

IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 125 OF 2005.

- 1 Shri Uttam Pandurang Naik
Gaonkar, Son of Pandurang
Naik Gaonkar, Agriculturist
and his wife.
- 2 Kalpana Uttam Naik Gaonkar,
housewife.
- 3 Shri Ulhas Pandurang Naik
Gaonkar, major of age,
agriculturist, and his wife.
(since deceased) through legal
heirs,
 - (a) Pandurang Ulhas Gaonkar, Son
of late Ulhas Naik Gaonkar,
Major in age, married, Residing
at Delem, Canacona, Goa.
 - (b) Prayesh Ulhas Naik Gaonkar,
son of late Ulhas Naik
Gaonkar, Major in age,
married, Residing at Delem,
Canacona, Goa.
 - (c) Pratibha Uday Naik nee
Pratibha Ulhas Naik Gaonkar,
wife of Uday Naik, Major in
age, Married, Resident of
Dharavi, Ponda, Goa.
- 4 Shanti Ulhas Naik Gaonkar,
housewife,
All residents of Delem,
Canacona. ... Appellants.

Vs

- 1 Shri Narayan Dattaram Naik
Gaonkar, aged 44 years, in
service.
- 2 Shri Bhaskar Dattaram Naik
Gaonkar, aged 29 years,

agriculturist

- 3 Shri Prasad Dattaram Naik Gaonkar, aged 25 years, agriculturist, All residents of H.No.1160, Delem, Canacona.
- 4 Parvathi Shambu Naik Gaonkar, wife of late Shambu Venkatesh Naik Gaonkar, housewife,
- 5 Shri Venkatesh Shambu Naik Gaonkar, major of age, in business, Son of late Shambu Venkatesh Naik Gaonkar, and his wife;
- 6 Seema Venkatesh Naik Gaonkar, housewife;
- 7 Pramod Shambu Naik Gaonkar, son of late Shambu Venkatesh Naik Gaonkar, Major of age, in business, All residents of Delem, Canacona. (house numbers not known).
- 8 Sulaksha Vishwas Phal Desai, daughter of late Shambu Venkatesh Naik, housewife, and her husband;
- 9 Vishwas Anant Phal Desai, Both residents of Bhairavelivado, (House number not known), Nagorcem, Canacona, Goa.
- 10 Shri Bichao Rama Naik Gaonkar, aged about 62 years, C/o Naru Desai, resident of Dessaiwada, (House number not known) Uguem, Sanguem, Goa.

... Respondents.

Shri Sudin Usgaonkar, Senior Advocate with Ms. T. Mashelkar, Advocate for the appellants.

Shri C. A. Coutinho and Shri I. Santimano, Advocates for the respondents nos. 1 to 3.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 9th January, 2020.

JUDGMENT

Facts:

The respondents filed Regular Civil Suit No.244/1991 for perpetual injunction; the appellants were the defendants 1 to 3 in that suit. The fourth defendant all through remained ex parte. Later, the suit was renumbered as Regular Civil Suit No. 87/2000.

2. Over time, the plaintiffs amended the plaint. They sought a declaration of their title to the suit property and recovery of possession. For these reliefs, the plaintiffs supplied justification in the amended plaint: pending the suit, the defendants 1 to 3 trespassed upon the property and dispossessed them. Of course, the defendants, too, amended their written statement; they maintained that they secured a half share through purchase from the fourth defendant and a quarter share by succession through the common ancestors. Thus, they asserted to be the owners in possession of 3/4th of the suit property.

3. On 30.9.2002, the trial Court dismissed the suit. Aggrieved, the plaintiffs filed Regular Civil Appeal No.201/2002; it was allowed on 29.3.2005. As a result, it was the defendants' turn to file this Second Appeal.

4. Indisputably, the plaintiffs and the defendants 1 to 3, that is the appellants in the Second Appeal, had a common ancestor: Dadi Naik. That common ancestor had two sons—Ram and Gurguro. The plaintiffs trace their rights through Ram, whose great grandchildren they are.

5. On the other hand, the appellants trace their right through Gurguro, being his great grandchildren. If we examine the genealogy, it reveals that Ram, Dadi Naik's eldest son, had three sons: Bhiso, Raiu, and Barkelo. Bhiso, Ram's eldest son had one son, Dattaram. The plaintiffs are Dattaram's sons.

6. When Ram's property, as the plaintiffs plead, devolved on his three sons, each possessed 1/3rd share. Raiu died issueless, so did Barkelo. When Ram's all three children were alive, Raiu and Barkelo, issueless, gifted their share to Dattaram's children—that is, the plaintiffs.

7. The defendants maintained before the trial Court that Gurguro had two sons: Venkatesh and Pandurang. The elder one is the third defendant. Pandurang had two sons: the first and the second defendants. In other words, the first and the second defendants are the nephews and the third defendant is their paternal uncle.

