

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.113 OF 2006

1. Shri Pundolik Rama Gad
(since dec. through LR's)

1(a) Shri Rama Pundalik Ga,
age 60 years, Son of late Pundalik Gad.

1(b) Smt. Janaki Rama Gad,
age 55 years, daughter-in-law,

1(c) Shri Laximikant Pundalik Gad,
age 56 years, son of late Pundalik Gad
(since dec. through LR's)

1(c)(i) Siddhesh Laxmikant Gad

1(c)(ii) Sarvesh Laxmikant Gad

Both residents of Row House No.6,
Sayyadri Enclave A. Durgabhaat,
Ponda-Goa.

1(d) Smt. Savita Laximikant Gad,
age 53 years, daughter-in-law,

1(e) Shri Namdev Pundalik Gad,
age 48 years, son of late Pundalik Gad,

1(f) Smt. Namita Namdev Gad,
age 45 years, daughter-in-law,

1(g) Shri Sanjay Pundalik Gad,
age 42 years, son of late Pundalik Gad

1(h) Smt. Shamal Sanjay Gad,
age 38 years, daughter-in-law,
All residents of H.No.99-A,
Gaonkarwadda, Usgao, Ponda, Goa.

1(i) Smt. Priya Datta Raut Desai,
age 48 years, daughter, married,

1(j) Shri Datta Krishna Raut Desai
(since dec. through LR's)

1(j-1) Mandar Datta Dessai,
Son, age 22 years, r/o. Avanti Nagar,
Behind Cine Kamla, Tisk,
Usgao, Ponda, Goa.

1(j-2) Smt. Dipali Mangesh Gauns,
daughter, major, married

1(j-3) Shri Mangesh V. Gauns,
Major, son-in-law,
Both resident of Amegal, Pali,
Taluka Bicholim-Goa.

1(j-4) Shri Sachin Shrikant Sawant
Talaulikar, son-in-law, major.

1(j-5) Smt. Swasti Sachin Sawant
Talaulikar, major, married,
Both residents of Forest Quarters No.2,
Opposite Central Hospital, Tiska.

2. Shri Shantabai P. Gad,
major,
both residents of Gaunkarwaddo,
Usgao, Ponda-Goa.

... Appellants

Versus

Shri Ganesh P. Deulkar
(since dec. through LR's)

1(a) Shri Mohan alias Puttu Ganesh

Deulkar

1(b) Shri Damodar Ganesh Deulkar
(since dec., LR's already on record)

1(c) Shri Manguesh Ganesh Deulkar
sons of deceased respondent no.1
All residing at House No.817, Tisk,
Usgao, Ponda-Goa.

1(d) Smt. Suvarna Prakash Priolkar

1(e) Shri Prakash Kanta Priolkar
(since dec. through LR's)

1.e.1 Pratiksha Prakash Priolkar,
12 years. d/o. deceased respondent no.1.e

1.e.2 Parth Prakash Priolkar
Aged 5 years
Both residents of Davorlim
Salcette, Margao-Goa.
Through their legal guardian respondent
no.1(d)

1(f) Smt. Shanti Digambar Shetkar

1(g) Shri Digambar alias Ganpat Shetkar
daughter and son-in-law of dece.
respondent no.1.

Both residing at Vargao, Marcel, Goa.

1(h) Smt. Savitri G. Deulkar (since dec.)
widow of dec. respondent no.1 residing at
house no.817, Tisk, Usgao, Ponda Goa.

2. Shri Vasant P. Deulkar
(since dece. Through LR's)

2(a) Smt. Tulsi Vasant Deulkar,
major of age, W/o. Vasant T. Deulkar is
already on record as respondent no.3.

2(b) Sanju Vasant Deulkar,
major of age, S/o. Vasant T. Deulkar,
since deceased is survived by following
LR's:

(i) Namita Sanju Deulkar,
major of age, W/o. Sanju V. Deulkar

(ii) Sanskruti Sanju Deulkar,
aged 6 years, D/o. Sanju Vasant Deulkar

(iii) Sarvam Sanju Deulkar,
aged 3 years, S/o. Sanju Vasant Deulkar,
resident of Gaunkarwado, Usgao, Goa.
(ii) and (iii) through guardian no.2(b)(i)

2(c) Milan Vasant Deulkar,
major of age, D/o. Vasant T. Deulkar,
married to Pramod Keshav Naik Priolkar.
Both resident of H.No.2479, Housing
Board Colony, Sankhali, Goa.

2(d) Prakash alias Rajendra Vasant
Deulkar, major of age, S/o. Vasant T.
Deulkar, married to Swati Prakash
Deulkar, Resident of Gaunkarwado,
Usgao, Goa.

3. Smt. Tulsi, w/o. Vasant Deulkar,
major.

4. Shri Vasudev P. Deulkar,
major,
All r/o. Gaunkarwado, Usgao, Goa.

.... Respondents

**Mr S.D. Lotlikar, Senior Advocate with Mr T. Sequeira,
Advocates for the Appellants.**

**Mr Sudin Usgaonkar, Senior Advocate with Ms T. Mashelkar,
Advocate for the Respondents.**

CORAM: M. S. SONAK, J.

