

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.94 OF 2005**

Shri Constancio Luis Caetano
Rubina Lobo alias Constantino Luis
Coetano Rubino Lobo alias Louis
Caetano Lobo,
Since deceased, represented by his legal
heirs:-

- (a) Shri Hubert Lobo
of major age, and his wife
- (b) Smt. Ophelia D'Souza Lobo,
of major age,
Both residing at House No.124/H,
North Bombay Co-operative Housing
Society, Juhu, Bombay.
- (c) Smt. Suzanne Lobo Fernandes,
of major age, housewife and her
husband,
- (d) Shri Cleto Fernandes,
of major age,
Both residing at House No.: 298/15,
Kilachand Bldg., Princess Street,
Bombay – 400 002.
- (e) Smt. Julie Luis Lobo (deceased)
of major age, housewife,

Both residing at North Bombay Co-operative Housing Society, Juhu, Bombay.

All represented by their duly Constituted Attorney, Shri Joviano Joel Dias, of major age, residing at Ambora, Camurlim, Salcete, Goa.

Appellants

(Original Plaintiffs)

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V/s.

- 1 Smt. Leandrina Antao
widow, of Ligorio Francisco Dias, of
major age, housewife, (deceased through
legal representatives 2(a) and 2(b)
- 2 Shri Ligorio Francisco Dias alias
Lourencino Dias, since deceased,
represented by His legal heirs,
 - (a) Shjri lincoln Nestor Dias,
of major age, occupation service,
residing at H.No.134, Taluka Salcete,
Goa
 - (b) Mrs. Greffa Dias,
wife of Respondent no.2(a)
- 3 Smt. Ludovino Antao, since deceased
represented by Legal heirs:-
 - 3(a) Shri Sebastiao Antao,
son of Jose Francisco Antao,

- of major age,
housework, and his wife,
- 3(b) Smt. Clelia Antao,
of major age, housewife,
- 3(c) Shri Antonio Antao,
son of Jose Francisco Antao, of major
age, landlord,
- 3(d) Smt. Nora A. Antao, of major age,
housewife,
- 3(e) Shri Inacio Antao,
son of Jose Francisco Antao,
of major age, landlord, and his wife,
- 3(f) Smt. Maria Antao, housewife,
of major age,
- 3(g) Shri Reginaldo Antao,
son of Jose Francisco Antao,
of major age, businessman, and his wife,
- 3(h) Smt.-Rosy Antao, housewife,
of major age,
- 3(i) Shri -John Brito Antao,
son of Jose Francisco Antao, landlord,
and his wife, 3(i) of major age,
- 3(j) Smt Jessy Antao,
of major age, housewife,
- 4 Shri Jose Filipe Antao,
(Jose Francisco Antao)

of major age, landlord. (deceased)

All residing at House no: 133, C/o Zilla Bakery, Ambora, Taluka Salcete, Goa.	Respondents
(The above address is the	(Original
registered address of the respondents)	 Defendants)

Mr. M.B. D'Costa, Senior Advocate with Ms. Karishma Betquecar, Advocate for the petitioner.

Mr. Sudesh Usgaonkar with Ms. R. Pereira, Advocates for the respondents.

Coram:- SMT. BHARATI H. DANGRE, JJ.

Reserved on : 1st February,2021

Pronounced on : 11th February,2021

JUDGMENT:

1. The Appeal revolves around the property admeasuring 503 sq.m known as 'Mixto Sonarxeilem, 2nd Adicao or Mixto Sonarxetilem, situated at village Camurlim of Salcete Taluka and as averred in the plaint, is enrolled in the Revenue office at Margao under Matriz No.167 with an existing house registered in Taluka office under Urban No.85. The said property is surveyed under Survey No.109/7. The discord revolving around the property arises out of the description

of the said property given in the plaint by the plaintiff and the defence set up by the defendant in their written statement to the effect is that there exist no such property as described in the plaint and the survey holding no.109/07 of Village Camurlim forms part and parcel of the opponents bigger property described in land registration office of Salcete under No. 45018 and Matriz No. 166. The parties are in controversy about the ownership and possession of the said property.

2. The Appellant in this appeal is the plaintiff who instituted a Suit for declaration, possession and perpetual injunction vide Regular Civil Suit No. 294 of 1987 and since deceased, his legal heirs are on record. The respondents are the original defendants and on demise of the defendant nos.1, 2 and 3, their legal heirs are on record and are contesting the Appeal.

The suit for declaration and consequential possession as mentioned above was based on the property mentioned above and the plaint outlined the boundaries of the suit property shown under Matriz no.167 with the land registration no. 28030 at Folios 51-V of Book 'B' no.72, New series as Sonarxeta – Bata @ Gor Bata. The plaintiff claimed that the suit property referred to in paragraph 1 of the plaint

was in ownership, possession and title of one Mariano Angelino Dias and his brother Joaquim Antonio Dias and from whom the property devolved up on their daughter Maria, Santena Rita Carolina Dias. Upon her death, it is the plaintiff no.1 who claim the property by inheritance. The plaint pleaded that since the plaintiffs are residing at Mumbai and the defendant no.1, who owns a property to the West of the suit property, taking advantage of their absence has fraudulently entered the suit property in her name and that she has no right, title or interest in the suit property. On gaining knowledge about the plantation being done on the suit property and some laterite stones being pulled on the said property and when the attempt on the part of the plaintiff's attorney to examine as how the property has devolved upon them and not finding any satisfactory explanation, the suit is instituted on 1st October 1987 as the cause of action is pleaded to have arisen on or about June 1997 when the plaintiffs learned about the illegal acts of the defendants. It pleads that the Suit is within limitation and pray for judgment and decree declaring the plaintiff as owners in title of the suit property and for consequential possession thereof, with consequential deletion of the name of defendant no.1 from the Taluka Revenue Matriz and substitution of the plaintiffs name therein.

