

VPH

IN THE HIGH COURT OF BOMBAY AT GOA

**SECOND APPEAL No. 51 OF 2016
WITH
SECOND APPEAL No. 52 OF 2016
WITH
SECOND APPEAL No. 53 OF 2016
WITH
SECOND APPEAL No. 54 OF 2016**

- Satchidanand S. S. Kacodkar)
(since deceased, representing through)
legal representatives))
1. Smt. Bhavanibai Sinai Cacodkar)
(deceased) widow of Satchidanand)
Kakodkar)
2. Shambhu @ Rajendra Satchidanand)
S. Kakodkar, son, married)
and his wife)
3. Mrs. Shambhu Satchidanand Kakodkar
Housewife)
4. Mahendra Satchidanand S. Kakodkar)
Son, married and his wife -)
5. Mrs. Mahendra Kakodkar, Major,)
housewife,)
- All the above are residents of Rua)
Abade Faria, Margao, Goa)
6. Dr. Arvind V. S. Salelkar, son-in-law)
7. Smt. Kanaklata Arvind Salelkar)
d/o Satchidanand Kakodkar,)

both R/o. – Opposite Universal)
Pharmacy, Fontainhas, Panji)

8. Dr. Satish Bhale, son-in-law and his)
wife Respondent No. 8 – expired)

9. Smt. Sulaksha Satish Bhale, d/o.)
Satchidanand Kakodkar,)
both residents of Amrut Pillai, IInd)
floor, Dr. Atmaram Borkar Road,)
Panji)

Appellant Nos. 6, 7, 8 and 9 are)
proforma parties, as they stood)
deleted in the suit vide order)
dated 18.8.2012)

... Appellants

Vs.

1. Megaxma Ramacrishna Sinai)
Cacodkar alias Dr. Meghasham)
Ramkrishna Sinai Kakodkar,)
Medical Practitioner, R/o. Curchorem)
(deceased) and his wife -)

2. Smt. Manoramabai Megaxama S.)
Cacodkar, housewife, R/o. Curchorem)
(since deceased, represented through)
the legal representatives))

(a) Smt. Kundan Ghanashyam Kamat)
d/o Meghasham S. Kakodkar, major,)
married and her husband)

(b) Ghanashyam Raghuvir Kamat,)
son of Raghuvir Kamat, major in age)
married, both R/o. Curchorem Goa)

(c) Smt. Vandan Krishnanath Dhume,)
d/o Meghasham S. Kakodkar, major)
in age, married and her husband -)

- (d) Shri Krishnanath Govind Dhume)
s/o. Govind Dhume, major in age)
married,
both above R/o. Alto Dabolim, behind
Skyline Apartment, Post Dabolim,)
Airport Goa)
- (e) Smt. Snehal Shekhar Sukhtankar,)
d/o Meghasham S. Kakodkar, major)
of age, married, and her husband -)
- (f) Shri Shekhar Sadanand Sinai)
Sukhtankar S/o Sadanand Sinai)
Sukhtankar, major in age, married)
both above R/o. Sadanand, Flat)
No. 148, near Journalist Colony,)
both R/o. Alto Betim,)

... Respondents

Mr. M. B. D'Costa, Sr. Counsel with Abhay Nachinokar, for the Appellants.

Mr. Nitin Sardessai, Sr. Counsel with Vibhav R. Amonkar, for the Respondents.

CORAM : C. V. BHADANG, J.

RESERVED FOR JUDGMENT : OCTOBER 21, 2019

JUDGMENT PRONOUNCED ON : JUNE 26, 2020

(Pronounced through video conferencing)

JUDGMENT :

1. All these appeals arise out of the common judgment and decree dated 22.3.2016 passed by the learned District Judge at Margao in Regular Civil Appeal Nos. 84/2015, 85/2015, 12/2016 and 13/2016, which in turn arose out of judgment and decree dated 1.6.2015 passed

by the learned Civil Judge Junior Division at Quepem in Regular Civil Suit No. 33/1983/B. As such, they are being disposed by this common judgment.

2. The brief facts necessary for the disposal of the appeals may be stated thus:

Late Meghasham Sinai Kakodkar and his wife Smt. Manoramabai Sinai Kakodkar (original plaintiffs) filed the aforesaid suit against now deceased Satchidanand Sadashiv Sinai Kakodkar (original defendant) for mandatory and perpetual injunction in which the defendant raised a counter claim for declaration and injunction. The original plaintiff No. 1 and the sole defendant are dead. The parties herein are the legal representatives/successors of the plaintiffs and the defendant. For the sake of convenience they are referred to in their original capacity as plaintiffs and the defendant.

3. The subject matter of dispute is land surveyed under number 146 (described under No. 26507 and inscribed under No. 7818) of village Cacora (Excluding the portion sold by sale deed dated 24.3.1980 and 12.8.1981 and the portion leased out to M/s. Geekay Industries by a lease deed dated 27.11.1981) known as Chourgalimordi or Chougallivorilmordi, which is more specifically described in para 4 and 4A of the plaint. The suit property has cashew and bamboo trees

and teak plantation and is said to be surrounded by a mud wall (Addo).

The case made out in the plaint is that the plaintiffs are in exclusive possession of the said property as owners thereof.

4. It was contended that on 23.5.1983 when the plaintiff No. 1 visited the suit property, he noticed some rubble stones lying in the property and upon inquiry it was learnt that the stones were brought and dumped by the defendant, some two days back, during night. The defendant by a communication dated 20.5.1983 claimed ownership over land Survey No. 146/1 and proposed to construct a compound wall in the said property. Apprehending disturbance to their possession the plaintiff No. 1 lodged a complaint against the defendant with police station Curchorem. The plaintiffs contended that the defendant has no right, title or interest in the suit property. It was contended that the defendant has no right to interfere with the peaceful possession of the plaintiffs over the suit property. It is in these circumstances that the suit came to be filed for mandatory injunction directing the defendant to remove the rubble stones and for restraining him from interfering with the possession of the plaintiffs over the suit property.

5. The defendant resisted the suit and raised a counter claim. It is contended that the plaintiffs have referred the entire property known as 'Chourgalimordi' or 'Chourgalivorilmordi' as the suit

property, which is not correct. It is contended that only a portion, admeasuring 5000 sq. mts. from out of the aforesaid property, which is surveyed under No. 146/1, is the property in dispute, which is more specifically described in para 1 of the written statement cum counterclaim. The defendant has referred to the said portion as the “suit land”. According to the defendant, he is in possession of the suit land, since the year 1959 continuously, peaceably and as of right. It is contended that the defendant was put in possession of the suit land by the plaintiff No. 1 as per the terms of the *Escrito Particular* (EP) dated 17.12.1957. It is contended that the defendant has planted several cashew and bamboo trees in the suit land. It is contended that the document of Escrito -Particular is a document, which is acted upon by both the parties and is binding on the plaintiffs and the defendant. It is contended that the defendant has performed and was always ready and willing to perform his part of the obligations under the said document. It was contended that the defendant has paid proportionate rent (*foro*) of Rs 53/- per annum to the plaintiffs till the year 1982.

