

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 4 OF 2010
WITH
MISC. CIVIL APPLICATION NO. 167 OF 2017

1. Harichandra Vitola Porobo
Also known as Horichondar
Vitto Porobo, (deceased)
And his wife,
1(a) Vithal Harishchandra Porob
son of deceased Appellants No.1 & 2.
1(b) Mrs. Rukmini Vithal Parab,
wife of
- [2. Taramoti] (since deceased)
- 2.a. Sadashiv Raut Mulgaonkar
Major, son-in-law of deceased R. 2
- 2.b. Satyawati Sadashiv Raut
Major, daughter of deceased R. 2
Both r/o Mulgao, Tambdo Road,
- 2.c. Anandi Anand Kolvekar
Major, daughter of deceased R. 2
- 2.d. Mr. Anand Kolvekar,
(Since deceased) Through Lrs
- 2.d.1. Trupti Anand Kolvekar
Major, daughter of deceased R.2.d.
- 2.d.2. Pooja Anand Kolvekar
Major, daughter of deceased R.2.d.
- 2.d.3. Pallavi Anand Kolvekar
Major, daughter of deceased R.2.d.
- 2.d.4. Pranali Pranesh Parab
R/o. Molem, Goa.

3. Roulo Chandro Porobo e Sua
Mulhar

4. Xantabai Porbina,
Mairos, agricultorido
Resident of Amona

(3 and 4 deleted by order Dated 24/7/1953)

... Appellants.

Versus

1. Narana Pandu Porobo Gauncar (deceased)

2. And his wife Parvoti (deceased)
Heirs not brought on record by virtue of
Order of the Trial Court dated 6/2/1985.

3. Ladco Pandu Porobo Gauncar
(deceased) represented by his heirs
Defendant no.4, 5, 6, 7, 8 and 9 already
on record and following other heirs:

3-a Bhima Shiva Sawant Sarvankar
(deceased) daughter

3-b Shiva Jaidev Sawant Sarvankar
(deceased) son-in-law

3-b-1 Jaimala alias Mali Jaidev Sawant
(widow of deceased son) Jaidev
Shiva Sawant and her children.

3-b-2 Vassudev Jaidev Sawant (minor)

3-b-3 Neeta Jaidev Sawant

3-b-4 Santosh Jaidev Sawant

3-b-5 Anita Jaidev Sawant

3-b-6 Suchita Jaidev Sawant

3-b-7 Harischandra Shiva Sawant

3-b-8 Rohidas Shiva Sawant

3-b-9 Savitri Shiva Sawant

3-b-10 Sushma Shiva Sawant,

All residents of Sarvon,
Bicholim Taluka.

3-b-11 Smt. Shobhavoti Shantaram Shetgaonkar
d/o late Shiva Jaidev Sawant
and her husband

3-b-12 Shantaram Datta Shetgaokar, (since
deceased)

Both residents of Naroa, Bicholim, Goa

3-b-13 Smt. Shubhangi Sadanand Gawas,
Daughter of late Shiva Jaidev Sawant
And her husband

3-b-14 Sadanand Soiru Gawas,
Both residents of Nadora,
Bardez, Goa.

3-c Late Kashinath Sawant Sarvankar (since
deceased)

3-d Kashinath Sawant Sarvankar (deceased)
Represented by his legal heir,
Defendant no. 3-c, already on record,
And following children.

3-d-1 Shri Sitaram Kashinath Sawant

3-d-2 Shri Damodar Kashinath Sawant
(died bachelor)

3-d-3 Smt. Nirmala Kashinath Sawant

3-d-3(a) Ramesh Gopi Gawas,
r/o. Amona Pimpal, Wada,
Amona Goa.

3-d-4 Smt. Guite Kashinath Sawant

3-d-4(a) Uttam Kashinath Fadte,
r/o Betki, Tamsule, Ponda, Goa.

3-d-5 Smt. Lila Kashinath Sawant

3-d-6 Smt. Sharmila Kashinath Sawant,
All residents of Sarvan, Bicholim, Goa.

3-e Bayu Shabi Malik (since deceased)

3-f Ranganath Shabi Malik
Both residents of Kudnem, Sanquelim

3-g Sugandhi Shabi Malik (deceased)
L.H. not brought on record as
Exemption granted by Order
Dated 24/10/76

3-h Rajendra Shabi Malik

3-i Sushma Shabi Malik

3-j Shirguem Ramnath Porob (since deceased)

3-k Ramnath Porob (deceased)
Both residents of Kothambi Pale,
Usgaon, represented by his
Legal heir defendant no.3-1