3. The pleadings in the plaint and the relief sought is denied by the defendants by filing a written statement. The defendants specifically denied the existence of the property described in the plaint and stated that the survey holding no.109/7 of village Camurlim form part and parcel of the defendants bigger property described in the land registration office of salcete under no.45018 and matriz under 166 with the following boundaries “*on the east by the street or municipal road; on the west by public road, on the north by first addition of the property Laquia Naicalet Patoly, of Augusto F. Boaventura Andrade, and on the south by the property Mixto Sonarxetilem bata of Jeremias A.de Carvalho and property of Patricio Caetano Dias, Pedrinho Dias and others.*” The defendants raised a plea of res-judicata by referring to the earlier proceedings of injunction filed by the plaintiff in the year 1966. Further the defendants pleaded that they are in enjoyment of the portion under Survey No.109/7 as owners since its acquisition. By amending the written statement, pursuant to order dated 31/08/1994 defendants without prejudice, claim to be in exclusive possession of part surveyed under Survey No.109/7 since the date of sale dated 28/09/1965 against owner or against any claimants thereof.

4. The first Court framed the following issues:
1. Whether the plaintiffs prove that they are in owner's in title of the property “Predio Mixto Sonarxetilem Adicao” or “Mixto Sonarxetilem”, situated at the Village of Camurlim of Salcete?
 2. Whether the plaintiffs prove that they are entitled for perpetual injunction restraining the defendants or any of them from interfering with the suit property and for direction to remove whatever plantation the defendants have carried out in the suit property?
 3. Whether the defendant prove that the suit is barred by doctrine of res-judicata?
5. The suit was decreed on 30th April 1996 by the Civil Judge, Jr. Division, Margao, declaring the plaintiffs as owners in title of the suit property and with a consequential direction that the name of the defendant no.1 be deleted from the survey record and instead, name of the plaintiffs to be inserted to the extent of 503 sq.metr.

6. While the decree was in Appeal, claiming that there is an accidental slip/omission in decree, an application was made by the plaintiff before the trial court for correcting the same. By taking recourse to Section 152 of C.P.C. the application was allowed on 18/02/1999 by inserting words 'and for consequential possession thereof'. This order was called a question in Civil Revision Application and on 16th March 2000, the High Court set aside the order passed by the Civil Judge, permitting insertion of prayer for consequential possession by invoking Section 152 of C.P.C.

Yet another application was moved before the Civil Judge under Order 6 Rule 17 for amendment of the plaint which was granted on 19/08/2003 by inserting prayer for restoration of possession. The proceedings landed in the High Court once again. On 9th January 2004, the Writ Petition was disposed of by granting relief to the effect that whether the prayer sought can be granted or not or whether it is barred by limitation, should be considered by the trial Court while granting the final relief. The amendment was thus allowed to be carried out by keeping the aspect of limitation open.

However the issue as regards the said point being not framed, though the written statement was amended, by invoking the

provisions of Order 41 Rule 25 of C.P.C., the Appellate Court remanded the matter back to the trial Court which gave its finding on 6th September 2004 on the additional issue. With these findings, the Addl. District Judge, South Goa, Margao, along with an application filed under Order 41 Rule 27 decided the First Appeal vide No. Regular Civil Appeal No.20 of 1996 on 22nd February, 2005. The Appeal was allowed by setting aside the judgment dated 30th April, 1996. Resultantly, the suit of the plaintiff bearing Regular Civil Suit No.294 of 1987 was dismissed. In the backdrop of these proceedings, the Second Appeal has been filed assailing the judgment in Appeal.

7. On 23rd February 2006, the Appeal was admitted on the following substantial questions of law :-

(A) Whether, in the absence of clear and specific pleadings that the possession of the defendant of the suit property was open, hostile and exclusive, and to the knowledge of the plaintiffs, adverse to the title of the plaintiffs and when possession became adverse; and further in the absence of specific claim of title to the suit property by adverse possession and failure on the part of defendant to

fulfill the ingredients of the principles of adverse possession, the suit of the plaintiffs could be dismissed holding that the defendants have proved adverse possession ?

(B) Whether, the claim of title to the suit property by way of a sale deed and claim of title by adverse possession can be raised as alternative pleas?

C) Whether, the constituted Attorney of the plaintiffs could depose on behalf of the plaintiffs when the evidence reveals that the facts pleaded in the plaint are entirely within the knowledge of the Authority?

8. During the course of arguments, Mr.Sudesh Usgaonkar, learned counsel for the respondent urged that another question of law arises in the Second Appeal and which needs to be framed, being “Whether the suit for declaration of ownership and recovery of possession is barred by the law of limitation”.

It is no doubt true that the Appeal filed under Section 100 of the C.P.C. is to be determined on the substantial question of law

formulated at the time of admitting the Appeal but by the proviso appended to sub-section (5) of Section 100, the High Court, if satisfied that the case involves any other substantial question of law, other than the one which was formulated at the time of admitting an appeal, it can determine the said question of law if it is satisfied that the case involves such a question.

9. On the question of law which has been proposed to be the one arising in the Appeal in form of substantial question of law as pointed out by the learned counsel Mr. Usgaonkar, the learned Senior counsel Mr. M. B. D'Costa, agree that the said question of law arises in the aforesaid appeal.

The question couched as a substantial question of law arises in the backdrop of the issue framed and findings recorded and by the First Court and the Appellate Court. While determining the issue as to whether the plaintiffs prove that they are the owners of suit property and whether they are in possession, in contrast when the defendants claim to be in possession of the larger block of property from the date of sale deed being 28th September 1965 and this is a specific stand taken by them in the written statement opposing the

plaint and has tendered oral evidence to that effect. Apart from this, the defendant has also brought on record the proceedings for injunction instituted by the plaintiff in the Court of Civil Judge, Sr. Division at Salcete in the form of “process of injunction on new construction” in the year 1966 where the injunction was rejected by the Civil Court. On the basis of the same, the defendant aver that the plaintiffs had knowledge of their title being disputed and the factum of possession of the defendant. The question that necessarily arose is whether the plaintiff's suit filed in the year 1987 is within limitation.

