

*Esha***IN THE HIGH COURT OF BOMBAY AT GOA****SECOND APPEAL NO. 51 OF 2010**

Shri Madhav Shankar Dhargalkar, s/o late
Shankar Dhargalkar, r/o Patrong, Baina,
H. No. 95/A, Vasco-da-Gama.

... APPELLANT

VERSUS

1. Smt. Bernadino Barreto, widow of late Honoratto Barreto and her children,
2. Shri Thomas Barretto, son of late Honoratto Barreto, aged about 39 years, in service,

Both abovenamed r/o H. No. 374,
Butea Bhat, Vasco-da-Gama.

3. Shri Gabriel A.R. Barrerro (deceased), s/o late David Thomas Barretto, and his wife,

since deceased represented by legal heirs:

- 3(a) Shri Anthony Barretto (son),
- 3(b) Smt. Esmeralda (daughter) and her husband Shri Jerome D'Silva,
- 3(c) Smt. Angelina Dias (daughter) and her husband Shri Menino Dias,
- 3(C) Albano Barretto, H. No. 194/2, Mangoor Hill, Vasco-da-Gama,
- 3(d) Smt. Sapiencia (daughter) and her husband Shri Paulo D'Cunha,

3D Sapinepia D'Cunha, H. No. 129/d, Dactolem Lake, Vasco-da-Gama.

All major represented by their
Power of Attorney i.e. Heir No. 3(a)

4. Lourdes Concecao Fernandes, both
major in age, landlords, both
residing at H. No. 391/A,
Buteabhat, Vasco-da-Gao,
5. Shri Anthony Marcelino Barretto,
major in age, r/o H. No. 399,
Mangor Hill, Vasco-da-Gama. ... RESPONDENTS

Mr. S.S. Kantak, Senior Advocate with Mr. Kher Simoes and
Ms. Saicha Dessai, Advocates for the Appellant.

Mr. Nigel Costa Frias with Ms. Barbara Andrade and Ms.
Sonadevi Nishad, Advocates for Respondent Nos. 1 and 2.

Mr. Ajit R. Kantak with Mr. Raunak Kantak, Advocates for
Respondent Nos. 3(a) and 4.

CORAM: BHARATI DANGRE, J.

DATED: 19th MARCH 2025

ORAL JUDGMENT:

1. On 22.08.2012, the Second Appeal came to be admitted on
the following substantial questions of law:

*(1) Whether the non-consideration of document at
exhibit P-45 produced by the Appellant has vitiated the
finding of facts by the Courts below to the effect that
the Appellant has failed to establish the identity of the
suit property ?*

*(2) Whether the Appellate Court could have
discarded the evidence of PW-3 (Expert Witness) by
merely holding that once it is shown that there is no*

connection between cadastral Survey No. 277 and property purchased by Sale Deed dated 12/03/1934, evidence of PW-3 becomes useless ?

2. The Appeal is taken up for final hearing.
3. I have heard the learned Senior Counsel Mr. Kantak for the Appellant, Mr. Nigel Costa Frias for Respondent Nos. 1 and 2 and Mr. A.R. Kantak for Respondent Nos. 3(a) and 4. On hearing the Appeal for some considerable length of time, I deem it appropriate to remand the proceedings to the first Appellate Court i.e. Adhoc District Judge, South Goa, Margao who has decided Regular Civil Appeal No. 68/09/FTC-1, which arose out of Regular Civil Suit No. 53/2001/C.
4. In justifying the record, a brief mention of facts would offer clarity to the course of action to be adopted by the Trial Judge.
5. The Appellant is the original Plaintiff who filed the Regular Civil Suit for eviction as well as possession and the consequential reliefs qua the property known as 'Muxelem alias Muxellem' or 'Butelem' situated at Mormugao described in the registry of property of Salcete Division under no. 23709 of book B-61. In the plaint, the Plaintiff specifically pleaded that his father by

registered sale deed executed on 12.03.1934 before the Sub-Registry of Mormugao, purchased the property from one Valariano Coutinho and his wife Adolfinia Pereira. He gave the description of the said property as reflected in the sale deed dated 12.03.1934 by stating that the property was bounded on the east by a hillock of Comunidade of Mormugao, on the west by Antonio Cassiano Coelho and on the north with that of the heirs of Caetano Manuel Castanha and now, with the wall of the house and the property of David Thomas Barretto heir of Joao Francisco Castanha and on the south with that of Nazario Castanha, now heirs of Antonio Menino Pereira. The Plaintiff pleaded that the property is entered in the matriz records at no. 868 and at the time of its purchase, it was barren with ruins of the house.