Already on record and following
other heirs

3-k-1 Pandu Ramnath Porob, and his wife

3-k-2 Mrs.Preethem Pandu Porob

3-k-3 Gunolo Ramnath Porob
And his wife,

3-k-4 Sneha Gunolo Porob

3-k-5 Meera Ramnath Porob,
And her husband

3-k-6 Gurudas Muradkar
All residents of Kothambi, Bicholim, Goa

3-k-7 Sharad Ramnath Porob,
And her husband,

3-k-8 Shashikant alias Vantu Keshav Parob,
Both residents or Mulgao, Bicholim, Goa

3-k-9 Gokul Ramnath Parob alias
Gokul Gopinath Gawas, and her husband

3-k-10 Gopinath Narayan Gauns
Both residents of Goteli, Sattari, Goa

[3-l Vilasini Pandhari Malik] since deceased

3 l(a) Jaidev Pandhari Malik, (son)

3 l(b) Anand Pandhari Malik, (son)

3 l(c) Shrikant Pandhari Malik, (son)
All major of age

Resident of Kudnem,
Devatimol, Gaonkarwada,
Bicholim - Goa.

3-m [Pandhari Keshav Malik] since deceased

3-m-1. Jaidev Pandhari Malik,
Major,

3-m-2. Anand Pandhari Malik,
Major,

3.m.3. Smt. Anandi Anand Malik
Major,

3.m.4. Uday S. Pal
Major,

3.m.5. Smt. Priya Uday Pal
Major,

3.m.6. Surya M. Gawas
Major,

3.m.7. Smt. Shubhangi S. Gawas
Major,

3.m.8. Sagun N. Phadte
Major,

3.m.9. Smt. Sumitra S. Phadte
Major,

3.m.10. Santosh D. Calangutkar
Major,

3.m.11. Smt. Priya Santosh Calangutkar
Major,

3.m. 12. Manoj S. Modi
Major,

3.m.13. Smt. Shobha M. Modi
Major,

All residents of Kudnem, Gaonkarwada,
Near Sateri Temple, Kudnem, Goa

3-n Ganapati Ladko Porob

3-o Motibai Ganapati Porob

3-p [Mrs. Vaikunth Ladco Porob Gauncar] since
deceased

3.p.1 Janardhan Vaikunth Parab & his wife

3.p.2 Rangana Janardhan Parab
Amona, Ambeshwada, Bicholim-Goa

3.p.3 Kashinath Vaikunth Parab
r/o Amona, Ambeshiwada, Bicholim, Goa,
widower

3.p.4 Ankush Sawant
And his wife

3.p.5 Jaya Ankush Sawant
Temawadi, Maneri, Maharashtra

3.p.6 Vishwanath Vaikunth Parab
And his wife

3.p.7 Vidya Vishwanath Parab

3.p.8 Bhanudas Vaikunth Parab

unmarried

3.p.9 Yogita Yogesh Prabhugaonkar

3.p.10 Yogesh Prabhugaonkar

4. Seguenim, Wife of Ladco Porob (def. -3)
(deceased) and her legal heirs are already
on record as that of defendant no. 3

5. Panduranga Ladco Porobo Gauncar (deceased)
Represented by his L.H. Defendant No. 6
wife,
Already on record, and following children

5-a Suresh Pandurang Porob Gaonkar

5-b Miss Metha Pandurang Porob Gaonkar

5-c Miss Shanti Pandurang Porob Gauncar

5-d Sadanand Pandurang Porob Gauncar
All are minors,
Resident of Amona Ambashi,
P.O. Marcel
Bicholim, Goa.

5-e Mrs. Kamal Shantaram Gawas
Daughter of Pandurang Porob Gauncar

5-f Mr. Shantaram Gawas
Husband of Kamal S. Gawas
Both residents of Navelim,
Sanquelim, Goa.

5-g Mrs. Anjani Fati Naik,
Daughter of Pandurang Ladco
Porob Gauncar

5-h Mr. Fati Naik (husband of Anjani
F. Naik (expired)
Both residents of Dhumashe,
P.O. Sal, Goa.

5-h-(a) Arjun Fati Naik
5-h-(b) Amrut Fati Naik
5-h-(c) Arun Fati Naik
5-h-(d) Amrita Fati Naik
r/o Bicholim (as per order
dated 6/12/2004)

6. Rucmini (deceased) wife of respondent no.5
Legal heirs are already on record as
5-a to 5-h and her following heirs:

6-a Sulochana Suresh Porob

6-b Rajeshri Sadanand Porob

6-c Uttam Nauso Naik,
Husband of Shanti Porob,
Resident of Mencurem, Bicholim Taluka

7. Yeshwanta Ladco Porob Gaunkar (deceased)
Represented by his following legal heirs :

7-a Shablo Yeshwant Porob

7-b Satyavati Shablo Porob;

7-c Vinayak Yeshwant Porob, (since
deceased)

7-c(a) Smt. Vinayshri Porob

7-c(b) Miss Vishwadara Porob

7-c(c) Miss Vinda Porob

7-c(d) Miss Vijaya Porob
All r/o Ambeshwaram, Amonda, Goa.

