

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.23 OF 2006

1. Shri Mahadev Sitaram Sinai Kakodkar
and his wife (Expired) through LRs.

1.a) Shri Atrey Shitalkumar S. Kakodkar
major, married, and his wife

1.b) Mrs. Ramaa Atrey Sinai Kakodkar
major, married,
both resident of H.No.215,
Ward Bepquegal, Curchorem, Goa.

2. Smt. Ushabai Mahadev
Sinai Kakodkar
Both r/at USHA, House No.215,
situated at Near Marutigad, Kakoda,
Curchorem, Goa.

...Appellants
(Ori. Plaintiffs)

Versus

1. The Conservator of Forests,
Government of Goa, having his
office at Junta House, Panaji-Goa..

2. Dy. Conservator of Forests,
Government of Goa, having its
office at Aquem, Margao-Goa.

3. The State of Goa, through its
Chief Secretary, Secretariate,
Panaji-Goa.

... Respondents
(Ori. Defendants)

Mr. R.G. Ramani, Senior Advocate with Ms. S. Patil, Advocate for the
Appellants.

Mr. D.J. Pangam, learned Advocate General with Ms. M. Simone Correia, Additional Government Advocate for the respondents.

Coram: M. S. SONAK, J

Reserved on: 12th February 2021

Pronounced on: 18th February 2021

JUDGMENT:

Heard Mr. R.G. Ramani, Senior Advocate with Ms. S. Patil, Advocate for the appellant and Mr. D.J. Pangam, learned Advocate General with Ms. M. Simone Correia, Additional Government Advocate for the respondents.

2. This second appeal was admitted on 20.11.2006 on the following substantial question of law.

“Whether the learned Courts below after finding that the appellants had proved that the appellants were the owners in possession of the suit property which according to the appellants was wrongly included in survey Nos. 98 and 97 and that the respondents had not proved that the entire land bearing Survey Nos. 97/1 and 98/1 was reserved forest known as “Cudeladongor” belonging to the Forest Department were right in dismissing the appellants' suit?”

3. By Judgment and Order dated 28.08.2015, this Court set aside the impugned Judgment and Decree and remanded the matter to the Trial Court. On remand, the Trial Court had to appoint a Commissioner and thereafter proceed to dispose off the matter.

4. However, the Judgment and Decree dated 28.08.2015 made by this Court remanding the matter to the Trial Court was challenged by the respondents before the Hon'ble Supreme Court. The Hon'ble Supreme Court set aside this Court's order dated 28.08.2015, and again, on consensual terms, issued the following directions:-

“a) the judgment and order passed by the High Court be set-aside;

b) Second Appeal be restored to the file of the High Court;

c) The High Court be requested to consider and dispose of the Second Appeal on its own merits; and

d) If a case is made out for appointment of Commissioner, the matter may be gone into by the High Court purely on merits without being influenced by the order dated 28.8.2015 passed by the High Court on the earlier occasion.”

5. This is how the present second appeal came to be once again heard and is now being disposed off uninfluenced by the order dated 28.08.2015, which in any case, was set aside by the Hon'ble Supreme Court.

6. By yet another order dated 06.02.2015 in Miscellaneous Civil Application No. 54/2015, this Court had permitted the appellants to rely upon a Government Gazette dated 14.03.2002, in support of the appeal. The contentions of both the parties on the merits of the documents were however left open for consideration at the stage of final

disposal of the second appeal.

7. The appellants in this case are the original plaintiffs and the respondents are the original defendants in Special Civil Suit No.88/1996 instituted in the Court of the Civil Judge Senior Division at Quepem seeking the following reliefs:-

“a) The Judgment and Decree declaring the Plaintiff to be owners in possession of the suit property marked as Plots “A” admeasuring 17320 sq.meters, “B” admeasuring 9300 sq.meters and Plot “C” admeasuring 4800 sq.meters from Survey No.98 and Plot “A” admeasuring 11240 sq.meters, Plot “B” admeasuring 7560 sq.meters and Plot “C” admeasuring 6640 sq.meters from Survey No.97 which Plots “A” are delineated with green line, Plot “B” delineated black line on the plan of survey Number 98 and 97 which plan is annexed to the plaint as exhibit “A” to the plaint, of survey No.98 and 97 of Colomb Village taluka Sanguem.

b) For a direction to Survey Authorities to re-survey the land under survey No.97 and 98 and mark the area shown as Plot “A”, “B” and “C” from survey Number 98 and Plots marks A,B and C from survey No.97 as a separate holding in the name of the Plaintiffs. Alternatively,

c) For an Order and direction from this Hon'ble Court to Survey Authorities to demarcate the land of the property “PONSOIBANDULAM” described in the Land

Registration office of Quepem under No.15260 and bearing Land Revenue Office of Sanguem (Matriz) No.850 and 851.

d) Cost of the suit.

e) Any other relief which this Hon'ble Court, deems fit and proper in the circumstances of the case.

