Prabhakar Gones Prabhu Navelkar . vs S.S.Prabhu Navelkar(D) By Lrs.. on 21 August, 2019

Author: K.M. Joseph

Bench: K.M. Joseph, Navin Sinha

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs. 10501-10502 OF 2014

PRABHAKAR GONES PRABHU NAVELKAR (DEAD)
THROUGH LRs & ORS. ..APPELLANTS

VERSUS

SARADCHANDRA SURIA PRABHU NAVELKAR(DEAD)
THROUGH LRS. & ORS. ..RESPONDENTS

J U D G M E N T

K.M. JOSEPH, J.

1. Civil appeals by special leave are directed against the judgment of the High Court of Bombay at Goa in Second Appeals Nos. 16 of 2004 and 17 of 2004. The appellants are the plaintiffs. By the impugned judgment, the High Court has dismissed the appeals. The trial Court in fact had partly decreed the suit. However, the First Appellate Court reversed the judgment of the trial Court and dismissed the suit. By the impugned judgment, the High Court affirmed the decision of the First Appellate Court.

2. We may refer to following genealogy chart, which will facilitate better understanding of the issues involved:

> ANNEXURE P-1 NAVELKAR FAMILY VINTECTEXA POROBO NALVELKAR VINTOLA POROBO NAVELKAR (WIFE: PADMAVATI PORBINI) (WIFE: LAXIMI VINTOLA POROBO NAVELKAR) (SONS) (SON) (DAUGHTER) BALAKRISHNA PORSHOTTAMA SRNIVAS NAGENDRA RAMACHANDRA PIRU ALIAS SOROSPATI POROBO NALVELKAR POININ GROUP P/BRANCH OF VENKTEXA GROUP/BRANCHES OF VITOL (SON) (SON) DF.7 TO DF.27 SURIAJI POROBO GONES POROBO NAVELKAR NAVELKAR (WIFE PREMAWATI) (WIFE: SHANTIBAI) P1 P3 D28 PRABHAKAR PREMANAND SMT. JAISHREE (HUSBAND: VISHNU KAMAT) D29 D3 D5 ANDRA SHARADCHANDRA VENCTEXA

3. As can be noticed, the litigation concerns the properties of the Navelkar family. Parties are referred to with reference to the position in the trial Court. Venctexa Suria Porobo Navelkar was married to one Padmavati. They had one son by name Ramchandra Porobo and a daughter by name Piru. Ramchandra in turn had two sons, namely, Suriaji and Gones. The plaintiffs no. 1 and 3 are sons of Gones. The 2nd plaintiff is the wife of the first plaintiff and the 4th plaintiff is the wife of the 3rd plaintiff. Defendants no. 1 and 3 are the sons of Suriaji.

Defendant no. 2 is the wife of 1st defendant. Defendant no. 4 is the wife of 3 r defendant. Defendant no. 5 is the sister of the

defendants no. 1 and 3. Defendant nos. 7 to 27 are drawn from the other branch of the Navelkar family. As noticed from the genealogy chart Venctexa Navelkar's brother was Vitol Porobo. The wife of Vitol Porobo was Laxmi. They had four sons. Defendants no. 7 to 27 represent the branch of late Vitol. Defendant no. 28 is the sister of plaintiff nos. 1 and 3 and 29 th defendant is her husband.

4. The case set up by appellants in short is as follows. There exist two properties known as "Mallons" (hereinafter referred to as "M") and "Bainguinim" (hereinafter referred to as "B") situated in the village of Bainguinim in Goa. The properties lie adjoining to each other. M is admeasuring 90 hectares (approximately). B admeasures 31 hectares (approximately). Together they constitute the plaint schedule properties. By a deed of gift, dated 09.03.1913, Venctexa gifted half of the property of M to his grandsons, namely, Suriaji and Gones. In the inventory proceedings, held upon the demise of Padmavati, wife of Venctexa, the remaining half of the property of M and the entire property of B was allotted to their daughter named Piru. In the year 1915, Piru along with her husband, by a deed of sale dated 17.11.1915, sold in equal parts the remaining half in the property M and the entire property B to Suriaji and Laxmi. This meant 1/4th right in property 'M' and 1/2 right of 'B' was sold to Suriaji. Later on a deed styled as a deed of dissolution of accounts, payments and obligation came to be executed on 21.01.1919. In the said deed Suriaji and Gones appeared as parties on the one side representing the Venctexa branch and other branch of Vitol came to be represented by his wife Laxmi along with her four sons. In the said deed dated 21.01.1919 Suriaji admitted that the purchase of 1/4th in the property of M and half of property B by the sale deed dated 17.11.1915 was for self and for his brother Gones who paid half the price. Therefore, Suriaji and his wife Shantibai undertook to effect the transfer of registration in the name of Gones, half of the property purchased in his name at all time if so desired. Gones was on the occasion of transfer to make reimbursement of the half of money paid by Suriaji to Laxmi towards the dowry account to his wife. In the year 1925 Suriaji and his wife Santibai gifted in favour of Gones the 1/4th of property M acquired by Suriaji from his grandfather under the gift deed dated 09.03.1913. Therefore, Gones became entitled to 1/8th of the property M and 1/4th of the property B as a result of purchase made under deed of sale dated 17.11.1915. The further case of the plaintiffs is that half share of Gones in property M came to be sold in public auction in execution proceedings against Gones. Despite the dissolution of the Hindu undivided family of Navelkars, the two branches continued to live in their own ancestral house under the same roof. Annual income from the property in or about 1940 hardly

exceeded Rs. 1000/-. The families of Gones and his brother Suriaji always lived continuously together. In 1949 Gones proceeded to Daman on account of his employment. He used to get his share from the suit property until his death which took place in December 1978. After death of Gones, plaintiffs were not given their share. Plaintiffs found that their names were not included in the Survey records. They made an application to the survey authorities. They came to know somewhere in 1983 that one or two junior members of the Navelkar's family are making preparations to dispose of some portion of the suit property. There is reference to proclamation of sale by the Assistant Registrar informing bidders in respect of portion of suit properties. They came to know for the first time about the partition deed dated 13.03.1969 and found that the plaintiffs and other co-owners are excluded. Accordingly, they filed a suit for following relief:

> "(a) For a decree to declare that the plaintiffs together with the defendant Nos. 28 and 29 are entitled to 1/8th share in the property Mollans and 1/4th share in the property Bainguinim. The shares of the defendant Nos. 1 to 6 in the said two properties being 3/8th and 1/4th respectively and the share of the remaining defendants of the Branch of Vitol Porobo being ½ each in the suit properties.

(b) For a decree to declare that the Deed of Partition dated 13.03.1969 executed by the concerned defendants is null and void and not binding on the plaintiffs and for cancellation of the said deed;

(c) For a decree against the defendant Nos. 1, 3 and 5 jointly and severally, to pay to the plaintiffs their share of income in proportion to their share of income in proportion to their aforementioned right in the suit properties since 1979, the share which the said defendants have no right to retain with them.

(d) For a decree to partition the suit properties to separate the plaintiffs' rights and shares in the proportion stated specifically herein above.

(e) For a decree to rectify the survey records to include their names together with the names of defendant Nos. 28 and 29 by directing resurvey in relation to the suit properties.

(f) For a decree of permanent injunction to restrain the defendants in general and the defendant Nos. 1 to 6 and the defendant Nos. 30 and 31 in particular from negotiating deal of any type in respect of the suit properties and/or portion thereof and/or restrain them from disposing off the same by or in any manner whatsoever."

5. The said suit was resisted. The defendants (as noted by the trial Court) can be classified in four groups, one group consisted of defendants no. 1, 2, 30 and 31, second group consisted of defendants no. 3 to 6, third group consisted of defendants no. 7 to 27 and fourth group consisted of defendants no. 28 and

29.