10. Reference to the proceedings also reveal that the aspect of allowing amendment to the prayer clause for restoration of possession was highly contested between the parties and in the year 2003, the prayer clause was permitted to be amended seeking restoration of possession on the basis of pleading that the plaintiffs were dispossessed in June 1987. The Suit seeking declaration, possession and perpetual injunction instituted by the plaintiff pleaded the cause of action to have arisen on or about June 1987, without reference to the earlier proceedings instituted by the plaintiff in form of summary proceedings seeking injunction on construction in the year 1966. In the backdrop

of the said factual aspect, the additional question referred to above does arise and since the learned senior counsel for the appellant also agree that such a question arise and agree and the Appeal is also heard on the additional question of law to the following effect :-

“(D) Whether Suit for declaration of ownership and recovery of possession is barred by the law of limitation”

11. I have heard the learned senior counsel Mr.M.B. D'Costa along with Ms. K. Betquecar, Advocate for the appellant and Advocate Mr. Sudesh Usgaonkar with Ms. R. Pereira for the respondent on the substantial questions of law.

According to the learned senior counsel Mr. D'Costa, the plaintiff has inherited the property described in para – 1 of the plaint from his mother Maria Santana Carolina Dias in whose name the property was registered in the land registration office at Salcete in the year 1922. The property had devolved upon her being daughter of Mariano Angelico Dias and his brother Joaquim Antonio Dias. The learned counsel rely upon the certificate issued on perusal of the register of land matríz of village Carmolin of Taluka Salcete which record the properties vide nos.166, 167 and 168, along with their

boundaries. The property under Matriz 167 is the suit property and it is claimed that the plaintiff is the owner of the said property and the certificate establish so. According to the learned counsel, the said property in Matriz no.167, was initially inscribed in the name of Mariano Dias and Joaquim Dias and subsequently inscribed in the name of the defendant, Leandrina Antao, described as the property bounded on the east by road, West and North Sonarxetilem, Batta of Antonio Cristovam Piedade Dias and others, and on the South by Sonarxetilem Batta of Antonio Cristovam Dias. He refer to the property under Matriz No.168 initially inscribed in the name of Antonio Dias and subsequently in the name of Leandrina Antao, the defendant. The description of the property- bounded on the east road, West Sonarxetilem Bata of Patricio Caitano Dias, on the north property of Mariano Dias and South, the property of Pedrino Casmiro Dias. The learned counsel would submit that this certificate dealing with Matriz Nos.166, 167 and 168 correspond with the boundaries of the suit property mentioned in the plaint. He would further submit that the certificate issued by the Registrar of Records of Comarca of Salcete which contain the description at Folios also refer the said property vide no.28030 as the property known as Sonarxeta - Bhat commonly known as Ghorbhat, 4th Division of the cultivation of trees

situated in village Camorlin bounded on east by public road on West and North with property of heirs of Jose Caitano Dias and on the South with Rivulet. The inscription of transfer recorded on 18th September 1922 record that Maria Santana Carolina Dias has been allotted the same in division of assets, on death of her grandparents Joaquim Antoa and his wife Maria Dias, landlords who held from Camurlim. The document state that the inscription is made in the light of the public deed executed in notes of Assistant Notary in Salcete on 15th Separately 1922. The learned counsel has also relied on the registration of births in the year 1930 recording birth of Constanico Luis Cateno Rubino Lobo (plaintiff) to Maria Santanio Rita Caralina Dias. The learned counsel would urge that the plaintiff is the son of Maria and a grand child of Mariona Angelico Dias, he has proved his title to the suit property and his title is registered. In order to rebut the claim of the defendant that the property has been purchased from one Jeremias Carvalho and that the property was allotted to him in inventory proceedings initiated by Dr. Gregorio Magno De Souza Antao, he would submit that the assets under item no.7 and 8 of the inventory identify the property only by matriz number and do not bear any land registration number. He would submit that the vendor of the defendant was allotted property under matriz no.166 and 168 but was

never allotted suit property bearing no.167. According to the learned Counsel the suit property admeasures an area of 503 sq.mt and the area of suit property shown in the survey plan relating to survey no.109 /7 will be 503 sq.mt but wrongly mentioned as 1075 sq.mt.

As per the plaintiff, the Sale Deed has wrongly inserted matriz no.167 and there is no title with the conveyor of the said property in favour of the defendant and therefore, he could not pass any title to her. He also heavily rely on the admission on part of the witness of the defendant who have admitted that the property acquired by Jeremias Carvalho was under matriz no.166 and 168 and he admitted that the defendant had purchased only two matriz number i.e. 166 and 168, but did not purchase matriz no.167.

As regards the objection about the earlier proceedings, the learned senior counsel would urge that the said proceedings were purely summary in nature and the claim staked by the plaintiff seeking injunction was rejected on 2nd February 1988 but these proceedings have nothing to do with the title. On another attempt of disturbance with the plaintiffs possession, the suit was filed in the year 1987 and it is specifically averred that the defendant had no interest and title in the suit property. In absence of the defendant being afforded an

opportunity to remand, according to the learned counsel, they have failed to prove continuous, actual, undisturbed possession of suit property and at no point of time, the claim of adverse possession was put forth. He would place reliance on the judgment of the Apex Court in **Krishnamurthy S. Setlur (dead) by LRS v/s. O.V.Narsimha Setty and others** [2007(3) SCC 569], and the judgment **State of Haryana v/s. Mukesh Kumar and others** [2011(10) SCC 404], to buttress his submission that adverse possession has to be specifically pleaded by reflecting upon the actual exclusive, undisturbed and continuous possession. He would support the judgment of the trial court which record that in 1965, Jerenias Carvalho did not possess any property rights or ownership rights in respect of suit property and he could not pass them to the defendants. The learned senior counsel submit that the finding recorded by the appellate court that the possession of the defendant is clearly adverse to the title of plaintiffs from the year 1966, is not based on any evidence brought on record. Further, the finding of the Appellate Court about the suit being filed in the year 1987 and being not tenable in view of Article 65 of the Limitation Act, is also incorrect is the submission.

