

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 48 OF 2005

Shri Ganesh Mallu Dessai,
Son of Mallu Dessai,
Major in age, service and R/o. ...Appellant
Toleavado, Xelvona, Quepem,
Goa.

Versus

Shri Gopinath Kusta Fotto Dessai,
Son of Kusta Fotto Dessai, Major
of age, landlord and r/o. Xelvona,
Quepem, Goa, ... Respondents.
(Since deceased represented
through legal representatives)

1.a Smt. Shrimati Tiru Naik
daughter of Gopinath K.F. Dessai,

1b. Shri Tiru Bhiku Naik
son of Bhiku Naik
r/o. Borim, Ponda

1c. Shri Babal Gopinath F. Dessai
son of Gopinath K.F. Dessai

1d. Smt. Suchita Babal F. Dessai,
wife of Babal G.F. Dessai,
both r/o. Govwada Xelvona

1(b)(i) Smt. Shrimati Tiru Naik, Amendment

(Already on record)
Major,
Residing at H.No. 113
Tishem – Borim, Ponda – Goa.

carried out as
per order dated
20/07/20017

1(b)(ii) Deepak Tiru Naik
Major,
Residing at H.No. 113
Tishem – Borim, Ponda – Goa.

1(b)(iii) Rekha Tiru Naik
major,
residing at H.No. 113
Tishem- Borim
Ponda – Goa

1.e. Smt. Surang Nandu F. Dessai,
daughter of Gopinath K.F. Dessai,

1f. Shri Nandu M.F. Dessai,
son of Mahadev Dessai,

both r/o. Vailovaddo Xelvona,Respondents.
Quepem, Goa.

Ms. A. Agni, Senior Advocate with Ms. Jay Sawaikar,
Advocate for the Appellant.

Mr. V.G.P. Duple, Advocate for the respondents.

Coram:- BHARATI DANGRE, J.
Reserved on : 04th March, 2021.
Pronounced on: 12th March,2021.

JUDGMENT :

1. The appellant is the plaintiff who instituted a civil suit for declaration and perpetual injunction against the defendants restraining them from interfering in any manner with the suit property identified as "Ghorbatta" situated at Shelvona registered under No.364 at pages 391 to 395 of Book no.1 Volume no.23 in Sub-Registry at Quepem and bearing Matriz no.1114. The claim was staked on the suit property in the capacity as owner and in possession and therefore sufficiently entitled to the said property by virtue of continuous and exclusive occupation along with the enjoyment of the property for over 60 years and also by virtue of the title conferred.

2. Pleading that the ancestral residential house of the plaintiff is located in the said property, which is now in ruins and the plaintiff has his house in the said property which is used as a dwelling house unit by his family from the lifetime of his grandfather. It is pleaded that the property is in

possession of the plaintiff, but it was registered in the name of one Ragobha Fotto Dessai in official record and that Ragobha and his wife Gangabai transferred the said property to the plaintiff by a Deed dated 29th December 1970. Pleading that on the property fruit bearing trees are standing and it is asserted that the plaintiff's family is in possession and enjoyment of the same over 100 years as exclusive owners. An attempt on the part of the defendants to interfere with the suit property on 17th July, 1975 when the defendants started digging a trench for construction of the structure was pleaded to be the cause of action for seeking the aforesaid declaration and injunction in the suit filed on 25th July, 1975. The suit is filed against five defendants, however the defendant nos. 1, 2, 3 and 4 came to be deleted and though the Government of Goa through the Chief Secretary was added as a defendant, his deletion was sought and granted. Resultantly, the suit was prosecuted only against the defendant no. 5 i.e. Gopinath K. Fatto Dessai.

3. By way of preliminary objection. the defendant pleaded in Written Statement, that since the property is not identified, the suit is liable to be dismissed. The second objection pleaded being, since all the proper parties are not impleaded, the suit is liable to be dismissed. On merits, the defendant responded by stating that there is a property known as "Toleavado" bearing matriz no.1113 which is registered in land registration no.15332 and this property is purchased by the defendant and his three brothers Sazu, Raghoba and Dattu Fatto Dessai, by contributing equal money but for convenience the Sale Deed was effected in the name of Gopinath only. It is pleaded that the suit property is a part and parcel of the property under registration no.15332, owned, possessed and enjoyed by him and his brothers for many years, continuously, peacefully and openly.