6. The contesting defendants denied the case of the plaintiffs that they have any right in the property.

7. In the year 1919, it was pointed out that the undivided joint family of the Navelkar's came to be dissolved. As far as the condition of settlement deed dated 21.01.1919, it is contended that the payment of Rs. 1000/- by Gones to Suriaji was condition precedent to effecting transfer of undivided shares in the two properties to Gones. The period of payment could not be unlimited. A gift was made by Suriaji and his wife. The gift deed came to be executed in due performance of the acknowledgment. There is reference to inventory proceedings taking place on 07.05.1925 after the death of Suriaji and by order dated 16.12.1925, 1/4th of the property of M and ½ of the property of B was confirmed and allotted to the widow of Suriaji, Smt. Shantibai. Gones intervened as a "Vogal". Thus, in 1925 in relation to suit properties, 1/4th of M and ½ of B belonged to Shantibai, 1/4th of M and ½ of B belonged to Laxmi and ½ of M only belonged to Gones. Property belonging to Gones came to be sold in 1937. In the said execution sale 1/4th of the said half was purchased by defendants no. 1,3 and 5 and the remaining 1/4th was purchased by the sons of Laxmi and deceased father of defendants no. 7, 20, 23 and 25 respectively. Thus, Gones had no right in the properties B and M.

8. After framing appropriate issues, the trial Court partly decreed the suit and a preliminary decree of partition was ordered to be directed to drawn up. The actual decretal portion reads as follows:

> "The suit is partly decreed, whereby it is held and declared that the plaintiffs together with defendants No. 28 and 29 are entitled to 1/8th share in the property Mollans and 1/4th from the property Bainguinim; and that the defendants 1 to 6 are holders of 3/8th and 1/4th share respectively and the share of the remaining defendants representing the branch of Vitol Porobo is one half each in the properties Mollans and Bainguinim. Consequently the Deed of partition dated 31.3.1969 by which the two properties were divided by and between the concerned defendants including the plaintiffs, defendants no. 28 and 29, is declared null and void as such is liable to be cancelled.
>
> The plaintiffs' prayer for partition in prayer (d) is allowed to the area of the land from the suit properties allotted to the branch of Vencatoxa Porobo, represented by defendants 1 to 6 under the Deed of partition dated 31.3.1969. Hence preliminary decree is passed for separation of the plaintiffs and defendants 28 ad 29 share of 1/8th in Mollans and 1/4th from Bainguinim to be demarcated with the help of Collector or any gazette subordinate of the Collector as provided under Sec. 54 C.P.C. r/w O. XX R. 18(1) of C.P.C. respecting the possession of the third parties as far as possible from the area under alphabetical letters C,B & F of Deed of Partition dated 31.3.1969 and the corresponding survey numbers given to the said portion C, B & F viz. No. 17/1, 27/1, 25/1, 23/1 and 24/1. Collector to comply within six months as far as possible.

Survey Authorities directed to carry out mutation of the plaintiffs claim in respect of Survey Numbers fallen to portions C, B & F viz. 17/1, 27/1, 25/1, 23/1 and 24/1.

The defendants 1 to 6 are permanently restrained from dealing with and/or disposing in any manner any further portion of properties delineated as C, B & F in Deed of Partition dated 31.3.1969 and the corresponding survey numbers thereto viz. 17/1, 27/1, 25/1, 23/1 and 24/1, till the partition is effected and confirmation by this Court.

Preliminary decree be drawn accordingly.

Pronounced in Open Court."

9. The trial Court in decreeing the suit proceeded to employ the following reasoning:

"The settlement deed dated 21.01.1919 confers title on Gones in respect of the property covered by sale deed dated 17.11.1915 the payment of Rs. 1000/- and nothing to do with consideration. The consideration was acknowledged as paid in the settlement deed dated 17.11.1915. The transfer by registration was only secure and guarantee rights and absence of Gones.

There was no time limit for Gones to exercise his option under the settlement deed. The suit properties were enjoyed jointly at least until the deed of partition 1969. The deed of partition was not entered into with the plaintiffs and defendants no. 28 and 29 who were cousins. Therefore, it was found to be null and void."

10. The First Appellate Court found that the trial court had misread the relevant portions of the settlement deed. It was, inter alia, found that the settlement deed spoke of transfer of half the properties which meant transfer of title to the properties which was not to be read as transfer of registration/ mutation. The benefit of reimbursement was to Gones as it was for him to fulfill the said condition. The First Appellate Court describes it as absurd to say that the time for option is unlimited. The condition had to be complied within a reasonable time at least before the death of Gones. The deed of sale dated 17.11.1915 did not mention the name of Gones as one of the purchasers or that he had paid the half of price. There is no evidence to show that Gones had money, on his own, to pay half of price. The mere assumption, in the settlement deed, cannot be taken as gospel truth. There may have been some understanding between the two brothers. Condition had to be fulfilled by Gones by reimbursing half of the amount paid to Laxmi. The First Appellate Court appreciated the oral evidence and found that the plaintiffs have no right in the property. As they were not co-owners, it was found that deed of partition being entered into without the junction of Gones, would not make it illegal or invalid. It was further found that the suit was barred by law of limitation. It is still further found that the suit had abated on account of non-impleadment of legal representatives of certain parties. Two appeals were, accordingly, allowed and suit came to be dismissed with cost.

Impugned Judgment of the High Court in the Second Appeal

11. The High Court noted that the appeal had been admitted on the following substantial questions of law:

> "(1) Whether by virtue of Sale Deed dated 17.11.1915 read with the Deed of Declaration dated 21.1.1919, ownership of Gones to one-eight of the property Mollans, and one-fourth of the property Bainguinim, stood established or whether the declaration dated 21.1.1919 was merely an agreement, to sell half of what Suryaji had purchased under Deed dated 17.11.1915 in favour of Gones?

(2) Whether the interpretation placed by the First Appellate Court on the Deed of Declaration to the effect that it constituted an agreement to transfer undivided right in the properties Mollans and Bainguinim in favour of Gones subject to payment of Rs. 1000/- as a condition precedent reversing the finding of the trial court that declaration while acknowledging the ownership of Gones in the two properties merely provided for transfer of registration in the name of Gones at any time thereafter, is legal and sustainable?

(3) Whether in a suit for declaration of share in joint property, and a partition and separation thereof by metes and bounds, the prayer for declaration is the principal relief, and partition a subsidiary one, or the relief of declaration and partition, is the principal relief and such a suit would be within limitation, if filed within 12 years of the ouster of the plaintiffs from the common properties and not within 3 years of the denial of their rights therein?

(4) Whether, on true and correct interpretation of the Deed of Declaration dated 21.1.1919, the exercise of the option for transfer in the name of Gones, half of the property purchased under Sale Deed dated 17.11.1915 could be done without any limitation, particularly in view of the fact that in the Deed it was specifically stated that the transfer in the name of Gonesh would be effected "at any time he may wish"?

(5) Whether the suit instituted by the appellants could be declared to have abated for the alleged non-bringing of some of the heirs of the deceased defendants, who died during pendency of the suit, on record in the absence of any objection raised in the written statement by the defendants, that the suit was bad for non-joinder of necessary parties, and whether such an objection could be raised by merely amending the memo of appeal and when the estate of deceased was substantially represented by persons already on record?

(6) Whether on the pleadings and the material brought on record by the defendants First Appellate Court was right in holding that the suit filed by the plaintiffs was liable to be dismissed as barred by limitation more so when such finding was aimed in reversal of the finding of the Court?"