7-d Smt. Gulabi Yeshwant Porob

7-e Smt. Shashikala Yeshwant Porob
All residents of Amona

7-f Babli Vassu Rane alias Kesarkar
(expired)

7-f(a) Rupesh Babli Rane alias Kesarkar
r/o H. No. 32, Talap Wada,
Kumbarjua, Tiswadi Post Marcel.

7-f(b) Rupali Babli Rane Kesarkar alias
Rupali Laxman Gawas,

7-f(c) Laximan Jaganath Gawas
Both residing at Majorda
Sattari, Valpoi

7-f(d) Vaishali Babli Rane alias Kesarkar,
Married,

7-f(e) Yatim Umakant Shirodkar
r/o P.D.A. Colony,
Plot No. 136, Khorlim, Tiswadi, Goa

7-f(f) Savitri Babli Rane alias Kesarkar
Both residents of Kumarous Marcel

8. And his wife Emunim

9. Voicunta Ladco Porobo Gauncar
r/o Amona, Bicholim, Goa.

... Respondents.

Mr. S. D. Lotlikar, Senior Advocate with Mr. J. Karn, Advocate for the Appellants.

Mr. J. P. Mulgaonkar, Senior Advocate with Ms. Rupa Benaulikar, Advocate for Respondents No.3(n), 3(o), 6(b) and 7(b).

CORAM : M. S. SONAK, J.

Reserved on : 4th March, 2021

Pronounced on : 17th March, 2021.

JUDGMENT :

Heard Mr. S.D. Lotlikar, learned Senior Advocate, along with Mr. J. Karn for the Appellants.

2. Heard Mr. J.P. Mulgaonkar, learned Senior Advocate along with Ms. Rupa Benaulikar, for Respondents No.3(n), 3(o), 6(b), and 7(b).

3. Misc. Civil Application No. 167/2017 to amend the cause title and to bring on record the legal representatives of the deceased Appellant No.1 is, hereby, allowed. The amendment to be carried out forthwith. Mr. Lotlikar learned Senior Advocate for the Appellants submits that he has instructions to appear on behalf of such legal representatives and, therefore, the matter can be disposed of finally.

4. The Appellants are the original Plaintiffs in Accao

Summario (Summary Suit) 10104/1951 instituted in the Court of Civil Judge, Senior Division, at Bicholim and/or the legal representatives of the original Plaintiffs. They shall, even for this Appeal, be referred to as the Plaintiffs.

5. The Respondents are the original Defendants in the aforesaid Suit and, therefore, shall be referred to as the Defendants for this Appeal.

6. The learned Civil Judge, Senior Division, Bicholim (Trial Court), vide Judgment and Decree dated 24/11/1998, dismissed the Suit. The District Judge-2, North Goa, at Panaji (First Appellate Court) dismissed the Regular Civil Appeal No.64/2003 vide Judgment and Decree dated 31/8/2009. Hence, the present Second Appeal.

7. This Second Appeal was admitted on 11th June 2014, on the following substantial question of law :

"Whether the impugned judgment and decree is vitiated on account of misreading and misinterpretation of the documents of title in the form of land registration certificate pertaining to the property described under No.8662, the document of Matriz in respect of Matria Nos. 329 and 331, the records of the Comunidade in respect of the property registered under nos. 80 and 78 and the old cadastral survey in respect of the survey no.56 in the context of pleadings of the parties ?

8. Mr. Lotlikar, the learned Senior Advocate appearing for the Plaintiffs submitted that the Trial Court and the First Appellate Court have misread and misconstrued the following documents :

- (a) Land Registration Certificate (Description) bearing No.1055 of Book B 12 (Old) in respect of the suit property '*Batta Ambes*';
- (b) Land Registration Certificate (Description) bearing No.8662, concerning the suit property;
- (c) Matriz documents in respect of Matriz Nos. 329 and 331, concerning the suit property;
- (d) Comunidade records (Tombos) concerning the suit property registered under Nos. 78 and 80; and
- (e) Old cadastral survey records concerning the suit property.

9. Mr. Lotlikar submits that a proper construction of the aforesaid documents would make it clear that not only the suit property, as described in the plaint, existed in loco, but further, it is the Plaintiffs who were owners in possession of the suit property immediately before their dispossession by Naraina Pandu Porobo Gaoncar (Naraina) on the strength of a Court auction purchase of the property bearing Registration No.1055, which had fraudulently included the suit property, even though the suit property was neither owned nor possessed by the Judgment Debtor-Xamba Roulu Sinai

Amoncar (Amoncar) sometime in the year 1936.

