

s Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO.105 OF 2011

1. Namdeo Vishnu Salgaonkar
alias Joao Augusto Cardozo,
son of late Vishnu Salgaonkar,
residing at House No. 17, Zorichem Bhat,
Carambolim, Corlim, Ilhas, Goa, since
deceased through his legal heirs:

- (a) Luisa Maria Pereira (daughter)
- (b) Roque Cajetan Fedric Pereira
(son-in-law)
- (c) Minguel Antonio Cardozo (son)
through its duly constituted Power of
Attorney Mr. Menino F. Cardozo
- (d) Monica Maria Anes Cardozo
(daughter-in-law)
- (e) Maria De Fatima Cardozo (daughter)
- (f) William Filomena Gonsalves
(son-in-law)
- (g) Menino Feliciano Cardozo (son)
- (h) Fatima Teolflin Mascarenhas Cardozo
(daughter-in-law)
- (i) Maria Mystica Cardozo (daughter)
- (j) George B.M. Cardozo (son-in-law)

2. Smt. Maria Angelica Fernandes

(since deceased)
 (widow of Petitioner No.1)
 All residing at House No. 17,
 Zorichem Bhat, Carambolim Ilhas Goa Appellants.

Versus

1. Shri Subhash B. Velingkar
2. Shri Bhaskar Velingkar (expired)

Both at present occupying House
 No. 533, Near Mahalaxmi Temple,
 Dr. Dada Vaidya Road, Panaji,
 Goa. Respondents.

Mr. Coelho Pereira, Senior Advocate with Mr. Vinod Korgaonkar
 and Mr. Vilas Pavithran, Advocates for the Appellants.

Mr. S.S. Kantak, Senior Advocate with Mr. Rui Gomes Pereira and
 Mr. Abhijit Kamat, Advocates for the Respondents.

CORAM: M. S. SONAK, J.

Reserved on: 9th April 2021.

Pronounced on : 15th April, 2021.

JUDGMENT:

Heard Mr. J.E. Coelho Pereira, the learned Senior Advocate,
 along with Mr. Vinod Korgaonkar for the Appellants and Mr. S.S.
 Kantak learned Senior Advocate along with Mr. Rui Gomes Pereira

and Mr. Abhijit Kamat for the Respondents.

2. The Appellants are the original Plaintiffs and the Respondents are the original Defendants, or the legal representatives of the Defendants in Special Civil Suit No.239/90/A, instituted in the Court of Civil Judge, Senior Division, at Panaji. The parties to this Appeal will, therefore, be referred to as the Plaintiffs and the Defendants, for the sake of convenience.

3. In the plaint, the Plaintiffs pleaded that there exists a property bearing Chalta Nos.126 and 126-A of P.T. Sheet No.61 of City Survey of Panaji, in which, was situated a building comprising a ground floor, first floor, a garage, and a godown. The suit property originally belonged to Ramchandra Krishna Salgaonkar (Ramchandra), who was a widower and expired as such in 1969. The Plaintiffs claim title to the suit property and the building therein through the said Ramchandra.

4. The plaint further sets out that the ground floor of the building in the suit property was gifted by Ramchandra to one of his sons Prabhakar. However, Prabhakar let out the ground floor to some tenants and moved in with Ramchandra on the first floor. By a Will dated 2/2/1954, Ramchandra constituted Prabhakar as his universal heir. There was also a Deed of Succession dated 10/6/1976, by

which, Prabhakar was declared as the sole and universal heir of Ramchandra. Accordingly, after the demise of Ramchandra in 1969, it was Prabhakar, who was enjoying and possessing all the assets left behind by said Ramchandra, including the suit property and the suit premises therein.

5. The plaint further sets out that Prabhakar died on 28/1/1988 and, after his demise, the suit property, including the first floor of the building, garage, and the godown continued to be occupied by his niece Vilasini Salgaonkar. In terms of Inventory Proceedings No.74/1988, instituted on the demise of said Prabhakar, the suit property, including the building therein and one vehicle was allotted to Plaintiff No.1-Namdeo, (brother of Prabhakar) who started residing in the suit property or rather the first floor of the building in the suit property, after the death of said Prabhakar. In September 1989, however, Namdeo was taken ill and required to be admitted at the Goa Medical College, from where he was shifted to Carambolim. Vilasini, however, continued to stay on the first floor of the building.

6. The plaint further sets out that one Muktabai Bandekar was the housekeeper, engaged by late Ramchandra. She, along with her grown-up daughter Kesar, was staying in the suit premises in her capacity as a housekeeper. In the Will, Ramchandra made a provision

that Muktabai is given an allowance until her death by declaring her as his '*friend*'. Muktabai lived in the suit premises until her demise on 23/11/1971. Kesar was married to one Bhaskar Velingker. Upon marriage, the name of Kesar was changed to Gulabbai. However, since her relationship with Bhaskar was strained, Ramchandra permitted said Kesar to also stay in the suit premises along with her mother Muktabai, out of pity. After the death of Muktabai, Kesar @ Gulabbai continued to stay in the suit premises until she expired in the year 1974.

