

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 118 OF 2005

1. Elia Eufemia Eremita D'Silva
major of age,
wife of John Albert D'Silva
2. Felicidade Filomeno Rodrigues
major of age,
3. Benedicta Cardoz e Gomes
major of age,
4. Ema Rosalina Noronha
major of age, and her husband
5. Menino Cruz Noronha
major of age,
both residents of
Colmorod, Navelim, Salcete, Goa
6. Norbert Viegas
major of age,
7. Delfina Viegas
major of age,
both residents of
Chinchinim, Salcete, Goa
8. Pascoal Gomes
major of age,
all residents of
Varca, Salcete, Goa.
9. Camilo Gomes alias Camy Gomes
and his wife
10. Constanciana Gomes
major of age,
both residents of
Varca, Salcete-Goa.

11. Roque Rual Rui Gomes
major of age, and
12. Luis Armstrong Gomes,
major of age,
13. Mary Rose Cobarryboas e Gomes
major of age,
14. Hercules Gomes, bachelor,
major of age,
15. Evaristo Alexio Gomes,
Bachelor, major of age,
All residents of H.No.44
Navelim, Salcete-Goa.
16. Betsy Gomes e Carvalho,
major of age, and her husband
17. Shri Cyrilo Carvalho,
major of age,
Both residents of H.No. (not known)
Vasco da Gama, Goa.
18. Kum. Many Gomes,
major of age, and
19. Shri Donald Gomes,
major of age,
permanently residing at
H.No.44, ward no.6,
Ratwaddo, Navelim, Salcete, Goa
(Registered addresses)

... Appellants

Versus

1. Anil Sada Chari
major of age,
2. Mr. Ramkrishna Sada Chari,
major of age,

3. Mr. Damodar Sada Chari,
major of age,
4. Mr. Umesh Sada Chari,
major of age,
5. Miss Sunita Sada Chari,
major of age,
6. Miss Asha Sada Chari,
major of age,
7. Miss Neeta Sada Chari,
major of age,
8. Hirabai Sada Chari,
major of age,
widow of late Sada V. Chari,
all residents of Santeri,
H. No. 69, Near Navelim Church,
Navelim, Salcete, Goa.
9. John Albert D'Silva,
major of age,
both residents of H.No (not known)
Cruz Nagar, Navelim, Salcete-Goa.
10. Roque Socorro Rodrigues,
major of age,
both residents of H.No. (not known)
Comba, Margao, Salcete-Goa.
11. Shri Anthony Gomes, alias
Arnaldo Gomes, major of age,
and his wife
12. Smt. Nandy Gomes,
major of age,
both permanently residing at
H.No.44, ward No.6,
Ratwaddo, Navelim, Salcete-Goa.

... **Respondents**

Mr. C.A. Coutinho, Advocate for the appellants.

Mr. C. A. Ferreira with Mr. S. Karmalkar, Advocates for the respondents.

CORAM: BHARATI DANGRE,JJ

Reserved on: 22.01.2021

Pronounced on: 11.02.2021

JUDGMENT:

1. The appellant, the original plaintiff is aggrieved by the judgment and decree passed by the District Judge, South Goa at Margao in Regular Civil Appeal No.21 of 2001, thereby setting aside the judgment and decree dated 21st December 2000 in his favour, directing the original defendant and their legal heirs to quit and vacate the suit premises by delivering vacant possession thereof to the plaintiff.

2. Compendiously and concisely, the relevant facts absolutely necessary and germane for adjudication of the present appeal can be stated to be as under :-

One John Gomes, son of Antonio Gomes and Damaceno Gomes, the predecessor in title of the appellant filed an application for eviction under Section 22 of the Goa, Daman and Diu Buildings, (Lease, Rent and Eviction) Control Act, 1968, on 23rd January 1984 seeking eviction of one Sada Chari

from a house bearing new house no.69 and old house no.119 situated in the property recognized as "Mordi" or 'tanki' at Navelim Salcete Goa under Chalta No.3 of P.T. Sheet No.305, City Survey Margao i.e. the suit premises. The opponent/defendant filed written statement denying the landlord/tenant relationship. The Rent Controller ordered inquiry under Section 21 of the Act to determine the existence of landlord/tenant relationship. The opponent entered in the witness box and denied the relationship and also denied the payment of any ground rent for occupation of the land under the dwelling house. On detail inquiry, the Rent Controller concluded to the following effect. "The claim of the opponent is of denial of landlord/tenant relationship is hereby held to be bonafide."