10. Mr. Lotlikar submitted that Naraina purported to purchase suit property with full knowledge that the suit property was neither owned, nor possessed by the Judgment Debtor-Amoncar and, therefore, said Naraina can neither claim to be some bonafide purchaser, nor claim some equities based on such Court auction purchase.

11. Mr. Lotlikar submits that in the present case, the Trial Court and the First Appellate Court wrongly rejected the survey records on the ground that the survey was incomplete or that the records were not promulgated. He submits that there is no basis to hold that the survey was incomplete in so far as the suit property was concerned, particularly when there was evidence that even demarcation had been carried out. He, therefore, submits that the presumption of both, ownership and possession was required to be drawn based on the survey records and the two Courts erred in simply rejecting the old cadastral survey records in this matter.

12. Mr. Lotlikar submits that the two Courts failed to appreciate that Matriz Nos. 721 and 722 were unnecessarily created by Naraina in the year 1937 only to obliterate the records concerning the suit property. He submits that creation of such documents was consciously made by Naraina to fudge boundaries and create an

impression that the suit property was not even existing or that the suit property was subsumed in the property of Sinaris which was eventually taken over by the Government. He submits that such malafide manipulation by Naraina establishes that Naraina was aware of not only the existence of the suit property but the fact that the Plaintiffs were owners in possession thereof.

13. Mr. Lotlikar submits that since this is a case of established bad faith on the part of Naraina, under the Portuguese law, the limitation for recovery of the suit property stood extended to 30 years. He submits that there were never any serious disputes raised as to the suit being instituted within the prescribed period of limitation. Mr. Lotlikar submits that in any case, in terms of Article 526 of the Portuguese Civil Code, the limitation for recovery of immovable property is 20 years, particularly where the Plaintiff is deprived of the suit property on account of any bad faith or malafides on the part of the Defendants. He submits that the cause of action arose in the year 1936 and, therefore, the suit which was instituted in the year 1951 was very much within the prescribed period of limitation.

14. Mr. Lotlikar submits that the two Courts erred in discarding the testimony of PW.1 Krishna Vassu Porob on the ground that he was only the Power of Attorney Holder and could, therefore, not depose to the facts which were not to his personal knowledge. Mr. Lotlikar submits that the Plaintiffs' case was based on

documentary evidence and even the testimony of PW.1 was based mostly on his personal knowledge. He, therefore, submits that the two Courts erred in dismissing the suit on the ground that the Plaintiffs had not themselves stepped into the witness box.

15. Mr. Lotlikar submits that the two Courts erred in rejecting the evidence of PW.2, who was, in fact, the son of Naraina. He submits that PW2 has deposed from his personal knowledge and merely because his deposition was against the interest of Naraina, there was no question of rejecting such evidence on the specious plea of variance between the pleadings and proof.

16. Mr. Lotlikar submits that in this case, most of the facts pleaded to by the Plaintiffs were admitted by the Defendants or, in any case, evasively denied. He submits that even the issues were framed by taking into account the admitted facts. He submits that the Trial Court and the First Appellate Court, however, ignored the admitted facts and proceeded to non-suit the Plaintiffs for the alleged failure of proving these admitted facts. He submits that once the facts were admitted, there was no further requirement of proof both, under the provisions of the Portuguese Civil Code or the Civil Procedure Code (CPC). He submits that the impugned Judgments and Decrees stand vitiated on this count, as well.

17. Mr. Lotlikar submits that the two Courts erred in holding

that the Matriz documents are neither instruments of title, nor the source of possession. He submits that in this case, there is legal evidence that demarcation had also been carried out by the competent authorities, and, therefore, the Matriz documents were relevant and were required to be considered by the two Courts. Mr. Lotlikar submits that the two Courts have misconstrued the rulings in *Fabrica da Igreja de N.S. de Milagres vs. Union of India and ors.*¹ and *Narcinva Shivram Sinai Nadkarni & ors. vs. Government of Goa and ors.*²

18. For all the aforesaid reasons, Mr. Lotlikar submits that the substantial question of law is required to be answered in favour of the Plaintiffs and the Suit is liable to be decreed.

19. Mr. Mulgaonkar, the learned Senior Advocate for some of the Defendants, defended the impugned Judgments and Decrees based on the reasoning reflected therein. He submitted that in this matter, the Plaintiffs have neither produced any title documents nor produced any documents to establish their alleged possession in respect of any portion of the property purchased by Naraina through the Court auction in the year 1936. He submits that the Plaintiffs themselves never stepped into the witness box and, therefore, the allegations in the plaint were never proved following the law. He

¹ 1995 1 Bom CR 588

² First Appeal No.177/2005 decided on 18/2/2011

submits that even, otherwise, the evidence of the witnesses examined on behalf of the Plaintiffs is quite sketchy and does not prove any of the allegations in the plaint.