12. Per contra, the learned counsel for the respondent Mr.Usgaonkar state that the property described in the plaint in fact do not exist at all. He would submit that the trial Court has referred to the property only by its matrize number 167 and he would urge that there is no basis for the trial court which presumed that matrize no.167 correspond to the property described under survey no.28030 without any material brought on record to that effect. The learned counsel Mr.Usgaonkar is critical of the submission advanced by the learned senior counsel about the admission of the witness of the defendant who is alleged to have admitted that they did not purchase matrize no.167. He submit that since there is no clear identification of the property of the plaintiff in the suit or during the entire proceedings and whatever evidence has been tendered is running contrary to the record, the admission is inconsequential. He would further submit that the claim of the plaintiff that matrize no.167 corresponds to land registration no.28030, is not at all established and this is in fact, borne from the record of the Commissioner in the earlier proceedings. The defendants have, according to him, relied upon the land registration no.45018 which was identified by the boundaries by the commissioner and the disputed area claimed by the present plaintiffs in the earlier proceedings admeasuring 775.98 sq.m was found to be included therein. The

learned counsel would submit that this is the reason why the proceedings for injunction was rejected. He would vehemently argue that the plaintiffs have not disclosed anywhere as to when they were dispossessed by the defendants and the name of the defendants was recorded as occupants since 1972 and the entry to that effect was never challenged. In light of the survey records, he would rely on section 105 of the Land Revenue Code about presumption which has not been rebutted. According to him, the plaintiff never stepped into the witness box and his attorney deposed on his behalf and in light of the said fact, he would submit that one of the question framed in the appeal is whether the constituted power of attorney of the plaintiffs would depose on behalf of the plaintiffs in respect of the matters which are entirely within the personal knowledge of the plaintiff.

13. In the Civil Suit instituted by the plaintiff, the issue which arose for determination, in the light of the prayers sought by the plaintiff, was whether the plaintiffs have proved their title as owners for the period mentioned in the plaint. The relief sought was dependent on the said issue. An additional issue was framed in terms of the order passed by the Additional District Judge in the Regular Civil Appeal and the Trial Court was to determine whether the defendants proved that

they are in exclusive possession of Survey No.109/7 as thereof, since the date of the Sale Deed dated 28/09/1965, against its alleged owners or against any claimants.

In support of the claim, the plaintiffs entered into the witness box through his attorney. The suit property was described to be the one enrolled in the Taluka Revenue office under matriz no.167. The boundaries of the said property were given by the attorney to be as under : “towards east by road, West and North by property Sonarxetilem, Bata of Antonio Christo Dias and others, with matriz no.166, on the South by property of Antonio Christova Dias and others bearing matriz no.168.” This property was said to be surveyed under survey no. 109/7. This very property was thereafter reflected in form no.I and XIV in the name of the defendant. The attorney also deposed that the plaintiff's property is described in the land registration officer under No. 28030 with the boundaries “towards east by public road, West and North with property Sonarxetilem, Bata of Jose Caitano Dias and others, on the South by Rivulet rain water drain. The said property is alleged to be registered in the name of Maria Santena Rita Carolina Dias since September, 1922 and the document of description and inscription of the said property with matriz no.28030 is brought on record. The certificate brought on record by

PW 1 refer to the property vide matríz no.167 initially inscribed in the name of Mariona Angelico Dias and Joaquim Antonio Dias and later on inscribed in the name of the defendants. The description of the said matríz number in the said certificate is “second part situated at village Karmolim of Salcete Taluka bounded on the east by road, West and North Sonarxetilem, Bata of Antonio Christo Dias and others, and on the South by Sonarxetilem Bata of Antonio Christova Dias. The sketch produced as PW1G reveal the location as a Rivulet on South of the suit property and to the West the property of inscription and description relied upon the plaintiff do not mention the matríz number but the description of the property at Survey no. 28030 is the property known as Sonarxetilem, Bata commonly known as Ghor Bata, (4th Division) situated in the Village Camorlin, bounded on the east by the public road and in the west with the property of Jose Caitano Dias and on the South by Rivulet. The defendants however dispute that the said property belonged to the plaintiff and they claim to be in exclusive possession of survey no.109/7 as owners thereof by virtue of the Sale Deed dated 28/09/1965.

14. The Court of Civil Judge relying on the certificate of description bearing no. 28030 of the suit property and the said corresponding inscription held that the suit property is bearing matriz no.167 and this corresponds survey no.109/7. By relying upon the said document exhibited as PW1E which in fact do not contain any mention of matriz number, an inference has been recorded that the plaintiff had successfully proved that they are owners of the suit property as mentioned in the plaint.

15. The Appellate Court dealing with the said issue record that the Trial Court has presumed that Matriz no.167 corresponds to the property described in No.28030 without any material. On perusal of the certificate at PW1B where the property claimed by the plaintiff is described as matriz no.167 and which was initially inscribed in the name of the predecessor of the plaintiff and subsequently in the name of the defendant, the said property defer in its boundaries since on the South it is described as bounded by Sonarxetilem, Bata of Antonio Christo Dias. On the contrary the document exhibited as PW1 the property claimed by the plaintiff which is described as 28030, on the south the description referred to a Rivulet. PW 1 E certified that

no.28030 inscribed in the name of Maria. The boundaries in the matriz survey thus do not tally with the land registration description. The nomenclature of the properties in the two certificates is also distinct. No material has been placed on record by the plaintiff to establish that property under matriz no.167 is the same property which is described under land description no.28030. The witness of the prosecution also failed to throw any light on the said aspect as he deposed that he is not aware about the details of the property and he was not aware of the same prior to 1987. The Appellate Court therefore has answered the issue about the plaintiff proving title to the suit property in the negative reversing the findings of the Trial Court.