3. On the said decision John Gomes John Gomes along with 10 others who claim to be the owners of the landed property "Mordi" or 'tanki' instituted a Regular Civil Suit No.263 of 1990 in the Court of Civil Judge, Jr. Division at Margao, since the defendants who were inducted as tenants had denied the title of the plaintiffs and hence, they were not entitled to occupy the suit premises and sought the following reliefs.

“a) to order and direct the defendant nos. 1 and 2, to quit and vacate the suit premises, and deliver vacant possession thereof to the plaintiffs;

b) to grant a permanent injunction and restrain the

defendant nos. 1 and 2, their heirs, agents, assigns, legal representatives, servants or anyone claiming through them from doing any work of repairs/reconstruction in respect of the suit premises or otherwise interfere in any manner with the property of the plaintiffs;

c) temporary injunction in terms of prayer (b)above;”

4. In the suit, the plaintiffs’ claim was denied in entirety by filing a written statement and objection was raised to the relief claimed in the suit, being mere recovery of possession and injunction without a declaration being sought. Lack of identity of the property was also staked to be fatal for the plaintiffs in their claim of ownership of the suit property. The relationship of landlord/tenant was denied and even the claim that plaintiffs are the owners of the landed property was specifically denied. On the contrary, a stand was taken that till July 1982, the property was not entered into anybody's name and to the knowledge of the defendants, the area of the land form part of Comunidade. It was contended that the structure of the defendants was standing in the suit property for more than 45 years and the defendant no.1 was carrying his avocation of mechanic in his garage which was duly registered with the authorities.

5. The plaintiff no.1 entered in the witness box but

since he died, while being examined, his evidence was discarded. His daughter Alia, entered the witness box, whereas in order to defeat the claim of the plaintiff, the son of the original defendant no.1 deposed along with two other witnesses including a surveyor. On appreciation of the evidence brought before the Civil Judge, the Suit was decreed by holding that the plaintiffs have succeeded in proving that the suit property belongs to them and the defendant nos.1 and 2 have no right in the same. The case of the plaintiff was held to be proved by positive evidence, whereas it was recorded that the defendant has failed to produce any proof that the property belongs to Comunidade and it was held that the suit structure lies in the property of the plaintiff. By decreeing the suit, the defendants were directed to quit and vacate the suit premises and deliver vacant possession of the suit premises to the plaintiffs and they were restrained from interfering in any manner with the property of the plaintiff.

6. Being aggrieved, the defendant instituted an Appeal in the Court of District Judge, South Goa which came to be registered as Civil Appeal No. 21 of 2001. The Appellate Court reversed the finding of the First Fora by framing the issue as to whether the plaintiffs had established their title over suit property and whether the suit for recovery of possession without claiming declaration of ownership is tenable. Both the points came to be answered in the negative. The finding recorded was to the effect that the order passed by the Rent Controller in the

proceedings filed by the plaintiff was not challenged and had attained finality. It was held that the defendants had specifically denied the title of the plaintiff with regard to the suit property and also the relationship of landlord/tenant. In these circumstances, it was held that the owner of the property was entitled to seek a declaration regarding his status as owner and only thereafter, seek relief of eviction on one of the grounds contemplated under Chapter V of the Rent Control Act. By recording a clear finding that the trial Court has completely lost sight with regard to the important aspect of the title of the plaintiff and relied upon the inventory proceedings as the title documents, the finding was held to be unsustainable. The suit merely seeking recovery of possession without a declaration of ownership right by the plaintiffs, particularly when the defendants had disputed the ownership of the plaintiffs with regard to the said structure was held to be not maintainable. In nutshell, on this reasoning, the judgment passed by the Civil Judge, was held to be unsustainable in law and the Appeal was allowed on 25th January 2005.