7. The plaint further sets out that on 10/8/1990, when Vilasini had gone to her parent's residence, Defendant No.1 (Subhash), son of Kesar @ Gulabbai broke open the locks of the front door and took forcible possession of the suit building. Vilasini lodged a Police complaint, but, despite the same both, Subhash and Defendant No.2 (Bhaskar), continued to occupy the first floor, garage and the godown in the suit property. Therefore, it is these premises that are referred to as the suit premises in the Suit.

8. Based on the aforesaid pleadings, the Plaintiffs applied for the following substantive reliefs in the plaint:

- (a) For a decree, directing the Defendants to restore the vacant possession of the suit premises to the Plaintiffs;
- (b) For a decree for payment of mesne profits at the rate of

₹ 5,000/- per month;

(c) For a decree to restrain the Defendants from parting with the possession of the suit premises or any portion thereof; and

(d) For a decree of permanent injunction, restraining the Defendants from interfering with the suit premises, once the possession thereof was restored to the Plaintiffs in terms of prayer clause (a) of the plaint.

9. The Defendants filed their detailed written statement pointing out that Ramchandra was married to Muktabai in a ceremony solemnized at Sawantwadi, Maharashtra. Further, it was pleaded that Kesar was the daughter of Ramchandra and Muktabai. Defendant No.1-Subash was thus the grandson of Ramchandra and had right and title to the suit property and the building therein as a legal heir of late Ramchandra.

10. The written statement further sets out that Subhash was born in the suit premises sometime in the year 1948 and has lived there since, except for some years, when, on account of his employment, was required to stay away. The Defendants pointed out that none of the Plaintiffs were ever staying in the suit premises and the cause of action of alleged forcible ousting of the Plaintiffs on 10/8/1990, was a concocted cause of action to escape the bar of limitation. The Defendants referred to several circumstances to

establish their case.

11. Based on the rival pleadings, the learned Trial Judge framed the following issues and returned the findings thereon:-

<u>ISSUES</u>	<u>FINDINGS</u>
1. Whether the plaintiffs prove that they are owners of the suit property ?	Partly in the affirmative
2. Whether the plaintiffs prove that they are entitled for vacant possession of the portion of the suit property namely the first floor, garage and the godown ?	In the negative.
3. Whether the plaintiffs prove that they are entitled for mesne profits at the rate of Rs.5000/- per month from 10.08.1990 till the delivery of possession to the plaintiffs ?	In the negative.
4. Whether the defendants prove that late Ramchandra was the grand father of defendant No.1 ?	In the affirmative.
5. Whether the defendants prove that they are in lawful possession of the portion of the suit property namely the first floor, garage and the godown ?	In the affirmative.

12. Thus, by Judgment and Decree dated 30/1/2008, the Trial Court dismissed the suit holding, *inter alia*, that Subhash had a right to the suit property and the suit premises and further, the so-called

cause of action pleaded by the Plaintiffs, was a concocted one. The Trial Court also accepted that Muktabai was indeed the legally wedded wife of late Ramchandra and Subhash was their grandson.

13. The Plaintiffs, aggrieved by the Trial Court's Judgment and Decree dated 30/1/2008, appealed to the Ad-hoc District Judge-1, Fast Track Court, Panaji (First Appellate Court), by instituting Regular Civil Appeal No.45/2010.

14. The First Appellate Court, in paragraph 9 of its Judgment and Decree dated 18/11/2010, framed the following points for determination and recorded findings thereon:-

Points for determination

Findings.

1. Did the Ld. CJSD Panaji err in holding that defendant no.1 is the grandson of Ramchandra Krishna Salgaonkar ?

In the affirmative.

2. Did the Ld. CJSD Panaji err in holding that the plaintiffs are not the owners of the whole of the property?

In the affirmative.

3. Did the Ld. CJSD Panaji err in holding that the defendants had not trespassed into the first floor of the building of the suit property on 10/8/1990 ?

In the negative.

4. Did the Ld. CJSD Panaji err in holding that the plaintiffs are not entitled to mesne profit at the rate of Rs.5000/- per month?

In the affirmative.

15. Although the finding in respect of the fourth point of determination is recorded as “*in the affirmative*”, from the context, it is quite clear that the finding recorded by the First Appellate Court is, in fact, “*in the negative*”. This position was not even disputed by the learned Counsel for the Appellants. In any case, this position could not be disputed since, from the discussion, it is very apparent that the First Appellate Court has answered this point against the Plaintiffs and in favor of the Defendants.

16. By the Judgment and Decree dated 18/11/2010, the First Appellate Court held that the Plaintiffs were the only titleholders to the suit property and the building situated therein to the exclusion of the Defendants. However, the First Appellate Court also held that the cause of action pleaded by the Plaintiffs was a concocted one and, therefore, the suit deserved to be dismissed. The First Appellate Court, based on such reasoning, dismissed the Regular Civil Appeal No.45/2010, thereby affirming the Trial Court's Judgment and Decree dated 30/1/2008.

17. The Plaintiffs aggrieved by the dismissal of their Regular Civil Appeal No.45/2010, have instituted the present Second Appeal before this Court. This Second Appeal was admitted on 19/7/2011, on the following substantial questions of law :

Whether the First Appellate Court after holding that the appellant had title to the suit property and the defendants had not title thereto erred in law in dismissing the suit on the ground that the defendants were in settled possession of the suit property?

