partition Deed of 1950, not the Rectification Deed of 1968. It also says, importantly, that the southern boundary of the 1/8th portion was the railway line. The plan annexed to the plaint shows the plots and the railway line.²⁰ Consequently, Mr Jain submits, once he is able to demonstrate (i) that Plot Nos. 1, 2, 7 and 9 are in the 1/8th portion (of which there were four co-sharers as set out in the plaint); or (ii) that the four plots sold to Gobindram, viz., Plots Nos. 8, 10, 11 and 12 fall within the identified 7/8th portion (which came to Aureliano and then to Alba; and were then subjected to the Rectification Deed of 1968), this will disprove paragraph 17 of the plaint; the suit become automatically not maintainable, for in either view — either in regard to the 1/8th portion or in regard to the four sold plots in the 7/8th portion — there are demonstrably, on the Plaintiffs' own showing, other sharers who were never joined to the

²⁰ Exhibit PW1/W, Volume III, p. 538. This plan was annexed to the plaint.

suit and in whose favour no relief was sought. Paragraph 17 of the plaint (set out above) is an assertion that the four sold Plots Nos 8, 10, 11 and 12 comprise 'nearly the entire 1/8th' (and spill over into part of the 7/8ths). Factually, this is incorrect even on an arithmetical computation: the four sold plots are, together, only 1/4th of the larger property, not 1/8th. They are about 96,000 sq mts out of about 336,000 sq mts. He also points out that the 1973 suit agreement described the larger property exactly and, in the recitals,²¹ described the land as falling above the railway line (First Part or First Addition) and below it (Second Part or Second Addition). The agreement also referred to a plan annexed. The 1973 agreement also says in Clause 8²² that there was a small hut and a small portion in the possession of tenants who were to be vacated; and that immediate possession of that small portion was not possible. This cannot, Mr Jain says, be used to suggest that no possession of any portion was given to the Gobindram. Further, clause 10 required the vendors to pay outgoings until the date of the conveyance. There is not even a pleading that they paid anything to evidence continued possession. The agreement itself said that Gobindram did not have to await a conveyance to commence development,²³ and could even advertise for sale.²⁴

29. Three of the four plot sale conveyances of 1974 to 1978, those for Plot Nos. 10, 11 and 12 are, Mr Jain says, below the railway line. These conveyances were signed by all co-owners. The agreement of

21 Volume II, *p.* 399.

22 Volume II, *p.* 402.

23 Clause 11, Volume II, *p.* 402.

24 Clause 12, Volume II, *p.* 403.

15th February 1974 is for Plot No.8.²⁵ The description says Plot No. 8 is bounded on the south by the railway line; i.e. that the plot is to the north of the railway line. Factually, the Trial Court was therefore in complete error in saying that this plot was *below* the railway line; it could not have been. In cross-examination on 4th October 1997, PW1, the 1st Plaintiff admitted that there were other owners with rights in the agreement land.²⁶

30. Then — and this is important on the issue of maintainability — PW1 said in her cross-examination:²⁷

“The original owner of the property had five sons and two daughters, they are Diogo Miranda, Camilo Miranda, Luis Miranda, Mario Miranda and Aveliano Miranda and daughters are Angela and Flavia Mario died at the age of 17. After the death of Luis the property devolved upon his wife Aurelia by way of Inv. Proceeding. **After the death of Aurelia the 4 sons became the owners of the said property. as per deed of partition. I say that 7/8th share was given to my father Aureliano and 1/8th share to all sons including my father.** The two sisters were not parties to the deed of partition. I do not know whether there was Inv. after the death of my grandmother Aurelia. There was

25 Part of Exhibit PW1/V, Volume III, *p.* 492.

26 Volume I, *p.* 201. PW1 says: “I and 6 of us signed the agreement as sellers. The person who had signed the agreement are the owners of the said property. Beside then some more persons have right to the said property. Those are Maria Miranda, Flavia Menezes and Misquita, Colacao. Both persons had a right to the property ever prior to the execution of the said agreement. The above persons had signed the agreement. The parties to the agreement have different proportions. I cannot say as to why the rights of the parties in proportions have not been mentioned in the agreement.”

27 Volume II, *pp.* 210–211.

no partition by metes and bounds after the shares were allotted to my father. There was a mutual understanding. It was joint property as was not divided physically. Although the property was partitioned the property was enjoyed in common. **There was rectification deed after 1950 to the deed of partition. The rectification deed was signed somewhere in the yr 1970.** We were not the parties to the said deed. I do not know who were the parties to the said rectification deed. **The same deed of rectification was signed or executed to change the shares of the parties to the deed of partition. By said deed rectification the share all the parties to the deed of partition were made equal.** It is not true that myself and plttf.no.3 have acquired 1/4th share in the suit property. **Rectification deed was annulled by judgment and decreed obtained in the Court.** I do not remember even by approximation and in which year the same deed of rectification was annulled. It is not sugg. that the same deed of rectification has not annulled by any Court order, and the deed of rectification is valid even today. It is not true to suggest that all the brothers including my father were entitled for the equal share in the property. **This present suit is in respect of 7/8th share the part of the property has been sold ... The property which has been sold also formed the part of the property of agreement dt. 9.4.73."**

(Emphasis added)

31. I note this not for any factual dispute, but because the First Appellate Court materially misdirected itself by concluding that this evidence was *inadmissible on account of Sections 91 and 92 of the Evidence Act*, for it was 'contrary' to the Partition Deed.²⁸ Those

28 Volume I, pp. 32-33, paragraph 28.

sections had no application at all. The witness was not attempting to enforce an oral understanding contrary to the terms of a written documents. She was being cross-examined and answering a question on a document put to her. This underscores the need to invariably record a cross-examination in question-and-answer form rather than in this narrative fashion. But the answers contain important admissions: that the suit is in regard to the 7/8th portion or part of it sold to Gobindram; that the four sold plots were covered by the 1973 sale agreement; and that there were others who had a share or interest in this larger property. Now it makes little difference whether one proceeds with or without the Rectification Deed of 1968. If the Partition Deed alone is considered, then the four brothers had a stake in the 1/8th portion, and if any of the four plots covered by the suit are in that 1/8th portion, there were others who had a share in it. If the annulment of the Rectification Deed is considered, the same position obtains. If the decree annulling the Rectification Deed is itself a nullity,²⁹ then the Rectification Deed stands, and all four brothers (and their branches) had a stake in the whole of the property, including the four plots sold and covered by the suit. From any perspective, therefore, on this evidence, the question of joinder of other persons with a share in the property squarely arose.