6. It is contended that the portions, which are sold by registered sale deeds of the year 1980 and 1981 have nothing to do with the suit property as they are distinct. Insofar as the lease deed of the year 1981 with M/s. Geekay industries is concerned, the same is denied.

All other adverse allegations and contentions raised in the plaint have been denied including that the suit property is surrounded by a mud wall, as claimed on behalf of the plaintiffs. The defendant claimed ownership and possession over the suit land, since the year 1959 on the basis of the *Escrito Particular*. It was contended that apart from making the plantation of cashew and bamboo trees, the defendant has erected a mud ridge with barbed wire fencing in the year 1960 to protect the plantation. The defendant thus sought a declaration that he is in possession of the suit land as owner thereof and injunction restraining the plaintiffs or anybody on their behalf from interfering with his possession over the suit land.

7. The plaintiffs resisted the counterclaim. It was contended that the *Comunidade of Cacora* had granted to the plaintiff No. 1 by way of an *aframento* an area admeasuring 28,600 sq. mts. of the property known as *Chorgalivoril Mordi* under Matriz No. 416 which was accordingly described under No. 26507 and inscribed under No. 7818 in the name of the plaintiff No. 1. The plaintiff No. 1 has married the plaintiff No. 2 under the regime of communion of assets. It is the specific case that the *Escrito Particular* was never acted upon as it was executed for the limited purpose of arresting the bidding in the auction by the *Comunidade*. The bidding could not be arrested and as such the

said document was never acted upon. It was contended that the *Escrito Particular* is void and not enforceable at law and is not binding on the plaintiffs. In any event, it does not create any right in the immovable property, as it is not registered, though it is a compulsorily registrable document. It is contended that there is no evidence to show that the defendant was actually put in possession of the property. The said document is a unilateral document without consideration and has no binding force in law. It was denied that the defendant has ever paid or that the plaintiffs have accepted any amount towards *foro*. All other adverse allegations have been denied.

8. On the basis of the rival pleadings the learned trial court framed the following issues:

- (i) Whether the plaintiffs prove that they are owners in continuous, peaceful and uninterrupted possession of the suit property Chourgalivoril Mordi ever since its grant except the portions sold by them?
- (ii) Whether the plaintiffs prove that they have sufficiently identified / described the so called suit property, as required under Order 7 rule 3 of C.P. C.?
- (iii) Whether the plaintiffs prove that the defendants have illegally trespassed into the suit property and dumped laterite stones and granite stones during the night of 21.5.1983 or 22.5.1983 which was learnt by the plaintiff on 23.5.1983 upon inquiry?
- (iv) Whether the present suit is barred by law of limitation?

- (v) Whether the defendants prove that the plaintiff No. 1 had put them in possession of the suit plot admeasuring an area of 5,000 sq. mts. in the year 1959 after executing *Escrito Particular*?
- (vi) Whether the counter-claim is barred by law of limitation?
- (vii) Whether the plaintiffs prove that *Escrito Particular* was entered into only for the purpose of arresting bidding and it had no any validity in the eyes of law to confer any title on the defendants?
- (viii) Whether the defendants prove that the plaintiff No. 1 with the aid of labourers demolished the compound wall (addo) of the suit land between 25.5.1983 to 1.6.1983 and placed stones into the property of plaintiffs to create false evidence?
- (ix) Whether the defendants prove that they are in possession of the suit land described in the counter-claim since 1959 and their possession has been open peaceful and uninterrupted as of right?
- (x) What relief? What order?

9. The plaintiffs have examined Meghasham Kakodkar (PW 1), Bernard Rodrigues (PW2), Vishnu Karmali (PW 3), Manuel Fernandes (PW4), Ramkrishn Kakodkar (PW 5), Chandrakant Kuncolienkar (PW 6), Gajanan Shirvoikar (PW 7), Rajendra Desai (PW 8), Praveen Dessai (PW 9), Devappa Dessai (PW 10), Vishram Kantak (PW 11), Ganshyam Kamat (PW 12) and Amarnath Sawant (PW 13).

10. The defendants examined defendant No. 2 Shambu Kakodkar (DW 1), DW 2 Narcinva Kakodkar, DW 3 Vikas Desai, DW

4 Prabhanjan Karmali, DW 5 Sandesh Kosambe, DW 6 Joaquim Fernandes, DW 7 Santan Baretto, DW 8 Sudesh Bareli, DW 9 Hector Fernandes, DW 10 Alok Parigrahi, DW 11 Ashok Meghraj.

11. The learned trial court answered issue Nos. 1 to 3 and 6 to 8 in the negative and the issue Nos. 4, 5 and 9 in the affirmative. Consequently, the learned trial court, by a judgment and decree dated 1.6.2015 dismissed the suit, while allowing the counter-claim. This gave rise to in all four appeals before the learned District Judge at Margao. RCA No. 84/2015 and RCA No. 85/2015 were filed by the plaintiffs challenging the dismissal of their suit and the grant of the counter claim, while RCA No. 12/2016 and RCA No. 13/2016 are filed by the defendant, challenging the adverse finding against issue No. 8 about demolition of the compound wall, as claimed by the defendant. The only prayer in the said appeal is to answer the said issue No. 8 in the affirmative. It is necessary to note that, neither it was necessary for the plaintiffs to have filed, separate appeals, one each, challenging the dismissal of the suit and the grant of the counter-claim, as both these challenges were interconnected and could have been subject matter of a single appeal, nor it was necessary for the defendant to have filed any appeal, (much less two separate appeals), merely to challenge the adverse finding, against one of the issues, when the ultimate decree in

the suit was in favour of the defendant. The said issue could have been challenged in the appeal filed by the plaintiffs. This is just to put the record straight. Be that as it may, the learned District Judge framed following points for determination:

- (i) Whether it was proved that the plaintiffs were the owners in possession of the suit property?
- (ii) Whether it was proved that the defendant was the owner in possession of the disputed portion of the suit property?
- (iii) Whether the suit was not maintainable and / or no decree can be passed in favour of the plaintiffs?
- (iv) Whether the suit was within limitation?
- (v) Whether the impugned judgment calls for interference?

The learned District Judge by a Common Judgment and decree dated 22.3.2016 has allowed RCA Nos. 84/2015 and 85/2015 filed by the plaintiffs, while dismissing RCA Nos. 12/2016 and 13/2016. As a result thereof, the suit filed stands decreed while the counterclaim is dismissed. This has given rise to the present four second appeals, filed by the defendant.