16. The Appellate Court also draw its inference on the basis of the order passed in the process of injunction and on the basis of the report of inspection which was carried out when the defendant initiated construction in the suit property, described as Sonarxetilem, Bata described in the land registration office under no.45018 identified according to the factors attributed to the same property of the applicant indicated in the Croquis that an area of 775.98 sq.mt. It was verified by the 4th Division of the property Sonarxetilem, Bata alias

Ghor Bata had an area of 26.5 sq.mt Bamboos. On inspection it was recorded that in the said document boundaries are mentioned which do not confirm to the dimension of the sides and location of the 4th Division of the Croquis do not appear to agree with attributed boundaries because from the documents the same is bounded by West by the property of heirs of Jose Caetano Dias whereas in the Croquis it is bounded by water ditch. Further this property is not registered in the land registration office. Thus on the basis of the documents and on inspection of the site to locate the 4th Division, the expert did not opine that the construction was done in the property of the plaintiff.

Correction carried
out as per order
dated 11/03/2021.
Sd/-

On the basis of the said report injunction was refused. This finding dated ^{30/04/1966} ~~02/02/1988~~ has attained finality. Instead the plaintiff instituted a fresh suit claiming his ownership of the suit property as being enrolled under matriz no.167 and surveyed under Survey no.109/7 and known as Predio Mixto Sonarxetilem Adicao or Mixto Sonarxetilem. The plaintiff has therefore not proved the ownership of the suit property in contrast to the claim of the defendant to be in possession of the said property. On the additional issue framed vide issue no.5, the case of the defendants from the very beginning was to the effect that they are the owners of the property under matriz no.167 which is bearing registration no.45018.

17. The defendants traced their title to the said suit property on the basis of the Sale Deed brought on record by the defendant no.1, the property is being purchased from Jeremias Xavier De Carvalho. The property purchased in the Sale Deed is described as rustic property "Sonarxetilem bata" described in the Land Registration Office of judicial sub-division of Salcete under no. 45018 and inscribed in the respective matriz no.166 and 167. Another property purchased by the same Sale Deed was the property known as "Mixto Sonarxetilem Bata" described in Land Registration no. 45019 inscribed in matriz no.168. The vendor of the defendant has inherited the said property in the inventory proceedings ~~under tenancy~~, brought on record and exhibited as exhibit ~~PW4~~^{PW1/H}. The inventory proceedings covered the property under matriz no. 166 known as "Sonarxetilem Bata" as well as the property under item 8 known as "mixto Sonarxetilem Bata" under matriz no.168 along with another property under matriz no.173 with which we have no concern. The said inventory proceedings refer to the properties by matriz number. The Sale Deed referred to the property purchased by the defendant by land registration number and also the properties covered under matriz number. The defendants have therefore traced the title to the suit property on the basis of the sale deed and have claimed to be in possession of the said property since the said

Correction carried
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date. The initiation of the proceedings by the plaintiff in the year 1966 seeking injunction on the construction by the defendant and inscribing in the property of the plaintiff itself demonstrate that the defendant initiated the construction in the year 1966 itself, pursuant to the acquiring of the said property through the sale deed. The sketch plan of the suit property was placed on record and since no injunction was granted in favour of the applicant, the defendants continued to be in possession of the said property.

18. While instituting the suit seeking declaration, possession and perpetual injunction, the plaintiff claimed to be in ownership, possession of the suit property based on inheritance from Maria in whose name the property inscribed in the year 1922. The relief sought in the suit is a declaratory relief and consequential possession of the property. The record reveals that thereafter attempts were made by the plaintiff to amend the decree which declared them owners in title but did not grant him possession. The judgment came to be amended in terms of the order dated 2/04/1999 wherein the defendants were directed to put the plaintiffs in possession of the suit property forthwith. This itself is reflective of the fact that the plaintiff was not in

possession of the property and the issue of whether the plaintiffs were justified in amending the plaint seeking an amended decree was itself subject matter of further litigation and ultimately the high court permitted the amendment subject to the rider that the Court would also consider whether the prayer sought can be granted or whether it is barred by limitation and while granting the final relief the issue was directed to be considered. This resulted in determination of the issue of limitation by the Appellate Court whether the amended prayer clause for restoration of possession is within time since it was introduced in the year 2003. Even after assuming that the amendment relates back to the date of institution of the suit that is in the year 1987, the question for determination would be whether it is within limitation. Article 65 of the Limitation Act gets attracted in the present case since the possession was sought on the basis of title and the period of limitation prescribed under Article 65 has been 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. The evidence brought on record reveal that it is in the year 1966 itself the defendants had disputed the title of the plaintiff and claimed possession over the suit property. The proceedings of 1966 itself are indicative that the defendants claimed their title and possession over the suit property adverse to that of the plaintiff and would be the starting point of

limitation for instituting a suit by the plaintiff. In the suit filed in the year 1987 there is no averment about the earlier proceedings being instituted by the plaintiff. The cause of action in the suit instituted in the year 1987 has been averred to be accrued in the month of June, 1987 when the plaintiff through the attorney and some third person became aware of the alleged illegal acts of bringing of some laterite stones to undertake construction of an illegal compound wall or some other illegal construction. It is for the plaintiff to seek a declaration on discharging the initial burden of proving the title. Once the title is established on the basis of the document and other evidence, unless the defendant proves adverse possession for the prescribed period plaintiff cannot be non-suited. In the present case the plaintiff has not shown the actual date from which he is disposed but the defendant has brought on record ample evidence by examining the defence witnesses and has proved that the defendant is in possession of the property for the last 35 years. The plaintiff has not brought on record any evidence to show his possession over the suit property and on the contrary the PW1 has stated in evidence that the laterite stones were brought by the defendant on the suit property in the month of June 1987 and the defendant no.1 had fraudulently entered her name in form I and XIV since the year 1972. In absence of any positive evidence of possession,

the whole exercise attempted by the plaintiff to seek restoration of possession by amending the relief sought in the plaint. Clearly this prayer for restoration of possession in light of the evidence placed on record by the defendant is clearly hit by limitation precised under Article 65.