18. Mr. J.E. Coelho Pereira, the learned Senior Advocate for the Plaintiffs submits that it is quite axiomatic that the decree for possession should have followed in this matter after the First Appellate Court concluded that the Plaintiffs were the exclusive owners of the suit property and the suit premises. He submits that denial of a decree of possession by the First Appellate Court to the Plaintiffs, constitutes an error apparent on the face of the record, that is required to be corrected in this Second Appeal. He submits that it is a settled position in law that the possession follows the title and since the Defendants were unable to establish any right or title in respect of the suit property or the suit premises, the First Appellate Court erred in denying the Plaintiffs a decree possession, after having held that it is the Plaintiffs who were the owners of the suit property and the suit premises. He submits that the reasoning of the First Appellate Court is quite contrary to the law laid down by the Hon'ble Supreme Court in *Poona Ram vs. Moti Ram (Dead) through Lrs and ors.*¹ and *Govind Sadashiv Marathe and ors. vs. Dattaram R. Marathe and anr.*² by the learned Single Judge of this

¹ (2019) 11 SCC 309

² Second Appeal No.39/1997 decided on 29/7/2004

Court.

19. Mr. Pereira submits that the evidence on record is sufficient to prove the Plaintiffs' case of their forcible dispossession from the suit premises on 10/8/1990. On a proper appreciation of the evidence, it is clear that Vilasini Salgaonkar, who was holding possession on behalf of the Plaintiffs, was forcibly ousted from the suit premises on 10/8/1990. He submits that the evidence to the contrary recorded by the two Courts suffers from perversity and warrants interference. Mr. Pereira submits that in any case, once it was established that the Plaintiffs are titleholders and the Defendants have no legal right in respect of the suit property or the suit premises therein, the decree for the restoration of possession should have been made by the two Courts, as a matter of course. He, therefore, submits that this Second Appeal be allowed and the Plaintiffs' suit be decreed, as prayed for in terms of the reliefs sought in the plaint.

20. Mr. S.S. Kantak, the learned Senior Advocate appearing on behalf of the Defendants submits that the finding recorded by the First Appellate Court to the effect that there was no valid marriage between Ramchandra and Muktabai suffers from perversity. He submits that the Defendants, who are the Respondents in this Appeal, can challenge this adverse finding even without filing any cross objection. He relies on *Ravinder Kumar Sharma vs. State ODF*

*Assam and ors.*³ and *S. Nazeer Ahmed vs. State Bank of Mysore and ors.*⁴ in support of this contention.

21. Mr. Kantak submits that the findings recorded by the Trial Court were based on both, oral as well as documentary evidence. He submits that the First Appellate Court has not even looked into the oral evidence on record, but simply held that the oral evidence of the two parties is quite balanced and, therefore, the matter will have to be decided only on documentary evidence. He submits that even the documentary evidence has not at all been considered by the First Appellate Court in a proper legal perspective. He submits that the First Appellate Court has given no reasons whatsoever for reversing some of the findings of fact recorded by the Trial Court. He submits that the approach of the First Appellate Court, in matters of reversal of such findings, does not agree with the provisions of Order 41, Rule 3 of the Code of Civil Procedure as explained in *Bibi Riajan Khatoon and ors. vs. Sadrul Alam and ors.*⁵ and *Santosh Hazari vs. Purushottam Tiwari (Deceased) by Lrs.*⁶. He, therefore, submits that the finding to the effect that Ramchandra and Muktabai were not validly married, warrants interference.

22. Mr. Kantak submits that even, otherwise, there are

³ (1999) 7 SCC 435

⁴ (2007) 11 SCC 75

⁵ AIR 1996 Patna 156

⁶ (2001) 3 SCC 179

concurrent findings of fact that the Plaintiffs came to the Court based on a concocted cause of action. He submits that there is both, oral as well as documentary evidence on record, which establishes beyond reasonable doubt that the Defendants were in possession of the suit property and the suit premises for several years before the year 1969 and, in any case, continued to be in possession from 1969 in their own right, post the demise of Ramchandra, the grandfather of Subhash. Mr. Kantak submits that the Plaintiffs deserved to be non-suited for approaching the Court with a patently false case and a concocted cause of action. He submits that now that it is established that the Defendants were in possession of the suit property and the suit premises in their own right from 1969, at least, the suit instituted in the year 1990 was *ex facie* barred by Law of Limitation. He, therefore, submits that the suit was quite correctly dismissed by the Trial Court and the First Appellate Court.

23. Mr. Kantak submits that the plea of limitation was expressly raised by the Defendants in their written statement. He submits that the Defendants cannot be prejudiced because the two Courts may not have specifically considered this plea even though they were duty-bound to consider the same. He submits that from the evidence on record, it is apparent that the suit was barred by limitation and, therefore, the defendants ought to be permitted to support the decrees made, on these additional grounds as well.