7. In the backdrop of the said facts, the Second Appeal was admitted on 28th September 2006 by framing the following substantial question questions of law :-

(A) Whether the Additional District Judge was justified in holding that the plaintiffs have not proved title to the suit

property when the survey records stand in their favour coupled with the allotment in inventory proceedings and when the defendants have not led any evidence of whatsoever nature to rebut the presumption arising out of the survey records and the allotment in inventory and when the defendants themselves attempted to plead a claim of being 'mundkar' under Cloves Gomes brother of plaintiff no.1?

(B) Whether the Additional District Judge was justified in holding that the plaintiffs have not proved ownership of the suit property when the defendants themselves had pleaded adverse possession at one time and thereafter attempted to amend the pleadings to take a plea of being a mundkar through Clovis Gomes the same person through whom the plaintiffs claim rights ?

(C) Whether the finding of the learned District Judge was justified in holding that without declaration of ownership, the suit for eviction simplicitor was not tenable, particularly when what the Rent Controller has decided is that the denial of landlord tenant relationship is bonafide and there have been no findings on denial of title as contended by Addl. District Judge ?

8. In addition, while the Appeal was being argued, Mr. Ferreira, the learned counsel requested the Court to frame an additional question of law being “Whether the suit for eviction,

Tilak/msr.

possession simplicitor is maintainable in absence of relief of declaration of title when the title itself is disputed". The said question of law emanate in the backdrop of the facts involved and stem out of the judgments of the Courts below and addition of the said substantial question of law being not opposed by Mr.C.A. Coutinho, learned counsel for the appellant. The said question of law is also included in the substantial questions on which the Appeal is being heard as question No.(D).

9. The suit property is a residential property bearing new House No.69 to the Old House No.119 located at Navelim, Salcete, Goa under Chalta No.3 of P.T. Sheet no.305 of City Survey Margao and is popularly known as "Mordi" or 'Tanki'. The proceedings which were instituted before the ARC under Section 22 of the Act in respect of suit property by the plaintiffs claiming to be the landlord were contested by the defendants and the relationship of landlord and tenant was denied. An inquiry was ordered under Section 21 of the Act. In the said proceedings the defendant also denied the ownership of the applicant on the suit property but it was admitted that Clovis Gomes had permitted him to construct the dwelling house. The premises were being put to use for residential purpose as well as used for a mechanical work shop in form of a garage, for which a licence was also issued. The defendant admitted receipt of a notice in the year 1982 demanding arrears of rent which was responded to, denying that there was any question of payment of rent as the

property was never taken on rent. The evidence to the effect that the electric connection was obtained was also placed on record. It was deposed before the Additional Rent Controller that Clovis Gomes who was a bachelor resided in the property situated at a distance of 15 meters from the suit property and it was averred that he died 15 to 16 years back. A claim was also staked to the effect that he was residing in the property as 'Mundkar' of Clovis. The suggestion that the property was not constructed by him was specifically denied. In defence, two witnesses, Suryakant Udaikar and Shaikh Ahmed came to be examined. The applicant also entered the witness box and deposed that Sada Chari was residing in his property which comprises of two houses, one occupied by Sada Chari, constructed 18 years ago and the other being vacant which was earlier occupied by his brother who is now dead. He deposed that the property belongs to Antonio Gabriel Joaquim Gomes and on death his five sons inherited the property. Amongst them, Clovis Gomes, Luma Gomes and Pascoal Gomes died bachelors and the deponent was one of the brothers who was married and along with other applicants claimed to be the sole heir of their parents. The inventory certificate regarding allotment of the property was also exhibited. Three witnesses came to be examined by the applicant in support of his claim.

10. On examination of the claim, in light of the specific denial about payment of rent or ground rent in respect of suit

Tilak/msr.

premises and the claim of the opponent that the house was constructed 40 years back and in absence of any written lease in respect of the suit premises or any rent receipt and also not finding that there is any oral agreement on record depicting the relationship of landlord and tenant, it was held that there was no satisfactory evidence led about existence of landlord/tenant relationship, the claim of opponent to deny the landlord relationship, was held to be bonafide. Pertinent to note that this order passed by the Rent Controller on 28th September 1989 has not been challenged.