12. It was found, inter alia, that Suriaji had admitted in document dated 21.01.1919 that 1/8th of property M and 1/4th of property B was purchased by him for Gones and Gones was to pay his contribution, as indicated. No time limit was fixed for payment. The document did not specify that

prior payment should be made by Gones or payment is a condition precedent. It was further found that acknowledgment of liability to part with property is described as absolute and unambiguous and the document contains unambiguous recital about the acknowledgment of existence of right of Gones in the property. It was further found that right of Gones to receive share is thus crystallized and he had a right enforceable in law and according to law. If Gones was to exercise and enforce his rights under the deed dated 21.01.1919, he ought to have objected to the allotment of share. He did not raise any objection related to the inventory proceedings in 1925 and it attained finality. Allotment was not challenged by way of suit which was open to him between 1925 and 1940 or during his life time. Plaintiffs are not witnessing about allegations that Gones used to receive his share. There is no documentary evidence. It is a case of oath against oath. Plaintiffs witnesses did not have knowledge of antecedent facts. The statements of the plaintiff's witnesses were found to be vague. The following are the findings summarized by the Court:

> "40. Collective effect of the pleadings and evidence can be summarized as follows:-
>
> (a) Recognition of share of Gonesh is done in the document dated 21.1.1919;
>
> (b) In spite of recognition or acknowledgment of share of Gonesh, the property is given to Shantibai, wife of Suryaji, which was the only share remaining with the family of Suryaji and Gonesh, in the background the auction of share owned by Gonesh in the property MOLLANS.
>
> (c) The fact that share of Gonesh was sold out is not disputed.
>
> (d) It is also admitted that Gonesh did not dispute the allotment of property to the wife of Suryaji.
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> (e) Ordinarily Gonesh could have objected to the allotment of share to Laxmibai, as his property could not have been given to Laxmibai and could not have been subject matter of inventory, which was not challenged by Gonesh.
>
> (f) Having acquiesced with all these, now Gonesh and his heirs are estopped from opening of the succession after long span of over two decades.
>
> (g) Plaintiffs have failed to prove that their right to sue based on jointness in enjoyment subsisted, and they would be entitled to sue.

41. It is not the plaintiffs' case that they had no knowledge of registration of property in the name of Shantabai way back in 1940 as a final act based on conclusions of inventory proceedings." In the result, conclusion is that whatever right or interest may have survived with Ganesh, was lost, as Gonesh did not at any point of time challenged the allotment of property to Shantibai which allotment in the Inventory Proceedings and recording/ registration of rights in her favour has attained finality for want of challenge."

13. Thereafter the following findings have been entered:

> "42. After recording of properties in the name of Shantibai, she and her heirs have enjoyed suit properties in exclusion to plaintiffs and supporting defendants openly.
>
> 43. While it is clear that inter-se the co-owners registration of right by itself would not be a bar for claiming co-ownership, however, said right of re-opening is not without fetters of limitation when openly, properties are proved to be in exclusive enjoyment of contesting defendants in total exclusion of plaintiffs' predecessors."

14. Resultantly, the questions of law were answered against the appellants and the appeals were dismissed.

15. We have heard Shri J.P. Cama, Senior Advocate on behalf of the appellants, Shri Mukul Rohtagi, Senior Advocate along with Mr. Dhruv Mehta, Senior Advocate on behalf of the respondents.

16. The learned senior counsel for the appellants would submit that the High Court having found that there was title in the properties and there was also no requirement to pay Rs. 1000/- as a condition precedent, the suit ought to have been decreed. As far as the inventory proceedings are concerned, his contention is that this was the case which was set up by the defendants. It was incumbent on the defendants to produce the inventory proceedings.

17. He would further contend that even if Gones, the predecessor-in-interest of the plaintiffs, was party to the inventory proceedings and did not object to the properties being recorded in the name of his sister-in-law and children, this would not take away the effect of the acknowledgment of title in the settlement deed dated 21.01.1919. His rights in the property having been acknowledged by his sister-in- law and late brother with reference to the sale deed, by merely recording the properties in the name of his sister-in-law, his half right, which is acknowledged in the property, in the settlement deed dated 21.01.1919 would not be affected. It was further contended that it is not open to question that the consideration for obtaining the property in the sale deed of the year 1915 was acknowledged as paid partly by Gones. The mere fact that Gones did not, in his life time, bring any proceedings, would not preclude the plaintiffs, successors-in-interest of Gones, who were entitled as co-owners of the plaint schedule properties, to seek relief. When the title had not been extinguished, the Court has gone wrong in drawing the wrong conclusion about Gones not raising objection to the recording of the property to Laxmi. There could not be acquiescence by estoppel. The Court has not comprehended the effect of finding title with Gones and according to him if title is not lost, in a manner known to law, it is always open to enforce the same. The finding of the court that right arose latest in 1940 and there is limitation in a suit based on title was challenged. Unless adverse possession is proved irrespective of the period of time taken for the plaintiffs to institute the suit law does not recognize deprivation of their title.

18. Per contra, the learned senior counsel on behalf of the respondents/ defendants were at pains to point out that neither in law nor in equity the appellants have made out a case for interference. The litigation has been commenced after nearly six decades of the documents on which the plaintiffs lay

store-by. With the inventory proceedings, the curtains were rung down. Gones stood by and allowed his sister-in-law and children to be acknowledged as owners of the property. Gones lived long enough thereafter and yet he did not raise his little finger against the possession or right of the defendants. Gones passed away only in 1978. There is evidence to show that Gones was very much in the house on the eve of the partition deed and yet he did not raise any objection either then or even at any point of time thereafter till his death. They would in fact point out that Gones never contemplated this litigation launched by his successors-in-interest. This is for the reason that after this acknowledgment of the right in favour of Gones in the settlement deed dated 21.01.1919, in 1925 his elder brother Suriaji and his wife have executed a gift deed and it is pressed before us, that it resulted in Gones getting more than what he would have got in terms of the alleged liability to execute the document in terms of the settlement deed of 1919. Expatiating the argument, it is pointed out that the extent of property M was approximately 90 hectares, property B consisted of nearly 31 hectares. Under the gift deed of 1913, executed by the grandfather of Suriaji and Gones, in their favour 1/4th of M was given to Suriaji and Gones. This meant both of them obtained 22.5 hectares each. By the sale deed dated 17.11.1915 Suriaji and Laxmi, wife of Vitol, obtained 1/4th of M which is equivalent to 22.5 hectares and ½ of B, which is equivalent to 15.5 hectares. Thus on the aggregate an extent of 38 hectares formed the subject matter of sale deed. As per the deed of dissolution dated 21.01.1919, Gones would have been entitled to 19 hectares. This figure is arrived at as the half right of 38 hectares as calculated hereinbefore. However, by gift deed dated 14.04.1925, what was gifted was no doubt the 1/4th right of M acquired by Suriaji from his grandfather but which consisted of 22.5 hectares. Thus, it is pointed out after the gift deed dated 14.04.1925, Gones had 45 hectares. It is further sought to be contended that if the claim of the plaintiffs is countenanced Gones would get 64.12 hectares leaving 19 hectares alone to the branch of Suriaji. It is pointed out that this Court is hearing these appeals after grant of special leave.

19. In an appeal, so sourced, equitable considerations must play a dominant part. In other words, this is a case where Gones obtained a larger share than he would have got in terms of the acknowledgment in the settlement deed dated 21.01.1919. The learned senior counsel invites us to the conduct of Gones in this perspective. It is contended that Gones, during his life time, did not have any grievance or cause for complaint. His conduct is accordingly patterned on his contentment with having received his legitimate due. This state of fulfillment of his rights explains his conduct as “Vogal” and acquiescing in the proceedings whereunder his sister-in-law stands acknowledged as the owner of the properties. There is reference also to the partition which took place in 1969 i.e. 44 years after the gift deed of 1925. It is further pointed out that the Court may not overlook that apart from the partition, which took place in 1969, there were land acquisition proceedings. It was the branch of Suriaji in recognition of their rights who were awarded compensation. There was no objection raised at that time. The suit clearly was time barred. It is also the case of defendants that they have pleaded adverse possession. It is contended that plaintiffs have miserably failed to prove that they were in receipt of any income. We are taken to the evidence in this regard. Respondent also impugned the finding by the High Court that Gones had title and contended that the payment of Rs. 1000/- could not but be a condition precedent. It is also contended that the sale deed dated 17.11.1915 is executed in favour of Suriaji and Laxmi. There is absolutely nothing in the sale deed, which would indicate that the sale deed was also in favour of Gones. What would follow from the settlement deed dated 21.01.1919 was only that the parties contemplated the execution of the

another document of transfer of property in terms of the recitals in document dated 21.01.1919 in favour of Gones. This, in turn, was dependent upon Gones exercising option and paying Rs. 1000/- which was his share.