12. These appeals were taken up for final disposal, on the request of the parties, inasmuch as the suit, out of which these appeals arise, dates back to the year 1983. By consent of parties, the appeals

were heard on the following substantial questions of law:

- (a) Whether the First Appellate Court was justified in holding that the suit, simplicitor for injunction was maintainable, when there was specific cloud raised on the title of the plaintiffs over the suit land ?
- (b) Whether the First Appellate Court was Justified in holding that the suit was not barred by limitation?
- (c) Whether the judgment of the First Appellate Court is vitiated under Order XLI Rule 31 of CPC for not having framed proper points?
- (d) Whether the following findings of fact/law recorded by the learned first Appellate Court are perverse being against the weight of evidence and/or for want of pleadings and proof?
 - (i) That the *Escrito Particular* dated 17.12.1957 is void being an agreement opposed to public policy in terms of section 24 of the Contract Act, which finding is against the law, laid down by the supreme court in the case of *Gurumukh Singh Vs. Amar Singh*¹? Incidentally, whether oral evidence against the term of *Escrito Particular* could have been allowed in terms of Section 92 of the Evidence Act?
 - (ii) That the *Escrito Particular* was not acted upon?

¹ (1991) 3 SCC 79

- (iii) That the evidence of the defendant about he being in possession, was beyond pleadings, when there were specific pleadings that the defendant was in possession of the suit land?
- (iv) Whether the First Appellate Court has applied two different yardsticks, while appreciating the evidence of the plaintiffs and the defendant?

13. I have heard Mr. D'Costa, the learned senior counsel for the appellants and Mr. Sardessai, the learned senior counsel for the respondents. The parties have also filed written submissions on record. I have gone through the same. With the assistance of the parties, I have gone through the record and the judgment of the courts below.

14. Mr. D'Costa, the learned senior counsel for the appellants has made the following submissions:

- (i) It is submitted that the suit as framed and filed simplicitor for injunction was not maintainable inasmuch as a specific cloud was raised on the title of the plaintiffs over the suit land. It is submitted that the suit was filed in the year 1983 and was amended in the year 2013 without any declaration being sought as to the title over the suit land. For this purpose, reliance is placed on the decision of the Supreme Court in the

case of *Anathula Sudhakarr Vs. P. Buchi Reddy & Ors.*².

Even in the amended plaint, declaration that the EP is void and not binding on the plaintiffs was not sought. It is submitted that the main issue in the appeal is not of ownership but the agreement viz. the *Escrito Particular* (“EP” for short) and its consequences and the events that followed. It is submitted that the plaintiffs have conveniently forgotten the said document while filing the suit.

- (ii) It is submitted that the suit was clearly barred by limitation, inasmuch as the same was filed in the year 1983 when the cause of action has accrued much prior thereto. It is submitted that the plaintiffs have created an illusion of cause of action by clever drafting, which the court has to guard against. In this regard, reliance is placed on the decision of the Supreme Court, in the case of *Hardesh Ors (P) Ltd. Vs. Hede & Company*³. It is submitted that the first appellate court is not justified in holding that the suit, as framed and filed, was not barred by limitation. Reliance is also placed on the decision of this Court in the case of *Pedro do Rosario Fernandes Vs. Wilfredo Xavier Jose Monteiro & Ors.*⁴

² (2008) 4 SCC 594

³ (2007) 5 SCC 614

⁴ 2016 (2) All MR 844

- (iii) It is submitted that the first appellate court failed to frame proper points for determination, as is required by Order XLI, Rule 31 of the Code of Civil Procedure, 1908. It is submitted that the impugned judgment of the first appellate court is vitiated on the ground of non-framing of proper points.
- (iv) It is submitted that the first appellate court is grossly in error in holding that the *Escrito Particular* is void, being an agreement opposed to public policy in terms of S. 24 of the Contract Act. It is submitted that the said finding by the first appellate court is against the law laid down by the Supreme Court in the case of ***Gurmukh Singh Vs. Amar Singh***⁵. It is submitted that unless any particular statute specifically provides that a contract, contrary to the provisions of the statute, would be void, the contract would remain binding between the parties and could be enforced, as held by the Supreme Court in the case of ***Nutan Kumar & Ors Vs. IInd Additional District Judge & Ors.***⁶ It is pointed out that the Supreme Court in the case of *Nutan Kumar (supra)* has held that the law laid down in the case of ***Nanakram Vs. Kundalarai***⁷ still holds the field. Reliance is also placed on

⁵ (1991) 3 SCC 79

⁶ (2002) 8 SCC 31

⁷ (1986) 3 SCC 83

the decision of the Kerala High Court in the case of *M. Mohammed Vs. A. Narahan Rao*⁸ and of the Punjab and Haryana High Court in the case of *Sujan Singh Sadhana Vs. Mohkam Chand Jain*⁹.

- (v) It is submitted that the *Escrito Particular* was acted upon as the possession of the suit land was delivered to the appellants in consequence of the same. It is submitted that plaintiff No. 1 had admitted the execution of the EP, as also about the receipt of the initial contribution of Rs 53/- by way of *foro*. It is submitted that the plaintiffs are misconstruing the EP. It is submitted that the EP clearly records that the original defendant was authorized to utilize the ceded portion, soon after the delivery of provisional possession. It is submitted that the plaintiff No. 1 handed over the possession of the suit land to the original defendant. It is submitted that the failure to execute a formal document cannot militate against the fact that the possession of the suit land was handed over to the defendant in the year 1959, which was continued after 1962 till date. It is submitted that the EP is subsequent to the holding of the auction and as such, cannot be for arresting

⁸ AIR 1973 Ker 266

⁹ (1983) 2 ILR P & H 24

bidding/auction. It is submitted that there were thirteen bidders at the auction and the land fetched much more price than the fair market value, which is also indicative of the fact that the EP was not executed for arresting the bidding, as claimed on behalf of the respondents. It is submitted that the first appellate court has not framed a point on the aspect of the EP being a document which is against public policy nor any such ground is raised in the appeal memo by the respondents before the first appellate court.

- (vi) It is submitted that the first appellate court has applied two different yardsticks while appreciating the oral evidence of the plaintiffs and the defendant. It is submitted that the first appellate court is grossly in error in holding that there were no pleadings of the appellants about the defendant being put in possession, when there were specific pleadings to that effect (see main para). The appellants have filed a brief synopsis in order to demonstrate that the findings of fact recorded by the first appellate court on the basis of the evidence led are perverse and thus would tantamount to a substantial question of law. I would propose to deal with the same at an appropriate stage.

15. Mr. Sardesai, the learned senior counsel for the respondents has supported the impugned judgment. It is submitted that various documents produced on record would clearly show that the respondents are the owners in possession of the suit property. The learned senior counsel has referred to the certificate issued by the Administrator of Quepem Taluka (Exhibit P-6) stating that the provisional possession was handed over to the first respondent on 15th January, 1959 and the final possession was given on 15th February, 1962. It is submitted that the certificate issued by the *Comunidade of Cacora* (Exhibit P-7) shows the payment of Rs. 6,020/- being 20 times the annual '*foro*'. It is submitted that as per Article 241 of the *Code of Comunidade*, once the entire *foro* is paid, the ownership stands transferred to the transferee. He has then referred to the certificate of inscription issued by the Land Registration Office (Exhibit P-9), which shows that the suit property has been inscribed in the name of the first respondent. It is pointed out that the aforesaid documents have not been denied or disputed by the appellants.