Reserved on : 11th NOVEMBER 2022

Pronounced on : 14th NOVEMBER 2022

JUDGEMENT :

1. Heard Mr S. D. Lotlikar, learned Senior Advocate, along with Mr T. Sequeira for the appellant and Mr Sudin Usgaonkar, learned Senior Advocate, who appears along with Ms T. Mashelkar and Shukr Usgaonkar for the respondents.

2. The appellants are the original plaintiffs in Regular Civil Suit No.15/72/C seeking recovery of possession of the plot beneath the hut(house) occupied by Respondents (defendants) in the suit property and a permanent injunction to restrain the respondents - defendants from excavating or digging or causing damage or injury to the suit property.

3. The suit property is described in the plaint as follows:

" 1. The plaintiffs are the owners and proprietors of the property known as "Naicachem Betullem", situated at Usgao and bears matríz no. 492, herewith for brevity sake is known as 'the said

property'." The plaintiffs state that the said property has been surveyed in the recent survey under three survey numbers. The portion thereof on the northern side of the road is surveyed under survey nos.75/2 and 75/4 alongwith the properties belonging to Vasant Krishna Prabhu, Kusta Jagu Parab, Gopal Jagu Parab, Buka Jagu Parab, Shiva Parab, Shiva Anant Parab and Gurudas Shiva Parab. The suit property is distinct from the property belonging to Vasant Krishna Prabhu, Kusta Jagu Parab, Gopal Jagu Parab, Buka Jagu Parab, Shiva Anant Parab and Gurudas Shiva Parab and the same is identified in the plan annexed hereto and marked as Exhibit "A". The portion of the said property below the road is surveyed under no. 74/2. in the Record of Rights in the name of the plaintiff no. 1 alongwith the aforementioned Vasant Krishna Prabhu and others as occupants in respect of survey nos. 75/2 and 75/4. As far as the portion below the road, namely survey no. 74/2, is concerned, the name of the plaintiff no. 1 has been entered as the sole occupant thereof. Plaintiffs shall rely upon the Record of Rights in respect of survey nos. 75/2, 75/4 and 74/2 of Usgao Village, Ponda Taluka, and the survey plan alongwith the sketch annexed hereto as Exhibit "A". The said property is partly an agriculture land and partly cashew garden which belonged to Raghunath Ragoba Porobo.."

4. The reference to survey nos.75/2, 75/4 and 74/2 of Usgao Village, Ponda Taluka, was after the amendment of the plaint.

5. The Trial Court decreed the suit on 30.07.1985. The first appellate Court dismissed the respondents' Appeal on 16.06.1996. However, this Court, on 17.08.998, allowed the Second Appeal and remanded the matter to the trial Court, requiring the Trial Court to consider the cadastral survey plan and other documentary evidence for deciding the main controversy in the suit. This was because one of the main controversies in the suit revolved around identifying the suit property.

6. As against the judgment and order dated 17.08.1998 in Second Appeal No.28/1996, the appellants instituted Civil Appeal No.5550/1999 before the Hon'ble Supreme Court. This Appeal was disposed of by order dated 15.02.2005. The Hon'ble Supreme Court did not interfere with the judgment and order dated 17.08.1998 but directed the trial Court to dispose of the suit within six months and, in case any appeal was to be preferred against the decree of the trial Court, then, even the appellate Court was directed to dispose of the Appeal within six months of its institution.

7. The Hon'ble Supreme Court noted that the High Court had concluded that the courts below should have taken into consideration the survey plan carried out by the government agencies and, accordingly, remitted the matter back to the trial

Court for a fresh decision in accordance with the law on the aspects that the High Court pointed out after hearing the parties again. The Hon'ble Supreme Court held that it was not inclined to interfere with the order of the High Court, remanding the matter to the trial Court. The order of the Hon'ble Supreme Court is reported in *Pundalik Rama Gad & Anr. V/s. Ganesh Putu Deulkar & Ors.*¹.

8. In 2005, the plaintiffs amended the plaint in an attempt to identify the suit property with corresponding new survey numbers. On 12.04.2005, the respondents filed an additional written statement in response to the amended plaint. On 11.08.2005, the appellant further amended the plaint to incorporate the details of the survey allegedly conducted in the presence of the respondents. Finally, on 20.08.2005, the respondents filed additional written statements in response to the amended plaint.

9. By judgement and decree dated 31.12.2005, the trial Court decreed the suit. However, the first appellate Court vide judgement and decree dated 09.08.2006 in Regular Civil Appeal No.10/2006 allowed the Appeal and set aside the trial Court's decree dated 31.12.2005. Hence, this Second Appeal.

¹ (2005) 12 SCC 285

10. This Second Appeal was admitted on 08.03.2007 on the following substantial questions of law:

1. Whether, on established facts, the Appellants were entitled to the benefit of estoppel under Section 116 of the Indian Evidence Act, and whether the respondents were precluded from denying the title of the Appellants to the suit property?