24. Mr. Kantak submits that for all the aforesaid reasons, this Second Appeal may be dismissed.

25. The rival contentions now fall for my determination.

26. The substantial question of law as framed proceeds on the premise that the Plaintiffs have established their title to the suit property and the Defendants have failed to establish that they have any independent right to remain in possession of the suit property. Normally, if this is the position, the suit instituted by the Plaintiffs-titleholders will have to be decreed, provided there are no further impediments, like the absence of a valid cause of action, the bar of the Law of Limitation, etc.

27. In the present case, even if one is to proceed on the basis that the finding recorded by the First Appellate Court that the Plaintiffs are the titleholders to the suit property and the suit premises is correct, the impact of the concurrent findings recorded by both, the Trial Court and the First Appellate Court that the cause of action pleaded by the Plaintiffs was false and concocted, cannot be brushed aside or ignored.

28. Although no substantial question of law was either urged or

framed to the effect that the aforesaid concurrent finding of fact was perverse, Mr. Pereira was permitted to raise such contention. Upon consideration of such contention, however, no case is made out to interfere with this concurrent finding of fact.

29. On the assessment of both, oral as well as documentary evidence on record, the concurrent finding of fact to the effect that the Plaintiffs came to the Court based on a false cause of action or a concocted cause of action, cannot be said to be perverse, but rather, the same is fully borne out from the evidence on record. There is ample evidence on record that Ramchandra and Muktabai were staying in the suit premises. There is ample evidence on record that even Kesar, the mother of Defendant No.1 Subhash, was staying in the suit premises. There is evidence that Subhash was born in the suit premises sometime in the year 1948 or thereabouts. There is evidence that Subhash was residing in the suit premises right from the time of his birth and also received education from the Schools and educational institutions in and around the suit premises. There is evidence that the School records of 1954 or thereabouts had very clearly indicated that Subhash was the grandson of Ramchandra. No doubt, there is also evidence that for some period Subhash, on account of his employment as a Teacher, was residing at Mandrem and Shiroda. However, even at that time, there is documentary evidence that Subhash has always indicated the suit premises as his

permanent address.

30. Since both, oral as well as the documentary evidence on record establishes that the Defendants were in settled possession of the suit property and the suit premises therein, at least from 1969 or thereabouts, the case pleaded by the Plaintiffs that it is they who were in settled possession of the suit premises to the exclusion of the Defendants, was a false case. Similarly, the case of the Plaintiffs that they were forcibly dispossessed from the suit premises on 10/8/1990 by the Defendants, is also a patently false case. The Plaintiffs approached the Civil Court based on a false or a concocted cause of action. Once, there are concurrent findings of fact recorded by the two Courts on this aspect, the two Courts were justified in denying the Plaintiffs any reliefs in the suit. Based upon a patently false and concocted case, no Plaintiffs deserve any relief from the Civil Court, even assuming that the Plaintiffs had made out a case that they were the exclusive titleholders to the suit property.

31. In *Maria Margarida Sequeira Fernandes and ors. Vs. Erasmo Jack de Sequeira (Dead), through LRs.*⁷ the Hon'ble Supreme Court has held that the truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation of justice. The Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth. It was

⁷ (2012) 5 SCC 370,

further held that it is a well-accepted and settled principle that a Court must discharge its statutory functions – whether discretionary or obligatory, according to the law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. The Hon'ble Supreme Court has held that false claims and defenses are really serious problems with real estate litigation, predominantly because of ever-escalating prices of the real estate. The Hon'ble Supreme Court referred to its decision in *Rameshwari Devi vs. Nirmala Devi*- (2011) 8 SCC 249 in which it is observed that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. To curb uncalled-for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled-for litigation.

32. Mr. Pereira, at one stage submitted that the Trial Court based on the pleadings in the plaint had appointed Defendant No.1- Subhash as a Receiver of the suit property. According to him, such receivership continues to date even though the suit itself was dismissed and such dismissal was confirmed by the First Appellate Court. There is nothing on record that the First Appellate Court had continued the receivership. Be that as it may, it is apparent that based on a false and concocted cause of action the Plaintiffs persuaded the Court for appointment of Defendant No.1 as a Receiver of the suit property. Now that it is concurrently held by the two Courts that the

cause of action pleaded by the Plaintiffs was false and concocted, the two Courts were justified in dismissing the Plaintiffs' suit, regardless of whether the Plaintiffs had made out that they were the exclusive titleholders of the suit property or not.

33. Now that the concurrent finding of fact that the Plaintiffs had approached the Court based upon a false cause of action, or the concocted cause of action is upheld, yet another consequence follows. The evidence on record now establishes that the Defendants were in possession of the suit property and the suit premises at least from the year 1969. If this is so, then, the suit instituted by the Plaintiffs in the year 1990 was *ex facie* barred by law of limitation. The Defendants had specifically raised the issue of limitation by filing their written statement. The Defendants had pleaded that they were openly, exclusively, and continuously in possession of the suit property and the suit premises and as the lawful owners for the last 20 years. At least the aspect of open, exclusive, and continuous possession of 20 years has been established from the evidence on record. The suit, as instituted, could have succeeded only if the Plaintiffs were to establish that they were in possession of the suit property and the suit premises, but were forcibly dispossessed by the Defendants on 10/8/1990. This, the Plaintiffs have miserably failed to prove. Rather, the evidence on record establishes the settled possession of the Defendants from at least the year 1969. The suit, in such

circumstances, was barred by limitation and, therefore, the same could not have been decreed by the two Courts. The two Courts were, therefore, justified in dismissing the suit. The circumstance that this issue of limitation was neither considered by the Trial Court nor the First Appellate Court, though the same was raised, cannot operate to the prejudice of the Defendants. In fact, it was the responsibility of the Courts to take up the issue of limitation irrespective of whether or not the parties may have raised it.