20. Mr. Mulgaonkar submits that the suit was bad for non-joinder of necessary parties *i.e.* the Decree Holders – Borcar and the Judgment Debtors – Amoncar. He submits that in the absence of such parties, the reliefs, as prayed in the Suit could not even have been entertained. He, therefore, submits that there is no error whatsoever in the concurrent findings of fact recorded by the two Courts, warranting any interference in this Second Appeal.

21. Mr. Mulgaonkar submits that none of the documents relied on by the Plaintiffs can even be regarded as title documents. He submits that such documents have been quite rightly construed and there is no substantial question of law involved in this Second Appeal. He submitted that the suit was barred by law of limitation, particularly since, the Plaintiffs failed to establish any dispossession, much less, dispossession in bad faith. He submits that the entries in the Comunidade records are quite vague and there is no evidence that the same relate to the suit property. He submits that in any case, such entries, by themselves, are not documents of title. He submits that the documents, right from 1882, describe the property '*Batta Ambes*' in a particular manner. He submits that it is this property that was purchased by Naraina in a Court auction in the year 1936. He

submits that it was this property that was ultimately transferred by Naraina in 1943 to Saguni, her husband Ladco, and their children. He submits that the Plaintiffs, based on some strenuous interpretation, cannot connect the documents to the suit property and upset the 1936 Court auction purchase, even without impleading the Decree Holders (Borcar) and the Judgment Debtors (Amoncar) to the suit instituted almost 15 years, after such Court auction purchase, in the year 1951. He, therefore, submits that the Second Appeal may be dismissed, with costs.

22. Mr. Mulgaonkar relied on *Santosh Hazari vs. Purushottam Tiwari (deceased) by LRS.*³; *Janki Vashdeo Bhojwani and anr. vs. Indusind Bank Ltd. and ors.*⁴ and *Addagada Raghavamma and anr. vs. Addagada Chenchamma and anr.*⁵ in support of the Defendants' case.

23. The rival contentions now fall for my determination.

24. The case of the Plaintiffs, as pleaded in the plaint, is that the Comunidade of Amona, comprised of five vangors (families) as its components. These vangors (families) bear the surnames Fotto, Gaunco, Porobo, Sinari, and Amoncar. It is the case of the Plaintiffs that the Comunidade had granted emphyteusis (aforamento) of its property, having several denominations like Ambes, Ambesbata,

³ (2001) 3 SCC 179

⁴ (2005) 2 SCC 217

⁵ AIR 1964 SC 136

Ambechi bata, or Xir Ambes in the form of five distinct strips of land for agricultural purposes.

25. According to the Plaintiffs, the strip towards the northern part of such properties was granted to the Gaunco family, followed by the Fotto family, Amoncar family, Porobo family, and finally to the Sinari family (southern lands). To the south of the strip allotted to the Sinari family, was the land of Sardessais, which is not even remotely the subject- matter of the dispute between the parties.

26. The Plaintiffs have described the suit property as bearing Land Registration No.8662 and Matriz Nos. 329 and 331, being the strip of land allotted to them by the Comunidade and admeasuring 3415 sq. meters, sandwiched between the strip allotted to Amoncar towards the north and the strip allotted to Sinari towards the south. Mr. Lotlikar submitted that at no stage there was any dispute regards the eastern and western boundaries of the suit property.

27. The Plaintiffs allege that one Gonba Sinai Borcar (Borcar) obtained a money decree against Xamba Roulo Sinai Amoncar (Amoncar) from the competent Court. In the execution of this Decree on 23/3/1936, the property bearing Land Registration No.1055, allegedly belonging to the Judgment Debtor – Amoncar was got attached by the Decree Holder – Borcar, through the legal process. The documents in respect of this property bearing Land

Registration No.1055, had, however, fraudulently described this property as bounded to the north by the property of Gaunco and to the south by the property of Sardessai. Thus, the document suggested that the attached property included the strip of land allegedly allotted by the Comunidade to Fotto, Amoncar, Porobo, and Sinaris.

28. The Plaintiffs have alleged that at the time of sale of this attached property through Court auction, the boundaries of this attached property were partially corrected and the strips belonging to Fotto towards the north and Sinari towards the south, were excluded. However, the strip, which the Plaintiffs (Porobo) claim, was allotted to them by the Comunidade, was not excluded. As a result, in the Court auction held in the year 1936 for the satisfaction of the Decree obtained by Borcar against the Judgment Debtor-Amoncar, not only the strip allotted to and held by Amoncar was sold, but also the strip allotted to the Plaintiffs (Porobo) also came to be sold to Naraina. The Plaintiffs have alleged that Naraina had full knowledge about this apparent mistake, but took advantage of the situation and proceeded to purchase the strip held by the Judgment Debtor (Amoncar), as well as the strip held by the Plaintiffs (Porobo), based on misdescription in the land registration document No.1055.