2. Whether the conclusion drawn by the trial Court that the suit property belonged to the respondent is perverse being based on the old cadastral survey plan which had lost its evidential value after promulgation of new survey had come into existence and in view of the fact that the same was incomplete and also in view of the fact that survey plan cannot be a document of title and surveyor's report cannot be proof of ownership of property, particularly in the face of the fact that surveyor's report contradicted the case of the defendants?

11. On 13.10.2022, after hearing the arguments for some time, two further substantial questions of law were formulated. The same read as follows:

(a) Whether, the First Appellate Court could have at all entertained the plea of the respondents, that they were owners in possession of any part of the property surveyed under no.75/1, 75/2 or 75/4 in as much as no such

plea was taken in any of the written statements validly filed before the trial court, and whether the additional written statement dated 26.08.2005 in which such a plea was sought to be raised, for the first time was to that extent liable to be discarded as going beyond the scope of amendment to the plaint in response to which it was filed?

(b) Whether, the findings of the First Appellate Court to the effect that the appellants failed to prove their possession in respect of the suit property, given in reversal of the findings to the contrary of the trial court, is perverse; being rendered by ignoring the fact that the appellants and their predecessors being in possession of the suit property was not at all controverted by the respondents in the course of cross-examination of plaintiff no.1/PW1; and when on the contrary the possession of the appellants and their predecessors in title was in terms admitted by the respondents by claiming that such possession was attributable to a tenancy which the predecessors of the respondents had created in favour of the predecessors of the appellants, which was totally de hors the written statement and otherwise unsubstantiated?

12. With the consent of the learned Counsel for the parties, the hearing was deferred to 20.10.2022 to afford a sufficient opportunity for the parties to address the Court on the additional

substantial questions of law along with the substantial questions of law initially framed.

13. The Appeal was finally heard on 20.10.2022, 10.11.2022 and 11.11.2022. On the conclusion of the appellants, the matter was reserved for orders.

14. Mr Lotlikar learned Senior Advocate for the appellants submitted that since as many as three witnesses, including the Court Commissioner, could not identify the property in the context of the documents produced by other parties, this Court must advert to the other pieces of evidence and circumstances from the record. He submitted that other pieces of evidence or circumstances, by a standard of preponderance of probabilities, establish that the appellants are the owners in possession of the suit property, except the portion beneath the hut put up by the respondents under a licence issued by the appellants. He submits that since both parties have led evidence, the issue of burden of proof is only academic, and the appellants could not have been non-suited for failure to precisely identify the suit property despite all attempts.

15. Mr Lotlikar submits that the approach of the first appellate Court was perverse because the first appellate Court not only held

that the appellants had failed to prove their case but went further to hold that the respondents were the owners in possession of the suit property. In doing this, the first appellate Court misconstrued the deposition of DW5, a Surveyor/Expert examined by the respondents.

16. Mr Lotlikar submitted that the evidence of DW5, in fact, probabilises the appellants' version because this witness states that the suit property is surveyed under nos.75/1, 75/2, 75/4 and 74/2. Mr Lotlikar submits that the new survey records indicate the name of the appellants in survey nos.75/2 and 75/4, along with some other persons. He pointed out that survey no.74/2 bears the appellant's name exclusively. He points out that the respondents' names do not appear in any of these new survey numbers. He submits that this crucial aspect has been overlooked by the first appellate Court and, therefore, the appellate decree warrants interference.

17. Mr Lotlikar submits that the appellants produced a certificate from the Comunidade of Usgao followed by a registered Gift Deed that could be regarded as title documents. In contrast, the respondents did not produce any documents of title. He pointed out that there was no dispute about all properties in the vicinity, including the suit property earlier belonging to the

Comunidade of Usgao. He submits that the first appellate Court failed to give due credence to this documentary evidence.

18. Mr Lotlikar submits that none of the documents produced by the respondents were documents of title. He offered that, in any case, the documents refer to some person with the surname "Deulkar". However, the respondents failed to establish any kind of relationship with this so-called predecessor-in-title. He submits that the first appellate Court overlooked this crucial aspect.

19. Mr Lotlikar submits that PW1 had categorically deposed about the location and nature of the suit property. He also deposed about the possession and enjoyment of the suit property. He deposed about the boundaries of the suit property. He deposed about the licence issued to respondents to construct a hut in the suit property. He submits that most of his evidence was unchallenged for want of effective cross-examination or denials. He submits that in the absence of any denials or effective cross-examination, the testimony of PW1 should have been accepted. The provisions of Section 116 of the Evidence Act would also apply in such a situation. He relied on *Muddasai Venkata Narsaiah (D) V/s. Muddasani Sarojana*², *A.E.G. Carapiet V/s.*

2 AIR 2016 SC 2250

*A.Y. Derderian*³ and *K. Prabhakar Reddy & Ors. V/s. Lakkaraja Munirathnam & Ors.*⁴ in support of these contentions.