8. The defendants filed their written statement denying the case pleaded by the plaintiffs.

9. Based on the pleadings of the parties, the Trial Judge framed and answered the issues in the following manner:-

Sr.No.	Issues	Answers
1	Whether the plaintiffs prove that they are owners in possession of the suit property?	Affirmative.
2	Whether the plaintiffs prove that the suit property has been wrongly included in the land surveyed under No.98 and 97 with the name "Phonsomal" in the name of the Government?	Negative.
3	Whether the plaintiffs prove that the suit property so wrongly included in survey nos.98 and 97 admeasures 56860 sq.metres and is as shown by the plaintiffs as Plot "A" admeasuring 17320 sq.metres, Plot "B" admeasuring 9300 sq. Metres and Plot "C" admeasuring 4800 sq.metres. From survey No.98 and Plot "A" admeasuring 11240 sq.metres, Plot	Negative.

Sr.No.	Issues	Answers
	“B” admeasuring 7560 sq.metres and Plot “C” admeasuring 6640 sq.metres from survey no.97, as shown with red lines black lines and green lines on the plan annexed to the plaint at Exhibit “A”?	
4	Whether the plaintiffs are entitled to the reliefs claimed in paragraph 24 of the plaint?	Negative.
5	Whether the defendants prove that the suit is barred by Res-judicata?	Negative.
6	Whether the defendants prove that the suit is time-barred?	Negative.
7	Whether the defendants prove that the entire land bearing survey nos. 97/1 and 98/1 is reserved forest known as “Cudeladongor” belonging to the Forest Department?	Partly in negative and partly in affirmative.
8	What relief? What Order?	As per final order.

10. There plaintiffs, aggrieved by the impugned Judgment and Decree dated 14.02.2002 made by the Trial Judge, appealed to the District Court, South Goa at Margao (First Appellate Court) vide Regular Civil Appeal No. 61/2002. Again, by Judgment and Decree dated 21.09.2005, the First Appellate Court dismissed the appeal. Hence, the present second appeal on the aforesaid substantial question of law.

11. Mr. Ramani, learned Senior Advocate for the Appellants submits that both the Trial Court as well as the First Appellate Court have held that the Appellants are the owners in possession of the

property which is the subject matter of registered sale deed dated 07.02.1972 by which the Appellants purchased the suit property from Shri Sagun Naik Kurado and his wife. Mr. Ramani submits that once the two Courts come to this conclusion, the Plaintiffs' suit was required to be decreed, if necessary, by the two Courts themselves appointing the Commissioner to identify the location of such property, assuming that there was some ambiguity regards such location. He submitted that even this Court ought to consider appointing the Commissioner so that the issue of location or identity of the suit property is sorted out once and for all.

12. Mr. Ramani without prejudice to the aforesaid submits that there is perversity in the record of certain findings of fact by the two Courts and further, there is misconstruction of the documentary evidence produced by the Plaintiffs in the present matter.

13. Mr. Ramani pointed out that matríz documents relied upon by the two Courts to disbelieve the case of the Plaintiffs are neither documents of title nor are they relevant for determining the issue of possession. He submitted that such documents were prepared only for fixed purpose and therefore, only cultivated areas were normally reflected in the matríz documents. Mr. Ramani submits that from out of the total area of the suit property admeasuring 56,860 sq. mts., it is possible that property to the extent of about 8,900 sq. mts. was cultivated and therefore, this is the area which is reflected in the matríz documents. Mr. Ramani submits that in as much as this aspect has not been considered and appreciated by the two Courts, there is both misconstruction of

documentary evidence as well as perversity in the record of findings of fact by the two Courts.