11. The Rent Act which provide for Control of Rents and Eviction in the State of Goa, define the term 'landlord' as as person who, for the time being is receiving, or is entitled to receive the rent of any building, whether on his own account or on benefit of any other person mentioned in the definition. Tenant is defined in section 2(o) to mean any person by whom or on whose account or behalf the rent of any building is, payable and also include a sub-tenant and also any person continuing in possession after termination of his tenancy but shall not include a person against whom any order or decree has been made.

Chapter V of the Act provide for control on eviction of tenants. The proviso appended to Section 21 prescribe that where the tenant deny the title of the landlord or claims a right of permanent tenancy, the controller shall decide whether denial or

claim is bonafide and may pass a decree for eviction on any of the grounds mentioned in the Chapter even though it is found that such denial does not involve forfeiture of lease or that the claim is unfounded. The said proviso is substituted by amendment Act 14 of 2014 and prior to the said amendment, the landlord had to seek eviction of the tenant through a civil court, who was competent to pass a decree for eviction on any of the grounds mentioned in Chapter V. Section 22 set out the grounds of eviction and relevant for our purpose is ground (g); that the tenant has denied the title of the landlord or claimed the right of permanent tenancy and that such denial or claim was not bonafide.

12. In terms of the existing provision, the plaintiffs approached the civil court seeking the relief, which is reproduced in the paragraph above. No declaration is sought and the substantial question of law which arises is whether a suit merely seeking permanent injunction and restrain order against defendant and the relief of eviction is maintainable without seeking a declaration particularly when the title of the plaintiff was disputed by the defendant and in para 10 of the plaint, the eviction was specifically sought on the ground that there is denial of title of the plaintiff at the instance of the defendant and therefore, they are not entitled to occupy the suit premises and their continued occupation amounts to trespass.

13. The general principle as to when the suit for permanent injunction will lie and when it is necessary to file the suit for declaration and/or possession with injunction as a consequential relief is well settled by the Hon'ble Apex Court in case of Anathula Sudhakar Vs. B. Buchi Reddi (dead) by LRs and ors, 2008(4) SCC 594 and the relevant portion read as under:-

13.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

14) We may however clarify that a prayer for declaration will be necessary only if the denial of

title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration”.

14. In a suit for permanent injunction seeking relief of restraining the defendants from interfering with the plaintiffs possession, the plaintiff must imperatively establish that as on the date of the suit, he was in lawful possession of the suit property and there was attempt on the part of the defendant to interfere or disturb his lawful possession. In the present case, undisputedly, the defendant is in possession of the suit property and the plaintiff has sought delivery of possession/recovery of possession. In order to seek a decree for eviction and for

dispossessing the defendant, the plaintiff must establish his title to the property since he claim to have leased the same to the defendant who is admittedly in possession and who has denied that it was given on lease to him or that the plaintiff was the owner. In the scheme of the enactment governing relationship between landlord and tenant, in the State, when the Rent Controller has held that the claim of the tenant denying the landlord tenant relationship is bonafide and the plaintiff himself has approached the Civil Court seeking eviction of the defendant from the suit premises and restoration of the possession to him, particularly when there was a dispute as regards the relationship and also about the title of the defendant, he must seek a declaration before seeking a relief of permanent injunction. The proviso appended to Section 21 set out that when the opponent tenant denies the title and record a finding to that effect, the landlord can seek eviction of the tenant through Civil Court and the Civil Court may then pass a decree of eviction of any of the grounds mentioned in Chapter V, even though the Civil Court finds that such denial does not involve the forfeiture of lease. The defendants have categorically denied this relationship and therefore, the plaintiff has approached the Civil Court seeking his eviction where it is imperative for him to seek a declaration that he is a landlord of the premises and is receiving or is entitled to receive rent since the premises were let out on rent. In absence of a declaration being sought, the relief as claimed in the suit cannot be granted. The substantial question of law (D) is

therefore answered in the negative.