16. It is submitted that the *Escrito Particular* is not a document of title and it was the case made out by the appellants themselves that the *Escrito Particular* was only a promise to hand over possession and not a transfer of immovable property.

17. It is submitted that the *Escrito Particular* is not a document, which by itself ceded possession in favour of the appellants, which was to be done by executing “Escritura de Cedencia”, which was never executed. It is thus submitted that the contention on behalf of the appellants that the original defendant was put in possession, pursuant to the *Escrito Particular* cannot be accepted. It is submitted that even otherwise in the year 1959, the respondents/plaintiffs were put in provisional possession of the suit property and the definitive possession was given in the year 1962. It is submitted that as per Article 338 of the *Code of Comunidade*, the delivery of possession as emphyteusis is “an optional act of mere tolerance” and it is only definitive possession, which confers civil rights. It is submitted that the first appellate court has elaborately dealt with this aspect in paras 156 and 176 of the impugned judgment. The learned counsel has pointed out that Article 474 of the Portuguese Civil Code, which states that permissive acts or acts of mere tolerance do not constitute possession. It is submitted that in the absence of any required pleading spelling out basic ingredients of prescription, there was no cloud on the title of the respondents requiring a declaration of title being claimed.

18. It is submitted that the suit was filed within two days from the date of interference by the defendant with the possession of the

plaintiffs over the suit property, and as such, the learned trial court was in error in holding that the suit was barred by limitation. It is submitted that the first appellate court has thus rightly come to the conclusion that the suit was not barred by limitation.

19. It is submitted that the first appellate court has framed the points for determination in para 85 of the judgment, which is substantially in compliance of Order XLI, Rule 31 of the Code of Civil Procedure. Reliance is placed on the decision of the Supreme Court in ***Laliteshwar Prasad Singh & Ors. Vs. S. P. Srivastava***¹⁰, in order to submit that mere omission to frame points for determination does not vitiate the judgment, provided the first appellate court records its reasons, based on the evidence adduced by both parties. It is submitted that the first appellate court has given elaborate reasons for determination of the various points.

20. It is submitted that none of the findings recorded by the first appellate court can be said to be perverse, so as to amount to a substantial question of law. Reliance in this regard is placed on the decision of the Supreme Court in the case of ***Damodar Lal Vs. Sohan Devi & Ors.***¹¹ in order to submit that unless and until the finding is

¹⁰ (2017) 2 SCC 415

¹¹ (2016) 3 SCC 78

based on complete misreading of evidence and / or based only on conjectures and surmises, the same cannot be said to be perverse. It is submitted that inadequacy of the evidence or a different reading of the evidence is not perversity.

21. It is submitted that the first appellate court has dealt with the issue about the alleged mis-description of the property, in the context of requirements of Order VII, Rule 3 of the Code of Civil Procedure. It is submitted that the alleged discrepancy is extremely minor and is irrelevant, as the parties were clear about the property, which was subject matter of the dispute.

22. It is submitted that *Escrito Particular* was executed for the limited purpose of arresting bidding in the auction. It is submitted that the first appellate court has elaborately dealt with this aspect, in the context of the judgment of the Supreme Court, in the case of **Gurmukh Singh (supra)**, and has rightly come to the conclusion that the *Escrito Particular* was opposed to public policy. It is submitted that in any event the *Escrito Particular* not being a document of title or delivery of possession, the said aspect can, at the highest, only be a question of law, and not a substantial question of law, since in a suit simplicitor for injunction, it is only the title and possession, which is material.

23. Insofar as the issue of giving of oral evidence in the context of contents of the *Escrito Particular* is concerned, it is submitted that the oral evidence led, was not inconsistent with the terms of the *Escrito Particular*, and hence was admissible as per second proviso to Section 92 of the Evidence Act. It is submitted that even otherwise the said evidence would be admissible under the first proviso to Section 92 of the said Act, as the evidence would lead to the fact that *Escrito Particular* was illegal as being opposed to public policy, having been executed only for arresting bidding.

24. It is submitted that the first appellate court has rightly come to the conclusion that there were no sufficient pleadings as to the delivery of possession of the suit land to the original defendant in the year 1959, and as such, the oral evidence giving minute particulars as to the date, time and presence of the various persons, was inadmissible. It is pointed out that it is all along the case of the appellants that they have acquired title to the disputed portion of the suit property, by a positive prescription. It is pointed out under Article 515 of the Portuguese Civil Code, the court cannot *suo moto* take cognizance of prescription unless specifically pleaded by the parties. It is submitted that the requirements of Article 517 of the Portuguese Civil Code, for acquisition of title by positive prescription, are not satisfied in this case.

25. It is submitted that the first appellate court has not applied different yardstick while appreciating the evidence of the appellants and the respondents. It is submitted that the first appellate court has rightly weighed evidence of the plaintiffs at a higher footing, as compared to that of the defendants, inasmuch as the plaintiffs are admittedly owners of the suit property, and hence are presumed to be in possession of the same. Reliance in this regard is placed in the case of *Maria Margarida Sequeira Fernandes & Ors. Vs. Jack De Sequeira*¹² in order to submit that the possession or occupation of a person other than owner of the property has to be in subordination to the legal title holder, and it is for the person claiming a right to remain in possession to establish the same.

26. It is submitted that the appellants have not relied on Article 476 of the Portuguese Civil Code in respect of the good faith. It is submitted that the said reliance was only with regard to the good faith, as contemplated in Article 517 of the said Code, which contention has been rejected by the first appellate court.

27. It is submitted that the appeals do not involve any substantial question of law, and the same be dismissed.

¹² (2012) 5 SCC 370

28. The rival contentions now fall for determination. Before considering the various substantial questions of law, as framed, it would be worthwhile to note certain admitted / undisputed facts or facts which have clearly come on record as under:

- (i) That the Survey No. 146 of village Cacora belonged to *Comunidade of Cacora*, out of which an area admeasuring 28,600 sq. mts. was put up for auction. The original plaintiff No. 1 had participated in the said auction and an area admeasuring 28,600 sq. mts. was allotted / adjudicated in favour of plaintiff No. 1 on 17th December, 1957 on payment of the agreed annual rent / *foro* of Rs. 301/-.
- (ii) On the same day and after the auction, the *Escrito Particular* was executed between the plaintiff No. 1 and the original defendant, by which the plaintiff No. 1 had agreed to cede a portion admeasuring 5,000 sq. mts. in favour of the defendant. The *Escrito Particular* envisages execution of a separate deed of cessation (*escritucia de cedencia*).
- (iii) The plaintiff No. 1 was given provisional possession on 15th January, 1959 and the final / definitive possession on 15th February, 1962. In the year 1974, the plaintiff No. 1 paid

foro for 20 years on remission.