CASE LAW RELIED UPON BY THE APPELLANTS

20. In the case law relied upon by the appellants, in Md. Mohammad Ali (dead) by Lrs. v. Jagadish Kalita and others1, this Court, dealing with Article 65 of The Limitation Act, 1963 has essentially reiterated 1 (2004) 1 SCC 271 the principle that long and continuous possession by itself would not constitute adverse possession. Non- participation in the rents and profits of the land to co-owner does not amount to ouster. Furthermore, this Court has noted that in a suit governed by Article 65 of the Act, if the plaintiff succeeds in proving his title, it is no longer necessary to prove that he was in possession within 12 years of the filing of the suit. It is for the defendant to prove animus possidendi.

21. In Jai Singh and others v. Gurmej Singh2, this Court has articulated the principles relating to the interse rights and liabilities of co-owners, as follows:

> ”9. It is to be noted that in the subsequent Full Bench judgment in Bhartu case[1981 PLJ 204] , the earlier decision in Lachhman Singh case [AIR 1970 P&H 304] was distinguished on facts. The principles relating to the inter se rights and liabilities of co-sharers are as follows:
>
> (1) A co-owner has an interest in the whole property and also in every parcel of it.
>
> (2) Possession of joint property by one co-owner is in the eye of the law, possession of all even if all but one are actually out of possession.

2 (2009) 15 SCC 747 (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment. (6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to anybody to disturb the arrangement without the consent of others except by filing a suit for partition.”

22. The appellants, in short, on the strength of the said rulings, contend before us that since the High Court has found that Gones had title in the property, the suit must be decreed. The defendants have failed to prove adverse possession or ouster.

23. The decision of this Court in P. John Chandy and Co. (P) Ltd. v. John P. Thomas3 is pressed into 3 (2002) 5 SCC 90 service for contending that inaction in every case does not lead to inference of acquiescence. The said decision, in fact, was one rendered under the Kerala Buildings (Lease and Rent Control) Act, 1965. The ground for eviction alleged by the landlord was sub- lease. The contention of the tenant was there was implied consent of the landlord. This Court went on to hold that consent contemplated under the enactment was concerned with some positive act. It was in the context of the same that the Court, inter alia, made the observations made in regard to inaction not amounting to acquiescence.

24. In L. N. Aswathama and another v. P. Prakash4, this Court held that the plea of adverse possession is inconsistent with the plea of title. This Court, in this context, held as follows:

> "16. ... According to them, the two pleas being mutually inconsistent, the latter plea could not even begin to operate until the former was renounced. Reliance was placed on the following observations of this Court in Mohan Lal v. Mirza Abdul Gaffar [(1996) 1 SCC 639] made while considering a case where the defendant raised the pleas of permissive possession and adverse possession: (SCC pp. 640-41, para 4) 4 (2009) 13 SCC 229 "4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the [sale] agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor-in-title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years i.e. up to completing the period of his title by prescription nec vi, nec clam, nec precario [not by violence, not by stealth, not by permission]. Since the appellant's claim is founded on Section 53-A [of the Transfer of Property Act, 1882], it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."
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> 17. The legal position is no doubt well settled. To establish a claim of title by prescription, that is, adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence. (Vide P. Periasami v. P. Periathambi [(1995) 6 SCC 523] , Md.

Mohammad Ali v. Jagadish Kalita [(2004) 1 SCC 271] and P.T. Munichikkanna Reddy v. Revamma [(2007) 6 SCC 59]).

18. We are however of the view that the decision in Mohan Lal [(1996) 1 SCC 639] 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 the 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 the defendant is rejected." (emphasis supplied)

25. In Kuldip Mahaton and others v. Bhulan Mahato (Dead) by Lrs. And others5, this Court has reiterated the principle that in the case of Joint Hindu Family, there is community of interest and unity of possession among all members of the Joint Hindu Family. The fact that one of the coparceners is not in joint possession, does not mean that he has been ousted. The possession by one, it was found, is therefore, possession of all. Mutation in the name of elder brother, for the collection of rent and revenue, does not prove hostile title as against other. It was further held that where possession can be referred to lawful title, it would not be decided to be adverse.

26. In P.T. Munichikkanna Reddy and others v. Revamma and others6, this Court held that there is no equity in favour of a person who raises plea of adverse possession. Right to property is a human right and 5 (1995) 2 SCC 43 6 (2007) 6 SCC 59 plea of adverse possession is to be viewed in the light of the same.

27. In State of U.P. Another v. Universal Exporters and another7, this Court emphasized the need to prove the date when the defendant's possession became adverse to the plaintiff's title.

28. Punit Rai v. Dinesh Chaudhary8, is relied upon to contend that a fact within the knowledge of a person must be proved by the said person, and if the said evidence is not produced, it would lead to inference that had the evidence been produced, it would not have supported the case of the party.

29. Sankalchan Jaichandbhai Patel and others v. Vithalbhai Jaichandbhai Patel and others9 is relied upon to contend that mutation entries are only to enable the State to collect revenues from the

persons in possession and that do not create title or interest therein.

30. The decision of the High Court of Punjab and Haryana in Mohinder Singh and another v. Kashmira 7 (1997) 7 SCC 531 8 (2003) 8 SCC 204 9 (1996) 6 SCC 433 Singh10, is relied upon to contend that there is no period of limitation for filing a suit for possession on the basis of inheritance and that Section 65 of the Act is not applicable. In Paragraph 6, this is what was held by the Division Bench:

> "6. After hearing the learned counsel for the parties, I find force in the contention of the learned counsel for the respondent. It is well established principle of law that inheritance does not remain in abeyance and the heirs after the death of the last male holder succeed to the property of the deceased in accordance with law. Kashmira Singh, being the son of Niranjan Singh deceased, was entitled to 1/3rd share in the land in dispute. After the death of Niranjan Singh, he was not required to file any suit for possession on the basis of inheritance. He had become full owner of his share in the property on the death of the last male holder. For establishing his right as an heir, he was not required to file a suit. However, a situation may arise when the heir is not in possession of the property inherited. In that event a suit for possession may have to be filed and on contest the same may fail on the defendant proving that he has perfected his title by adverse possession. It is such type of suit which is governed by the provisions of Article 65 of the Limitation Act. In this view of the matter, with respect, I find that the view taken by R.N. Mittal, J. in Naginder Singh's case (1983 Cri LJ 432) (supra) that it is well settled that a suit for possession on the ground of inheritance should be filed within a period of twelve years from the date when the inheritance

10 AIR 1985 P&H 215 opens, does not lay down correct law. The decisions to which reference has been made in para 9 of the judgment by the learned Judge, do not lay down any such rule. On the other hand, in all those decisions it was adverse possession of the defendants which was upheld. Thus I hold that no period of limitation is prescribed for filing a suit for possession on the basis of inheritance."