29. The Plaintiffs have alleged that in the year 1943, Naraina transferred partly by way of sale and partly by way of gift, the property purchased by him in the Court auction in favour of Saguni

and Ladco. The Plaintiffs also allege that before such transfer, Naraina, on the strength of the Court auction purchase, sometime in the year 1936 itself, dispossessed the Plaintiffs from the strip of land allotted to them by the Comunidade of Amona.

30. The Plaintiffs, therefore, instituted a Summary Suit in the year 1951 and sought for, *inter alia*, recovery of possession of the suit property *i.e.* the strip of land admeasuring 3415 sq. meters, allegedly allotted in their favour by the Comunidade of Amona. The Plaintiffs reiterate that this strip which was sandwiched between the strip allotted to Amoncar on the north and Sinari on the south was wrongfully sold in the Court auction of 1936 to satisfy the Decree obtained by Borcar against the Judgment Debtor – Amoncar. The Plaintiffs claim to have produced on record title documents to establish their title to the suit property *i.e.* the strip and also relied on oral and documentary evidence in support of their claim of possession of the suit property *i.e.* the strip.

31. As noted earlier, the Trial Court and the First Appellate Court have not accepted the case of the Plaintiffs and dismissed the Suit, as well as the Appeal instituted by the Plaintiffs. The Courts have held that the Plaintiffs were unable to produce any title documents in support of their claim and even there was no reliable evidence in support of their claim to possession up to 1936, or the dispossession of 1936 by Naraina. The two Courts have analyzed the

documentary, as well as oral evidence on record, and concurrently returned the findings of fact. Though no substantial question of law on the issue of the perversity of findings, was ever framed in this matter, Mr. Lotlikar, the learned Senior Advocate for the Appellants submits that if, misreading and misconstruction of the documentary evidence is established, then, it would be apparent that the findings of fact recorded by the two Courts, are vitiated by perversity. He submits that, if necessary, this Court may consider the framing of an additional substantial question of law by exercising the powers under Section 100(5) of the CPC, though, according to him, there may be no necessity of exercise of such power if documentary evidence is properly construed and interpreted.

32. Though, the two Courts may not have gone into the issue of non-joinder of necessary parties, even though such issue was raised at the earliest opportunity by the Defendants, such issue, according to me, was quite relevant. The Plaintiffs, by instituting the Suit in the year 1951, had virtually pleaded that the Decree Holder-Borcar wrongfully attached and sold the suit property through Court auction in favour of Naraina in the year 1936. The Plaintiffs had virtually alleged that Amoncar fraudulently included the suit property in their title documents and offered the same for attachment and sale to satisfy the Decree which they had suffered in the Suit instituted by the Decree Holder – Borcar. The Plaintiffs had thus alleged that even

Amoncar fraudulently permitted the sale of the Plaintiffs' suit property, along with their own property, to satisfy the Decree which they had suffered in the Suit instituted by the Decree Holder – Borcar.

33. Now, to such a suit both, Borcar, as well as Amoncar were necessary parties. This is because the primary allegation of the Plaintiffs was that Borcar had wrongfully attached and sold the suit property through the Court process to satisfy the Decree, which he had obtained against the Judgment Debtor-Amoncar. Similarly, the primary allegation was against the Judgment Debtor-Amoncar that Amoncar had passed off the suit property as his own and caused it to be sold through Court auction for the satisfaction of the Decree which he had suffered in the Suit instituted by the Decree Holder -Borcar. In their absence, no effective decree could have been made in the Suit, more particularly because the two Courts have not accepted the Plaintiffs' case that Naraina purchased the suit property in the Court auction of 1936 with the full knowledge that he was purchasing the suit property which did not belong to the Judgment Debtor – Amoncar, but belonged to the Plaintiffs herein.

34. Mr. Lotlikar did refer to some provisions of the Portuguese Civil Code to submit that in the event the Court auction sale to the extent it included the suit property, were to be set aside, Naraina or the parties who claim title through Naraina would still be entitled to

maintain an action against the legal representatives of the Decree Holder – Borcar and the Judgment Debtor – Amoncar in respect of the Court auction sale of the year 1936. The provisions referred to by Mr. Lotlikar are far from clear, on this aspect. In any case, no provision was brought to my notice which prevented the Plaintiffs impleading the Decree Holder – Borcar and the Judgment Debtor – Amoncar to the Summary Suit instituted in the year 1951 so that all the issues could be decided in the same Suit, in the presence of all necessary parties.