20. Mr Lotlikar submits that the respondents had never taken any plea in their original written statement about the suit property bearing survey nos.75/1(part), 75/2(part) or 75/4(part). He submits that the appellants' amendment of the plaint was restricted to further describing the suit properties. In the guise of filing an additional written statement, the respondents could not have raised the plea about they being the owners in possession of property surveyed under no.75/1(part), 75/2(part), 75/4(part). Mr Lotlikar submits that an additional written statement, in response to an amended plaint, must be restricted only to the amendments and should not travel beyond or seek to amend the original plea or raise some additional pleas. He relies on *Gurdial Singh & Ors. V/s. Raj Kumar Aneja & Ors.*⁵ in support of this proposition.

21. Mr Lotlikar submitted that the oral and documentary evidence on record established at least the appellants' possession of the suit property. He submits that there was no serious

³ AIR 1961 Cal 359

⁴ MANU/AP/0455/2022

⁵ AIR 2002 SC 1003

challenge during cross-examination, even on this aspect. He submits that even the defence evidence had admitted the appellants' possession, though DW1 qualified the same as possession of a lessee for a lease granted for only two years. He submits that though the appellants were not lessees but owners of the suit property, the respondents, admitted de facto possession. Finally, he proposes that based on the possessory title, the suit ought to have been decreed for the first appellate Court should not have interfered with the decree issued by the trial Court.

22. Mr Lotlikar submits that the possessory title is good against the whole world except the actual owners. He submits that respondents have miserably failed to establish any link to the suit property, much less any title. Therefore, based on the possessory title, the suit should have been decreed against the respondents. He relies on *Somnath Barman V/s. Dr. S.P. Raju & Anr.*⁶ and *Rame Gowda (dead) by LR's V/s. M. Varadappa Naidu (dead) by LR's*⁷ in support of this proposition.

23. Based upon all the above submissions, Mr Lotlikar urged that the substantial questions of law as formulated in this Appeal may be answered in favour of the appellants and against the

⁶ 1970 AIR SC 846

⁷ (2004) 1 SCC 769

respondents. Accordingly, he urged that this Appeal be allowed, the decree of the first appellate Court be set aside, and the trial Court's decree restored.

24. Mr Sudin Usgaonkar contested the contentions on behalf of the appellants. He submitted that the suit was for recovery of possession and permanent injunction. Therefore, relief of declaration of ownership was intrinsic. He offered that the appellants - plaintiffs, had to stand or fall on their own feet and could not derive any advantage from the alleged weakness of the respondents' case. He submits that there was no weakness in the respondents' case. The first appellate Court, the final Court on facts, correctly appreciated the original and documentary evidence on record and dismissed the suit. He submits that the decree of the first appellate Court warrants no interference considering the restricted scope of the Second Appeal. He submitted that none of the questions formulated arise or, in any case, constitute substantial questions of law.

25. Mr Usgaonkar submitted that the appellants produced no documents of title, and the so-called title documents do not relate to the suit property. He offers that identification of the suit property was crucial, and the appellants have miserably failed in such identification. Finally, he submits that the respondents

produced clear and cogent, oral and documentary evidence based upon which the suit was correctly dismissed.

26. Mr Usgaonkar submitted that title issues can never be decided by estoppel or any alleged cross-examining failure. He proposes that the entire evidence on record has to be read and construed holistically. He submits that not only was the appellants' case challenged, but the respondents led positive evidence to contradict such a case. Finally, he offers that the decisions relied upon by Mr Lotlikar are distinguishable and do not apply to the fact situation in the present case.

27. Mr Usgaonkar submitted that the cadastral survey document could not be brushed aside as suggested by the appellants. He relies on *Varsha K. Sawant & Ors. V/s. Chief Secretary, Government of Goa State & Ors.*⁸. He submits that identification of the suit property in such matters is crucial, and in the absence of effective identification, the plaintiffs'/ appellants' case must fail. He relies on *Narayan Babu Velip & Ors. v/s. Dhillan Sada Dessai*⁹ and *Ganesh Mallu Dessai V/s. Gopinath Kusta Fotto Dessai*¹⁰ in support of these propositions.

⁸ 2016 SCC OnLine Bom 2561

⁹ 2014 (5) Bom.C.R. 627

¹⁰ MANU/MH/0901/2021

28. Mr Usgaonkar submits that there was sufficient cross-examination and, in any case, based on any alleged lack of cross-examination, no title can be conferred upon the appellants when they fail to identify the suit property and also produce any title documents. He relies on *Raju Purushottam Warurkar V/s. Bokey Printers, Amravati*¹¹, in support of this proposition.

29. Mr Usgaonkar also relied on *Vaman Govind Raut & Ors. V/s. Sitaram Narayan Raut & Ors.*¹², *Kamakshi Builders V/s. Ambedkar Educational Society & Ors.*¹³, *Canbank Financial Services Ltd. V/s. Custodian & Ors.*¹⁴ and *Pant Nagar Mahatma Phule Co-op. Hsg. Society Ltd. & Ors. V/s. State of Maharashtra & Ors.*¹⁵ in support of various contentions advanced by him.