4. The First Court framed the issue about the plaintiff having proved that he is the owner in possession of the property "Gorbatta" and whether the defendant attempted to disturb his possession.

Another issue was also settled, about the effect of non-impleadment of proper parties. One issue which was recasted, with a burden to be discharged by the defendant; whether it is proved by the defendant that the Deed of Gift dated 29th December, 1970 is a sham transaction and the same is liable to be declared as annulled.

5. By judgment dated 6th November, 2001 the suit of the plaintiff came to be decreed and a perpetual injunction came to be granted in his favour restraining the defendants and their agents and servants from disturbing the peaceful possession. The issue no.1 whether the plaintiff had proved to be an owner in possession of the property was answered in the affirmative and the recasted issue, whether the defendant had proved the Gift Deed is sham transaction was answered in the negative. The findings were rendered on appreciation of the evidence brought on record by the plaintiff through 6 witnesses along with supporting documents and by the defendant by examining about 4 witnesses, who brought several

documents on record. On careful scrutiny of the material brought on record by PW1 who had produced the Gift Deed executed in his favour by Ragobha as exhibit PW1/A which make a reference to property of "Ghorbatta" with matrize no.1114 and with its boundaries as mentioned in the matrize certificate under matrize no.1113, it was held that the certificate revealed that property bearing matrize no.1114 is inscribed in the name of Malu Santu Fotto Dessai of Shelvona. Admission of the plaintiff no.1 that the property of defendant is to his South and touching his property and bearing matrize no.1113 is enjoyed by the defendant and his brothers also formed the relevant foundation. On examination of the evidence of the defendant and in particular DW1 Gopinath Dessai who produced the Sale Deed on record but without any translation and on a serious attempt to discern the contents of the same with the assistance of an Advocate present in the Court, the Court records that there is no mention of matrize no.1113 or property "Toliavado" as claimed by the defendant. From the evidence of DW4 who also did not make any

positive statement that the registration certificate pertaining to the said property bearing the name of Sazu, Dattu and Ragobha, the Court derived a conclusion that property bearing matrize no.1113 and 1114 are adjacent to each other belonging to the plaintiff and the defendant and is surveyed under common no.25/11. Form no. I and XIV of survey no.25/11 was not produced either by the plaintiff or by the defendant. In absence of any evidence being led by the defendant to show that the Gift Deed is fake, the finding rendered is that property bearing matrize no.1113 and 1114 are surveyed under common survey no.25/11 and their area not being demarcated, under of the Gift Deed produced by the plaintiff, he is the owner of the "Ghorbata" bearing matrize no.1114 and is in possession of the same. Conclusively relief is granted in favour of the plaintiff since he is found to be the owner in possession of matrize no.1114 with boundaries as per matrize certificate and Gift Deed and he was held entitled to the relief for permanent injunction against the defendant as the defendant had gifted portion of the suit property to the

Government to construct primary school without consent of the plaintiff. However, the declaration as owner, as claimed was refused to the plaintiff in absence of all the co-occupants of survey no. 25/11 being not party to the suit.

6. The defendant being aggrieved by the said decree approached the Appellate Court by instituting a Regular Civil Appeal No.173 of 2001. It is at this point the first question of law on which the appeal is admitted arises. The appeal came to be filed on 12th December,2001 and the submission of learned Senior Counsel Ms. Agni appearing for the appellant is that the First Appeal is filed on 12th December, 2001 when the appellant had already expired on 11th December,2001 and therefore the appeal cannot be said to be validly instituted. It is in light of this argument the question of law has been framed by this Court on 7th November 2005 when the appeal is admitted and it is to the following to the effect:

(1) whether the appeal filed on 12th December,2001, when the appellant had already expired on 11th December,2001

was a validly instituted appeal and whether bringing the legal representatives on record can render such an incomplete and nonest appeal, a valid appeal and whether the legal representatives could have at all been brought on record in such an appeal filed on 12th December, 2001 by a person who had died on 11th December, 2001."