34. Therefore, for the aforesaid reasons, the substantial question of law as framed will have to be answered against the Plaintiffs.

35. The next issue is whether the Defendants are entitled to challenge the findings recorded by the First Appellate Court that the Plaintiffs were the exclusive titleholders to the suit property, without the Defendants having filed any cross objection before this Court. Further, if the Defendants are so entitled, then, whether such challenge will have to be restricted to the jurisdictional parameters prescribed by Section 100 of CPC. Finally, it will be necessary to consider whether any case is made out by the Defendants to establish that the finding recorded by the First Appellate Court about the Plaintiffs being exclusive titleholders of the suit property, is vitiated by perversity, to give rise to a substantial question of law.

36. Although, several decisions were pointed out by the learned Counsel for the parties, according to me, the issue as to whether the Defendants can challenge the adverse findings recorded by the First Appellate Court, before this Court, even without instituting any cross objection, stands answered in favor of the Defendants by the decisions in *Ravinder Kumar Sharma* (supra) and *S Nazeer Ahmed* (supra)

37. In *Ravinder Kumar Sharma* (supra), the Hon'ble Supreme Court was concerned with this precise issue, particularly in the context of the provisions of Order 41, Rule 22 of CPC, as amended in the year 1976. The Hon'ble Supreme Court held that a Respondent, who has not filed an appeal or cross objection, is nevertheless entitled to attack the findings recorded by the Trial Court adverse to the interest of such a Respondent, in an appeal instituted by the opposite party.

38. In the matter before the Hon'ble Supreme Court, the Appellant-Plaintiff filed a suit claiming damages for malicious prosecution against the State of Assam and two Police Officers for recovery of various amounts set out in Schedules A, B, and C. The Trial Court dismissed the suit on 16/7/1984. But the High Court, on appeal, held that the Defendants were guilty of malicious prosecution and abuse of power. The High Court, however, granted relief only

regarding pecuniary damages set out in Schedules B and C (value of goods) but dismissed the suit for non-pecuniary damages in the A Schedule items (pain, damage to reputation, etc.) on the ground that the pleadings and evidence in respect of the said items were vague. The Plaintiff, therefore, appealed to the Hon'ble Supreme Court, seeking a decree for non-pecuniary damages as set out in Schedule A to the plaint.

39. Before the Hon'ble Supreme Court, the Defendants who were the Respondents, sought to attack the findings recorded by the High Court on the aspect of malicious prosecution and the award for pecuniary damages as set out in Schedules B and C to the plaint. In this context, the point which arose for determination before the Hon'ble Supreme Court was whether the Defendants-Respondents were entitled to attack such findings of the High Court, without having filed any cross objection as contemplated by Order 41, Rule 22 of the CPC.

40. The Hon'ble Supreme Court first referred to the position of law enumerated from the provisions of Order 41, Rule 22 of CPC, as they stood before the 1976 amendment. Reference was then made to the Full Bench decision of the Madras High Court in *Gaddem Chinna Venkata Rao vs. Koralla Satyanarayanamurthy* - AIR 1943 Mad 698), which had held that the Respondents can attack a

finding upon which part of the decree against him was based to support the other part of the decree which was not against him. The Hon'ble Supreme Court noted that the Judgment of the Full Bench of the Madras High Court was specifically approved by the Hon'ble Supreme Court in the case of *Sri Chandre Prabhuji Jai Temple vs. Harikrishna* – (1973) 2 SCC 665. Based on this, the Hon'ble Supreme Court held that under Order 41, Rule 22 of CPC, before the 1976 amendment, it was open to the Defendant-Respondent who had not taken any cross objection to the partial decree passed against him, to urge in opposition to the appeal of the Plaintiff a contention which, if accepted by the Trial Court, would have resulted in the total dismissal of the suit.

41. The Hon'ble Supreme Court then referred to the legal position after the 1976 amendment to the provisions of Order 41, Rule 22 of CPC. After taking cognizance of the amended provisions, as also the explanation which was inserted, the Hon'ble Supreme Court referred to the Judgment of the Calcutta High Court in *Nishambhu Jana vs. Sova Guha* – (1984-85) 86 CWN 685 and held that the main part of Order 41, Rule 22 was amended to reflect the principle in *Gaddem Chinna Venkata Rao* (supra) as accepted in *Sri Chandre Prabhuji Jai Temple* (supra). The Hon'ble Supreme Court also referred to the 54th Law Commission report, in which it was explained that it was necessary to “*empower*” the Respondent to file a

cross objection against the adverse finding. That would mean that a right to file cross-objections was given, but it was not obligatory to file cross-objections. That was why the word “*may*” was used. That meant that the provision for filing cross objections against a finding was only an enabling provision.