32. There are very many issues with this decree in the 1991 suit.³⁰ No one explains how it came to light. Mr Diniz would have it that it was found by chance in 1989. The plaint says the cause of action

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30 Volume III, *pp.* 540–547.

arose on 29th December 1989. There was no question of Aureliano being a party to this document of 1968, for he had died in 1955; and there is no mention of inventory proceedings in his estate and the vesting of his share in his widow, Alba. This also does not explain how these four Plaintiffs abruptly joined other family members to the 1991 suit. Finally, the sale agreements proceed on the basis that the Plaintiffs knew of the Rectification Deed at the time of the Sale agreements in 1974 through 1978, because the vendors claimed *equal* shares, not that 7/8ths of the larger property vested in Aureliano alone, with all four brothers holding equal one-fourth shares only in the remaining 1/8th portion.

33. Mr Jain submits that in any case, so far as Gobindram is concerned, this is all moot. By 1991, the date of the second suit on the Rectification Deed, Gobindram held four conveyances and was a co-owner; and yet he was not joined to that suit. Not being a party, and the judgment not being *in rem*, it would not bind him or affect his title. In its judgment in the present suit of 26th August 2003,³¹ the Trial Court said that the suit was filed for recovery of plots lying on the 7/8th portion of the larger property (exclusively in Aureliano's share per the Partition Deed of 1950) and that no part of the subject matter fell within the 1/8th portion.³² The suit was laid on the basis of notional plot numbers not on survey records. Indeed, the Plaintiffs seem to have proceeded without any mention of Aureliano's estate inventory proceedings on the basis that they were universal heirs of their father. But the record shows that in the estate

31 Volume I, *pp.* 81–101.

32 Volume I, *p.* 91.

proceedings for Aureliano, the 7/8th share in the larger property (item 29 in the inventory) came wholly to his widow Alba, the moiety sharer, and his one-fourth share in the remaining 1/8th share (item 30 in the inventory) also came to her. The Trial Court referred to the inventory proceedings of 5th June 1973, but wrongly; for those were inventory proceedings for *Alba's* estate, following her death on 28th July 1971, and they made no mention at all of *any* of this property. It had to follow, therefore, that during her lifetime, *inter vivos*, she divested herself of title; that property had to be either in her estate, if she retained title to it, or it had to have gone somewhere. There are only two possibilities: either by the Rectification Deed of 1968, or by a sale or transfer. The former would operate to still retain a one-fourth share in the larger property in her estate. But if the whole of it went out of her estate, then it had to be by way of a transfer; and what therefore remained is that following the Rectification Deed of 1968, Alba divested herself of title.

34. Mr Jain puts it thus: on any reading of the plaint and the documents, if the four sold plots Nos 8, 10, 11 and 12 occupy the entirety of the 1/8th portion of the larger plot, then the appeal must fail. But the four plots together do not account for 1/8th of the larger property; they are about one-fourth of it, and therefore, must fall outside the 1/8th portion in the Partition Deed, and therefore there are other contenders to title not joined to the suit, and the Plaintiffs could not claim exclusivity on their own plaint and evidence. Equally, if any part of the unsold plots fell into the 1/8th portion, then, too, he would be entitled to succeed. In its judgment and decree, the Trial Court not only granted relief for the eight suit

plots (Nos 1, 2, 3, 4, 5, 6, 7 and 9) *but also* granted relief for distinct survey numbers: 20/1, 20/2, 20/3, 20/4, 25/32, 25/34, 27/1, 28/1, 32/1, 32/2 and 32/3. Nobody had sought this relief. Nobody had proved that these eight ‘unsold’ plots (and the plot markings were not official sub divisions but only for development) corresponded to these survey numbers.

35. There is the evidence of PW6,³³ who said that all survey numbers except survey no. 17 were unsold. Therefore, Survey No.17 was sold. But this survey number is below or to the south of the railway line and Plot No. 8 (admittedly sold) is above the railway line. The plan annexed to the plaint showed Survey No. 32 above the railway line and Survey No. 17 below it. This had to mean that Plot No. 8, a sold plot, was in Survey No. 32, and Plot Nos. 10, 11 and 12 alone were in Survey No. 17, in the 7/8ths portion. Yet the evidence of PW6 is that Survey No. 17 was sold. Now the record is clear from the inception that the 1/8th portion is above the railway line; nothing below the railway line can be part of the 1/8th portion. The entire footing of the plaint was, therefore, incorrect and directly led to the question of the necessity of other sharers.³⁴

36. As to the First Appellate Court, Mr Jain submits that the Learned Judge materially misdirected herself. Apart from rejecting the evidence of PW1 that there was *no* division by metes and

33 A retired Superintendent of Surveys and Land Records. Referred to by the Trial Court at Volume I, *p.* 92. Evidence at Volume II, *pp.* 253, 254.

34 Incidentally, on checking the record, I found that the crucial plan, PW1/W was completely in tatters.

bounds, and holding on no evidence at all that there was,³⁵ the First Appellate Court dealt only with Survey No. 17 and Plot Nos. 10, 11 and 12. The Court did not address the situs of Plot No. 8 at all.³⁶ Now if, Mr Jain says, as the record shows, the 1/8th portion is identified as being above the railway line (which forms its southern boundary), no survey number below the railway line can possibly be part of the 1/8th portion. Consequently, neither the Trial Court nor the First Appellate Court could have arrived at any determination of which part of Survey No. 32/3 was sold; and there is no finding that any part of Survey No 32/3 was sold. Yet the Trial Court decreed the suit for the whole of Survey No. 32/3;³⁷ and it granted a decree never sought, in respect of specific survey numbers.

37. On law, Mr Jain therefore puts his case like this.³⁸ To obtain a decree, a plaintiff must have a subsisting right on the date of his suit. Section 34 of the Specific Relief Act 1963 clearly says that a declaration can only be of the right as on the date of institution of the suit. Indeed, there is authority for the proposition that the right must subsist on the date of the decree.³⁹ At the time of the present suit, in 1985, the Rectification Deed was very much in operation. It

35 Volume I, *p.* 32–33: “This proves that the property was divided by metes and bounds i.e. a distinct 1/8th part of it was allotted to four of the parties and the remainder 7/8th part was allotted exclusively to the said Aureliano.” This was nobody’s case; all four conveyances were signed by all parties, and the vendors said that the 1/8th portion was *not* subdivided in the land records.

36 Paragraph 35, Volume I, *p.* 36.

37 Volume I, *pp.* 100, 102.

38 I will not succumb to the diversion regarding the nullity of the 1991 suit. That is not a matter that is for me to decide in this Second Appeal.