19. By the suit, the plaintiff sought declaration, possession and perpetual injunction qua the property mentioned in para 1 of the plaint. The plaintiff has relied on the Land Registration document in the name of his predecessor and the entry affected in the year 1922. There is no pleading to the effect that the plaintiff is in possession of the suit property. On the other hand, the pleading is to the effect that they are permanently residing at Bombay prior to 1961 and it is only when they were informed by the plaintiff's Attorney they become aware that the defendant no.1 has fraudulently entered her name in the survey records. It is admitted that the defendant no.1 owns a property to the West of the suit property but taking advantage of the plaintiffs absence from Goa fraudulent entries are recorded. The cause of action in the suit is alleged to have accrued in or about June 1987 when the plaintiff became aware of the alleged illegal acts. The suit primarily

therefore sought a declaration that the property belong to them and the defendants have no right, title and interest in the suit property and sought consequential possession. Injunction was also prayed for restraining the defendants from interfering in the suit property. The cause of action for the proceedings was the construction being undertaken by the defendants in the property adjoining on the northern side and the greater part of which encroaches in the property in question. Injunction was therefore sought on the construction as a precautionary step. The claim was refuted by the defendants by clamping it as unfounded. The sketch plan on which the claim was staked was said to be sketchy without there being any element, signs or points separately or demarcation.

20. During the course of the injunction proceedings witnesses were examined and the documents were inspected. A report was prepared on verification of the site which recorded to the following effect:

“It is verified at the site that a house indicated in the plan at pages 8 is under construction. The sae is constructed upto the plinth --- which has the height of 80 cs and in

the front portion which comprises three compartments, the walls have come to the height of two metres. It can be seen some heaps of land which appear to be vestiges of ruins of a house as indicated in the same plan. The property “Sonarxetilem-Bata” of the supplicate Leandrinha, described in the Land Registration Office under No.45018 (Exh. at pages) identified according to the boundaries attributed to the same property of the applicant indicated in the croquis with an area of 775.98 square metres it is included therein. From the documents referred to at pages 5 and another which the representative of the applicant showed to the expert calls for its annexation. It is verified that “the fourth division of the property “Sonarxetabata” alias “Gorbat” has an area of 26.5 square bamboos. In the same documents mentioned area only the boundaries which do not conform to the dimensions of the sides. The location of “forth division” of the croquis does not appear to agree with the attributed boundaries, because from the documents the same is bounded on the west by the property of the heirs of Jose Caetano Dias whereas in the Croquis it is bounded

principally by the “water ditch”. Besides this it is not evident from the application that this property is registered (described) in land registration office.”

Correction carried
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dated 11/03/2021.
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Pertinent to note that the proceedings were culminated by
30th April, 1966
order dated ~~2nd February, 1988~~ by dismissing the application for
injunction.

21. The witness of the prosecution i.e. the Power of Attorney admit that such proceedings were filed and dismissed. About the suggestion that the defendants were enjoying the property prior to 1997 when the suit was filed, he responded in the negative. The earlier proceedings though in the nature of summary proceedings record a finding on consideration of the rival claim and on examination of the witnesses and documents and apart from this a factual inspection report which record that the location of fourth division of the croquis of the applicant do not appear to agree with the attributed boundaries. On the other hand, the property “Sonarxetilum Bata” of Leandrinha, the defendant is described in the land registration no. 45018 was identified by the boundaries with an area of 775.98 sq.mt. The plaintiff has claimed that the suit property is under matríz no.167. The

description and inscription register relied upon in support of the claim of the plaintiff as contained in Book B and Book G of the register of records in the name of Maria Santana Carolina Dias bearing no.20100. There is no connection whatsoever between matriz no.167 and the land description no. 28030. Comparing these two documents, they are at variance; since the document recorded under matriz no. refer the property is bounded on east by road, west and north “Sonarxetilem Bata” of Antonio Cristovao Piedade Dias and other on south “Sonarxetilem Bata” of Antonio Cristovao Piedade Dias in the register of records the property with description 28030 is described as situated in village Camurlim, Parish of Raia bounded on east by the public Road, on the west and north with property of heir of Jose Caetano Dias and on south with Rivulet. This is the property under land description no.28030 which was in inscription of the predecessor of plaintiff no. 1 i.e Maria Santana Carolina Dias.

22. Pertinent to note that the old Portuguese regime had established record ward wise and village wise, the records known as matriz provides information about topography, nature and quantum or produce of crops and identification of properties with name of owners

of properties forming the boundaries of the unit of land. Under the old registration number every unit of property was described by its registration number in book B and ownership of the unit in Book G. On liberation of Goa the land revenue came to be enacted in 1968 and thereafter the properties were surveyed and survey numbers and subdivision numbers came to be recorded in the record of rights in Form No.1 and Form No.XIV. In order to establish that the properties which are described in the matrix is the same which has been recorded in the Registration Act, the plaintiff ought to have placed on record the entries reflecting the match between the properties in the matrix and the land description no.28030. On utter failure of the plaintiff to demonstrate so, the declaration in his favour as being owner of the property was rightly set aside by the Appellate Court by returning a finding that the document relied upon by the plaintiff is only the matrix certificate and it is not established that matrix no.167 corresponds to land registration no. 28030. Since the plaintiff has filed suit claiming possession and subsequently sought restoration of possession, it can be inferred that plaintiff was not in possession of the suit property at the filing of the suit. The plaintiff has not proved that they are owners of the suit property and therefore the Appellate Court has rightly reversed the finding of the first Court to the effect that the

plaintiffs are owners of the suit property and therefore entitled for declaration to that effect along with consequential relief. Hence, **Question 'A' is answered in affirmative.**

23. The additional issue framed by the first Court as issue no.5 in terms of the order passed in appeal is to the following effect “whether the defendants prove that they are in exclusive possession of survey no.109/7 as owners thereof since the date of sale deed dated 28/09/1965, against its alleged owner or against any claimants?”. The said issue was answered partly in favour of the defendant on the matter being remitted back to the first Court. The defendant has entered into the witness box through the Power of Attorney being her brother and also examined 5 other witnesses in support of their claim that they were in possession of the suit property under survey no.109/7 as owner since its acquisition. The written statement was amended and without prejudice to the said stand, it was pleaded that they are in exclusive possession of the portion surveyed under survey no.109/7 since the date of sale deed 28/9/1965 against its owner or against any claimants thereof. The defendant has brought evidence on record to show that they were in exclusive possession of the suit property after its purchase.