42. The Hon'ble Supreme Court specifically approved the decision of Calcutta High Court in *Nishambhu Jana* (supra) and *Tej Kumar Jain vs. Purshottam* – AIR 1981 MP 55 which had held that it would be incorrect to say that the explanation inserted by the 1976 amendment had made it obligatory to file cross objection even when the Respondent supports the decree by stating that the findings against him in the Court below in respect of any issue ought to have been in his favor. The explanation had merely empowered the Respondent to file cross-objections.

43. Based on the aforesaid, the Hon'ble Supreme Court ultimately ruled that the Defendants/Respondents were entitled to contend that the findings of the High Court regarding the absence of reasonable and probable cause or malice – (upon which the decree for pecuniary damages in B and C Schedules was based) can be attacked by the Respondents to sustain the decree of the High Court refusing to pass a decree for non-pecuniary damages as per A Schedule. The filing of cross-objections against the adverse finding was not

obligatory.

44. To a similar effect, are the observations in *S. Nazeer Ahmed* (supra). In that case, the Trial Court had held that the Plaintiff's suit for enforcing equitable mortgage was not barred by Order 2, Rule 2 CPC. In appeal, the High Court was inclined to hold that the suit was barred under Order 2, Rule 2 of CPC, though ultimately the High Court did not accede to the prayer of the Appellant to dismiss the suit as being hit by Order 2, Rule 2 of CPC. The High Court had held that since the Defendants had not filed any appeal or cross-objections, the Defendants could not challenge the findings of the Trial Court that the suit was not barred under Order 2, Rule 2 of CPC.

45. The Hon'ble Supreme Court held that the High Court was clearly in error in holding that the Defendants not having filed a Memorandum of Cross Objections in terms of Order 41, Rule 22 CPC, could not challenge the findings of the Trial Court as the suit was not barred under Order 2, Rule 2 of CPC. The Respondent, in an appeal, is entitled to support the decree of the Trial Court even by challenging any of the findings that might have been rendered by the Trial Court against himself. For supporting the decree passed by the Trial Court, it is not necessary for a Respondent in the appeal, to file a Memorandum of Cross Objections, challenging a particular finding

that is rendered by the Trial Court against him when the ultimate decree itself is in its favor. A Memorandum of Cross Objection is needed only if the respondent claims any relief which had been negated to him by the Trial Court and in addition to what he had already been given by the decree under challenge.

46. Based upon the legal position as explained by the Hon'ble Supreme Court in *Ravinder Kumar Sharma* (supra) and *S. Nazeer Ahmed* (supra), it will have to be held that the Defendants-Respondents, in this Appeal, have every right to attack the adverse findings recorded by the First Appellate Court to the effect that there was no valid marriage between Ramchandra and Muktabai, even though the Defendants-Respondents may not have filed any cross-objections in this Appeal.

47. Order 42, Rule 1 of CPC makes it clear that the provisions of Order 41 shall apply to second appeals. Therefore, the provisions of Order 41, Rule 22 will apply to the Second Appeal, as well. However, in applying such provisions, care will have to be taken to ensure that even a Respondent in such an appeal does not cross the limitations imposed upon by the provisions of Section 100 of CPC, read with Order 42 of CPC. This means that a Respondent in a second appeal even though permitted to challenge the adverse findings recorded by the First Appellate Court, will be entitled to

challenge such findings only on the ground of perversity and not by simply inviting the Second Appellate Court to reassess or reappreciate the evidence on record. This is because, it is by now, well accepted that it is the First Appellate Court which is the final Court in so far as findings of fact are concerned. Unless it is demonstrated that such findings of fact are perverse, an appellant is not entitled to maintain a second appeal under Section 100 of CPC to question such adverse findings of fact. The same restriction will apply to a Respondent in a second appeal who seeks to challenge the adverse findings of fact that may have been recorded against him by the First Appellate Court.

48. Mr. Pereira relied upon *Superintending Engineer and others vs. B. Subba Reddy*⁸ to submit that the aforesaid position may be true about first appeals, but will not apply to second appeals because the jurisdiction of a Second Appellate Court is circumscribed by jurisdictional parameters prescribed under Section 100 of CPC. He submitted that a cross objection is like an appeal. Therefore, if the Defendants fail to file such cross objection within the period prescribed, they are not at liberty to challenge any adverse findings in the order of the First Appellate Court. He submitted that the First Appellate Court is a final Court when it comes to facts.

49. Mr. Pereira, quite fairly also placed on record the decision of

⁸ (1999) 4 SCC 423

the Hon'ble Supreme Court in *Municipal Corporation of Delhi and ors. Vs. International Security & Intelligence Agency Ltd.*⁹ and pointed out that the decision in *B. Subba Reddy* (supra) has been partly overruled. However, he submitted that the contention advanced by him, as stipulated in *B. Subba Reddy* (supra) has not been overruled.