30. Based on the above, Mr Usgaonkar urged dismissing this Appeal.

31. The rival contentions now fall for determination.

11 2018 (1) Mh.L.J. 756

12 2014 (4) Bom.C.R. 429

13 (2007) 12 SCC 27

14 (2004) 8 SCC 355

15 (2016) 3 Bom.C.R. 249

32. By instituting the suit, the appellants claimed recovery of possession of the portion beneath the hut in the suit property and for a permanent injunction to restrain the respondents from otherwise interfering with or damaging the suit property. These reliefs were claimed based on the premise that the appellants are the owners in possession of the suit property (except the portion beneath the hut, in respect of which ownership but not possession was claimed).

33. Such ownership and possession were claimed on the specific plea that the Comunidade of Usgao, which owned most of the lands in the vicinity, had granted the suit property to the predecessor in title of the appellants to Rogunata Raghoba Porobo, the predecessor in title of the appellants. The appellants relied upon a certificate issued by the Comunidade dated 22.02.1972 in support of this assertion. The appellants also relied upon a Gift Deed dated 08.02.1958 by which Sazo Porobo and his wife Deuqui, the son and daughter-in-law of Rogunata Raghoba Porobo, gifted the suit property to the appellants Pundolica Rama Gad and his wife, Xantabai. Therefore, it is incorrect to say that the suit was filed based upon only some prior possession or a possessory title as claimed by Mr Lotlikar during his arguments.

34. Now the certificate dated 22.02.1972 issued by the Comunidade of Usgao records that the property "Naicachem – batlem" was leased by the Comunidade to Rogunata Raghoba Porobo under No.27 in the records of archives of the Comunidade. This certificate was issued by the Escrivao of the Comunidade (clerk) on perusing the Survey Book (Tombo) 2nd B. No. one of the above Comunidade of Usgao.

35. The Survey Book/Tombo was never produced or summoned for production. The terms and conditions subject to which the property Naicachem - batlem was granted were never established. There is no reference to any description of the property other than the denomination Naicachem - batlem. No boundaries are described, and no cadastral survey is referenced. There is no reference to any matriz number. There is no reference to any inscription or description documents.

36. Since identifying the suit property is one of the crucial issues in this matter, a certificate of this nature can hardly qualify as some titled document. In any case, on this document and without proper identification of the suit property, the appellate Court was justified in holding that this is not a title document based on which the appellant can obtain recovery of possession or even an injunction against the respondents.

37. The second title document is consequential to the first. However, though this Gift Deed was executed on 08.02.1958, this Gift Deed only refers to property Naicachem - batlem described in the office of the land Registrar under no.2078. Significantly, no attempt was made by the appellants to produce the description record from the land Registrar's office under no.2078. There is no explanation why such a description document was never produced because one of the crucial issues in this matter was identifying the suit property.

38. Besides, though the Gift Deed was executed on 08.02.1958, there is no reference to the boundaries of the gifted property. There is no reference to the matríz number or cadastral survey number. There is no reference to any inscription number. Therefore, even based on this Gift Deed of 08.02.1958 and in the absence of proper identification of the suit property, the appellants cannot get any relief by way of recovery of possession or even injunction.

39. The appellants are the plaintiffs. Therefore, it is for the appellants as plaintiffs to establish their case. Their entire case cannot be based upon some alleged deficiencies in the respondents' defence. The appellants cannot create a superstructure based entirely on some weaknesses in the

respondents' case. The burden is squarely on the appellants – plaintiffs. Only after some credible evidence is brought on record would the onus shift upon the respondents – defendants.

40. The appellants examined Jaydatt Nilu Shet Parkar (PW6) as their expert/Surveyor. However, this witness could not correspond or correlate the suit property with the two so-called title documents produced by the appellants. Similarly, the appellants, apart from appellant no.1 Pundalik Gad (PW1), examined Ragurai Prabhu (PW2), Narana Atma Parab (PW3), Jayu Prabhu (PW4) and Gopal Prabhu (PW5) as witnesses. The evidence of none of these witnesses, either jointly or severally, was sufficient to correlate the suit property with the so-called title documents produced by the appellants. Moreover, there were serious discrepancies in the pleaded boundaries. The problem was compounded since the so-called title documents contained no boundaries whatsoever. The appellants thus failed to identify the suit property by correlating the evidence with the so-called title documents or even the pleadings in the plaint.

41. Vidhyadhar Verenkar, an expert/Surveyor, examined by the respondents, did not fare any better. He also had considerable difficulties in identifying the suit property or the property claimed to be owned and possessed by the respondents. Even the

evidence of Court witness Maya Amonkar (CW1) from the DSLR was not of much assistance in identifying the suit property or correlating the suit property to the documents relied upon by the parties, including, in particular, the so-called title documents relied upon by the appellants.

42. The issue of identification of the suit property being most crucial, this Court, by its order dated 25.01.2012, appointed a Commissioner for identifying the properties bearing matriz no.491 and 492 of Usgao village. This is because the appellants had claimed that the suit property corresponds to matriz no.492. Still, the respondents contended that the property which they claim ownership and possession corresponds to 491 and old cadastral survey no.97.