6. The vendors of the Plaintiff's father had purchased the property from Antonio Cassiano Coelho and his wife Maria Edociana Pereira vide the sale deed dated 05.08.1915 when the property was described in a similar manner. The Plaintiff pleaded that the survey record maintained by the City Survey Authorities reflects a part of Plaintiff's property bearing chalta no. 15 of P.T. sheet no. 138 of the city of Vasco-da-Gama in the name of Landriano Pereira, Defendant No. 6. However, after making inquiry, it was revealed that no such person exists and similarly, a

portion of Plaintiff's property surveyed at chalta no. 11, reflected in the name of Honorato Barretto also did not correspond to the survey records of the predecessor of Defendant Nos. 1 and 2.

7. Defendant Nos. 3 and 4 claimed to be the co-owners of the properties bearing chalta nos. 9, 10 and 11 of P.T. sheet no. 138 whereas Defendant No. 5 claimed title to the properties bearing chalta nos. 9, 10 and 11 of P.T. sheet no. 138 pursuant to a Will dated 27.12.1989 from one Maria Angelica Castanha. It was also pleaded that Honorato Barretto instituted inventory proceedings in the Court of the Civil Judge Senior Division, Salcete at Margao, upon the death of Maria Angelica Castanha, which was registered and in the said inventory proceedings, a compromise was arrived and the terms of compromise along with the plan were filed.

8. In any case, it was the clear case of the Plaintiff that the old cadastral plan corresponded with cadastral nos. 277, 278 and 216. However, in the cadastral, the property is shown in the name of one Lauriana Rodrigues. The Plaintiff in the year 1996 noticed that Defendant Nos. 3 and 4 had trespassed into a part of the suit property by constructing a house bearing chalta no. 10 in P.T. sheet no. 138 and also constructed some tenements corresponding to chalta no. 11 along with some ancillary structures. Apart from

this, the portion bearing chalta no. 14, the Municipality tarred their existing footpath and the portion of the same was encroached upon by one of the adjacent neighbours.

9. It is in this background the Plaintiff filed a suit for eviction against the Defendants and in order to establish his claim, he annexed the plan at Annexure-A when he sought a mandatory injunction directing the Defendants to remove the encroachments from the portion of the Plaintiff's property and more particularly, from the area marked in pink on the plan at Annexure-A to the plaint. An injunction was also sought for restraining the Defendants from interfering with the suit property.

10. Separate written statements came to be filed by Defendant Nos. 1 and 2 as well as Defendant Nos. 4 and 5 and the whole conundrum existed as regards the actual identification of the property.

11. The Plaintiff filed an affidavit in evidence on 04.12.2004 reiterating the stand about the property being purchased by his father in terms of the description given in the sale deed dated 12.03.1934, though the approximate area of the property is not found mentioned in the sale deed dated 12.03.1934. The Plaintiff

examined himself as PW-1 and also examined Dhananjay Anant Navelkar, the Archivist approved by the Government of India (PW-2) along with Prazeres Agnelo Gonsalves, the Surveyor as PW-3.

Reliance was also placed upon the report of the Surveyor in form of verification cum survey report, as the surveyor was appointed to identify the property purchased by the father of the Plaintiff as per the documents and the survey plan. These witnesses of the Plaintiff were extensively cross-examined and what is pertinent to note is the evidence of these two expert witnesses, who have categorically stated that the property was purchased by the Plaintiff's predecessor vide description no. 23709 at folio 20v of book B-61 with respect to the boundaries mentioned in the said document.

12. PW-2 specifically deposed that inscription no. 26444 at file 136 of book G-32 declared that the property referred to above under no. 23709, denominated as 'Butelem' and confined on the north with the property of the heirs of Caitano Manuel Castanha and at present with the wall of the house and property of David Thomas Baretto and of the heirs of Joao Francisco Castanha and on the south with that of Nazario Castanha at present heirs of

Antonio Menino Pereira. If the evidence of this witness is read in minute detail, he relied upon the following documents:

- (a) Revenue/matriz no. 868 of Mormugao;
- (b) C.S. plan no. 277 of revenue village, Mormugao;
- (c) City survey chalta nos. 15, 9 and 10 parts and 11 and also parts of 12 and 14 of sheet no. 138;
- (d) Register maintained by the then surveyor in respect of C.S. no. 277 and its border plots including the comunidade (strip) and
- (e) Site plan showing C.S. no. 277 along with its border plots.

13. By referring to the aforesaid documents, he categorically told the Court on affidavit that he had verified and observed from the text, the legality of the above documents with the title to the said property, for which he has approved as surveyor, which were valid and as he was also presented with various documents in order to prepare the title documents in respect of the subject property. In detail, he has analysed the documents in the form of an inscription of transmission drawn in 1915 in favour of Valeriano Coutinho of Mormugao as well as the transcription in 1936 in the form of an inscription of transmission and rendered his findings in specific in minute details. He concluded that there

exists a property denominated at 'Muxelem' originally possessed and held by the original vendors, figured in the deed of 1915 and later on by the second party, who sold the property to Xencora Naraina Dargalcar of Mapusa, residing at Vasco and thereafter, it was inscribed in his name and the records were prepared which remained undisturbed establishing the possession and ownership of the property.