50. In *B. Subba Reddy* (supra), the issue was whether the provisions relating to filing of cross-objections apply to an appeal under Section 39 of the Arbitration Act, 1940. The Hon'ble Supreme Court held that such provisions do not apply to an appeal under Section 39 of the Arbitration Act since the scope of an appeal under Section 39 of the Arbitration Act was very limited.

51. Since some doubts were expressed on the proposition laid down by *B. Subba Reddy* (supra), a reference was made to a Bench of Three Judges of the Hon'ble Supreme Court, and this reference was answered in the case of *International Security & Intelligence Agency Ltd.* (supra). The Three-Judge Bench clearly held that the cross-objections could always be filed in an appeal under Section 39 of the Arbitration Act, 1940. But the reliefs sought therein had to conform to the requirements of Section 39(1) of the Arbitration Act, 1940. In other words, a cross objection can be preferred if the applicant could

⁹ (2004) 3 SCC 250

have sought the same relief by filing an appeal in conformity with provisions of Section 39(1) of the Arbitration Act, 1940. If the subject matter of the cross objection is to impugn such an order which does not fall within the purview of any of the categories contemplated by clauses (i) to (vi) of sub-section (1) of Section 39 of the Act, the cross objection shall not be maintainable.

52. The two decisions relied upon by Mr. Pereira do not concern the issue as to whether the adverse findings can be challenged by a Respondent without filing any cross objection. Further, *International Security & Intelligence Agency Ltd.* (supra), clearly holds that cross-objections are maintainable in an appeal under Section 39(1) of the Arbitration Act, 1940. However, the scope of such cross objection will have to be confined to the jurisdictional parameters prescribed by Section 39(1) of the Arbitration Act, 1940.

53. In the present case as well, even though the Defendants will be entitled to challenge the adverse findings recorded by the First Appellate Court, such challenge will have to be examined within the limited jurisdictional parameters prescribed by Section 100 of CPC. This means that the findings of fact recorded by the First Appellate Court that the Plaintiffs are exclusive titleholders will have to be examined on the touchstone of perversity.

54. Now, if the impugned Judgment and Order made by the First Appellate Court is perused, then, it is apparent that the First Appellate Court has not even bothered to assess the oral evidence on record. In hardly two or three very short paragraphs, the First Appellate Court has alluded to the oral evidence when, admittedly, the Plaintiffs had examined 3 witnesses and the Defendants had examined almost 9 witnesses in this matter. Thereafter in paragraph 19, the First Appellate Court observed as follows :

“The Plaintiffs have adduced oral evidence in support of the plaintiffs case. The defendants have adduced oral evidence in support of the defendants’ case. The oral evidence is equally balanced against each other. Therefore, let us look into documentary evidence to ascertain the truth.”

55. The First Appellate Court has then rather selectively referred to the documentary evidence on record and concluded that there was no valid marriage between Ramchandra and Muktabai and, consequently, Defendant No.1, who is the grandson of Muktabai had no legal right or title to the suit property.

56. The First Appellate Court referred to a Will made by Ramchandra in 1954 in which Muktabai has been referred to as his “friend” and not his wife. The First Appellate Court also referred to a

Gift Deed of 1963, in which Ramchandra had stated that he had no legal heirs and finally, the First Appellate Court referred to Muktabai's death certificate, in which, there was no reference to Ramchandra being her husband.

57. The First Appellate Court has, however, unduly discarded the School records prepared sometime in the year 1954, which had indicated Ramchandra Salgaonkar as guardian/grandfather of Defendant No.1 Subhash. The First Appellate Court has not even considered the electoral rolls in which the name of Muktabai's husband was clearly shown as Ramchandra Salgaonkar. The First Appellate Court also failed to notice that the death certificate of Muktabai had also indicated her surname as "*Salgaonkar*". In fact, the First Appellate Court, at paragraph 22 has even recorded a finding that the documents produced by the parties on record "*tend to show that defendant no.1 may have been grandson of Ramchandra Krishna Salgaonkar*".

58. The First Appellate Court having come to the aforesaid tentative opinion, could not have simply brushed aside the voluminous oral evidence produced on record by and on behalf of the Defendants. The Defendants examined independent witnesses who have deposed that they had actually seen Ramchandra and Muktabai behave as husband and wife. There was evidence that both of them

have lived in the same home and Kesar i.e. the mother of Defendant No.1 Subhash, was their daughter. They have deposed that Muktabai would always wear *Mangalsutra* and apply *kumkum*. There was evidence that Muktabai would celebrate *haldi-kumkum* in the suit premises whilst Ramchandra was living. There is evidence that after the demise of Ramchandra, Muktabai stopped wearing *Mangalsutra*, or applying *kumkum*, or celebrating *haldi-kumkum*. There is evidence of the witnesses having seen Ramchandra and Muktabai performing several religious activities, including *Satyanarayan Puja*, as husband and wife. All this evidence has been simply brushed aside by the First Appellate Court by observing that the oral evidence is equally balanced against each other.