31. In Ashok Kumar and others v. Gangadhar and another11, the learned Single Judge has laid down as follows:

> "24. In the instant case also, the plaintiffs suit is based on title and the consequential relief of possession was also sought for. The plaintiffs in these suits established before the lower Court that it is the self-acquired property of D-1's father and they purchased it under two different sale deeds. In such a case, the suit is governed by Article 65 of the Act as it was filed within 12 years of the dispossession. But it is for the defendants to show that the plaintiff was out of possession for more than 12 years. In the instant case, there is no such situation and the suit was filed immediately after completion of three years from the date of dispossession. If the contention of the defendants that Article 58 applies to the suit for possession based

> on title where declaration of title is also sought, is accepted, it would amount to ignoring the relief for recovery of possession and application of Article 65 to a suit for possession and taking away the right of the plaintiff to prove that the suit is within 12 years from the date when the 11 AIR 2007 AP 145 possession of the defendant becomes adverse to the plaintiff. If such a suit were to be decided with reference to Article 58 on the ground that the declaration is sought for, application of Article 65 to the suit for possession would be rendered otiose. Such a construction would be opposed to all principles of interpretation of statutes.

Therefore, different articles of the Limitation Act will have to be interpreted harmoniously. When such an interpretation is given to Articles 58 and 65 and when the suit is filed for declaration of title to the suit property with consequential relief of possession in my humble view Article 65 of the Limitation Act would apply and not Article 58 of the Limitation Act. Article 58 applies to a case where declaration simpliciter is sought for without possession in my humble view Article 65 of the Limitation Act would apply and not Article 58 of the Limitation Act. Article 58 applies to a case where declaration simpliciter is sought for without any further relief. It appears that this aspect has been the subject matter of consideration of Law Commission in its 89th Report on the Limitation Act and the Commission recommended for the amendment of Article 58 of Schedule I of Limitation Act by adding "without seeking further relief" after the word 'declaration' in the first column of Article 58 of the Schedule."

32. In Banarsi and others v. Ram Phal12, this Court dwelt upon the rights of a respondent in an appeal under Order XLI Rule 22 of the Code of Civil Procedure, 1908 inter alia:

> 12 (2003) 9 SCC 606 "10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-

rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross- objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree, he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

> (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.
>
> (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.
>
> (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment

which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross- objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross- objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent." (emphasis supplied) This position has been reiterated in Hardevinder Singh v. Paramjit Singh and others13. 13 (2013) 9 SCC 261

33. In Mohan Lal (deceased) Through His Lrs. Kachru and others v. Mirza Abdul Gaffar and another14, this Court held that the appellant's first plea of adverse possession was inconsistent with the second plea of possession being retained under Section 53A of the Transfer of Property Act, 1882. It was further held that having coming into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of independent hostile adverse possession to the knowledge of the transferor.

THE CASE LAW RELIED UPON BY THE RESPONDENTS

34. Reliance is placed on the decision of the High Court of Bombay at Goa in Sheela Rodrigues and another v. Lourencinha Ana D'Cruz Rodrigues Fernandes15 for the view that inventory proceedings are in the nature of a declaration of ownership rights and that it is like a judgment in rem. This is to apparently contend that it was necessary for Gones to object at the given time.

35. The decision of this Court in Raj Narain Pandey 14 (1996) 1 SCC 639 15 (1999) SCC ONLINE Bombay 109 and others v. Sant Prasad Tiwari and others16, is relied upon to contend that in the matter of a local law, the view taken by the High Court over a number of years should normally be adhered to. This has been reiterated and pointed out by this Court in Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat17.

36. The decision of this Court in Dilboo (Smt.)(Dead) by Lrs. and others v. Dhanraji (Smt.)(Dead) and others18, is relied upon to contend that once there was registration of a document, there is deemed knowledge regarding the same and limitation would begin to operate. Respondents also

seek support from the judgment of this Court in Vishram alias Prasad Govekar and others v. Sudesh Govekar (Dead) by Legal Representatives and others19 wherein this Court held as follows:

> "18. We have already noticed above, the basis on which the first appellate court as well as the High Court has held that the plaintiffs are the owners of the suit property, which rights they have inherited from Vassudev Govekar, father of Plaintiffs 1 to 3. Findings of the courts below are that the suit property viz. Talhao No. 168 of Communidade of Anjuna, 16 (1973) 2 SCC 35 17 (1994) 4 SCC 1 18 (2000) 7 SCC 702 19 (2017) 11 SCC 345 was acquired by Vassudev Govekar from Communidade of Anjuna under No. 131/1963 on 24-2-1970 as a permanent grant for the construction of the house. In order to prove this ownership, not only the said grant was produced on record, the plaintiffs also filed evidence of the inventory proceedings initiated upon the death of Vassudev Govekar which described the suit property. Additionally, duly promulgated survey records showing the property standing in the name of Vassudev Govekar were also produced.
>
> xxx xxx xxx
>
> 20. Pertinently, the learned counsel appearing for the appellants could not contest the aforesaid approach of the courts below. It is for this reason, he took an altogether different route by arguing that joint ownership in the property in question was admitted by the plaintiffs themselves for which purpose he referred to the averments made in the plaint filed by the plaintiffs. In the first instance, we find that no such argument predicated on such pleadings have been taken in the courts below. Be that as it may, since the defendants rely upon the pleadings of the plaintiffs themselves, we proceed to examine the weight in this submission. A closer and minute look into the pleadings would show that there is no admission on the part of the plaintiffs about the co-ownership insofar as the suit property is concerned. In Para 3 of the plaint, the plaintiffs have given the description of the suit property which is popularly known as "Devalvadi" bearing Survey No. 251/2 situate at Chinvar in the village of Anjuna, Bardez, Goa, having an area of 1000 sq m. What is significant is that this property bears Survey No. 251/2 and the plaintiffs described the same as the "suit property". In Para 4, it is mentioned that Vassudev Govekar acquired this property from Communidade of Anjuna.

In Para 6 it is mentioned that on this suit property, incomplete structure was raised by Vassudev Govekar which the plaintiffs referred to as the "suit house". Thus, the ownership is claimed by the plaintiffs through Vassudev Govekar who acquired the property bearing Survey No. 251/2 (the suit property) on which he constructed incomplete structure (the suit house). At the same time, in Para 5, which is relied upon by the defendants in their attempt to show admission of the plaintiffs as to co-ownership, the plaintiffs have stated that towards the eastern side of the suit property, there exists another property bearing Survey No. 251/4. The plaintiffs pleaded that on this land, whereupon a house is also constructed, belonged to their grandfather Jagannath Govekar (father of Defendant 1) and it is this property which the plaintiffs say is in the co-ownership of the plaintiffs

and the defendants. Thus, the statement about the plaintiffs and the defendants as co-owners in title and in possession pertains to property bearing Survey No. 251/4 which is not the subject- matter of the suit."

37. Parties cannot go beyond their pleadings, runs another argument on behalf of the respondents. This is in context of the argument of the appellant that Shantibai (wife of Suriaji) continued to hold the property in trust for Gones. The respondents contend that there is no concept of trust in civil law system which prevailed in Goa under the Portuguese Code. The case based on trust was never pleaded in the plaint.

38. Eurekha Builders and others v. Gulabchand, S/o Veljee Dand Since Deceased By Legal Representatives and others20 is relied upon to contend that rights, including title, can be extinguished by the passage of time. Article 505 read with Article 535 of the Portuguese Code resulted in extinguishing the right of Gones. Assuming for argument sake that there existed certain rights with Gones under the Settlement Deed of 1919, it is said that all such rights stood extinguished in 1939, i.e., 20 years from 1919 or in 1949, i.e., 30 years from 1919 under Article 535. Even before Goa became territory of Indian Union, the rights of Gones had already been extinguished.

39. Reliance is also placed on paragraph 30 of the judgment of this Court in Khatri Hotels Private Limited and another v. Union of India and another21 in regard to the effect of Article 58 of the Act. Therein, this Court held as follows:

> "30. While enacting Article 58 of the 1963 Act, the legislature has designedly 20 (2018) 8 SCC 67 21 (2011) 9 SCC 126 made a departure from the language of Article 120 of the 1908 Act. The word "first" has been used between the words "sue" and "accrued". This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued."

40. It is their case that the suit being one for declaration of title also, the suit is clearly barred as the right to sue first accrued in 1925.