35. There is no dispute that Naraina had purchased the property in the Court auction by paying the full price and going by the documents prepared way back in the 1880s. These documents did not refer to the strip allegedly allotted to the Plaintiffs (Porobo). Even assuming that there was some genuine error, then, unlike Sinaris and Fottos, no steps were taken by the Plaintiffs for correction of the documents to exclude the strip allegedly allotted in their favour from out of Amoncar's title documents concerning the property bearing Land Registration No.1055.

36. There is no credible evidence on record, establishing possession of the Plaintiffs or the alleged dispossession in the year 1936. There is no explanation as to why the Plaintiffs, who claim to have been in possession of the suit property, for over 50 years before the year 1936, did not react to their alleged dispossession in the year

1936 by Naraina on the strength of the Court auction purchase in the year 1936. There is not even a single complaint made to the civil or Police authorities produced on record by the Plaintiffs, complaining about such alleged dispossession. There are no pleadings that any such complaint was ever made to any authorities, complaining about the dispossession. The Suit was also instituted after almost 15 years *i.e.* in the year 1951. The issue is not whether the Suit was within the prescribed period of limitation or not, but the issue is whether the case of the Plaintiffs about their possession almost 50 years before 1936 or their alleged dispossession in the year 1936, is to be believed or not. The two Courts, based on both, documentary and oral evidence, have not believed the case of the Plaintiffs, on this aspect. The findings recorded by the two Courts suffer from no perversity.

37. The Plaintiffs, in the present case, have not produced any title documents to establish the allotment from the Comunidade. No doubt, the Plaintiffs have referred to certain entries in the Books of Comunidade (Tombos). However, the entries refer to several properties, including '*Batta Ambes*'. Mr. Mulgaonkar pointed out that nothing turns on the names of such properties, because such names are given to several properties. He submitted that the names are descriptive and, therefore, based only on the names there can be no identification. He submits that the entries in the Books of the

Comunidade can, very well, pertain to some other properties allotted to the predecessor-in-title of the Plaintiffs and, there is no credible evidence about the allotment of this particular strip, which is described as the suit property, to the Plaintiffs.

38. Based only on the entries in the Books of the Comunidade (Tombos), it cannot be said that the Plaintiffs have established their title to the suit property. There is no explanation about the absence of any formal grant from the Comunidade. The Plaintiffs took no efforts to correlate the entries in the Tombo to the suit property as described by them in the plaint. Mr. Lotlikar did rely upon some provisions to indicate that the books of the Comunidade are public documents and, therefore, what is set out in such books is to be presumed to be true and correct. Even, if we are to assume that this is so, in the absence of proper and credible evidence to link the entries with the suit property, no fault can be found with the concurrent findings that the Plaintiffs had failed to establish the title to the suit property.

39. Admittedly, there was no land registration document (Inscription) produced on record by the Plaintiffs. The description documents produced on record by the Plaintiffs, only describes the property referred to therein. But the same is certainly not some document of title, based upon which the Court auction sale of the year 1936 could have been set aside, even though the Suit was

instituted by the Plaintiffs only in the year 1951 and that too, without impleading either the Decree Holder (Borcar) or the Judgment Debtor (Amoncar), as parties.

40. In *Fabrica da Igreja de N.S. de Milagres* (supra), the learned Single Judge of this Court has held that it is a settled position that matriz document is neither an instrument of title nor a source of possession and that the organization of the matriz predial is a merely administrative exercise aimed at the collecting tax revenues from the land. As such, no legal evidentiary value can be attributed also to the said registration to establish ownership title or presume possession on the land. Similarly, there is no evidence that the old cadastral survey was ever completed or put to public objections, or promulgated. Although there is some reference to demarcation in the evidence tendered by the Plaintiffs, based upon such evidence, it is not possible to say that there existed '*auto de demarcacao*', which was an essential requirement to establish the correct boundaries of the land so demarcated upon the cadastral plan in support of its physical possession of the suit plot.

41. There are no pleadings on the aspect of demarcation and, therefore, based on some reference to demarcation in the evidence produced on record by the Plaintiffs, it cannot be said that the cadastral survey was completed or that the same was finalized or promulgated after inviting public objections. Therefore, even the

decision in *Narcinva Shivram Sinai Nadkarni* (supra) can be of no assistance to the Plaintiffs in the facts of the present case.

42. The document of land registration under No.8662, or the matriz records under Nos. 329 and 331 or the entries in the Books of the Comunidade under Tombos 78 and 80 can, in the facts of the present case, be not regarded as any documents of title. Even the Matriz certificates 329 and 331 referred to properties admeasuring only 100 sq. metres and 70 sq. metres, respectively when, the Plaintiffs claim that the suit property admeasures 3415 sq. metres or thereabouts. The Plaintiffs, as noted earlier, have not produced any primary documents of allotment. There is no evidence to correlate the property referred to in Tombos 78 and 80 to the suit property. The land registration document, as noted earlier, does not refer to the inscription in the name of the property. Based only on the description component, it is not possible to hold that the Plaintiffs have established their title to the suit property, followed by possession.