39 *Qabool Singh v Board of Revenue*, AIR 1973 All 158.

had not been annulled. The right of the Plaintiffs to claim exclusive title did not therefore subsist in them; and there was simply no proof of exclusive possession. To succeed, a plaintiff must prove that he is entitled to a declaration as to a legal character, or as to a right to property.⁴⁰ It is well settled that if absent a pleading, no amount of evidence can be used in substitution;⁴¹ and that evidence must be given only in support of plea properly raised.⁴² A court cannot grant a relief not sought; and a judicial decision cannot be based on grounds outside pleadings.⁴³ The finding to be returned must be on the case pleaded, not on grounds outside the pleadings.⁴⁴

38. The focus must remain on the two questions of law, and while I believe I have the authority to frame or raise additional ones,⁴⁵ I do not believe that is at all necessary. Of course, interpretation of documents is a substantial question of law, as the Supreme Court has long said.⁴⁶ I will accept, too, that the question of sufficiency of material to support a conclusion is also a question of law,⁴⁷ as are matters of admissibility of documents or evidence should these

40 *Sheoparsan Singh v Ramanandan Prasad Narayan Singh*, AIR 1916 PC 78.

41 *Bachhaj Nahar v Nilima Mandal & Anr*, (2008) 17 SCC 491; *Rao Saheb v Ranganath Gopalrao Kawathekar*, (1972) 4 SCC 181.

42 *Om Prabha Jain v Abnash Chand & Anr*, AIR 1968 SC 1083.

43 *Trojan & Co v RMNN Nagappa Chettiar*, AIR 1953 SC 235; *SN Ranade v Union of India & Anr*, AIR 1964 SC 24.

44 *SN Ranade, supra*; *Siddu Venkappa Devadiga v Rangu S Devadiga & Ors*, (1977) 3 SCC 532.

45 *State Bank of India & Ors v SN Goyal*, (2008) 8 SCC 92.

46 *SK Bhikan v Mehamoodabee & Ors*, (2017) 5 SCC 127; *Sir Chunilal V Mehta & Sons Ltd v Century Spg & Mfg Co Ltd*, AIR 1962 SC 1314; *Oriental Investment Co Ltd v CIT*, AIR 1957 SC 852.

47 *Seth Suwalal Chhagalal v CIT*, 1949 (XVII) ITR 269;

materially affect a finding.⁴⁸ A failure to consider relevant material, or taking a fundamentally wrong approach are also questions of law.⁴⁹ If a court does not correctly address whether a plaintiff before it has discharged the burden of proof, which never shifts (only the onus does),⁵⁰ then this is also a question of law. Even if no written statement is filed, a court should require the plaintiff to prove the facts stated in the plaint before passing judgment.⁵¹

39. The question is straightforward. On the material that I have set out — and I have set it out at some length only for this reason — how should the first question of law framed by the Court be answered? If it is answered in the affirmative, then both decisions of the courts below must be set aside, and the suit must be dismissed. If not, then the second appeal fails. It is to this that Mr Diniz, quite correctly, and with his usual precision, addresses himself.

40. It is Mr Diniz's submission that I should not, and even cannot, re-appreciate the evidence in this Second Appeal. What I must address is the question framed as one of law: was the suit maintainable without joining other owners?

41. His submission is that a co-owner can always sue a trespasser and recover possession without joining other owners. Having

48 *Bibhabati Devi v Kumar Ramendra Narayan Roy* ("the Bhowal Sanyasi case"), AIR 1947 PC 19 : [1946] AC 508; *Sir Chunilal Mehta, supra*.

49 *Jagdish Singh v Natthu Singh*, AIR 1992 SC 1604; *Bharatha Matha & Anr v R Vijaya Renganathan & Ors*, AIR 2010 SC 2685; *Anil Rishi v Gurbaksh Singh*, (2006) 5 SCC 558.

50 *A Raghavamma & Anr A Chenchamma & Anr*, AIR 1964 SC 136

51 *CN Ramappa Gowda v CC Chandregowda*, AIR 2012 SC 2528.

terminated the 1973 agreement, this suit was literally for that relief and no other. The factual basis of the substantial question of law was that the property was joint and undivided. If this is *not* true, then no substantial question of law arises, and the matter must end at that.

42. Consider what the First Appellate Court said, he submits. The Plaintiffs did indeed make an application to join others as fellow Plaintiffs. This application was opposed by the Defendants. He invites attention to the order on that application.⁵² I think it is perhaps best to reproduce the material portions of that order.

3. The defendant filed reply inter-alia contending that amendment frivolous and filed with intent to delay the suit. The plaintiffs on their own pleadings are not entitled for adding of any parties, since they claim that they have no right to the suit property and therefore have no interest or claim in the property. The plaintiffs cannot ask to join new parties against their wish. Present amendment will change the very nature of the suit, and is time barred and beyond limitations. The plaintiffs are trying to cover up holes in the evidence by the present amendment. The defendants will be greatly prejudice if amendment application is allowed.

4. Arguments heard.

Learned Advocate for the plaintiffs had submitted that in the suit for declaration all the parties are necessary. Limitation is concerned so far as the defendants to be added in the suit. Technical objections have been raised that suit is bad for non- joinder of the parties and therefore the application.

52 Volume I, *pp.* 106–111, at *p.* 109.

Per contra, learned Advocate for the defendants submitted that the persons are no way concerned with the suit. The presence of the persons to be added is not necessary to effectually and completely adjudicate upon and settle the points involved in the suit that it will give rise to different cause of action.

The plaintiffs presumably filed an application under Order 1 Rule 10 (2) r/w Order 6 Rule 17 of C.P.C.

There is no denying the fact that the question of implement of a party as defendant is to be decided one the touchstone of Order 1, Rule 10(2) of C.P.C. which provides that only a necessary or a proper party may be added which is necessary for effectual and complete adjudication of all the question involved in the suit.

In *Rasia Begum v/s. Sahebadi Anwar Acquem* reported in A.I.R 1958 SC 886, the Hon'ble Supreme Court was concerned with the question or addition of parties. That was a suit for declaration and the Supreme Court laid down various principles. Two of these principles would be relevant for the purpose of present case.

(a) That the question of addition of parties under Rule 10 of Order 1 of C.P.C. is generally not one of initial jurisdiction of the Court but of Judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case ...

(b) That in a suit relating to property, in order that a person may be added as a party he should have a direct interest as distinguished from a commercial interest in the subject matter of the litigation.

Therefore, it is manifestly clear that when the person has no interest in the subject matter of the suit on the date of the suit, the persons cannot be said to be necessary for adjudication of the suit.

In the instant case, the plaintiffs have not made out a case showing direct, defined, subsisting and substantial interest in the litigation which interest is either legal or equitable and which right is cognizable by law.

From the very tenor of the application at para 2, it is evident that the suit property exclusively belongs to the plaintiffs and parties sought to be added have no right or share in the property. What is required under Order 1 Rule 10 is that the parties must have direct interest in the suit. If not parties cannot be added. It is also seen that no reliefs have been prayed against the persons to be added. The issue cast is on the defendants to prove that there is non-joinder of necessary parties. The persons mentioned in the application at the most could be material witnesses for the plaintiffs to prove its case that they are the exclusive owners of the property. **The plaintiffs have failed to establish that the addition of the new parties is for the sole purpose of an effectually adjudicating the dispute, and that the persons are necessary and proper parties to the suit.** Hence pursuant to the above discussion,

I pass the following:-

ORDER

The application stands dismissed with no order as to costs.