41. Lastly, it is contended that the Court may take notice of the law laid down by this Court in Taherakhatoon (D) by Lrs. v. Salambin Mohammad22 and refuse to exercise discretion in favour of the appellants, having regard to the various facts, the long lapse of time, after the documents of the year 1913,1915, 1919, 1925, and the developments which have taken place in the meantime.

42. The first question we must pose and consider is what exactly is the property which is involved in the litigation.

22 (1999) 2 SCC 635

43. As we have noticed in the beginning of our judgment, property 'M' consisted of about 90 hectares whereas property 'B' consisted of about 31 hectares. By the Gift Deed of 1913, the grandfather of Suriaji and Gones had gifted one-half right in property 'M' to both Suriaji and Gones. Thereafter, the one-half share in property 'M' and the whole of property 'B' came to vest with the aunt (father's sister) of Suriaji and Gones. It is in 1915 that the aunt along with her husband executed the sale deed conveying the rights to Suriaji and to the other branch, viz., Vitol. Thereafter, in 1919, the deed of dissolution, which is the sheet anchor of the appellant's case came to be executed. It is thereunder that acknowledgment of title, as contended by the appellants, of Gones over the property, which his subject matter of the sale in favour of Suriaji, is made.

44. Still further, in 1925, Suriaji along with wife, executed a Gift Deed. Under the same, the donors have gifted the rights obtained by Suriaji under the Gift Deed executed in his favour under the document of 1913 by his grandfather. There is no dispute that in 1937 the rights of Gones as acquired under the Gift Deed executed in his favour by his grandfather in 1913 and also the property acquired by him under the Gift Deed by his brother and sister-in-law in 1925 came to be sold in auction in execution of decree obtained against Gones. The present suit is filed based on the sale deed executed by the paternal aunt of Gones and her husband expressly in favour of Suriaji and his wife and the other branch. The appellants claim one-eighth share being one-half of one-fourth of property 'M' conveyed under a sale deed to Suriaji and his wife. The appellants also claim one-fourth share being one-half of one-half in property 'B' conveyed to Suriaji and his wife under the sale deed of 1915.

PRESCRIPTION UNDER THE PORTUGUESE CIVIL CODE

45. Undoubtedly, the properties being located within the present Union territory was governed by the Portuguese till 20.12.1961. On 20.12.1961, the territories of Goa, Daman and Diu were included as Union territories. Article 505 relied upon by the respondents defines prescription. "Article 505 – Things and rights are acquired by virtue of possession, just as obligations are extinguished by the fact of not demanding their fulfilment. The law lays down conditions and the period of time, that is necessary, for one, as well as for the other. This is called prescription.

Sole Paragraph: The acquisition of things or rights by possession is known as positive prescription; the discharge of obligations by reason of not demanding their fulfilment is known as negative prescription." Article 535 is also relied upon by the contesting respondents. The same reads as follows:

> Article 535 -Whoever has incurred in an obligation, or to do something to another, stands relieved of the obligation, if its performance is not demanded for a period of 20 years, and the obligant is in good faith, at the end of the prescription period, or when the performance is not demanded for a period of 30 years, regardless of good faith or bad faith, except where special prescription are provided in law.
>
> Sole paragraph: Good faith in the case of negative prescription consists in the ignorance of the obligation. This ignorance is not to be presumed in case of persons

who originally contracted the obligation."

46. A Bench of three learned Judges in Syndicate Bank vs. Prabha D. Naik 2001 (4) SCC 713 had occasion to consider the Portuguese Civil Code. In the said case the appellant Syndicate Bank instituted a special suit for recovery of money advanced. The loan was granted in July 1978. The respondents agreed to pay the amount by December, 1978. Loan was granted on execution of promissory note and a deed of hypothecation. Plea of bar of limitation was raised as suit was filed in 1985. The appellant thereupon relied upon Article 535 which we have adverted to above. It was contended by the appellant Bank that the law of limitation in Goa was to be treated as the law under Portuguese Civil Code. Therefore, the period of limitation as prescribed under the Schedule I of the Indian Limitation Act would not apply. This Court referred to Section 5 of the Goa, Daman and Diu (Administration) Act, 1962 which contemplated continuance of laws in force before the appointed day in Goa, Daman and Diu or any part thereof until amended or repealed by a competent legislature or other competent authority. It is relevant to refer to para 13, 14 and 16, the same reads as under:

> "13. Admittedly, the Portuguese Civil Code continued in the Union Territory of Goa, Daman and Diu by virtue of Section 5 of the Goa, Daman and Diu (Administration) Act, 1962 which provides that the existing laws shall be continued in force in the Union Territory until amended or repealed by a competent legislature. We may also note Regulation 12 of 1962 which provides for extension of certain laws mentioned in the Schedule to the Regulation, to wit: The Negotiable Instruments Act, 1881 and the same was brought into effect in the Union Territory of Goa, Daman and Diu with effect from 1-12-1965. In Goa, Daman and Diu (Laws) (No. 2) Regulation, 1963 (Regulation 11 of 1963), provisions akin to those contained in Regulation 12 are found under which the Indian Contract Act, Sale of Goods Act and Transfer of Property Act were brought into force in the Union Territory from 1-11-1965 and 1-12-1965 respectively.

The situation thus emerges having regard to the two regulations noticed hereinbefore (Regulation 11 and Regulation 12) that both the Negotiable Instruments Act and the Contract Act together with some other statutes have been made applicable to the State by appropriate legislative authority. The promissory note signed by Respondent 1 herein and the guarantor issuing a guarantee thereof cannot but be termed to be the subject within the meaning of the Negotiable Instruments Act. In any event, and obviously on the factual score, there was also existing a deed of hypothecation which cannot also but be termed to be a contract within the meaning of the Indian Contract Act which stands applied in the State of Goa, Daman and Diu. It is, therefore, to be seen as to whether specific legislations containing the subjects under which the cause of action had arisen, would govern the field or the procedural law assuming it would have its due application in replacement of the governing statute. This however, involves a wider debate and this Bench has not been called upon to answer the same, as such we refrain ourselves from expressing any opinion in regard thereto but the fact remains that both the Negotiable Instruments Act and the Contract Act have been included in terms of the Regulations noticed above and as such, made applicable in the State of Goa, Daman and Diu.

14. Be it noted that Article 535 containing the provisions of limitation in Chapter III regulating the contracts in the Portuguese Civil Code, which however stands replaced by the Indian Contract Act. The prescribed period for limitation pertaining to the contracts being in the same Chapter under the Contract Act cannot be said to be surviving as an independent provision rather than going along with the other provisions of the contract which by reason of adaptation of the Contract Act stand replaced. It thus cannot but be said to be an implied repeal. The necessity of having an express repeal was never felt by reason of the factum of adaptation of the Indian Contract Act insofar as Chapter III is concerned. Either the Chapter survives in its entirety or it perishes in all its spheres — it is one Chapter dealing with contract and prescribes the period of enforcement of the same, no dissection is possible.

16. Article 505 of the Civil Code provides for acquisition of things and rights by possession and the same is ascribed to be positive prescription and discharge of obligations by reason of not demanding their fulfilment is known as negative prescription. The word "prescription" is in general a mode of acquiring title to incorporeal hereditaments by continued user, possession and enjoyment during the time. Article 535 prescribes a negative element of prescription which is akin to adverse possession. A prescriptive right however, differs from adverse possession, since prescription relates to incorporeal rights while adverse possession applies to an interest in the title to property. "Prescription" is usually applied to acquisition of incorporeal hereditaments and negative prescription obviously is a negation of such an acquisition.