59. According to me, this is a case where the findings recorded by the First Appellate Court are vitiated by perversity. The First Appellate Court has failed to take into account the vital and relevant evidence on record. The first appellate Court has made selective reference to the documentary evidence on record and the inferences drawn are far from reasonable. The First Appellate Court has failed to take into consideration the law laid down by at least two Division Benches of our Court in the case of *Kamalakant Pandurang Chibde and ors. Vs. Smt. Sushila Pandurang Chibde and ors.*¹⁰ and *Chandrasen Raikar vs. Smt. Mandakini Pundalik Salkar*¹¹ in which it

¹⁰ 1990 (2) Goa L.T. 185

¹¹ 2003(1) Goa L.T. 51

is held that registration of marriage is not a *sine qua non* of a valid marriage, particularly where marriage is performed outside Goa. In this case, the Defendants had pleaded that the marriage between Ramchandra and Muktabai was solemnized at Sawantwadi, which was then outside the territories of Goa. The finding recorded by the First Appellate Court is contrary to the weight of collective evidence on record. Relevant and vital evidence has simply been discarded without assigning any reasons. Therefore, the First Appellate Court was not justified in holding that there was no valid marriage merely because the marriage certificate or proof of registration was not produced by the Defendants in evidence.

60. Mr. Pereira relying on *Reema Aggarwal vs. Anupam and others*¹² submitted that strict interpretation is called for to determine whether the relationship between the parties constitutes a marriage where the claims for civil property rights are involved. He submitted that a liberal approach may be called for only where reputation is to be protected or a social evil, such as harassment or cruelty to wife for dowry is to be curbed.

61. According to me, the ruling in *Reema Aggarwal* (supra) is not at all attracted to the facts and circumstances of the present case as the issue involved therein was entirely different. The facts, in this case, are more or less similar to the rulings of the two Division

¹² (2004) 3 SCC 199

Benches of this Court in *Raikar* (supra) and *Chibde* (supra). Besides, even in this case the issue of reputation and social status of Muktabai, Kesar, and Subash is also involved.

62. In *Santosh Hazari* (supra), the Hon'ble Supreme Court has held that while reversing a finding of fact, the Appellate Court 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 Hon'ble Supreme Court clarified that this does not mean that when an appeal lies on facts, the Appellate Court is not competent to reverse a finding of fact arrived at by the Trial Judge. 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 on conjectures and surmises, the Appellate Court is entitled to interfere with the finding of fact.

63. The Trial Court, in this case, has assessed the documentary and oral evidence in some detail. The findings recorded by the Trial Court were entirely borne out by the documentary and oral evidence on record. The reasoning employed by the Trial Court also did not suffer from any legal infirmity. The First Appellate Court by virtually ignoring the entire oral evidence on record and without

indicating any reasons whatsoever as to where the learned Trial Judge had faltered, was not justified in reversing one of the crucial findings recorded by the learned Trial Judge. In doing so, the First Appellate Court has not adhered to the principles explained by the Hon'ble Supreme Court in *Santosh Hazari (supra)*.

64. Mr. Kantak had also relied upon the decision of the Hon'ble Supreme Court in *The Dollar Company, Madras vs. Collector Madras*¹³, in which the Hon'ble Supreme Court has held that a Court of appeal interferes not when the judgment under attack is not right, but only when it is shown to be wrong. The First Appellate Court has not adhered to this principle as well before reversing a finding of fact recorded by the Trial Court.

65. In this case, the First Appellate Court has neither come into close quarters with the reasoning assigned by the Trial Court nor given any cogent reasons as to why the Trial Court's order was required to be reversed. The First Appellate Court has certainly not held that the appraisal of the evidence by the Trial Court suffers from a material irregularity, or is based on inadmissible evidence or on conjectures and surmises. This is yet another ground as to why the finding recorded by the First Appellate Court, which is vitiated by perversity, cannot be regarded as final for this Second Appeal.

¹³ (1975) 2 SCC 730

66. Therefore, by remaining strictly within the jurisdictional parameters of Section 100 of CPC, it can be said that the finding of fact recorded by the First Appellate Court to the effect that there was no marriage between Ramchandra and Muktabai, or that the Plaintiffs are exclusive titleholders to the suit property and the suit premises, is quite perverse and warrants interference.

67. The aforesaid means that the Plaintiffs, in this case, have neither established the exclusive title nor established that the cause of action pleaded by them had any grain of truth. There are concurrent findings of fact that it is the Defendants, who are in possession of the suit property and the suit premises, at least from 1969 and the suit was instituted only in 1990 based on a concocted cause of action. The suit therefore can be said to be barred by the law of limitation as well. This Appeal will, therefore, have to be dismissed on each of the above grounds taken jointly or severally.

68. For all the aforesaid reasons, this appeal is liable to be dismissed and is, hereby, dismissed. There shall, however, be no order as to costs.

69. There is no clarity as to whether Defendant No.1 was appointed as a Receiver by the Trial Court and, further, whether there was any order made for his discharge. However, now that this Appeal

is being dismissed, it is made clear that in case the receivership of Defendant No.1 has inadvertently continued despite the dismissal of the Suit way back in the year 2008, then, the same is, hereby, discharged.

M.S. Sonak, J.

SANTOSH S MHAMAL  Digitally signed by SANTOSH S MHAMAL
Date: 2021.04.15 11:20:41 +02'00'