(Emphasis added)

43. Clearly, this order is not one of the stripe that Mr Diniz says. It did not reject the application simply because it was opposed. The application was rejected on merits, because the Plaintiffs failed to make out a case for impleadment; and the Learned Judge noted that the Plaintiffs' own application proceeded on the basis that they were still the *only* owners of the land in exclusive possession, and that the others sought to be impleaded had no right in it at all. The decision was rendered not on what the Defendants said, but on what the Plaintiffs said (or, more correctly, failed to say). The Learned Judge noted the submission that the amendment application sought to take away a valuable defence that had accrued to the Defendants, viz., of a fatal defect in the plaint, and that this was evident from the fact that the amendment did not seek to change the plea of exclusive ownership in the original Plaintiffs. But that submission is correct on all counts; and the opposition by the Defendants furnishes no answer at all to the issue of maintainability.

44. The argument for the Plaintiffs seems to be founded on some principle of estoppel by conduct or estoppel in pais, or at least on the prohibition against approbating and reprobating. Mr Diniz submits that having said the others were not necessary parties in response to the amendment application, the appellant cannot now be heard to say they were, and the suit is bad for their not being joined. I do not think this is at all correct. The amendment application is of 1998. Defendants Nos. 1 to 4 entered a written statement in 1985, over a decade earlier. In paragraph 2 of that

written statement,⁵³ they said in terms that the suit was bad for non-joinder of parties, and:

"All the persons who were the owners of the suit property have not been joined in the above suit either as Plaintiffs or as Defendants."

45. This was not just a defence accrued. This was a defence taken, and it is the underpinning of the first substantial question of law. If found to be correct, the suit would have to fail. Any amendment to add parties to cure such a non-joinder defect would have to be viewed first from the perspective of whether it took away a valuable defence. It did. Second, the amendment was inconsistent with the plaint, and its plea of exclusive ownership in the four original Plaintiffs. If they were indeed the exclusive owners, and continued to be so, then, as the Learned Judge hearing the application correctly reasoned, there was no need for the application at all, for they were not shown to be necessary parties. Mr Jain submits that the court could have joined them itself; indeed it could, but why would it, with this plea in the plaint and this response in the written statement? He is, however, correct in saying that nothing prevented the plaintiffs from mounting a correct application, claiming exclusivity of ownership not just in the four original Plaintiffs but in the others sought to be joined too. They did nothing of the kind, and the order of the Learned Judge, which I have quoted above for this very reason, shows us that the Plaintiffs' own application was materially misdirected and misconceived.⁵⁴ In

53 Volume I, *p.* 182.

54 I do not think it is necessary to even address the secondary question that the Plaint showed no cause of action against Defendants Nos. 2, 3 and 5,

holding against the Appellant on the ground of 'estoppel',⁵⁵ in my view the First Appellate Court fell into manifest error, and the error was one of law. This is not a question of the Defendants approbating and reprobating.⁵⁶

46. Indeed, if there was an issue of estoppel to be raised, it would have to be against the Plaintiffs not Gobindram, for this order notes the submission by the Plaintiffs' Advocates that in a suit for declaration, the proposed Plaintiffs were 'necessary'. I may also note the stage at which this application came to be made: it was in 1998, a good four years after the examination of PW1 in March 1994; and therefore was indubitably an attempt to cover up a lacuna in the evidence. I very seriously doubt any court would have allowed such an amendment, presented in this form, on these averment, this late in the day.

47. Mr Diniz goes further. Mario Miranda, PW5, one of the so-called co-owners gave evidence, noted by the First Appellate Court,⁵⁷ that the Plaintiffs were the exclusive owners. The Defendants did not cross-examine him. But this is a wholesale misreading of the evidence. PW5 said the 1/8th distinct part had already been sold; but to whom? And by whom? The discussion in

all employees of the 1st Defendant Gobindram, and Defendant No.4 was a partnership firm wholly unconcerned with the suit property.

55 Volume I, p. 55.

56 Mr Diniz relies on the decision in *Spring Fresh Drinks Pvt Ltd & Ors v Gani Sons Charitable Trust & Ors*, (2017) 1 BCR 672. But that was in an entirely different context of a landlord-tenant relationship and a case *inter alia* under Order II Rule 2 of the CPC.

57 Volume I, p. 37, paragraph 36.

the First Appellate Court's order does not critically examine the evidence of PW5 in the context of the historical documents. This witness said that the four sold plots comprised the 1/8th portion of the larger property — the very line taken by the Plaintiffs. But, as we have seen, that could simply not be true on the basis of the documents, the sale deed, the plans, the inventory proceedings, the Partition Deed or the Rectification Deed, or, for that matter, even on an arithmetical calculation. To put it in short, *some* portion of the eight plots that were the subject matter of the suit, and said to be unsold, had to fall into the 1/8th portion that was said to have been sold; and there was nothing to show that the four sold plots occupied the entirety of the 1/8th portion above the railway line. The fact that PW5, as the Constituted Attorney for other branches, said so was no proof of the fact he alleged if it was unsupported by any reasonable interpretation of the documents. In other words, if the documents in evidence showed title or shares in others, then no amount of oral denial was of any use. For this reason, I am not persuaded that Mr Diniz's submission that 'once a co-owner comes as a witness and says he has no right, title or interest, and is not cross-examined, then nothing remains'. This takes us back to the question of burden and onus; and the burden was firmly on the Plaintiffs to show, both from the documents and other evidence, that they were at the time of the suit exclusive owners of the eight plots in suit. Similarly, the emphasis he places on the phrasing of the written statement that those who *were* co-owners were not joined is incorrect. It is no substitute for proof that the whole of the 1/8th portion was covered by the four plots sold to Gobindram. That has, simply put, never been established.

48. This is where the Plaintiffs stumble. Their case now seems to be that the Plot No.8 is *exactly* the 1/8th portion. It is not; and the suit is not only about Plot No. 8. It is about Plot Nos. 8, 10, 11 and 12, and *all* of them are said to be in the 1/8th portion. That 1/8th portion is above the railway line (and always has been); and therefore all four plots must be above the railway line, and between them, make up the full 1/8th. But Plots 10, 11 and 12 are not above the railway line; they are entirely below it, as is part of Plot No. 9. It was never the Plaintiffs' case that only Plot No.8 was the 1/8th portion. This is a latter-day epiphany with no moorings in fact or evidence.