"Prescription" admittedly, is a part of substantive law but limitation relates to procedure, as such prescription differs from limitation. The former is one of the modes of acquiring a certain right while the latter viz. the limitation, bars a remedy, in short, prescription is a right conferred, limitation is a bar to a remedy. Chapter II of the Portuguese Civil Code provides detailed articles pertaining to prescription. Corpus Juris Secundum, Vol. 72 described the word "prescription" as below:

> "In law prescription is of two kinds: it is either an instrument for the acquisition of property or an instrument of an exemption only from the servitude of judicial process. In the first sense, as relating to the acquisition of property, prescription is treated in adverse possession. In the second sense, as relating to exemption from the servitude of judicial process, prescription is treated as Limitation of Actions." (emphasis supplied)
>
> 47. The Court proceeded to take the view that having regard to the applicability of the Indian law namely the Contract Act, Negotiable Instrument Act, the extinction of remedy under the Portuguese law cannot but be deemed to be impliedly repealed. It was further held that "having regard to the factum of Article 535 being a procedural aspect and not being a substantive right, the Court was not contemplating the situation under the Private International Law, but the distinction between substantive and procedural law has a meaningful existence herein.

The Court approved the earlier view taken by this Court in Justiniano Augusto De Piedade Barreto v. Antonio Vicenta Da Fonseca and Others 1979 (3) SCC 47 as laid down. As can be seen from the facts the transaction of loan arose in the year 1978 after the contract Act and the Negotiable Instrument Act were made applicable in Goa.

In this case the respondents relied upon Articles 505 and 535 to contend that the right of Gones was extinguished, by virtue of Article 505 and 535. The argument is on the following basis. Gones did not figure as a transferee in the sale deed dated 17.11.1915 executed in favour of Suriaji and Another. Four years thereafter, the document styled as settlement deed came to be executed on 27.1.1919. It is solely based on the clause in the same that the entire suit is apparently filed by the appellant. The clause reads as follows:

> "...Further the party of the first part Suriaji stated that the purchase made by him by the aforesaid sale deed dated 17th November, 1915, was made for himself and for the said party of the first part Gones his brother, and that he has paid for half of the price of the said purchase, therefore, he undertakes along with the said Shanntibai to transfer in the name of the said Ganesa the half of the properties purchased in his name by the aforesaid deed at any time he may desire to have it transferred and on the occasion of this transfer the said Gones will have to indemnify him with the half of the amount which has now been paid to the party of the second part Locximii from the money of the dowry of his wife..."
>
> 48. It is, therefore, the contention that at best Suriaji came under an obligation within the meaning of Article 505 read with Article 535, to transfer in favour of Gones as contemplated under the clause in the document dated 21.1.1919. It is their case that calculated from 21.1.1919 the period of 20 years would end in 1939 and at any rate the period certainly would end in 1949 on the expiry of 30 years from 21.1.1919.

On the expiry of the period of 30 years from 1919, therefore, the case of the respondents is that under Portuguese law which undoubtedly held the field before the Limitation Act of 1963 was made applicable with effect from 1.4.1964 the negative prescription extinguished whatever right, if any Gones had in the property.

49. We must at once consider the request of the appellant to apply the principle laid down in the decision of this Court in the case of Syndicate Bank vs. Prabha D. Naik (supra). If the argument based on Articles 505 and 535 is accepted, then it would be found that the obligation in regard of Suriaji would be extinguished. The decision in Syndicate Bank (supra)relied on by the appellants is clearly distinguishable. In the said case, as noticed, the transaction was entered into in the year 1978. A promissory note which is a negotiable instrument came to be executed. At the time when it is so executed, the contract entered into, provided for repayment of the amount by the debtor, the Contract Act and the Negotiable Act were made applicable to the State of Goa, Daman and Diu. This formed the fundamental basis for the Court's finding that the extended period of limitation available under Article 535 of the Portuguese Civil Code would no longer be available. Unlike the fact situation in the said case, we are in this case called upon to pronounce upon whether there was

extinguishment of the obligation and consequential right under the obligation. At the time when Portuguese Civil Code was the only law which is applicable, the appellant relied upon the document of 1919. If the case is to be resolved on the basis that Suriaji was under an obligation to do something that is transferring the property certainly such an obligation would stand extinguished at the latest on the expiry of 30 years, namely, on 21.01.1949 and earliest by 21.01.1939. If that is the position then when the Limitation Act of 1963 came into force on 01.04.1964 and under the erstwhile law, viz., Portuguese Civil Code, Suriaji and the contesting defendants stood freed from the obligation under the negative prescription contained under Article 535, then Articles 505 and 535 would be fatal to the appellants.

What however, is the effect of Article 537?. According to the appellants in the Settlement deed dated 21.1.1919 the word used are 'at any time'. In view of the same Article 537 stood attracted. Article 537 is an exception to Article 535 runs the argument of the appellants. Article 537 reads as follows:

> Article 537-Obligations attached to non transferable rights or to those not subjected to time limitations, do not attract prescription".
>
> When any time limit is not attracted the obligation under the Portuguese law it could be enforced at any time, runs the argument.
>
> 50. It is necessary also to consider the question relating to title sought to be set up by the appellants.

The entire case of appellants is based on right in the plaint schedule property, based in turn on the right which Gones acquired under the sale deed dated 17.1.1915. Under the sale deed dated 17.1.1915, 1/4 th share of property 'B' and 1/2 right in property 'M' came to be conveyed to Suriaji, the other part being conveyed to the Vitol branch. It is undisputed that Gones does not figure as a transferee in the sale deed. There is nothing left to even construe as there is not even a whisper of the name of Gones in the sale deed dated 17.1.1915. It is a case of outright sale of share of property as we have mentioned in favour of the named transferees. It is 4 years thereafter however that document dated 21.1.1919 styled as a dissolution deed is executed which contains the controversial clause which we have already set out.

51. According to the respondents the following is interpretation to be placed on the same. A document was executed for settlement of accounts of sociedade between the vitol and the venctexa branches of the Navelkar family. Breaking down the controversial clause(See para 47), it is the contention of the respondents that it was Suriaji who has actually paid for the purchase of the property in question. In this regard reliance is placed on the expressions 'he/his and himself'. Except for the use of the word 'he' in the underlined portion it is their case that the words 'he, his and himself' have been used to refer to Suriaji. It is only the word 'he' which is underlined that has been used to refer to Gones. The case is that the documents were drawn in Portuguese and there was lack of clarity in translations. It is further contended that the Gones was a minor when the property was purchased and he started earning only in 1925 which is admitted by PW1 when he stated that Gones was Puberto in 1919 and he started earning after 1925. They have a definite case that the civil law

system prevalent in Goa till 19th December, 1961 when it became an Union territory did not recognize equitable title and unless a proper document of transfer was executed Gones could not derive any title. It is their further case that the deed dated 21.1.1919 was at best in the nature of an agreement to sell. Such a promise to sell is governed by Article 1548 of the Civil Code. Article 1548 of the Civil Code is as follows:

> "Article 1548: A simple reciprocal promise of purchase and sale, being accompanied by specification of price and description of thing constitutes a mere agreement to perform a fact, which shall be governed by general terms of contract, with the difference, however, that where the earnest money is paid, i.e. any amount received by the promissory vendor, forfeiture of the same or its restitution in double shall be the compensation for loss and damages.
>
> Sole paragraph: In case of immovable properties, the contract must be drawn in writing and, if made without consent of the wife of prominent promisor vendor, the later shall be liable to compensate the promise purchaser for loss and damages." This is the submission of the respondents.
>
> The following testimony of P.W.1 may be relevant:
>
> "……I now say that the said agreement to transfer agreement was conditional depending on the exercise of the option by Gones. It is true that the agreement of Exh.F, namely the said Deed is a conditional agreement to transfer the registration in the name of Gones by said Suryaji….." "……..The said Gones never exercised to have the registration of the property or even transfer the property in his name during the entire 60 years period beginning from 1919 till 1978….." "….the obligation to reimburse Surya did not devolve on the heirs of Gones….." "I also do not know what was the exact amount which had to be paid by Gones to Suriyaji to effect registration of the property."