The finding of the learned District Judge to the effect that without declaration of ownership suit for eviction simpliciter was not tenable is therefore held good in terms of the authoritative pronouncement of the Apex Court referred above and though the Rent Controller has decided that denial of landlord-tenant relationship is bonafide, however, in terms of the proviso appended to Section 21 of the Rent Control Act, the plaintiffs approach Civil Court for seeking permanent injunction and restoration of possession from the tenants, and since it is held that in absence of declaration the relief cannot be granted, the finding of the District Judge is perfectly justified. Question no. (C) is therefore answered in the affirmative.

15. The plaintiffs claim to be owners of property surveyed under Chalta No.3 and 15 of the P. T. Sheet no.305 of City Survey Margao. The plaint do not contain any schedule of property by reference to the boundaries, the matríz number or registration number. The suit property is claimed through inheritance from late Antonio Gabriel Joaquim Gomes and is described as a residential house and it is averred that the plaintiffs are in peaceful possession of the said property since more than 20 years and prior to it, the property was enjoyed by their ancestors. Another house located in the said property is the one from which the defendant is sought to be evicted and it is in the form of an outhouse which is alleged to be leased out to the

Tilak/msr.

defendant on monthly rent of Rs.25/. On failure to pay the rent proceedings for eviction were instituted.

16. The witness of the plaintiff -PW2 Alia has produced on record a survey plan and form B of survey record of chalta No.3 and 15 to establish title to the property along with the certificate of assessment of house tax issued by Margao Municipal Council as well as the house tax receipts for the year 1978, 1979, 1980, 1983 and 1985. Apart from this, a document of inventory is relied upon to establish the title.

While decreeing the suit, the first court relied on the inventory proceedings and survey records, which were accepted as the genesis of the title. In holding these documents to be the source of title, the trial court has misdirected itself on two counts:- The first one being a legally permissible premise, since the plaintiff did not produce any documents of title and the second being on extraneous assumption that the survey record, inventory proceedings, house tax receipts establish the title.

17. It is a trite position and principle of law that mutation entries/entries in survey record do not confer any title to the property and it is only an entry for collection of land revenue from the person in possession. Title will have to be derived from an instrument executed by the owner in favour of any alienee as per Stamp Act and registered under Registration Act, through a conveyance. The survey record can neither create nor extinguish

title. As far as the survey records are concerned, it is settled position of law that the said documents cannot be taken to be conclusive proof of title and though reliance has been placed on Section 105 of the Goa Land Revenue Code which raises a presumption about the property being in possession by the person in whom the entries are effected, the said presumption is rebuttable and in any case there is no presumption of ownership. The trial Court failed to take into consideration an important aspect about the survey records; being that the plaintiff has placed reliance on survey records of Chalta No.3 and 15 and P.T. Sheet No.305 recording the name of Custodio Joao Crisostom Da Predade Gomes and Damaso Louis Francisco Da Predade Gomes. This document is issued in favour of the plaintiff on 15th March 1988 on an application filed by Rogue Sequeiro Rodriques. The defendant, in his evidence, has specifically deposed that the Chalta number of the suit house was not surveyed in anybody's name. He has produced on record Form No.B of Chalta No.3 of P.T. Sheet No.305, where the Chalta No.3 do not record anyone's name and copy of the said survey record is obtained by the defendant on 14th July 1982 by preferring an application to the Inquiry Officer, City Survey, Margao. This clearly lead to a conclusion that in 1982, Chalta No.3, P.T. Sheet No.305 did not include the name of the plaintiff but it is entered subsequently. In any case, since the revenue entries do not confer any title, it could not have been considered to be the document establishing the title of the plaintiff.

18. The document of inventory has been considered as a pivotal document for establishing the title of the plaintiffs by the trial Judge. The inventory proceedings are initiated at request of one Jose Miguel Pires De Menezes of Navelim on death of Antonio Gabriel Joaquim, father of plaintiff no.1. The Inventory proceedings include two properties i.e. property known as "Mordi" and property 'Nomoxim Santeri' situated at Navelim. By the said document, on the death of Antonio Gabriel Joaquim, the properties devolve upon his surviving heirs. The proceedings are in form of succession of the said property and its partition among the legal heirs. The proceedings have a limited purpose, being disposition of the estate of the deceased and the said law is prevalent in the State being part of Portuguese Civil Court of 1867 as amended in 1939. The inventory proceedings are not suits and are contemplated as distinct and separate proceedings where the parties to the proceedings are only interested parties being either the heirs or legal representatives or beneficiaries under Gift or legatees under a Will. The proceedings are instituted for administration of the estate of the deceased and contemplate preparation of list of assets, payment of debts, collection of credits of the estate, payment of legacies, distribution of assets, etc. The inventory proceedings safeguard the interest of all the heirs and successors of deceased and the interested parties may include heirs, moiety holders persons benefited by usufruct to a part of inheritance, legacies and creditors. The said process is a complete and independent Code