- (iv) The aforesaid aspects are substantiated by the certificate, issued by the Administrator, Quepem taluka (Exhibit P-6) about handing over of possession to the plaintiff No. 1 on 15th January, 1959 upon verification of the boundary marks and measurements, the final possession being given on 15th February, 1962.
- (v) There is further a certificate issued by the *Comunidade* (Exhibit P-7), which evidences payment of amount, being 20 times the annual *foro* (rent). As per Article 241 of the *Code of Comunidade*, once the entire *foro* is paid to the *Comunidade*, the ownership stands transferred to the allottee.
- (vi) That the suit property has been inscribed in the name of the plaintiff No. 1, as per the certificate of inscription (Exhibit P-9), issued by the land registration office.
- (vii) It has also come in the evidence of PW 1 that at the time of auction, the original defendant and his father had come and they are willing to bid at the auction and it was the plaintiff,

who stated that as both of them are coming from same family, he (defendant) should not bid in the auction and accordingly settlement was reached between them whereby the plaintiff had agreed to give an area of 5,000 sq. mts. from the said *aframento* after the provisional possession is given on the condition that the defendant bears the proportionate expenses till the date of the auction, and also subsequent thereto, and on payment of the proportionate amount of *foro*. It has also come in the evidence of PW 1 that the defendant had paid the proportionate amount of *foro* of Rs. 53/-.

The aforesaid facts by and large are not in dispute. It would now be necessary to deal with various substantial questions of law, as framed *ad seriatim*.

Whether the suit simplicitor for injunction was maintainable :

29. The law on the point is clearly well settled. It is only when there is specific cloud raised on the title of the plaintiffs over the disputed property, that the plaintiff is required to seek a declaration of ownership, and in such a case a suit simplicitor for injunction, based on possession would not lie. The question whether there is a specific denial or a cloud raised on the title of the plaintiff would depend upon

the facts and circumstances of each case. It has come on record that the survey in the concerned village was undertaken somewhere in the year 1973-74. It is contended on behalf of the appellants that in the year 1976, the claim was made on behalf of the original defendant on the suit land before the survey authorities on the basis of the *Escrito Particular*. It is contended that the plaintiff “shied away from an order of the survey authority” and did not file any suit against the defendant. It is contended that since beginning the defendant was claiming to be in possession of the suit land on the basis of the *Escrito Particular*, and thus, there was a clear cloud raised on the title of the plaintiff. It is pointed out that the written-statement and the counter-claim were filed in the year 1984 and although the plaint was amended on 17th October, 2013 (thirty years after the suit was filed), no declaration of title was sought.

30. In my considered view, the contention cannot be accepted. Mere raising of an objection before the survey authorities would not amount to raising of a cloud on the title of the plaintiff, particularly when admittedly, the entire land of 28,600 sq. mts. was allotted/ adjudicated in favour of the original plaintiff No. 1, the provisional and final possession was given respectively in the year 1959 and 1962, followed by the payment of 20 times of the *foro* in the year 1976 and

the existence of the documents (Exhibits P-7, 8 and 9), as above. It is now well settled, that even an adverse entry in the record of rights, without anything more, cannot amount to a cloud on the title. In the present case, the only contention is that there was objection raised before the survey authorities, and thereafter the plaintiff did not pursue the matter in the year 1976. Considering the overall circumstances, I do not find that the suit as framed and filed simplicitor for injunction was not maintainable.

31. In the case of *Anathula Sudhakar*¹³, the Supreme Court has held that a prayer for declaration will be necessary only if denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title when some apparent defect in his title to the property or when some *prima facie* right over it is made out or shown. It has been specifically held that where the plaintiff has clear title, supported by documents, if an inter polar without any apparent title merely denies plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff.

In any case, the claim of the defendant is solely based on the *Escrito Particular* of the year 1957, which is not shown to be a

¹³ (2008) 4 SCC 594

document of title vis-a-vis admitted position of allotment/ adjudication of the suit property by the *Comunidade* in favour of the plaintiff. Thus, it cannot be accepted that there was a cloud as such raised on the title of the plaintiff No. 1 by mere assertion of a claim on the basis of the *Escrito Particular* before the survey authorities.

32. In the case of ***Rame Gowda Vs. M. Vardappa Naidu & Anr.***¹⁴, the question was as to what amounts to settled possession. What has been held in that case is that a person in possession of land in assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against the entire world, but the rightful owner. It has been held *inter alia* that when the facts disclose no title in either party, the possession alone decides. The facts obtaining in the present case are clearly distinguishable inasmuch as the plaintiff's title on the basis of the *aframento* granted by the *Comunidade* is not at all disputed. It is necessary to emphasise that in fact the defendant is claiming through plaintiff No. 1 on the basis of the *Escrito Particular*, executed by the plaintiff No. 1. Thus, the contention that the suit simpliciter for injunction was not maintainable cannot be accepted. The point is answered accordingly.

Whether the suit was barred by limitation :

¹⁴ (2004) 1 SCC 769

33. This takes me to the second ground of limitation, which in a sense is closely connected with the aforesaid ground of the cloud on the title of the building No.1. If it is found that there was a cloud raised on the title of the plaintiffs as far back as in the year 1976 or prior thereto, the suit could be said to be barred by limitation. However, once if it is found that there was no such cloud raised by raising of an objection before the survey authorities, then it cannot be accepted that the suit as framed and filed by the plaintiff is barred by limitation. At the cost of repetition, it is necessary to emphasise that admittedly land admeasuring 28,600 sq. mts. (of which 5,000 sq. mts. of the suit land is a part) was allotted/adjudicated in favour of the plaintiff No. 1, and there are documents, viz. Exhibits P-7, 8 and 9, which clearly establish ownership of the plaintiffs over the suit land. The cause of action, as shown in the plaint, is in the first week of May, 1983 when the plaintiff No. 1 noticed that certain ruble stones were put on the suit land and the suit came to be filed shortly thereafter. Thus, the suit also cannot be said to be barred by limitation.

34. There cannot be any manner of dispute with the proposition that the court has to guard against clever drafting, creating an illusion of cause of action. However, here again whether there is any such illusion of cause of action, created by way of clever drafting

would depend upon facts and circumstances of each case. The case of *Hardesh Ores. (supra)* clearly turned on its own facts. That was a case wherein the issue was – whether the plaint could be rejected under Order VII, Rule 11(d) of CPC, as being barred by limitation.

35. Thus, I do not find any fault in the finding that the suit, as framed and filed, was within limitation, and there was nothing wrong in the first appellate court in holding that the suit was not barred by limitation.