7. I will advert to the said question of law a little later. To complete narration, the Appeal filed by the respondent on the suit being decreed in favour of the plaintiff rest on the ground that the Trial Court have fallen into grave error in accepting the case of the plaintiff, when no title document has been produced by the plaintiff nor he established that the predecessor in title was the owner of the suit property and further on the ground that even on the possession of the property has not been proved and also the suit property described in para 1 of the plaint has not been clearly identified. The Trial Court's judgment was also assailed on the ground of it being vitiated by wrong appreciation of the evidence, mis-

appreciation of the relevant provisions of law and reasoning based on conjecture and surmises which has resulted in grant of permanent injunction though the possession was not conclusively established. The Appellate Court vide its judgment dated 22nd December, 2004 allowed the Appeal and the reasoning rest on two major premises; the plaintiff has failed to prove his title on the suit property and extent of the property "Ghorbatta" claimed by the plaintiff has not been identified or proved and the second premise being that the house existing in the suit property was enjoyed and possessed by the plaintiff from the time of his ancestors is totally contrary to the document that has been placed on record by the plaintiff, in form of Gift Deed dated 29th December, 1970 and no evidence is brought on record about the possession for since 100 years. On scrutinizing the entire evidence, the claim of the plaintiff merely on the basis of the matriza no. 1114 came to be rejected since matriza document is not a title document and a declaration of ownership can be based only on revenue records. The Appeal is therefore allowed by

holding that the Trial Court has committed a serious error in the eyes of law while accepting the case of the plaintiff, specifically when no title document is produced nor the plaintiff established that his predecessors in title were the actual owner of the property.

8. In the wake of finding rendered by the Appellate Court while reversing the judgment and decree in favour of the plaintiff, in the Second Appeal the following substantial question of law in form of question no.2 has arisen and framed as such on 7th October 2005; “Whether the document of title that is the Gift Deed (exhibit PW1/A) could have been bypassed by the Appellate Court on account of typographical error which had occurred in the plaint wherein instead of the name of Yeshwant Ragobha it has been typed as Raghoba and whether the Apex Court could have been bypassed the matríz documents of 1114 showing the name of the father of the appellant and one of the boundaries of the property of the respondent

bearing no.1113 is the property with matrix no.1114.”

9. Coming to the first substantial question of law about the sustainability of an appeal filed by a person who was not alive on the day of its filing, the learned Senior Counsel Ms. Agni has placed reliance on the following judgments:

- 1.**Ashok Transport Agency v/s. Awadhesh Kumar and another** [(1998) 5 SCC 567]
- 2.**Chellaram Jethanand Madhrani And others vs Maruti Raghunath Kadam and Ors** [(2006) 1 Bom.C.R. 816]
- 3.**Changdeo Shivaji Kamble v/s. Nagsen Co. Op. Hsg. Society Ltd and others** [2006 (3) Bom.CR 345]
- 4.**Bai Pani Vankar v/s. Madhabhai Galabhai Patel** [AIR 1953 Bom 356]

As against the said submission, the learned Counsel Mr. Dukle representing the respondent would argue that in order to be raised as a substantial question of law in a Second Appeal under Section 100 of the Code of Civil Procedure, there must be first a foundation for it laid in the pleadings and the question should emerge from the substantial finding of fact arrived by the the Court and it must be necessary to decide that question of law for a just and proper decision of the case. He relied upon the decision of the Apex Court in case of **Union of India versus Ibrahim Uddin and another** (Civil Appeal No.1374 of 2008) where it is held as under:

49. In Vijay Kumar Talwar v. Commissioner of Income Tax, New Delhi, [(2011) 1 SCC 673], this Court held that, a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material on the decision of the case, if answered either way, insofar as the rights of the parties before it are

concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the questions should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. It will, therefore, depend on the facts and circumstance of each case, whether a question of law is a substantial one or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

10. Mr. Dukle submit that since the right to sue survived in the legal heirs of the appellant who are subsequently brought on record and there was no serious objection raised before the First Appellate Court when an application was moved for bringing the legal representatives on record and when the heirs of appellant prosecuted in the appeal proceedings, no issue was framed by the First Court about the tenability of the appeal and when the appeal is now decided on merit, it is not

open for the appellant to raise the said question in the Second Appeal without any foundation being traced in the impugned judgment. The learned Counsel submit that the Courts have to adopt a justice-oriented approach, dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the Court.

11. In a civil suit if any of the parties to the suit dies and if a right to sue survives then the suit can be continued by the legal heirs or legal representatives of the deceased party. If in any case where the right to sue do not survive, the suit must necessarily come to an end. The most essential ingredient which affects the abatement of the suit after death of the parties is the surviving right to sue; if it survives then the suit continues.