which is subsequently incorporated in a statute under the Caption “The Goa, Succession, Special Notaries and Inventory Proceeding Act, 2012 and Part IV of the said Act deals with inventory proceedings.

The inventory proceedings, however, are the proceedings *inter se* between the members of the family and are in the nature of summary proceedings and after the enactment of a statute, are governed by it. The inventory proceedings, however, do not confer any title since the whole object of the proceedings is crystallizing the estate of the deceased on the heirs entitled for it and on being partitioned. The proceedings, thus are limited to determination of rights of the heirs in the property and by no way can be construed to be the proceedings conferring title. Oblivious of the legal effect of the inventory proceedings, the First Fora has recorded a finding that the plaintiffs have proved their title based on the inventory proceedings and the survey records.

19. Before seeking relief of permanent injunction and for restoration of vacant possession, the plaintiff must prove his title to the suit property. Merely by relying on the revenue entries, the suit cannot be decreed nor can a permanent mandatory injunction granted, which can be done only on appreciation of evidence rendered for establishing the title. The evidence in form of revenue entries, tax receipts would only raise a presumption of possession and in the present case since the

plaintiff do not dispute the possession of the defendants over the suit property, only by adducing evidence of ownership the plaintiff is entitled for relief in the nature of permanent injunction, qua the defendants.

The Appellate Court framed the said issue as Issue No.2 and has answered the point in negative. The said position of law being well settled, the Appellate Court has rightly held that this very important aspect of the matter was clearly overlooked by the trial Court. The plaintiff has to establish his own case as against the defendant and when he seek decree for eviction and his ownership is disputed by tenant, it is necessary for him to establish his title and as has been held by the Appellate Court, the trial Court got itself embroiled in determining whether the defendant is entitled to continue with the possession and the Civil Judge has erred in holding that the plaintiff are owners of the property.

20. Apart from the issue about the plaintiffs being the owners of the property described in the plaint, the First Fora framed the issue about the house being leased out to the defendant and whether it is proved that there was oral agreement of tenancy, without having any evidence to establish the tenancy or that the rent was paid or that there was discontinuation of payment of rent, the said points have been answered in the affirmative. The DW-1 a witness of defendant has admitted th tax entries in the name of Damaceno Gomes in respect of house

no. 68 and 69 and it is on this basis the court answered that the plaintiff is the owner and has rented out the premises by oral agreement to the defendant. The law as regards the evidentiary value of the tax receipt is well settled; particularly in case of rival claims to property, such entry though not evidence of title depending upon the scope of provision contemplating such an entry, at the most constitute evidence of such possession of property. The DW-1 has alleged the property in which their house is standing as the property of Comunidade and he deposed that permission was taken from Babli master to construct the house. True that Babli master has not been examined but the evidence brought on record by the defendants establish that they are occupying the house and the garage since last 35 to 40 years.

21. The trial Court has wrongly shifted the burden on the defendants to produce any documentary evidence on record to protect their possession to the suit structure. When the plaintiff assert his claim on the basis that he is the owner of the suit property and leased out the same to the defendant, the onus of proof is on the plaintiff. The title should be strictly established in accordance with law and mere preponderance of probabilities would not entitle him for a declaration in his favour and for possession against the defendants. Section 10 of the Evidence Act cast a burden on the plaintiff to prove a fact and onus of proving is on the plaintiff and in absence of his failure to prove

Tilak/msr.

so, the Suit should fail and the weakness of defendant is of no consequence.