43. The respondents had claimed that they had their ancestral house in matriz no.491, corresponding to old cadastral survey no.97. After its demolition, the respondents had put up a small house and were in the process of constructing a bigger house when the appellants instituted the suit. Accordingly, this Court appointed the Commissioner to identify the property bearing matriz nos.491 and 492 of Usgao village after considering the then promulgated survey record of Usgao village.

44. This Court's order dated 25.01.2012 reads as follows:

*"Mr. S. D. Lotlikar, Senior Advocate with Ms. V. Palyekar, Advocate for the Appellants.
Mr. Sudin Usgaonkar, Advocate with Ms. G. Dalvi, Advocate for the Respondents.*

*Coram: F. M. REIS, J.
Date: 25th January 2012*

P.C.

After hearing Shri Lotlikar, learned Senior Counsel appearing for the Appellants and Shri Usgaonkar, learned Counsel appearing for the Respondents for sometime and taking note of the nature of the dispute raised in the above Appeal, both the learned Counsel, by consent, have agreed that the Directorate of Land Survey, Panjim, be directed to depute a Field Surveyor to identify the property bearing Matriz no. 491 and 492 of Usgao Village on the now promulgated Survey Records of Usgao Village. The parties agree to furnish the promulgated Survey Plan as well as the true copy of the Matiz Record to the concerned Surveyor and any other document which he may so desire including the Cadastral Survey Plan of the property bearing no. 97 of the same Village. The report is to be submitted within four weeks. The Field Surveyor shall submit his bill for fees and expenses which shall be borne by both the parties equally. The Director of Land Survey is accordingly directed to comply with the above prayer of the learned Counsel appearing for both the parties.

2. Place the matter for further hearing after receipt of the Commissioner's report. The parties are directed to appear before the Directorate of Land Survey, Panjim, on 03.02.2012 at 10.00 a.m. and abide by his further direction."

45. Based on the above order, Yogesh Mashelkar, Field Surveyor/Commissioner, filed his report on 27.02.2022. He reported that it was impossible to ascertain the exact correspondence of the old cadastral survey no.97 to matrizes nos.491 and 492 of the Usgao village. Therefore, on the ground, he could not identify the properties under matrizes nos.491 and 492 of Usgao village.

46. Therefore, it is evident that the appellants, burdened with the task of at least identifying the suit property in respect of which they claimed their reliefs, failed to identify the suit property so. Moreover, even Mr Lotlikar did not dispute that the appellants failed to identify the suit property. Therefore, in his oral arguments and the written brief, he contended that the other evidence on record and surrounding circumstances must be focused upon. He also relied upon certain deficiencies in the respondents' version. Based on these factors, Mr Lotlikar submitted that the trial Court was justified in decreeing the suit

and the first appellate Court was not justified in reversing the decree.

47. There is no dispute that in this matter, the standard of proof to be applied is one of the preponderance of probabilities. However, in such a matter, the initial burden is always upon the appellants – plaintiffs, and if the appellants – plaintiffs fail even to identify the suit property ordinarily, his suit must fail. To this effect are the observations in *Narayan Babu Velip* (supra) and *Ganesh* (supra).

48. The appellants failed to establish that the two documents they produced were indeed title documents to the suit property. Even de hors the two documents, the oral evidence was deficient in identifying the suit properties or correlating the suit properties to the so-called title documents. Even the three surveyors before the trial Court and the Commissioner appointed by this Court failed to identify the suit property or correlate the suit property to the so-called title documents of the appellants. In such a situation, the appellants' suit was rightly not decreed by the first appellate Court.

49. Regarding the contention based upon other evidence or surrounding circumstances, reference will have to be made to the

cadastral survey record and the matríz document relied upon by the respondents. The respondents claim that these are their title documents based upon which their predecessors- in-title and after them the respondents have been owning, possessing and enjoying the property from which the appellants seek to oust them.

50. Now, a matríz document or, for that matter, even a cadastral survey document cannot ordinarily be regarded as any document of title. These are basically survey documents that might have relevance in the context of possession. However, based on these documents, it is not as if the respondents had instituted any suit or counterclaim in seeking any declaration of ownership. Besides, these documents would also qualify "other evidence", which the appellants seek to rely upon in support of their case. Therefore, this Court remanded the matter with specific directions to consider the cadastral survey document. The Supreme Court affirmed this order. Therefore, these documents and their legal effect will have to be considered.

51. The respondents had consistently claimed that the property owned, possessed and enjoyed by them and the property in which they had their ancestral house, followed by the house which is described in the plaint as a hut and the foundation that they were laying when the suit was instituted, is the property bearing

cadastral survey no.97 and matriz no.491. They have also claimed that this property admeasures 5950 square metres and have pleaded the boundaries. They have also described the property by stating its physical characteristics, the number and type of trees therein, etc.

52. The cadastral survey document Exhibit DW1/B refers to a rustic property named Naicachem batulem, registered under no.97 in the name of Pundolica Xettee Deulicar, residing in Usgao. This document states that the property is demarcated with ten cut stone landmarks and a loose stone fence.