The principal to the above effect is to be traced to Order XXII. Rule 1 which reads thus:

“1. No abatement by party's death if right to sue survives.—The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.”

The above principle contained is based on a general principle that suits and all actions must be prosecuted by and against living persons. If a person against whom a personal action may be brought dies before the suit has been filed in the Court, then such suit can be amended to substitute the deceased person's representatives as party defendants. A dead person cannot be a party to legal proceedings and the effect of his death result in suspension of action until his or her legal representatives are substituted. A person who is deceased cannot be a party to the legal proceedings but death of a party does not abate a pending action where the cause of action survive, nevertheless the effect of death is to suspend the action until someone is substituted as party to the proceedings. No abatement however foreclose the fate of the plaintiff or defendant merely on his

death if the right to sue survives. A personal action dies with the person and the said principle is derived from the Latin Maxim "*Actio Personalis Moritur Cum Persona*". Right to sue always survives in or against the legal representatives. Rule II, III and IV of Order XXII are indicative of various situations where one of the several plaintiffs or defendants die but right to sue survives.

12. The reliance on the authorities cited by Ms. Agni are reflective of the aforesaid principle. In the case of **Ashok Transport Agency**(supra), an eviction suit was filed against the proprietary concern, proprietor and Manager of the concern. The proprietor predeceased the event of filing of suit and the suit was decreed. When the decree was sought to be executed, the issue arose whether it can be executed since that suit itself was filed against a dead person. It is in the backdrop of this fact with reference to Order XXX Rule 10, the Apex Court held that the Executing Court has rightly held that the suit having been filed against the dead person, a decree was a nullity and could not be

executed. It was based on reasoning that a real party who is being sued, in the facts of the case, is the proprietor of the said business, which is distinct from the business of the partnership firm.

The judgment and order in case of **Chellaram Jethanand Madhrani**(supra) pertained to a writ petition where an argument was advanced to the effect that the decree having passed against the dead person, the same is nullity. The facts of the case revolved around Order XXII Rule 6, when the death occurred between conclusion of hearing of the appeal and the pronouncement of the judgment and in such a case it was held that the proceeding do not abate and this was held to be an exception to the principle of law that Court cannot pass decree against a dead person. Para 5 of the said the judgment reads thus:

“ 5. The explicit language of the abovequoted rule discloses that if the death occurs between the conclusion of the hearing of the appeal and pronouncement of the judgment, then the proceedings do not abate. In fact, the said rule incorporates an exception to the

principles of law that the Court cannot pass a decree against a dead person. The logical conclusion which follows from the said rule is that any decree passed in appeal against a dead person, if the death has occurred between the conclusion of the hearing of the appeal and pronouncement of the judgment, would be lawful decree and would be executable one. The death of a party, occurring after the conclusion of the hearing of the appeal, would not affect the decree in any manner."

13. Recording that in the facts of the case the impugned decree was passed on 12th March 2004 by the First Appellate Court and an appeal was filed by the respondent no.1 who expired on 2nd March 2004, the Writ Petition being filed on 29th June 2004, the contention advanced by the petitioner was that the plaintiff/ respondent had expired and it was not brought to the notice of the lower Appellate Court and the decree in favour of the dead person is a nullity. It was sought to be contended that failure on part of the legal heirs of the deceased being on record , has resulted in an abatement of the appeal and therefore provisions of Order XXII

Rule 6 are not attracted. Relying upon the decision in case of **Bai Pani Vankar**(supra), in the facts of the case since the appeal was heard much prior to 2nd March 2004 and the death of the respondent having occurred subsequent to the conclusion of the hearing and before pronouncement of the judgment, provisions of Order XXII Rule 6 were squarely held to be attracted and it was held that it is not a decree passed against dead person. The ratio in the said judgment has to be understood in the contest of the facts involved and since it is settled position of law that an authority is precedent for what it decides and not what logically follows from it. This decision do not in any way take further the case of Ms. Agni.

14. Another decision in case of **Changdeo Shivaji Kamble** (supra) is in a Writ Petition, where the petitioner challenged the order of Maharashtra State Cooperative Appellate Court dismissing his application for bringing legal representatives of the dead opponent on record. The dispute was filed on 31st August 2001 whereas the opponent had

expired on 23rd April 2001 and the dispute came to be filed though he had received information about her death on 2nd July 2001 itself. The petitioner sought to bring the legal heirs on record, and this was refused by the Co-operative Appellate Court. In the peculiarity of the facts narrated in paragraph no. 3 and reliance being placed on the decision where the dead person has been joined in good faith, where the Court can breathe life into the suit, the facts were held to be distinct and the petition was dismissed.