Ground based on Order XLI Rule 31 of CPC

36. Order XLI, Rule 31 of CPC *inter alia* provides that the judgment of the appellate court shall be in writing and shall amongst other things, as set out therein, shall state the points for determination.

37. I have reproduced the points framed by the first appellate court as against the issues settled by the trial court in the suit. It is true that the appellate court could have framed points on similar lines as that of the issues framed *by the* trial court or those argued by the parties particularly when the first appellate court is the final fact finding court in the matter. However, the question is what is the effect.

38. On behalf of the respondents, reliance is placed on the decision of the Supreme Court in the case of *Laliteshwar Prasad Singh (supra)* in order to submit that mere omission to frame points for determination, does not vitiate the judgment of the first appellate court, provided the appellate court records its reasons based on the evidence adduced by both the parties. In the case of *Laliteshwar Prasad Singh* on facts, it was found that the High Court (as the first appellate court) had not framed points for determination in order to discuss the evidence adduced by the defendants. On facts, it was found that the High Court had only considered two aspects, viz. (i) genealogy produced by first respondent/plaintiff; and (ii) documentary evidence adduced by the first respondent/plaintiff.

39. Coming to the present case, a perusal of the judgment of the first appellate court, would reveal that the first appellate court has elaborately considered all the contentions raised in relation to the nature of the dispute involved, which is principally based on the *Escrito Particular*, executed by the plaintiff No.1. Considering the overall circumstances, I do not find that this is a case where the impugned judgment of the first appellate court would be vitiated on the basis of non-framing of proper points. The point is answered accordingly.

Ground based on the findings of fact recorded by the first appellate court being perverse

40. **Whether the *Escrito Particular* is void, being an agreement opposed to public policy.**

It has come in the evidence of PW 1 that at the time of the auction, the defendant and his father were willing to bid and it was PW 1, who stated that as both of them are coming from the same family, the defendant should not bid and agreed to gratuitously cede a part of said land admeasuring 5,000 sq. mts. to the defendant, soon after the provisional possession is given. It has further come in his evidence that this was on the condition that the defendant bears proportionate amount of *foro* and the expenses. The *Escrito Particular* does not give any indication about the consideration for such area being ceded and quite to the contrary, states that this was a gratuitous act, on the part of PW 1, albeit on the defendant agreeing to bear the proportionate *foro* and the expenses.

41. According to the respondents, the *Escrito Particular* was executed for arresting the bidding and therefore it is void being against public policy, in terms of Section 23 of the Contract Act. The learned counsel for the parties had argued on the basis of Section 92 of the Evidence Act as to whether any such oral evidence could have been

permitted to be led. On behalf of the respondents, reliance is placed on the first and second proviso to Section 92 in order to submit that the oral evidence could be led.

42. In my considered view, it is not necessary to go into the issue whether such oral evidence could have been permitted to be led in the present case. This is because even assuming that such evidence could be led, I do not find that the *Escrito Particular* can be said to be void on the ground that the object and / or consideration of the same was opposed to public policy, as claimed on behalf of the respondents. Although it is contended on behalf of the respondents that the *Escrito Particular* was executed in order to arrest the bidding, it has come in the evidence of PW 1 that by the words “arresting the bidding”, what is meant is that the defendant should not participate in the bidding or go on increasing the price. It has clearly come on record that eventually the defendant did not participate in the bidding. It is a matter of record that the initial bid was of Rs. 15/- and ultimately the property was adjudicated in favour of the plaintiff No. 1 for Rs. 301/- per annum, which even according to PW 1 was fairly high. It has also come on record that there were about 13 bidders, who had participated in the auction.

43. In the case of *Gurmukh Singh (supra)*, there was an agreement between two bidders to jointly bid in a public auction for sale of property and the appellant Gurmukh Singh had agreed to convey half of the property, purchased in the auction, in favour of the respondent. In that case, there were six bidders, who had participated in the auction. The upset price was fixed at Rs. 1,000/-. The auction was started with the bid at Rs. 1,000/- and ultimately at the 20th knock, the highest bid of the respondent, which was at Rs. 5,000/-, was accepted. The appellant and the respondent contributed their shares and the sale was confirmed. Thereafter the appellant failed to perform his part of the contract, which led the respondent to file a civil suit for specific performance of contract, or refund of the amount advanced by him. It was contended on behalf of the appellant that the contract was void, being opposed to public policy. The trial court decreed the suit, which was confirmed by the district court, as well as the High Court, and the matter went to the Supreme Court. The Supreme Court *inter alia* held that Section 23 of the Contract Act is concerned only with the object or consideration of the transaction and not the reasons or the motive, which prompted it. It was held that if the object or consideration is opposed to public policy, which tends to defeat any provision of law or purpose of law, it becomes unlawful, and thereby is

void under S. 23. In the facts of the said case, it was found that the agreement between the appellant and the respondent to purchase the property at an auction sale jointly, and not to bid against each other is perfectly lawful, though the object may be to avoid competition between the two. However, it was held that if there is an agreement between “all the competing bidders” at the auction sale to form a ring to peg down the price and to purchase the property at a knock out price, then the purpose or desire of the agreement is to defraud the third party, viz. the debtor or the government. It was also found that object or consideration of such a contract (to peg down the price) would involve an implied injury to the debtor within the meaning of S. 23 of the Contract Act. In such a case the agreement would be void being opposed to public policy.

44. Coming to the present case, there were in all 13 bidders and there is nothing on record to show that there was any agreement between the bidders or even the plaintiff No. 1 and the defendant, to peg down the price or to purchase the property at a knock out price. All that the PW 1 claims is that it was intended that the defendant should not bid at the auction and continue to raise the price. In my considered view, particularly having regard to the fact that there were other bidders at the auction and the bid started at Rs. 15/- and ultimately the bid at

Rs. 301/- was accepted, which even according to the PW 1, was fairly high, and in the absence of any agreement to peg down the price, the *Escrito Particular* as it stands, cannot be said to be void, as being opposed to public policy, within the meaning of S. 23 of the Contract Act. To that extent, the first appellate court, in my considered view is not right. The point is answered accordingly. However this in my opinion would not be decisive in upholding the ultimate judgment and decree passed by the First Appellate Court.

45. (a) *That the Escrito Particular was not acted upon?*

(b) *That the evidence of the defendant, about he being in possession, was beyond pleadings, when there were specific pleadings that the defendant was in possession of the suit land?*

(c) *Whether the First Appellate Court has applied two different yardsticks, while appreciating the evidence of the plaintiffs and the defendant?*

All these grounds will have to be taken up together for consideration.

46. It is contended on behalf of the appellant that the main issue in the appeal is not ownership, but the agreement, viz. *Escrito Particular* and its consequences and events which followed thereafter.