A copy of the sale deed through the defendant stake of their title from Jeremias Xavier Carvalho was exhibited. The sale deed of document referred to three properties being a) Rustic property "Sonarxetilem batta, described in the Land Registration Officer of the Judicial Sub-Division of Salcete under number Forty Five thousand eighteen (45018) at pages seventy six of the book B-117 new and inscribed in the respective matriz under numbers one hundred sixty six and one hundred sixty seven(167); b) Rustic property called "Mixto Sonarxetilem batta" described in the same Land Registration Office under number forty five thousand nineteen (45019) at pages seventy six overleaf of the said book B.117 new, and inscribed in , the Matriz under number one hundred sixty eight (168) and also one another property with inscription no.49116 with which we are not concerned. . The vendor of the defendants inherited the said property through the inventory proceedings which are brought on record by the plaintiff. The plaintiff had however not bothered to challenge the Sale Deed though executed on 28/09/1965 and was always aware that the defendants had stake their claim through the said Sale Deed. The defendants have proved their possession on the suit property from the time of Sale Deed by effecting pleadings to that effect and also by adducing evidence in support of the said pleadings. Apart from the

power of attorney holder one of the defendants Reginaldo Antao had entered in to the witness box and has deposed about the actual location of the property and specifically deposed that after purchase of the property the defendant no.1 had constructed the house in the year 1966 and carried out the cultivation on the said land. It is specifically stated that regular agricultural operations had been done by the defendants and their family members. The said witness had exhibited personal knowledge about the trees being planted by the defendant no.1 and his mother in the year 1965 and 1966 when the house was under construction. Though he has admitted what was acquired by the defendant was the property under matríz no. 66 and 168 and not 167, the plaintiff cannot harp on the said admission as what is not relevant is not the admission but the document and since there is no identification of the property by the plaintiff commensurating with the land registration number, this admission was not of any relevance. The finding recorded by the Appellate Court that the defendant was in possession of the said suit property since the date of Sale Deed therefore needs a confirmation.

24. The claim of the plaintiff/ appellant that the defendant failed to prove that he was in continuous, actual and undisturbed possession as was pleaded by the defendants in the written statement. The defendants have placed the Sale Deed on record and pursuant to the said document, the name of the defendant has been entered in the survey record in Form of survey no.109/7. It is no doubt true that survey entries are only prima facie evidence of being in possession and are not conclusive proof of title, in terms of Section 105 of The Goa Land Revenue Code, the said presumption however is rebuttable. From the time when the survey entries are affected in the name of the defendants the plaintiffs have failed to rebut the same that they are in possession. The case of the defendants from the very beginning is that they are in possession on the basis of the Sale Deed in their favour in respect of land under land registration no. 45018 which is inscribed in matrizes nos.166 and 167. The property registered in the name of predecessors of the plaintiff is vide registration no.28030 and therefore it is not the same property which is occupied by the defendant. Burden lies on the plaintiff to prove that the property is owned by them and that they are in possession of the property. The property described in the plaint has been found to be a portion of the larger part of the property belonging to the defendants under land registration no.45018 and is

clearly identifiable. The defendant has raised a claim of title to the suit property by way of the Sale Deed and adverse possession was claimed by way of an alternative plea.

Whether the claim by adverse possession can be raised on the alternative plea is settled by the judgment of Apex Court in case of **L.N. Aswathama v/s. P. Prakash** [2009 13 SCC 229] and in facts which are somehow identical to the case in hand where the defendant asserted right of title over suit property derived through a person other than a plaintiff owner and adverse possession and also there was discrepancies in the bhata number of the suit property, the question as to whether the adverse possession can be claimed as an alternative plea was examined and the said issue was answered in the following paragraphs of the law report:

“18. We are however of the view that the decision in Mohan Lal (supra) relied on by the plaintiffs is inapplicable, as the defendant therein had pleaded that he was in possession, having obtained possession in part performance of a sale agreement. As the defendant therein admitted that he came into possession lawfully under an agreement of sale and continued to remain in such

possession, there was no adverse possession. This case is different, as the defendant did not contend that he entered possession under or through the plaintiffs. His case was that he was in possession as a tenant under Gowramma from 1962 and he became the owner by purchasing the plot from Gowramma in 1985. He alternatively contended that if Gowramma did not have title and consequently his claim based on title was rejected, then having regard to the fact that he had been in possession by setting up title in Gowramma and later in himself, his possession was hostile to the true owner; and if he was able to make out such hostile possession continued for more than 12 years, he could claim to have perfected his title by adverse possession. There is considerable force in the contention of defendant provided he is able to establish adverse possession for more than 12 years. When a person is in possession asserting to be the owner, even if he fails to establish his title, his possession would still be adverse to the true owner. Therefore, the two pleas put forth by the defendant in this case are not inconsistent pleas but alternative pleas

available on the same facts. Therefore, the contention of the plaintiffs that the plea of adverse possession is not available to defendant is rejected.”