Another decision which forms the fulcrum of arguments of Ms Agni in case of **Bai Pani Vankar**(Supra). The ratio flowing from the said decision needs its appreciation in the facts involved and narrated in para 1 of the judgment. The suit was filed by a minor through his next friend and it was dismissed on 23rd December 1950. By that time the minor had attained majority and instructed his pleader on 21st January 1951, to prefer an appeal and he signed the vakalatnama on 22nd January, the Appeal was preferred on 29th January 1951 and

prior to that the plaintiff Soma died on 23rd January 1951. On 16th March, 1951 the petitioner, before the Court being the heir and legal representative of Soma applied to substitute her name. This application was dismissed by the learned Judge and therefore a revision was preferred to the High Court. While adjudicating the said revision, the discussion revolved around Order I Rule 10 which pertained to a suit in the name of wrong plaintiff. In paragraph 2 of the said judgment, Justice Chagla, as he was then expressed as under:

“The appellant being dead, the pleader who preferred the appeal had DO authority to prefer any appeal and the vakalatnama signed in his favour had come to an end. If the appeal was a nullity, no order could be made in that appeal which would be an effective order, and therefore the learned District Judge was right in refusing to direct that the petitioner should be substituted in place of the deceased appellant. An effective order under Order 1, Rule 10, can only be made provided there is a suit or an appeal before the Court, but if the suit or the appeal is a nullity, then any order made in that suit or appeal is equally a nullity, and the learned Judge rightly relied on the

decision of Mr. Justice Mulla in --'Rampratab V. Gourishankar', AIR 1924 Bom 109 (A). In that case the learned Judge was dealing with a suit filed by the plaintiff against the firm of the defendant's father. The defendant's father was the sole owner of the firm and he had died before the institution of the suit, and Mr. Justice Mulla held that the suit instituted was not merely against a wrong person but against no person at all and he points out at p. 111 that any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased a defendant and allowing the suit to proceed against him is also a nullity."

The decision of the Madras High Court in **Gopala Krishnayya vs Lakshmana Rao [AIR 1935 Mad 1210(FB)(B)]** was referred to along with earlier judgment of Madras High Court in case of **Veerappan chetty v/s. Tincia Ponnem** [31 Mad 8G(C)] where a view was taken that there was nothing in the Code of Civil Procedure to authorise the institution of a suit against a dead person and the Courts have jurisdiction to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased, even

when the suit is instituted bona fide and in ignorance of the death of the defendant. Justice Chagla agreed with the said view and held that what is said about the plaint also applies to an appeal. Referring the view expressed in **Veerappan Chetty** (supra) the District Judge was held right in dismissing the application made by the petitioner.

15. Distinguishing line in the said judgment which had made reference to the Full Bench judgment of Madras High Court and the judgment in case of **Veerappan Chetty** (supra), reference is to the institution of suit against the defendant who is deceased. However in the present case we are concerned with a situation where the appellant who though dead on the date of filing of the appeal being aggrieved by a decree passed against him, the right to sue being surviving, the principle that a suit will not abate if the right to sue survive as contained in Order I Rule 22 come into picture and become applicable. The same principle is equally made applicable to Appeals, under Rule 11 of Order XXII. If the right to sue survives, on death of the

appellant, the legal representatives can further the said surviving right by bringing themselves on record in the said proceedings. On an application filed for bringing legal representatives on record, by the appellant, the legal representatives were brought on record before the Appellate Court and the appeal is prosecuted by the legal representatives of Gopinath.