49. On what is the Plaintiffs' case predicated? Shorn of all details, it is on the basis (i) that the Rectification Deed is a nullity and was validly adjudged to be so; (ii) that this was the position as on the date of the suit; (iii) that all four sold Plots Nos 8, 10, 11 and 12 occupy the whole of the 1/8th portion, viz., that none of them are outside it, and (iv) that it stands proved that not one of eight *unsold* suit plots is within the 1/8th portion. Why must this necessarily be so? The answer lies in the Plaintiffs' claim for *exclusive* possession of the eight plots and their saying that these fall in the 7/8ths portion of the larger property; and that they said this not only when they instituted the suit, but maintained it right up to the decree. The reasoning, on their part, seems to be that Aureliano was, under the 1950 Partition Deed, given the 7/8th portion exclusively. The Rectification Deed of 1968 taking away that exclusivity and bringing in the shares of the other owners was adjudged a nullity. That reverted the parties to the 1950 position, with Aureliano's branch taking the whole of the 7/8ths portion. Therefore, the Plaintiffs, the

lineal descendants in Aureliano's branch, were the exclusive and only owners of the 7/8ths portion. Therefore, in Mr Diniz's formulation, once it was shown that the eight unsold suit plots fell into this 7/8th portion, they were the only ones with title to these suit plots; and no question of non-joinder could arise.

50. This required, therefore, the Plaintiffs to establish that none of the unsold plots fell into the 1/8th portion, which, as we have seen, was firmly established as being north of the railway line. They were therefore also required to show from evidence and documents that the four sold plots constituted the whole of the 1/8th portion. If any unsold plot fell into that portion then even on the Plaintiffs' own showing, there were others who would have had title, simply because that 1/8th portion was always held by the four Brothers Miranda equally and the Deed of Rectification did not and could not alter this. It only expanded that equalisation to the 7/8th portion. Even if the Deed of Rectification fell, there were other co-sharers to the 1/8th portion lands and plots.

51. If this be so, and there is simply no other way to look at it, and since the suit itself did not peg the claim to any Survey Nos, nor was any attempt made even by PW6 to correlate the survey numbers to the plots, then the other co-sharers had to be joined as parties to the suit; or, at the very least, the prayer had to seek a declaration *not of exclusivity* but worded to say that the Plaintiffs, along with named persons, were the true owners of the plot. The plaint does not do this. That there is no one-is-to-one correspondence between the

plot numbers and survey numbers is evident from the decree itself:⁵⁸ it mentions the eight suit plot numbers and then eleven survey numbers.

52. Mr Diniz submits that the first substantial question of law is premised on the continuing validity of the Rectification Deed. He says that since the 1st Defendant, Gobindram, never challenged it or sought to have it set aside, it is binding on him. There are far too many problems with this formulation. Gobindram was not made a party to the 1991 suit seeking annulment of the 1968 Rectification Deed. It is for the Plaintiffs to show how it could be said to be binding on him, even assuming that its *ex parte* result was indeed valid and proper.

53. But this construct proceeds on a wholly incorrect assumption, which is this: that the 1985 suit not only mentioned the 1968 Rectification Deed, but that the Plaintiffs derived their claim to title from its annulment. The argument assumes that, as on the date of the institution of the suit in 1985, the Rectification Deed of 1968 was not valid or binding on the Plaintiffs. In fact, it was not until 1991 that the Plaintiffs filed a suit impeaching the 1968 Rectification Deed. This is important because:

- (a) The 1950 Partition Deed gave the 7/8ths portion of the larger property to Aureliano, the Plaintiffs' ancestor, exclusively;

58 Volume I, *pp.* 100–101.

- (b) The 1968 Rectification Deed took this away, and made all four Brothers Miranda (Aureliano and his brothers) equal one-fourth sharers in the 7/8ths property — and since they were already one-fourth sharers in the remaining 1/8th property, this made them one-fourth sharers in the whole of the larger property;
- (c) Therefore, as on the date of institution of the suit, in 1985, all four branches had a one-fourth share in the entire larger property;
- (d) This meant that all four branches had an interest or share in all the eight unsold plots.

54. Mr Diniz's reliance on the brief Supreme Court decision in *A Viswanatha Pillai v Special Tahsildar*,⁵⁹ and particularly a statement in paragraph 2 of that decision, is, regrettably misplaced. That was a case under the Land Acquisition Act, with some of the co-owners, without joining the others, claimed a *pro rata* share in the compensation. This is how that paragraph reads:

2. The sole question for decision is whether in a reference sought for by one of the co-owners whether the other co-owners who did not expressly seek reference, are entitled to enhanced compensation pro rata as per their shares. It is not in dispute that under the partition deed, the four brothers as coparceners kept in common the acquired property and Venkatachalam was in management thereof and each are entitled to 1/4 share in the ancient anicut and the irrigation system. It is also

59 (1991) 4 SCC 17.

undisputed that total enhanced compensation is Rs 52,009.40. Therein all the four brothers including the appellant are entitled to 1/4 share each. In the reference application made by Venkatachalam indisputably he mentioned that the acquired property belonged to him and his other brothers and the compensation awarded by the Land Acquisition Officer was inadequate and very low. It was also stated that they should get an enhanced amount at the figure specified in the reference application. Undoubtedly he stated therein that he is entitled to 1/4 share. What he stated thereby was that of his entitlement of 1/4 share of the total enhanced compensation and obviously, after the reference on par with his three brothers, he is entitled to receive compensation at 1/4 share. The courts below disallowed the payment to the appellants on the ground that there is no mention in claim petition of the partition deed; that they are the co-owners and that there is no averment that Venkatachalam was seeking reference under Section 18 on his behalf and on behalf of his other three brothers. As regards the first two grounds are concerned they are palpably incorrect. It is seen that an express averment was made in the objections filed pursuant to notice under Sections 9(3) and 10 and also in his reference application under Section 18 of the Act, that there was prior partition and each of the brothers are entitled to 1/4 share and that they are dissatisfied with the award of the Collector. Undoubtedly there is no express averment in the reference application under Section 18 that he is seeking a reference on his behalf and on behalf of his three brothers. It is contended by the counsel for the State that the pleadings are to be strictly construed and that as the reference was sought for only by Venkatachalam of all the six awards the other three brothers are not entitled to any share in the enhanced compensation. In support thereof it is also further contended that Viswanathan and