I do not find that the contention can be accepted. This is because while

the plaintiffs had filed the suit simplicitor for injunction, the appellants (original defendant) had raised a counter-claim seeking a declaration that he is the owner in possession of the suit land. It can thus be seen that the issue of ownership was very much involved in the suit. It is significant to note that although the trial court had decreed the counter-claim but had not granted a declaration of ownership. The trial court only granted a declaration that the defendant was in possession of the suit land, shown in sketch (Exhibit 137). It does not appear from the appeal memos filed by the appellant in RCA no 12/2016 and 13/2016 before first appellate court that this part of the judgment (granting only a declaration of possession and not title) was challenged by the appellants before the first appellate court. Be that as it may, the matter really turns upon as to whether the original defendant was put in possession of the suit land and whether he has perfected his title by virtue of a positive prescription within the meaning of Article 517 of the Portuguese Civil Code. The principal contention on behalf of the appellant is that the finding recorded by the first appellate court, that the defendant was not put in possession of the suit land, is perverse. The said contention is based on three aspects, viz. (i) the appellate court has erroneously found that there were no pleadings made by the defendant as to the delivery of possession; (ii) while appreciating the

oral evidence of the parties, the first appellate court has applied two different yardsticks; and (iii) finding that the *Escrito Particular* was not acted upon is also incorrect.

47. Now, before dealing with the contentions as raised, it is necessary to note that as recorded by the first appellate court in para 116 of the judgment, the case of the appellant is specifically based on the positive prescription under Article 517 of the Portuguese Civil Code and not the negative prescription, as is contemplated under Article 535 of the said Code. It is necessary to note that the positive prescription as envisaged under Article 517 of the said Code is different than the concept of adverse possession, which is relatable to Article 65 of the Limitation Act. Article 517 of the said Code reads as under:

“Article 517 : Ingredients of prescriptive possession -

Possession for the purpose of prescription should be:

1. Founded on title;
2. In good faith;
3. Peaceful;
4. Continuous;
5. Open and public.

§ Sole paragraph – The provisions of this Article admit of no exception which is not expressly laid down by law.”

48. In order to appreciate rival contentions, it is necessary to note as to why the first appellate court has held that the pleadings as to

delivery of possession were insufficient. The first appellate court has dealt with this aspect in para 135 of judgment and held that the pleadings of the defendant, as to the fact of putting him in possession were vague. The first appellate court has found that the defendant had only pleaded that he was put in possession in the year 1959. However the evidence led was “to the minutest details” not only as to the manner in which the defendant was put in possession but also to month, day and the time, of which the plaintiff had no opportunity to meet. The first appellate court has then considered the issue, in relation to Order VI, Rule 2 of CPC, and the distinction between the material facts and particulars. The appellate court has found that considering the nature of the plea taken by the defendant and the facts that were brought in evidence as regards the manner in which the original defendant was put in possession, on a particular day and time, were material facts, and not mere particulars, that needed to be pleaded, so as to give an opportunity to the plaintiffs to meet the same. This is, the reason why the first appellate court has found that the evidence led, giving the finer details of the day, date and time, as to the delivery of possession, were beyond the pleadings and cannot be considered.

49. Mr. D’Costa, the learned senior counsel for the appellant has strenuously urged that Order VI, Rule 2 of CPC requires that the

pleadings shall contain only a statement in concise form of the material facts, relied by the parties in his claim or the defence, as the case may, but not the evidence by which they are to be proved. In the submission of the learned counsel for the appellant, the details about the day, date and time were mere particulars and not material facts, as has been found by the first appellate court.

50. Mr. Sardesai, the learned senior counsel for the respondents has submitted that the details as to the day, date and time were indeed material facts and not mere particulars.

51. On behalf of the appellants, reliance is placed on the decision in the case of *Rame Gowda (supra)* and ***P. T. Gandhi Vs. Smt. Majulaben Shah & Anr.***¹⁵. In the case of *Rame Gowda (supra)* the Supreme Court has held that the pleadings should receive a liberal construction and no pedantic approach should be adopted to defeat justice on hair splitting technicalities. It has further been held that once it is found that in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on these issues by producing evidence, in that event, it would not be open to a party to raise the question of absence of pleadings in appeal.

¹⁵ (1988) 3 Bom CR 191

52. In the present appeals, the case made out by the defendant is that a week after the plaintiff No.1 was put in provisional possession of the land in the year 1959, the original defendant was put in possession of the suit land. During the course of the evidence, the further particulars as to the delivery of possession have been set out. It is claimed that the possession was delivered on Sunday in January, 1969 between 3.30 to 4.00 p.m. The question is whether these subsequent details are part of the material facts or mere particulars. If they are mere particulars, they may not be pleaded, as being part of evidence. In my considered view, having regard to the fact that the pleadings should receive liberal construction and as parties led evidence on the point of delivery of possession, it is not possible to hold that in the facts of the present case, the details about the date on which the possession was delivered, namely Sunday, and the time between 3.30 to 4.00 p.m. would be material facts. In my opinion they would be mere particulars. Therefore, to that extent the first appellate court may not be right in holding that they were part of material facts and not mere particulars.

53. This, however, may not be decisive in determining the veracity and the acceptability of the evidence of delivery of possession given by DW 1 – Shambhu Kakodkar, alongwith DW 2 - Narcinva Kakodkar, DW 4 –

Prabhanjan Karmali and DW 6 - Joaquim Fernandes. The appreciation of this part of the oral evidence is an independent matter. It is necessary to note that DW 4 claims that he used to play alongwith his schoolmates, in the land ‘Chorgalivorie Morde’ during his school days and many people of the locality used to come there for a walk. DW 6 is a labourer who was allegedly present when the possession was delivered to the defendant. All these witnesses have deposed about 49 years after the incident, to which they are alleged witnesses. I have carefully gone through the evidence of these witnesses, and their oral evidence as to the delivery of possession, to my mind, does not inspire confidence, particularly in the wake of the fact that when the final possession was delivered in the year 1962, the officer of *Comunidade* had not noted the existence of a separate portion to be in possession of the defendant. This aspect is also considered by the first appellate court. It is further necessary to note that although *Escrito Particular* states that possession was agreed to be delivered after the plaintiff No. 1 obtaining the provisional possession, it also envisages execution of a separate deed of *Escritura de Cedencia* (Deed of Cession), which is admittedly not executed in this case.

54. The learned senior counsel for the appellant has placed reliance on the decision of this Court in the case of ***Hrish Loyalka & Anr. Vs. Dilip Nevatia & Ors.***¹⁶ in order to submit that DW 6 Joaquim Fernandes has not been cross-examined on material particulars. I have carefully gone through

¹⁶ 2015 (2) Bom C.R. 361

the evidence of DW 6 Joaquim Fernandes. The only aspect on which DW 6 has deposed is about the alleged delivery of possession about 49 years back, prior to recording of his evidence. Thus, his evidence was clearly limited to the only aspect of delivery of possession, and there is a suggestion given to DW 6 that the relevant contents of his affidavit, are false, which is denied. Thus, it cannot be accepted that there was no challenge to his evidence.