It is apparent from the order of the Appellate Court that at no point of time the defendant (the appellant) before this Court raised a plea that the appeal was nullity that it suffered from any defect on the count and that the right of sue do not continue with the legal representatives. In any case even if the said appeal would have been hit by a technicality that on the date the appellant was dead, the legal representative had the liberty to file a fresh appeal as the right to sue survived in them. I do not feel it necessary to determine the said question as a substantial question of law arising in Second Appeal as there is no foundation to that effect laid in the judgment and order impugned and

the legal representatives prosecuted the Appeal on behalf of their deceased father. Further the perusal of memorandum of appeal do not bear any signature of the appellant nor it is sworn by him. The Appeal memo dated 12th December 2001, which is prepared prior to the death of the original defendant is signed by his Counsel. The legal representatives of the appellant being permitted to be brought on record by filing an application and the permission being granted by the Court , the substantial question of law framed vide question no.1 in my considered opinion do not arise in the absence of any foundation being laid before the Appellate Court and on the first time being raised in the Second Appeal. Since the right to sue survives in the legal representative there is no legal disability in the appeal being prosecuted by them.

16. The plaintiff who sought a declaration and the perpetual injunction being owner of the suit property entered in the witness box and for the first time, he stated that he and his family possessed

land over 3000 square metres. The description of the property in the plaint lacked the said specification and the property was identified by the matríz number and the boundaries along with the registered number with the Sub-Registrar. He deposed that the property consisted of the house constructed by his father over 100 years back and the house is occupied by him along with his father and wife. He referred to two houses in the property as old and new, the old being in ruins. The case of the plaintiff is that one Yeshwant Raghoba Fotto Dessai, is the son of the daughter of his cousin brother of his grandfather and the suit property was standing in the name of grandfather of Yeshwant Raghoba Fotto Dessai, which was transferred in his name in the year 1970 by a Gift Deed . The Gift Deed is brought on record which mentions Esvonta Raghoba Fotto Dessai as a landlord/first party and the plaintiff Ganesh son of Malu Fotto Dessai, the second party. The first party being owners and possessors of the property mention in the deed excluding including at point number (b) a rustic property denominated “Ghorbat” with a residential

house bounded on East, West, North and South by property "Toliavado" of Antonio Camilo Patricino Carvalho under matríz no.1114, the house not recorded, gifted the property mentioned in the said deed to Gones Malu Fotto Dessai with reservation of usufruct for themselves during their lifetime. It is this document which has been ascertained as the source of the title of the plaintiff. The said property is identified by its matríz number. A matríz certificate is also produced on record by the plaintiff and matríz No.1114 records a rustic property denominated "Ghorbat" with a dwelling house in the name of Malu Santo Fotto Dessai. The plaintiff has not brought on record any material to show the relationship of Malu Santo Fotto Dessai and Yeshwanta Ragobha Fotto Dessai to establish the continuity of title since it is Yeshwant Ragobha Fotto Dessai who has gifted the suit property in favour of the plaintiff according to the plaint. Matríz No.1113 which is situated at south of matríz no.1114 records the name of Antonio Camilio Carvalho on the property with nomenclature "Toliavado".

17. Pertinent to note that on consideration of the material placed before it in form of evidence oral and documentary the Civil Judge though recorded that the plaintiff is owner in possession of matriz no.1114 with the boundaries as per matriz certificate and Gift Deed and the property on the south is in position of the defendant bearing matriz no.1113, the relief of declaration could not be granted in absence of all co-occupants of Survey no.25/11 in which the property was surveyed but held him entitled for relief of permanent injunction as the defendant had gifted portion of suit property to the Government. The declaration of ownership being refused, on the basis of the continuous and peaceful possession as claimed by the plaintiff permanent injunction was granted. The Appellate Court delved into the contention at the instance of the unsuccessful defendant who instituted an appeal. Noting the contradictory stand taken by the plaintiff, on one hand representing that the property is in his hands by the Gift Deed by Yeshwanta Raghoba Fatto Dessai and on the other hand staking a claim that the said property is an

ancestral residential property and that the family of the plaintiff is in possession and enjoyment of the property from the time of his great grandfather for 100 years as exclusive owners, did not receive acceptance by the Appellate Court and rightly so. For claim of a title, the applicant must establish the property to be in his hands through revenue records establishing title but here the plaintiff has relied only on the document in form of matríz certificate. It is well settled that matríz records are only for the assessment of land revenue and it is not a document of title. The period prior to coming into force of the Goa Land Revenue Code, 1968, the matríz document identified the properties by its topography, boundaries etc. However on coming into effect of Land Revenue Code, record of right is maintained in the manner described in the Land Revenue Code. The plaintiff has failed to show any relationship between Yeshwanta who has gifted him the property and Malu Santo Fatto Dessai in whose name matríz no.1114 is recorded. In the cross-examination he has clearly admitted that there is no document to show that Malu was the