14. Mr. Ramani submits that from the oral as well as the documentary evidence on record, it is clear that the Plaintiffs have substantially identified the boundaries of the suit property. He submits that at the highest there is a discrepancy about the eastern boundary, which has also been explained in the course of oral evidence. He submits that to the north of the suit property is the property earlier owned by the Commissioner, but later acquired by the Plaintiffs. He submits that pleadings as well as evidence to this effect have been ignored by the two Courts, which have held that the northern boundary does not deal with the land registration documents. Mr. Ramani submits that this is a clear case of failing to read the pleadings as well as evidence on record and consequently the findings of the two Courts are vitiated by perversity.

15. Mr. Ramani submits that the two Courts erred in relying upon the Notification dated 03.12.1997 issued under Section 3 of the Indian Forest Act, 1927 for disbelieving the case of the Plaintiffs. He submits that this Notification refers to the forest name "*Colomba-II*" and not to "*Cudela Dongor*", which, according to the pleadings of the defendants instituted the suit property i.e. reserve forest. Mr. Ramani submits that there was no necessity of issuing Notification dated 03.12.1997 when it was the case of the Defendants that the suit property had already been declared as a forest by the erstwhile Portuguese regime and by virtue of Notification dated 01.02.1965, such areas were deemed to be declared as "*reserve forest*" for purposes of the Indian Forest Act of

1927. Mr. Ramani submits that in as much as this vital aspect has been ignored, the impugned Judgments and Decrees warrant interference. Mr. Ramani submits that the Notification dated 04.03.2002 which was produced in appeal by the Plaintiffs pertains to the forest “*Cudela Dongor*”. However, this Notification makes no reference to properties surveyed under numbers 97 and 98 i.e. the suit property and from this it is quite clear that the suit property is neither a reserve forest nor can the Defendants claim any rights in respect thereof. Mr. Ramani submits that in as much as there was no part for this vital documentary evidence, the impugned Judgments and Decrees are liable to be set aside.

16. Mr. Ramani submits that in this case the Plaintiffs have established the boundaries of the suit property. He submits that in case of any dispute between the boundaries and the area statement, it is the boundaries which must prevail. He relied on *Palestine Kupat Am Bank Co-operative Society Ltd. vs. Government of Palestine and others*¹ in support of his contention.

17. Mr. Ramani submits that for all the aforesaid reasons, the substantial question of law is liable to be answered in favour of the Appellants and the Appellants suit is liable to be decreed.

18. Mr. Pangam, learned Advocate General for the State submits that the Plaintiffs prior to the institution of Special Civil Suit No.88/1996 had raised an objection before the survey authorities for inclusion of their names in properties bearing survey numbers 97 and 98, which they claim was the suit property purchased by them vide sale

¹ AIR 1948 Privy Council 207

deed dated 07.02.1972. The Inspector of Survey upheld the contention of the Plaintiffs but the appellate authority and the revisional authorities i.e. the Superintendent and the Division Bench of the Administrative Tribunal on detailed consideration of the matter dismissed Plaintiffs' objections / pleas. It is only thereafter that the Plaintiffs instituted the suit, which came to be dismissed by the Trial Court and the First Appellate Court.

19. Mr. Pangam pointed out that the boundaries referred to in the documents relied upon by the Plaintiffs are at complete variance with one another and based upon the same, the two Courts have correctly held that the Plaintiffs have failed to identify or establish that the suit property is indeed the property purchased by them vide sale deed dated 07.02.1972. He pointed out that the matrix documents were produced by the Plaintiffs themselves as a piece of corroborative evidence. Now that such documents do not corroborate, the Plaintiffs cannot be permitted to urge that the matrix documents are irrelevant even for the purposes of corroboration.

20. Mr. Pangam submitted that there is a serious issue about the northern boundary and the Plaintiffs failed to place on record any material whatsoever as to how or where they acquired the properties to the north from the Comunidade. Mr. Pangam pointed out that this was one of the grains of which the Administrative Tribunal has held against the Plaintiffs and therefore nothing prevented the Plaintiffs from producing on record their title documents in respect of the property allegedly acquired from the Comunidade. He submitted that such title

documents would indicate whether the southern boundary is now the suit property. He submitted that failure to produce such documents entails drawal of adverse inference.

21. Mr. Pangam submits that it is inconceivable that in the year 1972 the Plaintiffs could purchase the property admeasuring 56860 sq. mts. for a meager of ₹500/-. He submits that there is no correlation between the suit property and the property which is the subject matter of 1972 deed. He submits that there is no explanation as to why there was no area statement in the 1972 deed. He submits that there is no explanation as to why even in the 1972 deed the northern boundary is shown to be bounded by the property of the Comunidade when it is the case of the Plaintiffs that by 1972 they had already acquired the property from the Comunidade. He submits that the principle laid down by the privy council in *Palestine Kupat Am Bank Co-operative Society Ltd.* (supra) is not applicable because the Plaintiffs have failed to identify the correct boundaries of the suit property.