In a suit for eviction based on relationship of landlord and tenant the Court has to decide whether the defendant is the tenant of the plaintiff or not and when the title is disputed, incidentally the question of title can be gone into. The Apex Court in the matter of *Dr. Ranbir Singh v. Asharfi Lal*, (1995 (6) SCC 580) referring to its earlier judgment in the matter of *Life Insurance Corporation of India v. India Automobiles and Company and others* (1990 (4) SCC 286), has held that in a suit for eviction based on such relationship of landlord and tenant, the Court has only to decide whether the defendant is the tenant of the plaintiff or not, though the question of title if disputed, may incidentally be gone into, in connection with the primary question for determining the question about the relationship between the litigating parties. In the matter of *Life Insurance Corporation of India v. India Automobiles and Company and others* (supra) it was held that in a suit for eviction between the landlord and tenant the Court will take only a *prima facie* decision on the issue as to whether the applicant and the opponent are the landlord or the tenant and if the Court finds the existence of relationship of the landlord and the tenant between the parties, it will have to pass a decree in accordance with law. It is further observed therein that the Court has to satisfy itself that the person seeking eviction is a landlord who has *prima facie* right to receive the rents of the property in question. In

other words, the exercise of analysing the material on record from the point of view of finding out whether the denial is *bona fide* or not can be undertaken only after the Court *prima facie* finds existence of the relationship of the landlord and the tenant between the litigating parties.

This conclusion is inevitable from the provisions contained in Section 21 read with Section 22 of the said Act.

22. No doubt, that in the present case the the defendants have taken contradictory stance as on the one hand, they have pleaded adverse possession on the other hand admitted to raise a plea of being a Mundkar of Clovis Gomes, the predecessor in title of the plaintiff. However, the plaintiff is not entitled to take benefit as the burden has to be discharged by him to establish that he was a landlord and an owner of the property and the defendant was his tenant. The claim that the defendant was a tenant, except the bald pleading has not been proved by rendering any positive evidence. The claim of tenancy as asserted in the plaint, is as vague as it could be when it is pleaded that in the suit property, apart from the house of the ancestors of the plaintiff, there is another house located referred to as an out-house (suit house) which was leased to the defendant about 18 years back. It is also plaintiff's case that before, it was leased out to one Joao Fernandes. The monthly rent payable by the defendant is alleged to be Rs.25/- and the suit house is

pleaded to be registered in the municipal record as house no.69. The suit which seek eviction raise a ground of failure on the part of the defendant no.1 to pay rent regularly and there is no payment of rent from June 1982. No evidence has been led to support the said pleading. The witness of the plaintiff Alia, depose that the defendant nos.1 and 2 started residing in the Loja (out-house) for about 25 years and her father and paternal uncle Damaceino had permitted him to reside as tenant. Her specific assertion is that the Loja was used as a store room to store coconut, firewood etc but the defendants had put up zinc sheets in place of palm leaves and extended on the southern side without her consent.

The case of the defendant as pleaded in the written statement before the Rent Controller in the first round of proceedings and filed on 4th August 1984 take a stand that the applicants are not the owners but co-owners of the landed property and he admitted that he has been residing in house bearing no.69. In the written statement, the respondent state that the suit house in which he has been residing was constructed by him some 32 years back in the property of one Clove Gomes who expired but he deny that he ever paid any rent for occupation of the house or for occupation of the ground under the house to John Gomes or any other person. The case of the defendant is they are residing in the suit house for more than 40 years which was constructed by them. In absence of the landlord/tenant relationship, he had opposed the jurisdiction of

the Rent Controller to entertain the case and took a plea of adverse possession. The attempt to raise a plea of Mundkar was, however, not permitted and therefore, cannot be gone into.

23. When the relationship as a tenant has not been established by the plaintiff by bringing any positive evidence on record, and since in the first round of litigation, the Rent Controller who conducted an inquiry under Section 21 of the Act has returned a finding that the denial of the relationship was bonafide and the finding which is not challenged and has attained finality has been simply ignored by the trial Judge. It is admitted by the plaintiff that the respondent is residing in House No.69, whereas the house of the plaintiff is distinct and separate from house no.69, it being house no.68. The possession of the defendant in the suit premises has not been disputed by the plaintiff and the defendant has adduced evidence to the effect that prior to 40 years, the dwelling house was constructed by him and he started residing in the said house. Before the Rent Controller, the defendant has admitted that Clovis Gomes had permitted him to construct the dwelling house at Sateri Navelim but he raised a doubt about the title by asserting that he do not know to whom the property belongs to. The garage which is being run in the premises has been proved to be standing there since last 40 years and by examining a witness who deposed that since 35 years, he was taking his car to the said garage, the defendant has asserted and proved his possession since the