The said witness was subjected to cross-examination and certain suggestions, given on the part of the Defendants which have come on record.

14. Another relevant piece of evidence is the evidence of the Surveyor Mr. Prazeres Gonsalves who submitted in his report on identifying the property of Xencora Naraina Dargalcar as per the documents and the survey plans and while preparing the report, he referred to the old cadastral survey records bearing no. 217 recorded in the name of the persons whose description was given in the document of 1915 as well as the document of 1934. Similarly, there is also a reference to plot no. 216, recorded in the name Lauriana Rodrigues which is also found recorded in plot no. 277. He graphically by superimposing the plan of the said plots bearing old cadastral survey no. 277, 276, 217 and 216 over the corresponding area on the new cadastral survey plan using the tool

of scanning and rastering the plan image and using auto cad to graphically enlarge/reduce to scale to bring to a uniform scale on the plan, prepared the plan which was exhibited by him.

15. It is in the wake of the aforesaid evidence brought on record by the Plaintiff, that the first Appellate Court appreciated the pleadings and the evidence brought on record but when the impugned judgment is perused, the Trial Court has answered in the negative the issue no. 1, to the effect as to whether the Plaintiff has proved that the part of his property has been shown by the survey authorities as a portion of chalta no. 15 of P.T. sheet no. 138 of the city survey of Vasco-da-Gama and another portion bearing survey no. 14 as well as another area surveyed under chalta no. 11. Another issue as to whether the Plaintiff has proved that in the year 1996, Defendant Nos. 3, 4 and 5 trespassed into the suit property and constructed their residential house is also answered in the negative, apart from the issue that the Plaintiff was unable to prove that the suit property as shown in the pink shade has been encroached by Defendant Nos. 3, 4 and 5.

Admittedly in the impugned judgment, the Trial Court has failed to take into consideration the evidence of PW-2 and PW-3 the expert witnesses.

As far as the Appellate Court is concerned, my attention is invited to the impugned judgment, though it is the insistence of Mr. Kantak that both the Courts below failed to appreciate the evidence of the expert witnesses, the learned Counsel for Respondent Nos. 1 and 2 have taken me through the extracts of the said judgment to submit that the Appellate Court had at least referred to the evidence of these witnesses. It is the specific contention advanced on behalf of Defendant Nos. 1 and 2 that the evidence of the Surveyor, as well as the Archivist, cannot be relied upon because they have referred to certain documents, which were never brought before the Court either by the Plaintiff or by these witnesses and they were never exhibited before the Court.

16. However, when the impugned judgment dated 18.01.2010 is perused, I find that the evidence brought on record through PW-2, the Archivist and PW-3, the Surveyor, has been cursorily referred to and what is expressed by the learned Judge in the said judgment is only an opinion in the form of some comments instead of appreciating the entire evidence in its entirety. PW-2 and PW-3 have been examined as expert witnesses, who were conversant with the revenue matter, the cadastral plan, both old and new and based upon the entire material placed, they arrived at a conclusion in identifying the said property of the Plaintiff.

Whether there was an encroachment by the Defendants on the property of the Plaintiff would have been appreciated only if the evidence of these two witnesses was carefully scrutinized. However, it is not even disputed by Mr. Kantak, the learned Senior Counsel for the Appellant that appreciation of the evidence of these two witnesses by the Appellate Court is just a perfunctory approach which resulted in the dismissal of the Appeal also. This aspect is also not disputed by the learned Counsel for the Defendants.

17. In these circumstances, since the first Appellate Court is the competent Court to appreciate the facts apart from the legal position, I am of the view that one more opportunity deserves to be afforded to the parties to submit their arguments revolving around the evidence of PW-2 and PW-3 being the expert witnesses so that the Court is in the position to appreciate the evidence, which shall also include the survey report prepared by PW-3 as well as the document of land registration at Exhibit-44 along with Exhibit-43 and the survey records of chalta nos. 14 to 20, 9 to 11 and 15 of P.T. no. 138 marked as Exhibit P-45.

18. Needless to state that the matter is being remanded to the first Appellate Court for appreciating the evidence that is already

brought on record by the parties and therefore, the Court shall restrict itself only to the said evidence which is already brought record and shall not permit tendering of any new evidence on record. What is expected from the Appellate Court is an appreciation of the evidence which is already on record with the able assistance of the respective Counsel for the parties.

19. The aforesaid exercise is expected to be carried out by the Adhoc District Judge, South Goa, Margao within a period of three months. As a result of the aforesaid, Regular Civil Appeal No. 68/2009/FTC-1 is remanded for consideration before the District Judge, South Goa, Margao, who shall be assigned with the said Appeal. While the Appeal is remanded back, the parties are at liberty to re-argue the Appeal and therefore, all their rights and contentions are kept open.

BHARATI DANGRE, J.