Pasupathy had only asked for reference in respect of two awards and Sabhapathy Pillai made no request for reference against any of the six awards made by the Collector. It is true that Viswanathan and Pasupathy made such request in respect of two awards and Sabhapathy did not make any request for reference against any of the awards. But what would be the consequence in law is the question. It is surprising that the State having acquired the property of a citizen would take technical objections regarding the entitlement of the claim. The State certainly is right and entitled to resist claim for enhancement and lead evidence in rebuttal to prove the prevailing price as on the date of notification and ask the court to determine the correct market value of the lands acquired compulsorily under the Act. But as regards the persons entitled to receive compensation are concerned it has no role to play. **It is for the claimants inter se to lay the claim for compensation and the court would examine and award the compensation to the rightful person.** As seen in the objections pursuant to the notice under Sections 9(3) and 10, Venkatachalam made necessary averments that himself and his brothers had 1/4 share in the anicut and irrigation system pursuant to the partition deed referred to therein. In his reference application under Section 18 also he reiterated the same and stated that the amount awarded by the Collector was inadequate and that they were dissatisfied with it and that they are entitled to more. **It is settled law that one of the co-owners can file a suit and recover the property against strangers and the decree would enure to all the co-owners.** It is equally settled law that no co-owner has a definite right, title and interest in any particular item or a portion thereof. On the other hand he has right, title and interest in every part and parcel of the joint property or coparcenery under Hindu law by all the coparceners. In *Kanta Goel v. B.P. Pathak* [(1977) 2 SCC

814 : (1977) 3 SCR 412] this Court upheld an application by one of the co-owners for eviction of a tenant for personal occupation of the co-owners as being maintainable. The same view was reiterated in Sri Ram Pasricha v. Jagannath [(1976) 4 SCC 184 : (1977) 1 SCR 395] and Pal Singh v. Sunder Singh [(1989) 1 SCC 444 : (1989) 1 SCR 671] . A co-owner is as much an owner of the entire property as a sole owner of the property. It is not correct to say that a co-owner's property was not its own. He owns several parts of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner in the property. That position will undergo a change only when partition takes place and division was effected by metes and bounds. **Therefore, a co-owner of the property is an owner of the property acquired but entitled to receive compensation pro rata.** The State would plead no waiver nor omission by other co-owners to seek reference nor disentitle them to an award to the extent of their legal entitlement when in law they are entitled. Since the acquired property being the ancestral coparcenary and continued to be kept in common among the brothers and the income derived therein was being shared in proportion of their shares by all the brothers it remained as joint property. As co-owners everyone is entitled to 1/4 share therein. It was also laid by this Court in a recent judgment in Ram Kumar v. Union of India [(1991) 2 SCC 247] that it is the duty of the Collector to send full information of the survey numbers under acquisition to the court and make reference under Section 18 and failure thereof is illegal. The same ratio would apply to the facts in this case as well. **When one of the co-owners or coparceners made a statement in his reference application that himself and his brothers are dissatisfied with the award made by the Collector and that they are entitled to higher compensation, it would**

be clear that he was making a request, though not expressly stated so but by necessary implication that he was acting on his behalf and on behalf of his other co-owners or coparceners and was seeking a reference on behalf of other co-owners as well. What was acquired was their totality of right, title and interest in the acquired property and when the reference was made in respect thereof under Section 18 they are equally entitled to receive compensation pro rata as per their shares. The courts below committed manifest error in refusing to pass an award and payment thereof to the appellants merely on the ground that there was no mention in this regard in the reference application or two of them sought reference in respect of two awards and the last one made no attempt in their behalf. The claimants are entitled to payment of the enhanced award by the civil court pro rata of their 1/4 share each with 15 per cent solatium and 4 per cent interest as awarded by the civil court. The appeals are accordingly allowed with costs of this Court.

(Emphasis added)

55. But in the case at hand, the Plaintiffs' claim was not to a declaration of a fractional title *along with others*, i.e. any *pro rata* share in the 7/8th property. Their claim was that they and they alone were exclusively entitled to the whole of that 7/8ths and that no one else had a share in it, even from the family Miranda. On the Partition Deed read with the Rectification Deed as it stood at the date of the suit, this was plainly incorrect and hostile to the title of the other branches of the Miranda family. There was no pleading at all that the other branches had ceased to exist and that their title in the land had passed to the Plaintiffs. There was simply no question

of the Plaintiffs' claim, if granted, 'enuring to the benefit of the other co-owners'.

56. The decision in *Poonamma v Narayanan*,⁶⁰ also cited by Mr Diniz, turned narrowly on the facts of that case and can be of no assistance to Mr Diniz. Here, too, the claim was made against an outsider but, as paragraph 14 shows, there was *also* a claim of being a co-owner. The present Plaintiffs have made no such claim at any time.

57. Mr Diniz's reliance on paragraph 11 of the Supreme Court decision in *Mohinder Prasad Jain v Manohar Lal Jain*⁶¹ is without the all-important reference to context. Paragraph 11 of the decision says this, in the context of a tenant eviction action by one of several co-owners:

11. A suit filed by a co-owner, thus, is maintainable in law. It is not necessary for the co-owner to show before initiating the eviction proceedings before the Rent Controller that he had taken option or consent of the other co-owners. However, in the event a co-owner objects thereto, the same may be a relevant fact. In the instant case, nothing has been brought on record to show that the co-owners of the respondent had objected to eviction proceedings initiated by the respondent herein.

However, paragraph 2 of the same decision reads:

2. The father of the respondent herein was the owner of a shop in which the appellant was inducted as a tenant

60 (2017) 6 SCC 778.

61 (2006) 2 SCC 724.

on 1-4-1972. The monthly rent payable in relation to the said tenanted premises was Rs 700. **The original landlord, the father of the respondent having died on 5-3-1979, the respondent along with his four sisters, became the owner of the said tenanted premises.** He was an employee of Hero Honda Motors Limited. He retired from service having attained the age of superannuation. One year after his retirement, he filed an application under Section 13 of the Haryana Urban (Control of Rent and Eviction) Act, 1973 ("the Act") for eviction of the appellant from the shop in question on the ground of his bona fide personal requirement i.e. for the purpose of running wholesale business in Ayurvedic medicines. The said application was dismissed by the Rent Controller holding that the bona fide requirement of the respondent in respect of the non-residential premises had not been proved **and moreover he had not been able to show consent of his sisters in his favour in that behalf.**

(Emphasis added)

58. There was no dispute there that the plaintiff was indeed a co-owner and sued as such. But the present Plaintiffs do not claim co-ownership. To the contrary: their claim is of *exclusive* ownership, i.e. to the exclusion of the other three branches of the family Miranda who were entitled to a share in the 7/8ths of the larger property following the Rectification Deed. As on the date of the suit, they could not maintain this claim of exclusivity. For this reason, too, the unreported decision in *Raman B Kapadia v Amin Yakub Habib*⁶² does not assist Mr Diniz.

62 Decided on 17 December 2004.

59. Finally, Mr Diniz refers to the decision in *Laxmishankar Harishankar Bhatt v Yashram Vasta*,⁶³ to say that since the Defendants did not spell out the co-owners they claimed ought to have been joined, their plea was of no avail. But the Supreme Court decision is on a totally different footing. There, the defence was vague and did not have the shared history this case does. In the present Plaintiff, there is no question of the Plaintiffs being unaware of the persons to whom the Defendants referred in their written statement. There were always only two sides in this: the family Miranda and Gobindram. The plea of non-joinder was, evidently and clearly, only a reference to the other branches of the Miranda family who took under the Partition Deed read with the Rectification Deed. There could be no other.