8. According to the defendants 1 to 3, the property belonged to Dadi Naik. But after his death, Ram, being the eldest son, represented the family and had the revenue records bear his name, to the exclusion

of Gurguro. At any rate, the defendants assert that Ram continued to be on the revenue record as the owner and possessor, but that was as the karta of the family.

9. The defendants also asserted that half share belonged to the fourth defendant, from whom they purchased it through a registered sale deed. Thus, they came to own and possess a half share through purchase and a quarter share through succession. The entire property put together, according to the defendants, the plaintiffs possessed and separately cultivated 1/4th of the suit property, whereas the defendants possessed and cultivated 3/4th.

Before the trial Court:

10. In the light of these rival assertions, the trial Court framed these issues (summarized):

1. Have the plaintiffs proved that they are the co-owners in possession of the suit property?
2. Have the plaintiffs planted cashew, teak wood trees, etc., in the hilly portion of the suit property?
3. Have the plaintiffs exclusively enjoyed the usufruct of the trees on the suit property?
4. Have the plaintiffs regularly cultivated the paddy on the suit property?
5. Have defendants illegally trespassed upon the suit property and obstructed the plaintiff?
6. Have the defendants and the plaintiff possessed and enjoyed the suit property as separate holdings in the proportion as their respective ancestors did?
7. Is the suit not maintainable?

8. Has the suit been undervalued?

11. Eventually, the trial Court answered the issues against the plaintiffs and dismissed the suit.

In the First Appeal:

12. In the appeal, the First Appellate Court framed the following points for determination:

1. Have the plaintiffs proved that they are the owners of the suit property?
2. Are the plaintiffs entitled to recovery of possession? and
3. Are the plaintiffs entitled to permanent injunction as claimed?

13. The First Appellate Court has answered all the points in the plaintiffs' favour; it has, thus, reversed the trial Court's findings.

In the Second Appeal:

The Substantial Questions of Law:

14. This Court admitted the Second Appeal in August 2006, after framing these substantial questions of law:

- (a) Has the First Appellate Court misread the evidence, specially that of PW-1, that is Respondent No.1, who admitted that his father executed a declaration before the Executive Magistrate, acknowledging rights of the Appellants to the suit property?
- (b) Has the First Appellate Court misconstrued the survey documents which contained the names of all the co-owners, that is Appellants and the Respondents, and, earlier, those of Bichao Naik Gaonkar, from whom the Appellants purchased half share and title in the suit property by a registered Deed of Sale?
- (c) Has the First Appellate Court misread the evidence of PW-2, who did not deny that both the parties cultivated distinctly

separate portions near each other's?

Submissions:

Appellants:

15. Shri Sudin Usgaonkar, the learned Senior Counsel for the appellants, has submitted that the suit property had a lot of vegetation including timber. To fell a few trees, both the plaintiffs and the defendants secured license from the authorities concerned. Though it was in the first plaintiff's name, both the branches have shared the proceeds. According to him, the First Appellate Court has disregarded this aspect, despite PW1's admitting this fact in his cross examination.

16. The revenue record, after the survey of the land-holdings in 1975, reflected not only the names of the plaintiffs but also, according to the learned Senior Counsel, those of the defendants, including the 4th defendant. Therefore, there arose a presumption that the defendants, too, are the co-owners, besides the fourth defendant's having an independent right. Shri Usgaonkar asserts that in the course of time the defendants' names were rounded off in the revenue record, but that was without any justification. This aspect, too, has not been considered by the Appellate Court.

17. Shri Usgaonkar has insisted that there is ample evidence about the defendants' cultivating the land. PW2, who is said to be a cultivating tenant for the plaintiffs, has been evasive in his cross

examination. To elaborate, Shri Usgaonkar has submitted that PW2 did state in his cross examination about the defendants' right to and possession over the property.

18. The revenue records, according to Shri Usgaonkar, continued to reflect the defendants' names until they were rounded off. Yet none of these aspects has been considered by the First Appellate Court. About the sale deed in 1975 from Bichao, Shri Usgaonkar submits that it was a decade before the suit was filed; therefore, it could not be said that they brought about the sale deed only to defeat the plaintiffs' rights. To conclude, Shri Usgaonkar has submitted that the First Appellate Court has misread the evidence and that had led to manifest injustice and perversity of findings. So, according to him, this perversity and misleading of evidence present substantial questions of law, which this Court needs to address.

Respondents:

19. On the other hand, Shri C. A. Coutinho, the learned counsel for the respondents, has submitted that it is the trial Court that has misread the evidence. The Appellate Court has only set the record straight after addressing every aspect the parties raised and erroneously decided by the trial Court. According to him, though both the parties had a common ancestor, Dadi Naik, the property had never been registered in Dadi Naik's name. So there could be no presumption that there was ancestral property to which both Ram and Gurguro, his

sons, succeeded.