43. Even, the oral evidence on record is quite sketchy. The Plaintiffs did not step into the witness box. The Power of Attorney holder, in terms of the decision of the Hon'ble Supreme Court in *Janki Vashdeo Bhojwani* (supra), could have only deposed to the facts which were to his personal knowledge. The deposition of Naraina's son (PW.2) also inspires no confidence. This witness was hardly 5

years old when his father purchased the properties in a Court auction in the year 1936. The two Courts have evaluated both, the documentary, as well as oral evidence on record and returned concurrent findings of fact against the Plaintiffs. As noted earlier, this is not a case of any misreading or misconstruction of the documents on record. The documents on record have been fairly considered by the two Courts and, therefore, there is no case made out to interfere with the dismissal of the Suit by the Trial Court, or dismissal of the appeal by the First Appellate Court.

44. Mr. Lotlikar then submitted that the First Appellate Court has not assessed the material on record, but has superficially agreed with the findings recorded by the Trial Court. From the perusal of the impugned Judgment and Decree made by the First Appellate Court, there is no basis for such criticism. The First Appellate Court has affirmed the findings recorded by the Trial Court. In *Santosh Hazari* (supra), the Hon'ble Supreme Court has explained that the Appellate Court agreeing with the view of the Trial Court, need not restate the effect of the evidence or reiterate the reasons given by the Trial Court, and expression of general agreement with reasons given by the Court would generally suffice. However, the Hon'ble Supreme Court has cautioned that expression of general agreement with the findings recorded in the judgment, should not be a device or camouflage adopted by the Appellate Court for shirking the duty cast on it.

Therefore, as a matter of law if the appraisal of the evidence by the Trial Court suffers from a material irregularity or is based on inadmissible evidence or conjectures and surmises, the Appellate Court is entitled to interfere with the finding of fact. The Appellate Court, while reversing a finding of fact, must come into close quarters with the reasoning assigned by the Trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the First Appellate Court had discharged the duty expected of it. The First Appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from a challenge before the High Court in the second appeal. Now, the First Appellate Court is also a final Court of law, in the sense that its decision on a question of law even if erroneous, may not be vulnerable before the High Court in the second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the First Appellate Court even on questions of law unless such question of law is a substantial one. (see paragraph 15 of *Santosh Hazari*).

45. Based on the aforesaid, it cannot be said that the First Appellate Court has either shirked its duty or failed to consider the contentions raised by the Plaintiffs in the context of the Judgment and Decree made by the Trial Court. Further, since the Plaintiffs have

failed to make out any case of misreading or misconstruction of documents or even perversity in the record of the findings of fact, it cannot be said that any substantial question of law as such arises in the present Appeal to warrant interference with the concurrent findings of fact recorded by the Trial Court and the First Appellate Court.

46. There is no clear evidence on record on the aspect of Naraina being allegedly aware in the year 1936 that he was purchasing through a Court auction the property of not only the Judgment Debtor – Amoncar, but also the property belonging to the Plaintiffs or in possession of the Plaintiffs. There are written statements filed by the Defendants on record. There is no scope to proceed on the basis that this significant aspect was admitted by either Naraina or any other Defendants. This is to be coupled with the circumstance that for almost 15 years, the Plaintiffs took no steps to even complain about their alleged dispossession by Naraina in the year 1936 based on the Court auction purchase in the year 1936. Non-establishment of this aspect makes it difficult to accept the Plaintiffs' case about bad faith which they have imputed to Naraina. In the absence of any evidence of bad faith, the period of limitation for seeking recovery of possession would be only 10 years and, since this Suit was instituted beyond 10 years, there is scope to hold that the suit was barred by limitation, as well.

47. However, it is made clear that this Court is not holding against the Plaintiffs only on the ground of bar of limitation, or non-joinder of necessary parties, and further, if these two issues are not taken into account, since these two issues do not appear to have been seriously gone into by the two Courts, based on other material on record, it cannot be said that this is a case of either misreading or misconstruction of the documents or a case of perversity in the record of findings of fact by the Trial Court and the First Appellate Court.

48. For all the aforesaid reasons, the substantial question of law, as framed, is required to be answered against the Appellants and this Appeal is liable to be dismissed.

49. This Appeal is, accordingly, dismissed. However, there shall be no order as to costs.

50. The Second Appeal and the Misc. Civil Application are disposed of in the aforesaid terms.

M.S. Sonak, J.