53. Furthermore, the cadastral survey document records that the property is not leased since the quit rent of four *tanges* is paid to the Comunidade. This document also states that the property admeasures 5950 square metres being, 4600 square metres of the coconut grove, 1320 square metres of barren land and cashew tree plantation and 30 square metres of times. Even the boundaries of the property are provided. Significantly, this document records that there exists in this property the residential house of the owner. The extract of this document is dated 12.01.1968.

54. The respondents have also relied upon the matriz document Exhibit DW1/D, which again provides the property's boundaries and notes that the property is enrolled in the name of Panda Deulcar.

55. As in the case of the appellant's witnesses, even the respondents' witnesses could not clearly and accurately depose to the boundaries. From this, the description of boundaries indicated in these old documents appears to have changed over the years. The neighbouring properties are sold, new surveys are undertaken, and certain earlier physical characteristics like spilling waters do not remain. Therefore, the appellants cannot draw much mileage based upon the weakness in respondents' evidence on the aspect of tallying of boundaries accurately. Even the appellants' witnesses were unable to depose accurately to the boundaries.

56. In *Varsha K. Sawant* (supra), the substantial question of law concerned the evidentiary value of a cadastral survey record in the absence of a land registration document. The learned Single Judge of this Court held that though it is well settled that the entries in the survey record can neither create nor defend a title and even though the matriz record by itself is not a document of title, the

same is an instance to be considered in the claim of title by a person in whose name such entry stands.

57. In the context of the record of the cadastral survey, the Court referred to Article 274 of decree 3602, which provides that the cadastral survey is conducted after a minute observation of the title documents of all the adjoining owners. The Court held that in such circumstances, the survey entries could not be easily quashed or brushed aside unless cogent evidence establishes that the entries are incorrect. The Court found that in the case before it, the respondents had failed to produce any document contrary to the entries in the survey plan.

58. Thus, on evaluation of the oral and documentary evidence produced by the appellants and the respondents, the first appellate Court, which is usually the final Court regarding factual findings, was not unjustified in reversing the trial Court's decree. Based on the oral and documentary evidence on record and by applying the standard of preponderance of probabilities, there is nothing unreasonable or perverse in the assessment of the first appellate Court about the appellants' failing to discharge the burden, which was cast upon them or that the respondents succeeding in discharging the onus that might have shifted upon them.

59. Irrespective of the issue of burden or onus, even upon evaluating the oral and documentary evidence on record led by both parties, the first appellate Court's assessment cannot be faulted as perverse or unreasonable. The first appellate Court has analysed the evidence in some detail and offered convincing reasons to reverse the Trial Courts decree. The first appellate Court came into close quarters with the reasoning of the Trial Court and, for cogent reasons, reversed the Trial Court's decree. Therefore, the substantial question of law, based upon so-called perversity, will have to be answered against the Appellants.

60. The substantial question of law based upon the doctrine of estoppel under Section 116 of the Evidence Act hardly arises in this matter. In any case, based upon this provision, no relief can be granted to the appellants in the facts and circumstances of the present case. Pundalik Gad (PW1), in his deposition, spoke about permission being given by the appellants to the respondents to construct a hut in the suit property. Though there is not much cross-examination on this aspect, it is not as if the respondents have admitted this position. Suppose the examination-in-chief and the cross-examination of PW1 are construed holistically. In that case, there is no scope to conclude that this aspect has gone unchallenged or that there is any admission on this aspect.

61. In the written statement, the respondents specifically denied having constructed the hut after obtaining permission from the appellants. Instead, the respondents have consistently asserted ownership and possessory rights based upon which they built the house and were in the process of constructing another house in the vicinity. The respondents, in their evidence, squarely deposed about the construction of a house (hut) in their own right and not based upon any alleged permission from the appellants. The suggestions on this aspect during cross-examination were also rightly denied.

62. In the absence of clear admissions or convincing evidence about the hut being constructed by the respondents, based upon permission or a licence issued by the appellants, the principle of estoppel under Section 116 of the Evidence Act can hardly be invoked. Section 116 of the Evidence Act provides that no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

63. As noted by the first appellate Court, there is no proper identification of the suit property. Further, there is no evidence about the appellants' title to the suit property, particularly in the

absence of its precise identification. Further, there is still no evidence about the appellants being in possession. There is also no evidence about the hut being constructed by the respondents based upon some permission or licence by the appellants. Therefore, because the cross-examination of PW1 may not have been of a high standard, no title or possessory rights can be claimed by the appellants only for that reason.

64. In *Kamakshi Builders* (supra), the Hon'ble Supreme Court has held that the title is not created by estoppel. Acquisition of a title is an inference of law arising out of a certain set of facts. If a person does not acquire title in law, the same cannot be vested only because of acquiescence or estoppel on the part of others. These observations were made in the context of Sections 116 and 114 III.(g) of the Evidence Act.

65. Thus, for all the reasons mentioned above, the first substantial question of law will have to be answered against the appellants.