20. The fact that the revenue record reflected Ram's name since 1883 stands un rebutted, stresses Shri Coutinho. To elaborate, he submits that after Ram's death, his three sons succeeded. But two of his sons had no children, save his eldest son. That eldest son had a child, Dattaram. In 1964, Ram's issueless sons gifted their shares in the property to Dattaram's sons, the plaintiffs. That gift was through a registered deed. It was even before the defendants allegedly purchased half share from Bichao, in 1975. Shri Coutinho has further stressed that the gift deed included the property which the defendants claimed through Bichao.

21. Faced with the specific query from this Court about the mutation in the revenue record, Shri Coutinho has submitted that when the plaintiffs came to know about the revenue record reflecting defendants' name, they complained to the Revenue Authority. Then the authorities acted on that complaint and registered three disputed cases: 373, 379, and 372.

22. And after putting the defendants on notice, the authorities ruled that they had no right to the property and then rounded off their names. Shri Coutinho stresses on the fact that this mutation proceedings attained finality. In this context, he has drawn my attention to Section 105 of the Land Revenue Code as well as Article 953 of the Portuguese Civil Code. To a further query about PW1's admission that

the defendants too had a share in the proceeds, Shri Coutinho would have the Court conclude that to be a stray assertion taken out of context. To elaborate, he has submitted that no title to the property could be conferred on a person based on an admission, if it were. To support his contention, Shri Coutinho has relied upon *M/s Kamakshi Builders v. M/s Ambedkar Educational Society*^[1], *Banwari Lal v. Sukhdarshan Dayal* ^[2], besides *M.P. Wakf Board v. Subhan Shah*^[3].

23. Shri Coutinho has taken me through a few portions of the impugned judgment and has stressed that the First Appellate Court has considered the issue elaborately and rendered its findings essentially on the questions of fact. In other words, whatever the Appellants have presented before this Court are only questions of fact, which already stand answered conclusively by the First Appellate Court. So he has urged this Court not to upset the First Appellate Court's well-considered findings.

24. Heard Shri S. Usgaonkar, the learned Senior Counsel for the appellants; and Shri C. A. Coutinho, the learned Counsel for the respondents.

Discussion:

25. To begin with, the plaintiffs, first, filed the suit for mere

1□ AIR 2007 SC 2191

2□ AIR 1973 SC 814

3□ 2006 (10) SCC 696

injunction; later, they amended it seeking a declaration of title and recovery of possession. As I have already noted, to justify this amendment and altered reliefs, the plaintiffs have pleaded that pending the suit the defendants 1 to 3 dispossessed them. The trial Court framed initially eight issues; later, curiously on three occasions, it framed three more issues. It resolved all those issues against the plaintiffs. In the First Appeal, three points were framed and answered in the plaintiffs' favour.

26. True, the property originally stood in the name of Ram, the plaintiffs' great grandfather. That was in 1883. In fact, Ram's name was reflected in the inscription and description as a matter of registration of title under Article 953 of the Portuguese Civil Code. The same position continued even after the resurvey. Later, the revenue records showed not only the names of the plaintiffs but also those of the defendants, including Bichao, from whom the defendants 1 to 3 purchased half the suit scheduled property.

27. Ram enjoyed the presumption that he had been in possession and enjoyment of the property because of the entries in the revenue records. Then, even the defendants had the same advantage because the revenue records during 1970s reflected their names. That said, I must add that their names were later rounded off. According to the plaintiffs, it was on their complaint. Exh. 27 is the Index of Land in Form No.3, dated 24.9.1998, issued in 1998.

28. That record reveals that based on the plaintiffs' complaint, the revenue authorities took up three disputed cases 372, 373 and 379. Then, they ruled on the entitlement of the parties whose names were reflected in the revenue records. In fact, the defendants' names were rounded off. The record does not contain any other material about the adjudication in disputed cases Nos.371, 373, and 379.

29. Granted that Exh. 27 cryptically refers to disputed cases and shows the defendants' names rounded off, I must add that it is an official record enjoying sanctity under Section 114 of the Indian Evidence Act. I must presume that the officials have performed their task of mutating the names or correcting the revenue record strictly under the statutory regime. It is not the appellants' case that the rounding off has happened behind their back. In the absence of the appellants' counter assertion, we must inevitably conclude that the revenue officials put the defendants on notice and then rounded off their names, as is evident from Exh.P-27. Thus, so long as that Exhibit remains undisturbed, as there does not seem to be any challenge to it, the initial reflection of their names in the revenue record could not enure to their benefits.