In light of the said authoritative pronouncement when the defendants have produced evidence on record to show that he was in possession of the suit property for a period of 12 years prior to filing of the suit and this claim was set out by him by way of an alternative plea to his claim of title. Hence, **Question 'B' is answered in the affirmative.**

25. Coming to the additional question of law being whether the suit filed by the filed by the plaintiff is barred by limitation the defendant has brought on record the proceedings instituted by the plaintiff in the year ¹⁹⁶⁶~~1964~~ and by seeking a amendment in the prayer clause for restoration of possession which was allowed in the year 2003 and even if it relate back to the date of filing of the suit in the year 1987, the permissible limitation would be governed by Article 65. A suit for possession of immovable property or any interest therein based on title, by virtue of Article 65 of the limitation act is to be filed within 12 years from the date the possession of the defendant becomes adverse

Correction carried
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to the plaintiff. In the year 1966 itself the plaintiffs were aware that the defendants have disputed their title and are claiming the ownership and possession of the suit property. The defendants in the proceedings in the nature of injunction itself stake their claim of title which was adverse to the plaintiff and, therefore, I have no hesitation in holding that the limitation would start running from the year 1966. By not initiating any action till ¹⁹⁷⁸ ~~1987~~ i.e. by instituting any suit claiming declaration and restoration of possession which remedy the plaintiff had resorted to in the year 1987, the suit for declaration and recovery of possession is clearly time barred. The Trial Court did not framed the issues but since when the matter was remanded by the High Court on allowing the amendment, the question of limitation was permitted to be decided while granting the final relief and it was accordingly considered by the Appellate Court and in any case the said question being pure question of law, it was permissible to be raised at that stage. The possession of the defendant is clearly adverse to the title of the plaintiff from the year 1966 and the suit has been filed in the year 1987 seeking the declaration of ownership of title and for restoration of the possession clearly leading to a conclusion that the plaintiff was not in possession. The suit filed by the plaintiff is therefore barred by limitation. Hence, **Question 'D' is answered in the affirmative**

26. As regards the substantial question of law raised in point no. C, the position of law is well settled by the catena of decisions. In **Mohinder Kumar v/s. Santa Paul Singh [(2019) 9 SCC 358]** the Apex Court has held as under :

6. We have considered the submissions on behalf of the parties. It is an undisputed fact that the suit property stood redeemed from mortgage on 04.07.1989. The appellant sent due intimation by registered post to the respondent on 27.07.1989 and also provided him with a photocopy of the release deed, requiring the respondent to take steps for execution of the sale deed. The respondent by reply dated 02.08.1989 insisted on the nodues certificate, denying receipt of the release deed. The respondent then gave a power of attorney on 02.11.1989 to PW1. The witness was naturally unaware of the preceding events and denied receipt of the notice dated 27.07.1989 itself. The witness was therefore also incompetent to deny receipt of photocopy of the release documents by the respondent. It was for the respondent to establish his readiness and willingness for execution of the agreement by entering the witness box and proving his

capacity to pay the balance consideration amount. Except for the solitary statement in the plaint no evidence whatsoever was led on behalf of the respondent with regard to the same, if PW1 was competent to depose with regard to the same because these were facts which had to be personal to the knowledge of the respondent alone. Had the witness even led any documentary evidence on behalf of the respondent, in support of the plea for readiness and willingness on part of the respondent, different considerations may have arisen. The witness also sought to deny any knowledge regarding the cancellation of the agreement on 01.09.1989.

*7. In **Janki Vashdeo** (supra), it was held that a power of attorney holder, who has acted in pursuance of the said power, may depose on behalf of the principal in respect of such acts but cannot depose for the principal for the acts done by the principal and not by the power of attorney holder. Likewise, the power of attorney holder cannot depose for the principal in respect of matters of which the principal alone can have personal knowledge and in respect of which the principal is entitled to be cross-*

examined. In our opinion, the failure of the respondent to appear in the witness box can well be considered to raise an adverse presumption against him as further observed therein as follows :

“15. Apart from what has been stated, this Court in the case of Vidhyadhar v. Manikrao observed at SCC pp. 583-84, para 17 that:

“17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct....”

The legal position as to who should give evidence in regard to the matter in personal knowledge is no more res integra and the various situations have been culled out, include a situation, where an attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit. If he has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be

examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, in regard to such act. A clear embargo has been imposed on the attorney holder who cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

In the light of the said settled position of law when the evidence of PW1 power of attorney holder for the plaintiff no.1 is perused, he has deposed on the aspect of the description of suit property and about the location of the property of the defendant no.1. On cross-examination he has admitted of not having knowledge about the important aspect as who was the caretaker of the suit property prior to filing of the suit or the details revolving around the property like to whom the drain located on south of the suit property belonged to. He is not aware of the personal affairs of Maria which reflect that he is not aware of the details of the property and the relationship of the plaintiff to the property and these are the matters which are within the personal knowledge of the plaintiff and the defendant could not have been a competent witness to establish the claim stake in the plaint about the

ownership, possession and title to the suit property. Hence, **Question 'C' is answered in negative.**

27. Another aspect of the matter, also need a mention. As the application was filed before the Appellate Court under Order 41 Rule 27 of CPC (Exhibit 28) and the same was strongly contested amongst the parties, the same was kept pending by the Appellate Court till the matter was argued finally, by placing reliance upon the decision of **K. Venkataramiah v/s. A. Seetharama Reddy** [AIR 1963 SC 1526]. On examining the same, at the time of hearing, the Appellate Court did not consider it necessary to take the documents on record as additional evidence, in the light of the discussion on other issues i.e. plea of limitation and discussion on point Nos.2 and 3 in the judgment. The approach of the learned District Judge, being in tune with the procedure to be adopted while considering the application under Order 41 Rule 27 of CPC, it calls for no interference.

28. Question of law vide question Nos.A, B, C and D, being answered above, the Second Appeal stands dismissed, by upholding the

Correction carried
out as per order
dated 11/03/2021.
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judgment and order passed by the Additional District Judge , South
1996
Goa, Margao in Regular Civil Appeal No.20 of ~~1999~~. No order as to
costs.

SMT. BHARATI H. DANGRE, J.

Tilak/mv

MEENA
VISHAL BHOR