construction of the suit house. The finding recorded by the Appellate Court, reversing the finding of the trial Court about the ownership of suit property is not dependent on the claim set up by the defendants pleading adverse possession. Once the defendant has raised a cloud over the title of the plaintiff, the plaintiff will have to establish his title and ownership when he seeks a relief of eviction by approaching the Civil Court.

The defendant has examined Sakharak Bhende, a Surveyor who was engaged to measure the property and to demarcate the same from the property of Comunidade. On perusing the survey plan, and on visiting the site, he had prepared an inspection report which has been exhibited as Exhibit D3/A which is accompanied with a sketch. The said witness was also appraised of the inventory which covered item no.1, property known as 'Mordi' and item no.2 property Nomoxim Santeri situated at Navelim. Demarcating the properties of the plaintiff and the defendants, the inspection report reveal that the existing garage workshop of the defendant fall in the property of Comunidade of Margao. The site plan exhibited along with the inspection report is reflective of the two properties which form part of the inventory and as far as the property of the defendant is concerned, it is on south side of the property of Er Pascoal Manual Piedad Gomes. The witness has deposed that on three sides of the garage, there is a Comunidade land and to the north of the house of Umesh i.e. the defendant is the property of Pascoal Gomes who is a plaintiff in the suit. The two properties

of Antonio Gomes are described as Naxocim and 'Mordi'. The deposition of the said witness is based on inventory documents and topography at site. The house of Antonio Gomes in Naxocin is described by the said deponent to be ruined house surrounded by shrubs. The two houses are located in Chalta No.3 but there is no document proving the ownership of the plaintiff or the defendant on the Chalta No.3 of P.T. Sheet No.305 except the record of right and the inventory proceedings without its matrix number or chalta number but described by its nomenclature and that it has devolved upon the plaintiff, but the defendant has proved his possession over the suit property on the basis that the construction of the house is by him. In the written statement of the defendant filed in the earlier proceedings before ARC he has taken a stand that the suit house was constructed by him about 40 years back and since then, he is residing there without any obstruction.

24. The witness examined on behalf of the plaintiff has failed to trace the origin of the said property in the hands of the parents of the plaintiff. No document of inscription and description as regards the said property has been brought on record. In absence of any title documents have been placed on record and the evidence of PW no.1 about being unaware as to how the property was being inherited by Antonio, her grandfather the issue no.1 is rightly answered by the Appellate Court. The findings rendered by the trial court have been rendered

Tilak/msr.

unsustainable since recorded only on the basis of the documents of inventory and the survey register. Since the defendants have established the possession over the suit property merely because the tax receipts are in the name of the plaintiff would not contrast his claim of possession and establish the claim of plaintiff of ownership. Another document placed on record is a certificate issued by Chief Officer, Margao Municipal Council which is a recent document dated 23rd March 1998 certifying that the House Asset Vide No.69 at Satari Margao is in the name of Dama Ceno Gomes. The property number in the assessment register is recorded as 119 and the occupier is described as Sada V. Chari. The document reflect that the house was assessed to tax. Apparently, the record of assessment would also not lead to a conclusive evidence of ownership of the plaintiff. The question for determination as question no. (A) and (B) formulated in the appeal are answered in the affirmative by upholding the findings of the Appellate Court.

25. Answering the substantial questions of law framed in the appeal in the affirmative and finding no legal infirmity in the judgment of the Appellate Court, the findings rendered are upheld. The suit for eviction filed by the plaintiffs without seeking a declaration of ownership, particularly when the defendants are in possession of the suit property since last 40 years and since cloud was created on the plaintiff's title, the relief of eviction simpliciter cannot be granted. The Appeal,

questioning the judgment of the Appellate Court deserve a dismissal and is accordingly dismissed.

BHARATI DANGRE, J