22. Mr. Pangam submits that the findings of facts recorded by the two Courts suffer from no perversity and perhaps that is why not even a ground was framed based on perversity. He pointed out that the order appointing the Commissioner was already set aside by the Hon'ble Apex Court and in any case he submits that the Court will not appoint a Commissioner to collect evidence for the parties. He submitted that the case of the Plaintiffs must stand or fail on its own feet and the issuance of Notification by the Government at a later point of time can have no impact upon the case pleaded by the Plaintiffs or the defence taken by

the Defendants.

23. Mr. Pangam submits that for all the aforesaid reasons, this appeal may be dismissed with costs.

24. The rival submissions now fall for my determination.

25. The Plaintiffs case is based mainly upon its sale deed dated 07.02.1972 by which the Plaintiffs claim to have purchased the suit property from its erstwhile owners Sagun Naik Kurado and his wife for a consideration of ₹500/-.

26. Now the sale deed dated 07.02.1972 does not indicate the area of the property purchased. There is no clause in the sale deed stating that the area of the property purchased is 56,860 as now claimed by the Plaintiffs in the plaint. The property purchased is also not identified by survey numbers and it is the case of the Plaintiffs that by the year 1972, the survey process had just commenced and was yet to be completed. Again, this was only a contention raised in the course of arguments but no evidence was led on this aspect by the Plaintiffs before the Trial Court.

27. The sale deed dated 07.02.1972 does not identify the property purchased by the boundaries as may have evolved by the year 1972. But rather, the sale deed of 1972 refers to the boundaries in the land registration document and the matríz documents prepared much prior to the liberation of Goa on 19.12.1961. Again, the only explanation given by Mr. Ramani for this was that the Advocates at that time used to draft

the sale deeds and other conveyances adopting the forms prevalent before liberation. No evidence was led on this aspect but only a submission was made in the Court urging this alleged position.

28. The two Courts have recorded concurrent findings of fact that the boundaries of the suit property have not been identified by the Plaintiffs. This means that the boundaries of the suit property at loco and the boundaries as reflected in the sale deed in the year 1972 or the land registration and matríz documents do not correspond or tally to one another. The two Courts have held that the boundaries of almost three sides do not tally and Mr. Pangam, the learned Advocate General in the course of his submissions demonstrated how this is so. Therefore, it is not possible to accept Mr. Ramani's contention that only the boundary on the eastern side was not found to be tallying.

29. There is ample evidence on record that the suit property to the north is bounded by the property of the Comunidade. It is true that the Plaintiffs had vaguely pleaded that this Comunidade property was acquired by them and therefore, by the year 1972 belonged to them. There are no documents produced on record by the Plaintiffs to establish such acquisition. Production of such documents was vital because this was one of the basis for the Administrative Tribunal to hold against the Plaintiffs. This position is very well reflected in the Tribunal's Judgment and Order dated 15.02.1996 delivered by Justice N.A. Britto, a former Judge of this Court and Afonso Araujo, former District Judge. Mr. Pangam is quite right in his submission that an adverse inference has to be drawn against the Plaintiffs for failure to produce any documents in

support of their contention that the Comunidade property to the north was indeed acquired by the Plaintiffs. If the acquisition documents were to be produced, then, the southern boundary of the Comunidade property might have been the suit property if the case pleaded by the Plaintiffs was indeed correct. If the southern boundary was not the suit property, then, the position of the Plaintiffs claim would become extremely favourable. Therefore, it was the duty of the Plaintiffs to have produced such acquisition documents, assuming they existed and the failure to produce such documents did call for drawing of adverse inference against the Plaintiffs.

30. Apart from the issue of adverse inference, if the Plaintiffs had indeed acquired the property to the north of the suit property from the Comunidade and had become the owners of such property, then, nothing prevented the Plaintiffs from indicating the northern boundary of the suit property as the Plaintiffs own property. Even in the 1972 deed, the position is quite different. The two Courts have evaluated the evidence on record in great detail and there is no case of perversity made out .