66. As regards the second substantial question of law, though the first appellate Court may have held that the respondents have established title relying upon the old cadastral survey plan, the same is mainly in the context of the proposition that the cadastral

survey plan cannot be simply brushed aside. Suppose the first appellate Court's judgement and decree are read and construed holistically. In that case, it is apparent that the first appellate Court, on the touchstone of preponderance of probabilities, has found favour with the respondents' version as compared to the appellants' version.

67. Therefore, it is not as if the first appellate Court has conferred or acknowledged the respondents' title to the property based on the old cadastral survey no.97 and matríz no.491. The appellate Court has merely held that the old cadastral survey records and the Matríz documents render the respondents' case more probable. There is no perversity in the record of this finding because the appellants, in this case, have miserably failed to identify the suit property and correlate the suit property to the so-called title documents. As noticed earlier, the documents produced by the appellants can hardly qualify as title documents in the absence of any proper description of the suit property or its identification and correlation with the other evidence on record.

68. Besides, this is a case where the appellants, as plaintiffs, were seeking recovery of possession and permanent injunction. Though the appellants may not have sought the specific relief of declaration, such declaration was, to a certain extent, implicit in

a prayer for recovery and permanent injunction. Moreover, the appellants had never based their case on a mere possessory title but claimed ownership based on certain documents, which according to them, were title documents. In such a situation, the burden was always on the appellants, and the appellants could not take any advantage of any alleged weakness in the respondents' – defendants' case.

69. *In Pant Nagar Mahatma Phule Co-op. Hsg. Society Ltd.* (supra), the Division Bench of this Court, has held that parties seeking a declaration of title must stand or fall on their own feet and cannot take advantage of the defence's weakness. The Division Bench relied upon *Union of India V/s. Vasavi Cooperative Housing Society Ltd.*¹⁶ in which it is held that it is trite law that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

70. The Court held that the legal position is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title, and that can be done

¹⁶ (2014) 2 SCC 269

by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. The Court held that even title set up by the defendants was found against them in the absence of the establishment of the plaintiff's own title, the plaintiff must be non-suited.

71. In the context of the second substantial question of law, the observations in *Varsha K. Sawant* (supra) are also quite relevant. The first appellate Court also found serious faults in the new survey. The first appellate Court noted that there were names of several other parties along with the appellants' names in the survey nos.75/2 and 75/4. Incidentally, though the appellants claim possession and title of survey no.75/1, in which the hut is located or where the respondents attempted further constructions, the appellants' names do not figure in this survey records. Besides, the first appellate Court pointed out that the survey records do not even reflect the existence of the hut, about the existence of which there is no dispute between the appellants and the respondents.

72. Based upon all the above factors, even the second substantial question of law will have to be answered against the appellants.

73. The substantial question of law about the additional written statement travelling beyond the amended plaint will also have to be answered against the appellants. This is because when the plaint was instituted in 1972, the survey was incomplete, and the parties did not have to refer to survey numbers 74 or 75 and parts thereof. After completing the survey, the appellants amended the pleadings to refer to the new survey numbers. The appellants admittedly made mistakes by omitting reference to survey no.75/1. However, both parties proceeded on the premise that no such error was committed, and the parties led evidence in the context of survey no.75/1.

74. Therefore, there was nothing wrong in the respondents also pleading that their house (hut) or construction which they had commenced was in survey no.75/1 and that they claimed ownership and possession of property surveyed under no.75/1. Thus, the principle in *Gurdial Singh* (supra) was not attracted in this case. The substantial question of law at (a) in the order dated 13.10.2022 will also have to be decided against the appellants.

75. In so far as the substantial question of law (b), in the order dated 13.10.2022, it is true that there were some deficiencies in the cross-examination of PW1. However, if the evidence of PW1 is read and construed holistically, it is not as if the respondents

admitted some critical points in PW1's deposition. Besides, this deposition will have to be read and construed in the context of pleadings where the respondents pleaded about not having put up the hut's construction with the appellants' permission but in their own right.

76. The respondents, in their evidence, including in response to their cross-examination, have denied the aspects that the appellants now wish the Court to treat as proved. In such circumstances, the principle in *Muddasani Venkata Narsaian (D) th. Lrs.* (supra) or *A.E.G. Carapiet* (supra) and *K. Prabhakar Reddy* (supra) would not apply.

77. In *Raju Purushottam Warurkar* (supra), a single judge of this Court in the context of *A.E.G. Carapiet* (supra) has explained that no general proposition is laid down in *A.E.G. Carapiet* (supra). The Court held that when both sides lead evidence, it is for the Court to see if a case of retrenchment is made out. If no case was made out based on the evidence led by the employer, the mere want of cross-examination on the part of the employee would make no difference.

78. This is not a case where there was a complete failure to challenge or deny certain portions of PW1's testimony. In any

case, the appellants, having failed even to identify the suit property, much less establish their title to the same, cannot build any superstructure based upon some deficiencies in the cross-examination of their witnesses. Therefore, even the final substantial question of law will have to be answered against the appellants.

79. For all the above reasons, this Appeal is liable to be dismissed and is hereby dismissed. However, there shall be no order for costs.

80. If any misc. applications are pending in this Appeal, even they are hereby disposed of.

M. S. SONAK, J.

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