60. Even factually, this last submission is not well-founded. Paragraph 11 of the written statement⁶⁴ actually names the other persons in the sale agreement of 1973; and then says that the ‘said 10 persons who were the owners of the whole property have not joined in the suit either as Plaintiffs or as Defendants’. There can be no doubt that the 1973 agreement for sale of the larger property was premised on the 1968 Rectification Deed. Later in the same paragraph (on the next page), there is again a reference to the co-owners; and then there is this statement, never rebutted, and never considered, that:⁶⁵

63 (1993) 3 SCC 49.

64 Volume I, p. 189, internal page 9.

65 Volume I, p. 190.

the Plaintiffs Nos. 1 and 3 with a view to avoid of [sic] joining the other co-owners to the suit property either as plaintiffs or as defendants made false statements in the suit that the remaining unsold property belongs to the Plaintiffs.

61. On the question of non-joinder, Mr Diniz says that the written statement itself says in paragraph 7⁶⁶ that the heirs of the alleged co-owners are dead. This is incorrect. That is not what the written statement says at all. It says:

"The Plaintiffs have not informed this Hon'ble Court that *some of the alleged co-owners who signed the agreement for sale with the Defendant No.1 are dead. In the absence of the heirs of the alleged deceased co-owners the present suit cannot be proceeded with.*"

(Emphasis added)

No pleading can be read in this manner, dropping some words and even entire phrases. The pleading in paragraph 7 of the written statement is entirely consistent with the case of non-joinder.

62. Finally, there is the curious wording of paragraph 17 of the Plaint, set out above, where the Plaintiffs say that Plots Nos. 8, 10, 11 and 12 comprise 'nearly' the entire 1/8th (therefore not the whole of it) *and includes some part of the remainder of the property*, viz., the 7/8ths part. Therefore, on this paragraph alone, and given the subsistence of the Rectification Deed at the date of the suit, the

66 Volume I, *p.* 185.

other co-owners were necessary parties and had to be joined to the suit.

63. It is one thing to say that a co-owner can sue for his *pro rata* share, or on behalf of other co-owners, seeking a relief that will enure to all without joining the others; it is quite another to say that he will sue for the whole of it in defeasance of the rights of the other co-owners without joining them. There is absolutely no vestige of doubt in my mind that such a claim of exclusive ownership to the 7/8ths of the larger property could not have been made at the date of institution of the suit without joining the other co-owners; and no such relief could have been granted to the Plaintiffs.

64. This was a fatal defect in the plaint, never cured. The suit had to fail. On the principle of better late than never, it does, now; the first substantial question of law will be answered in the affirmative.

65. As we have seen earlier, the evidence of PW6, the retired Superintendent of Surveys and Land Records, was that all survey numbers except Survey No. 17 were *unsold*. The only buyer was Gobindram. If this was sold, and since the Plaintiffs said that all four sold plots were on the 1/8th portion, and that portion was, admittedly, to the north of the railway line, Survey No. 17 had to be to the north of the railway line. But factually, and demonstrably, Survey No. 17 is to the south of the railway line. Therefore, it follows that one of the sold plots fell outside the 1/8th portion; and the assertion that all the sold plots were in the 1/8th portion to the north of the railway line cannot be correct. Plot No. 8 lies to the

north of the railway line. The plaint plan shows Survey No. 32 to the north of the railway line and Survey No. 17 below it. This could only mean that Plot No. 8 was part of Survey No. 32. Yet the Trial Court decreed the suit for Survey No. 32, a portion that the Plaintiffs' own evidence said was sold. This also meant that Plot Nos. 10, 11 and 12 were in Survey No. 17 and this was *not* part of the 1/8th portion, since it was south of the railway line. These three sold plots therefore fell within the 7/8th portions; and no declaration of absolute and exclusive ownership of the 7/8ths portion could have been granted to the Plaintiffs.

66. Now the 12 plots covered the whole of the larger property. If the Plaintiffs could not show that Survey No.32 encompassed Plot No. 8, it would have to follow that some unsold plots fell within the 1/8th portion, and that immediately brought into play the title of others from the Miranda family. There is, of course, the arithmetical computation. If the four sold plots all fall into the 1/8th portion, their aggregate area must admeasure 1/8th of the larger plot. But this is incorrect. The areas in the four sale deeds taken together come to around 1/4th of the larger plot. Beyond this, however, is one salient aspect. The 1/8th portion was exactly described and defined from the inception of this division. Its boundaries were known and fixed. Not one of the sold plots — not even Plot No. 8 — matches these boundaries. The plaint thus held inherent contradictions. If, as the Plaintiffs said, the four sold plots constituted the 1/8th portion, and no unsold plot fell within the 1/8th portion, then the declaration sought was useless against the 1st Defendant. If any part of an unsold plot fell in the 1/8th then there were other co-sharers who were not joined. The unsold plots

could not be both only within the 7/8ths portion of the larger property and also outside it. Both assertions could not co-exist.

67. This actually puts us directly in the frame of the second substantial question of law framed at the time of admission of this Second Appeal. At the cost of repetition, and for convenience, I will reproduce here again:

ii) Whether Plots No. 8, 10, 11 and 12 sold to the deceased Defendant No.1 by various sale deeds totally admeasuring 96,068.95 sq mts constitutes 1/8th of the entire property totally admeasuring 3,58,722.80 sq mts?

68. The four plots referred to here are the four sold plots; and the 1/8th portion is not a reference to area or dimensions, but to the identified 1/8th in the 1950 Partition Deed. In view of the previous discussion, the answer to his question must be in the negative. The four sold plots cannot and do not constitute the 1/8th identified portion of the larger property.

69. On the aspect of a substantial question of law, I find Mr Diniz's reliance on the decision of the Supreme Court in *Santosh Hazari v Purushottam Tiwari*⁶⁷ to be more than somewhat misplaced. Indeed, it seems to me that paragraph 14 of that decision is more against him than for him:

14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must

67 (2001) 3 SCC 179.

be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case **unless it goes to the root of the matter**. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; **the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.**

(Emphasis added)

70. On any reasonable assessment of the record, the substantial questions of law do arise. They relate to the proper approach, the proper appreciation of evidence, matters of admission and estoppel and, critically, to the frame of the suit and its maintainability, a question that indubitably goes to the root of the matter.

71. The written statement also contains another statement, at two places. It points out an inherent contradiction in the plaint. In paragraphs 11 and 13,⁶⁸ Gobindram said that the Plaintiffs had never

68 Volume I, *pp.* 191, 192.

informed him that they had acquired a 7/8th share in the larger property; and assuming without admitting that they did, then they could not have signed the four sale deeds as co-owners. This is not a plea about joinder; it is a direct reference to the factual basis of the second substantial question of law, i.e., the sold plots were not confined to the 1/8th identified portion, and nor were the unsold plots confined to the 7/8ths portion of the larger land.