31. The Plaintiffs in this case themselves relied upon the matriz documents in respect of matriz numbers 850 and 851. There is reference to these matriz documents even in the 1972 sale deeds. The 1972 sale deeds suggest that the property which is the subject matter of the sale deed is described in the matriz documents 850 and 851. The Plaintiffs did not rely upon the matriz documents to establish their title knowing fully well that matriz documents are not determinative of title. However,

the Plaintiffs relied upon the matrix documents to establish the identity of the suit property and by way of corroboration to the land registration documents.

32. Now the matrix document 850 refers to an area of hardly 900 sq. mts. and the matrix document at 851 refers to an area of hardly 8,000 sq. mts. Based on the matrix documents, therefore, the area of the property which is subject matter of the 1972 sale deed is hardly 8900 sq. mts. and not 56,860 sq. mts. as claimed by the Plaintiffs. Merely because the matrix are now found to be inconvenient to the Plaintiffs, the Plaintiffs cannot therefore urge their exclusion. These documents were relied upon by the Plaintiffs themselves.

33. Mr. Pangam submitted that it would be inconceivable that property admeasuring 56,860 sq. mts. could be purchased for only ₹500/- in the year 1972. Mr. Ramani submits that ₹500/- was a considerable amount way back in 1972 and in any case inadequate consideration is never a ground to question a validly executed and registered document. In this case, the Defendants are not questioning the document i.e. the 1972 sale deed. However, the issue is whether the property which is the subject matter of the 1972 deed is indeed the suit property admeasuring 56,860 sq. mts. or whether the same is some other property admeasuring hardly about 8,900 sq. mts. as depicted by the matrix documents relied upon and produced by the Plaintiffs themselves. The two Courts have recorded concurrent findings of fact that the property which is the subject matter of the 1972 deed is not the suit property and therefore based upon the 1972 sale deed, no reliefs are due

to the Plaintiffs.

34. According to me, nothing much turns on the nomenclature on the properties referred as reserved forest on the Notification relied upon by the parties. Even if it is assumed that there is some overlapping or some explanation is lacking on the part of the Defendants as well, that by itself, is not sufficient for the Plaintiffs to succeed in their suit. Ultimately, the Plaintiffs have to stand or fail on the strength of their own case and cannot seek any advantage based on any alleged weakness of the defence. The two Courts have correctly appreciated and evaluated the oral and documentary evidence on record. There is no error of law pointed out in the reasoning adopted by the two Courts so as to give rise to any substantial question of law.

35. There is no case made out by the Plaintiffs for appointing of any Commissioner particularly at this stage. It is necessary to note that on this very issue, the parties litigated before the survey authorities and no less than three authorities which includes the Division Bench of the Administrative Tribunal have negated the claim of the Plaintiffs based on oral as well as documentary evidence. Before the survey authorities, the Plaintiffs examined experts and surveyors. So also, before the Trial Court, experts and surveyors were examined. This means that both the parties had full opportunity to produce whatever evidence they deemed appropriate and both the parties have availed of such opportunities. It is only upon the evaluation of all such evidence that the two Courts have recorded concurrent findings of fact against the Plaintiffs. At this stage, therefore, it would not be appropriate to appoint yet another

Commissioner in order to identify the property which is the subject matter of the 1972 deed and thereafter determine whether the same is indeed the suit property. Though the Court has powers to appoint a Commissioner, such powers are not to be exercised for collecting evidence for the parties. Such powers are to be exercised if the Court desires assistance from the Commissioner or is of the opinion that the Commissioner's report will assist the proper disposal of the cause before it. No such case is made out by the Plaintiffs and therefore the request for appointment of a Commissioner at this stage cannot be acceded to.

36. The ruling of the Privy Council in *Palestine Kupat Am Bank Co-operative Society Ltd.* (supra) is not at all attracted to the facts of the present case. In this case, there is no discrepancy between the areas set out in the matríz documents and the boundaries in the matríz documents. There is discrepancy between the boundaries referred to in the matríz documents and the boundaries referred to in the land registration documents. There is a discrepancy between the area of the suit property as claimed by the Plaintiffs and the area reflected in the two matríz documents. To such a situation, the principle that the boundaries will prevail, will clearly not apply. Therefore, the decision of the Privy Council can be of no assistance whatsoever to the Plaintiffs in the present case.

37. For all the aforesaid reasons, the substantial question of law will have to be answered against the Appellants and this appeal will have to be dismissed. The appeal is accordingly dismissed.

38. There shall however be no order as to costs.

M. S. SONAK, J.

jfd/-