30. True, the defendants have all along persisted with the plea that Ram represented the joint family comprising him and his brother and that his name stood reflected in the records as the manager or karta of the family. I reckon that there can be a presumption about a joint family but not about that joint family's owning any property. That is to

say, the defendants had had a heavy evidential burden, but they could not discharge it. They have, thus, failed to dislodge the presumption in the plaintiffs' favour, as to the correctness of the revenue records.

31. Besides, PW1 did admit that the defendants had a share in the proceeds of the felled trees. That does not, as rightly contended by Shri Coutinho, confer any title on the defendants. At one stage, they might have been in possession of a part of the property; that possession may have been under myriad circumstances. Now, the plaintiffs have sought the recovery of possession.

32. In *M/s Kamakshi Builders*, the Supreme Court, in a landlord-tenant dispute, has held that acquiescence does not confer title. In *Banwari Lal*, it has held that estoppel is but a rule of evidence and except in cases like those under Section 43 of the Transfer of Property Act, when a grant is fed by estoppel, the Rule does not operate to create interest in property.

33. In *Subhan Shah*, the facts reveal that certain properties were declared as wakf property and the Dargah was registered as wakf. The legal heirs of the person who established the Dargah applied to the Wakf Board for the recall of that order. The plea was rejected. Later, the Board constituted a committee for managing the affairs of the Dargah. The committee allegedly took over the property forcibly. The legal heirs filed a suit in the civil court for a declaration and for

recovery of possession of the suit property. Later, the matter was transferred to the Wakf Tribunal from the civil court.

34. When the Tribunal passed an order framing a scheme for managing the affairs of that Dargah, both the Board and the private parties filed revision applications before the High Court. Unsuccessful, the legal heirs approached the Supreme Court.

35. In the above context, the Supreme Court in *Subhan Shah* has noted that the Tribunal seemed to have taken into consideration the legal heirs' alleged admission about the nature of the property. It has noted that title to a property has a definite connotation. It is not the same as user. Further goes the observation that the purported admission of the legal heirs was a conditional one, so the Tribunal ought not to have treated the nature of the property as wakf. The Court has emphasised that "an admission of a party must be clear and explicit in a case where an inference is required to be drawn in regard to the fact that thereby he had admitted the title of the other. Generally speaking, even no title can be created by admission." To support this proposition, *Subhan Shah* has quoted with approval *Thayyil Mammo v. Kottiath Ramunni*[⁴].

36. Here, if we go through the record, PW-2's evidence reads:

"[I]t may be true that defendants might have planted the cashew trees in the property Moina which are enjoyed by them, *I cannot say this as I do not know*. To the suggestion that you are cultivating $\frac{1}{4}$

4 [] AIR 1966 SC 337

part of the property Moina belonging to the plaintiffs, I say that *I cannot say anything in respect of share of the property Moina which I am cultivating. To the suggestion that on that 3/4th of the portion of the property situated at Moina Shristal Canacona belonged to the defendants which were used, possessed and enjoyed by them for last many years, I say that I do not know.*

(italics supplied)

37. Going by the standard laid down by the Supreme Court in *Subhan Shah*, I reckon PW-2's alleged admission about the defendants' title to the property would not tilt the scales. I wonder whether there is any admission at all. The admission, if any, may be suggestive of the defendants being in possession at some point in time. And the plaintiffs have already sought the relief of recovery of possession, too.

38. Even otherwise, in the Second Appeal, this Court cannot reappreciate evidence. In *Kashibai v. Parwatibai*^[5], the Supreme Court has reiterated its consistent view that the High Court "has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, based on appreciation of the relevant evidence." So is the dictum in *Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor*^[6]: a question whether a finding of fact is against the weight of evidence does not project a question of law, much less a substantial one. Thus, the third substantial question of law, which this Court framed earlier, stands answered.

39. In response to the second substantial question of law, I may

5 [] 1995 SCC 6 213

6 [] 1962 Supp (3) SCR 549

note that given the mutation or rounding off and given the finality of those revenue proceedings in disputed cases 373, 379, and 372, the second question of law, too, perishes.

40. Even the first substantial question of law concerns the appreciation of evidence. At one stage of the cross-examination, PW-1 has deposed thus: “It is true that my father had sworn an affidavit, dt.18.10.78, acknowledging the rights of the defendants.” This stray sentence of admission, if it were, does not reveal what rights they are, nor has that affidavit, dt.18.10.78, seen the light of the day to appreciate the nature of those admitted rights. As we have already noted, when an admission does not confer title, the defendants must have elicited more information from PW-1 or must have produced relevant documentary proof how that admission translates into a tangibly traceable title. Nothing of that sort do we find here.

41. Under these circumstances, I hold that the Second Appeal fails on all the three substantial questions of law. So I see no ground to upset the well-considered findings of the First Appellate Court. Accordingly, the Second Appeal stands dismissed.

No order on costs.

DAMA SESHADRI NAIDU, J.

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