72. There is no dispute that the four plots nos. 8, 10, 11 and 12 were indeed sold to Gobindram. The question was whether these four sold plots took up the whole of the identified 1/8th portion, and the pleading in the written statement cannot be read as some sort of inference of that fact, let alone proof of it. The evidence of PW5 that the others have 'no right' does not take the matter further, because it only means that the other heirs had no right in the four sold plots. That is not in fact the ambit of the suit. Indeed, the suit referenced the four plots not to seek any title for them but to separate them out, i.e. to say that everything *except* for these four plots belonged to, and only to, the four original Plaintiffs. Evidence that the other co-owners had sold the four plots to Gobindram was, therefore, never even in dispute.

73. Referring finally to the plan at Exhibit PW1/W, Mr Diniz is compelled to say that part of Survey No. 32, viz., Survey No.32/3 covers Plot No. 8, but does not 'clearly' show Survey No. 32/3 flowing into the unsold portion. That is not good enough. As we have seen, all four sold plots had to be shown to be confined to the identified 1/8th portion, north of the railway line; and this is demonstrably not correct, for Plot Nos. 10, 11 and 12 are south of

that railway line. They could not therefore be in the identified 1/8th portion. They fell into the 7/8th portion. The Plaintiffs could not therefore claim exclusive title to the whole of the 7/8ths portion. And this would also mean, going by the areas, that some portion of the unsold plots fell into the 1/8th portion, or had to; which is precisely Mr Jain's submission. According to Mr Diniz, in the Second Appeal, I may modify or clarify the decree invoking powers under Sections 151 or 152 of the CPC. He relies on *UP State Brassware Corporation Ltd v Uday Narain Pandey*,⁶⁹ about the inherent powers of a court. But reference to a decision under labour law, the Industrial Disputes Act, and the powers of the Supreme Court under the Constitution of India, albeit read with Section 151 of the CPC, can be of little assistance in a matter such as this when the question is not of moulding a relief but goes, as we have seen, to the root of the matter.

E. THE IMPUGNED JUDGMENT

74. This takes me, finally, to a consideration of the impugned judgment of the First Appellate Court.⁷⁰ I have already set out the three points for determination framed in the First Appeal.⁷¹ The reasoning starts from paragraph 24. The first point was whether the Plaintiffs proved they were the absolute owners in possession of the eight unsold Plot Nos 1, 2, 3, 4, 5, 6, 7 and 9. In paragraphs 26 and

69 (2006) 1 SCC 479.

70 Volume I, pp. 16-69.

71 Volume I, p. 29.

31, the First Appellate Court held that the Plaintiffs had established that they owned the whole of the 7/8th portion. There is no discussion here of how this could be on the date of the suit. Then in paragraph 34, the First Appellate Court proceeded to hold that the Defendants had admitted that the four sale deeds include only S No 17 and Survey Nos 20/1 to 20/4. But that was not the issue at all. The question was whether these covered the identified 1/8th; and the plaint did not proceed on the basis of Survey Numbers at any point.

75. Indeed, this case implodes in the very next paragraph 35, where the First Appellate Court held that Plot Nos. 10, 11 and 12 fell only within Survey No. 17/1. But that Survey No is below or to the south of the railway line, and could never, therefore, be part of the identified 1/8th portion which was admittedly entirely to the north of that railway line. The entire reasoning proceeds on the basis that 1/8th is an unidentified share or fraction of the property, when in fact it was an *identified* 1/8th, whose boundaries were clearly spelt out. There was no question of anyone having any burden in regard to the survey numbers — no such question arose in the suit.

76. In paragraph 43, the First Appellate Court addressed the question of non-joinder. The reasoning on estoppel (the defendants having opposed the amendment application) was, as we have seen, incorrect and cannot be sustained. The question was also not of joinder of the owners of the other 1/8th part; but of the owners of the 7/8th portion in view of the Rectification Deed of 1968. Indeed, in this there is no discussion about the Rectification Deed at all or

how, absent any pleading whatsoever, the 1st Plaintiff as PW1 could have been permitted to give any evidence in respect of it.

F. CONCLUSION & ORDER

77. For the foregoing reasons, the Second Appeal succeeds. The first substantial question of law is answered in the affirmative. The second substantial question of law is answered in the negative. For clarity, these are reproduced with my findings.

Sr No	Substantial Question of Law	Finding
(i)	Whether declaratory Regular Civil Suit No. 21/1985/C is inherently not maintainable in the absence of impleadment of all co-owners of the suit property as necessary parties either as Plaintiffs or Defendants more particularly Diogo Miranda, Avelino Miranda and Luis (Jr) Miranda or their heirs the suit property being joint and undivided?	In the affirmative. The suit was not maintainable
ii)	Whether Plots No. 8, 10, 11 and 12 sold to the deceased Defendant No.1 by various sale deeds totally admeasuring 96,068.95 sq mts constitutes 1/8th of the entire property totally admeasuring 3,58,722.80 sq mts?	No. The four sold plots do not constitute 1/8th of the larger property.

78. The orders of both courts below are quashed and set aside. The suit is dismissed.

79. At the request of the Respondents, the operation of this order is stayed for a period of eight weeks from today. In the meantime, the original Plaintiffs shall not themselves, or through their agents or successors or assigns, create any third party rights in respect of the eight plot number 1, 2, 3, 4, 5, 6, 7 and 9.

G. ACKNOWLEDGEMENTS

80. I realize this is unusual, but I believe I should be entirely remiss if I did not say this. I must express my gratitude to the Counsel on both sides. Both have faced a formidable task. Mr Jain had an uphill task before him, with two concurrent findings against the appellant of the courts below. The record is, by any standard, exceptionally difficult. It is not the volume or mass — nearly 1200 pages — but the even the physical state of the record. There are very old documents. Many are handwritten. The language in some is difficult and arcane, and the structure is peculiar to the region. The narrative itself has doubled back on itself and twisted this way and that (not in the least assisted by the fact that many names were common through generations, *Aurelia* among them). Mr Jain has navigated these difficult waters with admirable dexterity and skill, marshalling the facts neatly and precisely. Resisting the undeniable temptation to veer off in different directions he has remained focussed on the questions that arose in the Second Appeal. For his

part, Mr Diniz has had no less daunting a challenge. He has had to defend both orders and, more than that, to substantiate the initial pleading, the suit with which his clients came to court. He, too, never lost sight of the precise objective before him. Throughout, the conduct of advocates had that genteel and courteous quality for which the Goa Bar is rightly renowned. To the parties, too, my thanks for their forbearance in this delay, and my apologies. The case at hand has, on documents, evidence, testimony and law not been easy, and while this is no excuse, the expression of regret must suffice.

(G.S. PATEL, J.)