55. The case of *Harish Loyalka (supra)* turned on its own facts. In fact in para 9 of the said judgment, this Court has said that it is not necessary for the counsel for the adversary to put the witness through every line of his evidence/affidavit or pleadings and to suggest to him that each of this is incorrect. What has been held is that cross-examining counsel must, however, put their affirmative essential and material case.

As noticed earlier, DW 6 was only a witness on aspect of delivery of possession and that aspect has been denied, as being false, in the cross-examination.

56. The learned senior counsel for the appellants, in order to elaborate the point that the appellate court has employed two different yardsticks while appreciating the evidence of the plaintiffs and the defendant, has pointed out that the PW 1 Meghshyam Kakodkar in his evidence claimed that after obtaining the provisional possession, he cleared the bushes and erected mud mounds (*addo*) and put barbed wire fencing and made plantation

with the help of labourers namely Custodio Fernandes, Jose Fernandes, Mingueal Souza, Salvador Mesquita and others. He submitted that however, none of them are examined. It is pointed out that on the contrary, the plaintiffs examined Bernard Rodrigues (PW2) and Manuel Fernandes (PW 4), who have not been named by PW 1. It is therefore, submitted that the appellate court was not justified in placing reliance on the evidence of erection of *addo* and the plantation done.

In my considered view, this contention cannot be accepted for the simple reason that the appellants had not and cannot dispute that the original plaintiff No. 1 was put in provisional possession of the land in January, 1959. As noticed earlier, the aspect about the allotment / adjudication of the land by the *Comunidade* in favour of plaintiff No. 1 and delivery of provisional possession and the final possession are matters which are not in dispute. In fact the case made out by the appellants is that about a week after the plaintiff No. 1 was put in provisional possession that the defendant was ceded an area of 5,000 sq. mts. as per the *Escrito Particular*. Therefore, the contention based on non examination of Custodio Fernandes and others, who are named by PW 1 and the examination of PW 2 Bernard Rodrigues, PW 4 Manuel Fernandes, (who are not named) to my mind, is of no avail.

57. In the result, I hold that the evidence of the defendant to the extent the defendant claimed that the possession was allegedly delivered on a Sunday between 3.30 to 4.00 p.m. cannot be said to be beyond pleadings. However, that by itself is not decisive and the oral evidence of the defendant as to the delivery of possession falls short of bringing the said *fact* home, on preponderance of probability, and particularly in the absence of the execution of deed of cessation, viz. *Excritura de Cedencial*, and the fact that no such portion was noticed by the officer of *Comunidade* in the year 1962.

58. It was contended by the learned senior counsel for the appellant that the Officer of the *Comunidade* was only supposed to verify whether the plaintation is made or not and he did not notice any other aspect. The contention to my mind cannot be accepted. Had the suit land admeasuring 5,000 sq. mts. been put separately in possession of the defendant and the defendant had constructed an *addo* around the same, it was bound to be noticed and recorded while delivery of final possession which is not the case in this matter. It is also not possible to hold that the appellate court has applied two different yardsticks while appreciating the evidence of the plaintiffs and the defendant.

Once it is found that the possession was not delivered and no deed of cessation was executed it has to be held that the Escrito

Particular was not acted upon.

59. The learned senior counsel for the respondents submitted that even assuming that the possession was delivered, it would be only by way of tolerance. Countering the said argument, it is submitted by the learned senior counsel for the Appellant that Article 338 of the *Code of Comunidade* provides that provisional delivery of land granted cannot be considered “in the legal relations between the *Comunidade* and the emphyteuta” (which, according to the learned senior counsel, is wrongly translated as lease holder), as it is contingent (original Code uses the word “faculative”) act of mere tolerance. The contention is that act of provisional possession is of mere tolerance *vis-a-vis* the grantor i.e. *Comunidade* in this case and not third parties. In order to substantiate the said contention, it is pointed out that Article 338 empowers the grantee to file a suit for possession and other protective acts against the third party. It is submitted that if the grantee did not have possession, the grantee would not be empowered by Article 338 to file a suit for recovery of possession *vis-a-vis* third parties. It is submitted that Article 474 of the Portuguese Civil Code is relevant only in relation of the grantee *vis-a-vis* the grantor.

60. The contention in my humble view cannot be accepted. The relevant provisions of *Code of Comunidade* clearly set out that

after the adjudication/grant of the land, it is only provisional possession which is granted and it is only after verification of the fact that the land has been put to use for which the same is granted, that a final/definitive possession is delivered, which in the present case is admittedly delivered in the year 1962. Subsequently, on payment of 20 times *foro* / rent, the land absolutely vests in the grantee and the entry about the land is deleted from the register 2 (Tombo 2). In the present case, admittedly till 1962 the plaintiff No. 1 was only holding a provisional possession, which is merely by way of tolerance. The empowerment of the allottee, to take action against the third party, is merely to protect and preserve the land from any acts of third party. That however, does not change the nature and character of possession being merely by way of tolerance.

61. Thus, in the first instance it is not established that the defendant was put in possession of 5,000 sq. mts. of land, and secondly, even assuming that any such possession was delivered, it could not be in any thing better than what plaintiff No.1 was holding i.e. by mere tolerance and certainly cannot perfect the title by way of positive prescription under Article 517 of the Portuguese Civil Code.

62. Reliance placed on the decision of the Supreme Court in the case of ***Ravinder Kaul Grewal Vs. Manjit Kaur***¹⁷, to my mind is misplaced. That was a case wherein the issue was whether a person claiming title by virtue of adverse possession can maintain a suit under Article 65 of the Limitation Act. The Supreme Court has held that a person claiming title on the basis of adverse possession can indeed maintain a suit and it is not necessary that such a claim of adverse possession can only be used by way of defence or shield and not as a sword. The Supreme Court in the case of *Ravinder Grewal (supra)* has overruled its earlier decision in the case of ***State of Uttarakhand Vs. Mandir Sri Laxman Sidh Maharaj***¹⁸ and ***Dharampal Vs. Punjab Wakf Board***¹⁹. The decision to my mind is clearly distinguishable on facts.

The points are answered accordingly.

63. In the result, all four Second Appeals are dismissed with no order as to costs. Decree be drawn up accordingly.

64. At this stage, the learned senior counsel for the appellants prays for extension of the interim relief, which was operating in the appeals, in order to enable the appellants to consider taking further steps, if any. The learned senior counsel for the respondents states that the Court may pass an appropriate order, as may be deemed just and

¹⁷ (2019) 8 SCC 729

¹⁸ (2017) 9 SCC 579

¹⁹ (2018) 11 SCC 449

necessary.

65. Having regard to the fact that the interim relief was operating during pendency of the Appeals, the same shall continue to operate for a period of 10 weeks from today.

C. V. BHADANG, J.