grandfather of Yeshwanta. He admitted that he has no document to show that Yeshwanta and his wife had title to the entire property "Ghorbatt" gifted to him and clarified that the property belonged to the grandfather Malu but there is no document to show that Malu is grandfather of Yeshwanta. He admits that the Gift Deed do not contain mention of area of the property and in fact at the time of execution no plan was prepared. He reiterated that he is in possession of 3,000square metre of land and denied the suggestion that the suit property measuring 3,000 square metre is a part of property "Toleavado". This weakness on part of the plaintiff has been aptly captured by the Appellate Court by holding that the much emphasis on matriz documents which are not title documents, did not deserve the relief to the plaintiff at the hands of the Trial Court. Initially onus to show title in possession of the property lies on the plaintiff unless it is specifically admitted by the defendant. The defendant has admitted that there is one house occupied by the plaintiff but denied specifically that the plaintiff is the owner of the said house as well

as the property surrounding it. The Trial Court had therefore framed the issue no.1 but has ignored the important aspect being the failure of the plaintiff to discharge the said burden, which dis-entitle him for permanent injunction. The plaintiff examined 6 witnesses but none of the witnesses conclusively established factum of possession of the plaintiff qua the area claimed in the deposition of PW1 being 3000 square metres; the plaint do not contain any averment about the area in possession of the plaintiff and the boundaries disclosed in the plaint of the property has not been established and proved as the witnesses have deferred in their narration about the said boundaries.

18. The plan which is sought to be projected as a document reflecting the possession of the property and exhibited as PW1/C is merely prepared on the instructions of the plaintiff and the PW5 who has been examined by the plaintiff and who has prepared the plan PW1/C has admitted that no title document was produced when the plan was prepared and he had admitted that the plan was

drawn by him at the instance of the plaintiff according to what he had shown to him as belonging to him. In absence of the clear identification of the property claimed by the plaintiff to be owned, possessed and enjoyed by him, the plaintiff was not entitled for a mandatory injunction. On the issue as to whether the Gift Deed dated 29th December, 1970 is fake and bogus and is required to be declared as so, the defendant examined 4 witnesses and also relied upon the Sale Deed executed by Patrocinio Carvlho and the matriz Certificate. As per the said document which was exhibited as PW1/A the property bearing matriz No.1114 was in possession of Yeshwant Ragobha Fotto Dessai and his wife inclusive of the house. No oral evidence to the contrary would wipe out the contents of the said documents and since the title of the plaintiff is traced to the said document, his case that the suit property was enjoyed and possessed by him from the time of his ancestors fall to the ground.

19. Same is the case as regards the construction of the house as the PW1 has deposed that the house was constructed by his father whereas at the same time he takes a stand that the ancestors were residing in the said house including his grandfather and great-grandfather. There is no plan qua the property and under the shelter of illiteracy he has attempted to be evade the burden to be discharge by him. The case of the defendant based on the written statement and the evidence advanced before the Court is that they purchased the property from their vendor for a consideration and the suit property is the part of the larger property, and they have donated some portion of the property to the Government for construction of a school. The fact that the defendants have not been able to establish conclusively their title to the entire property "Toleavado", the plaintiff surely cannot succeed because of the loopholes in their case. He has to rest on the basis of the pleadings made by him and evidence adduced by him. In absence of any title document or any evidence being adduced on being in possession of the suit

property, the relief granted by the Trial Court in favour of the plaintiff cannot be confirmed. The substantial question of law framed as point No.2 do not arise at all since the Appellate Court has not bypassed the Gift Deed produced by the plaintiff as exhibit PW1/A and surely not as fraud on account of typographical error. The plaintiff has failed before the Appellate Court on account of his contradictory and dubious stand and the Appellate Court has rightly held that matriz documents are not the documents of title though one of the boundaries of the respondent bearing no.1113 is the property comes to Matriz No.1114. The said substantial question of law as framed above do not arise in the said appeal.

20. By answering both the questions of law framed vide Nos.1 and 2 while admitting the appeal as not arising in the Second Appeal, the present appeal deserves to be dismissed by confirming the judgment passed by the District Judge South Goa in Regular Civil Appeal no.173 of 2001.

21. In view of the dismissal of the appeal, the MCA No. 418 of 2021 do not survive and is accordingly dismissed.

BHARATI DANGRE, J.

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