52. Respondents would further contend that the sale deed in terms of Article 1519 must be reduced to writing and if the value exceeded 1000 excudos it had to be registered under Article 949. Respondents would contend that finding of the High Court in regard to title is erroneous and cannot be sustained. The High Court has found inter alia as follows:

> "Admittedly, no time limit is fixed for the payment of the share or exercise of right in the Deed dated 21.1.1919. This document also does not specify that a prior payment should be made by Gones due to be made thereunder, or that such payment is a condition precedent.." The respondents further contended that under Article 949 of the Civil Code, certain documents where rights in immovable property were created have to be registered. They included transfers of immovable property gratuitously, onerously and all transmission of properties or corporeal immovable property and mere possession were acts which were subject to registration under Article 949. Article 960 is also relied upon which provides that the registration record is also to be

maintained in whose favour the transmission is made. It reads as under:

"Article 960: The extract, of inscription against the description besides serial number and date of the year, month and day and the date of the title deed as the date its presentation for registration shall contain:

Paragraph 1; xxx Paragraph 2 : the name, status, profession and domicile:-

1. xxx

2. Of the person in whose favour the transmission is made in the cases of transmission of immovable properties" It is their case that such transmission was made only in favour of Suriaji and Laxmi under the sale deed dated 17.11.1915.

53. The appellants no doubt would contend that the High Court had found title with Gones and there is no cross objection filed by the contesting respondents. It is their case that without cross objection it would not be open to the respondents to ask this Court to interfere with the finding of title. In this regard they placed reliance on the judgment of this Court in Hardevinder Singh v. Paramjit Singh 2013 (9) SCC 261. The appellants would contend that Gones paid half the price for the purchase dated 17.11.1915 which too stood acknowledged in the deed of dissolution dated 21.1.1919. There is a solemn undertaking to transfer Gones share whenever he paid Rs.1000/- as his half share of the dowry amount of Rs.2000/- paid by Suriaji. The gift made on 14.4.1925 by Suriaji does not take away the rights of Gones under the sale deed dated 17.11.1915 as acknowledged in the dissolution deed dated 21.1.1919. Reference is made to the finding by the trial court that Gones has admittedly paid half of the purchase price out of Rs.13022/- for the purchase of the suit property. Therefore, the amount of Rs.1000/- was over and above the purchase price and resultantly non-payment of Rs.1000/- had no bearing on the title of Gones which he derived from the purchase.

54. Before we consider the question, it is necessary to enter the actual findings rendered by the High Court in regard to the title. The High Court finds that recognition of share of Gones is done in document dated 21.1.1919. It is further found as under:

"31. Admittedly, no time limit is fixed for the payment of share or exercise of right in the Deed dated 21.1.1919. This document also does not specify that prior payment should be made by Gonesh due to be made thereunder, or that such payment is a condition precedent. Thus, acknowledgment of liability to part with property described therein is absolute and unambiguous. This document contains an unambiguous recital about acknowledgment of existence of right of Gonesh to the properties." Right of Gonesh to receive share, is thus, crystalized, and he has derived a right enforceable in law and according to law." We have already referred to the law laid down by this Court in regard to Order XLI Rule 22 of the Code of Civil Procedure. In an appeal if the respondent does not want any change in the decree of the lower court, it is not necessary for him to file an appeal or cross objection to merely support the decree already passed without any variation in the decree but by

challenging the correctness of the findings in the judgment. The appellants are correct in contending that if a challenge is made to a decree by a respondent then necessarily the respondent must file either an appeal or a cross objection. In this case however, the suit filed by the appellants stood dismissed by the first appellate court. The two appeals which were carried by the appellant before the High Court were dismissed. Resultantly, the decree of the first appellate Court dismissing the suit came to be confirmed. Before this Court the respondents are not seeking to challenge the decree.

They do not wish any variation of the decree. They seek to have the decree confirmed. They support the decree entirely. The decree is one dismissing the suit. They are only seeking to support the said decree by challenging one of the findings namely the finding relating to title. For doing the same, it is not necessary for them to file an appeal or cross objection as by having the finding overturned in regard to title they are not seeking to have a different decree passed in any manner. Hence we reject the contention of the appellants that it is not open to the respondents to contest the finding on title without filing cross objection.

QUESTION RELATING TO TITLE

55. The findings of the High court can be culled out as follows:

1.Suriaji has admitted that 1/8th of 'M' and ¼ of 'B' was purchased by him for Gones and Gones was supposed to pay his contribution as indicated therein.

2.No dispute can be raised as regards this promise or declaration in the deed.

3.Admittedly no time limit is fixed for the payment of share or exercise of right in the deed dated 21.1.1919.

4.The document does not specify that prior payment should be made by Gones or that the payment is a condition precedent.

5.Acknowledgment of liability to part with property is absolutely unambiguous and the document contains an ambiguous recital about acknowledgment of existence of right of Gones to the property.

6.Finally it is found that the right of Gones to receive share, is thus, crystallized and he has derived a right enforceable in law and according to the law.

56. Let us also see how the High Court finds that the appellants are not entitled to relief. i. Gones was a vogal in inventory proceedings. In the said proceedings property 'M' and 'B' were allotted to widow of Suriaji, viz., Shantibai. If Gones has to enforce his right under the deed, he had to object the allotment of share in view of a document dated 21.01.1919. He did not object. Event relates to

1925 which attained finality when rights accrues to Shantibai in the inventory proceedings which were registered into records around 1940. ii. The allotment of share in inventory was not challenged by Gones by way of suit between 1925 and 1940 or at any time during his lifetime. The court does not accept the case of the appellants that though there was separation of family and a partition, the parties continued in joint enjoyment and the share of income was initially given to Gones and then the wife of Gones. Having acquiesced with the allotment of share to the wife of Suriaji though his property could not have been given to Laxmibai (this must be Shantibai), Gones and his heirs are estopped from opening up the succession after long span of over two decades.

iii. It is not the plaintiff's case that there was no knowledge of registration of property in the name of shantibai way back in 1940. Therefore it is found that whatever right or interest survived with Gones was lost as he did at any point of time challenge the allotment of property of Shantabai which has become final for want of challenge.

iv. After recording the property in the name of Shantibai and her heirs enjoyed the property in exclusion to plaintiff and supporting defendants openly. Denial of right of Gones or his exclusion and ample denial relates back to 1925 and it has culminated by absoluteness in 1940. Right of Gones to have separate possession by partition or otherwise if he wanted to assert it on the basis of settlement deed that arose latest in 1940. As he did not enforce his right to seek partition and enforcement of the right under the settlement deed of 1919 was lost.

57. We have set out two broad findings by the High Court. The first relates to the question whether Gones had acquired any right. The second part relates to whether he has lost the right. The High court finds that Gones indeed had a right but he has lost it and the right should have been enforced latest by 1940.

Coming to the first part namely whether Gones had a right the most important part is finding that Suriaji admitted that 1/8 of 'M' and 1/4 of 'B' was purchased by him for Gones.

58. The case of the appellants appears to be that when 1/2 of the price was paid by Gones in terms of the acknowledgement contained in the document of 1919, all that remained to be paid was 1000 rupees for reimbursing Suriaji having paid the amount to Laxmi towards dowry. There can be no dispute that the sale deed does not show Gones as a transferee.

The document dated 21.1.2019 is described as a deed of declaration, fixation of balance of accounts, payment and obligation. Parties of the first part are described as Suriaji and his wife Shantibai aged 15 and minor aged 16. Gones is shown as aged 14 years assisted by his mother. Parties on the second part are described as Laxmi, widow of vitol (the other party) and her sons etc. The deed appears to provide for distribution of joint family and for settlement of accounts of the family which lasted only 3 years. It is inter alia stated further that the parties of the first part owed to the parties to the second part a sum of Rs.2000/-. It is inter alia stated therein that parties of the first part Suriaji stated that the purchase made by him by the sale deed dated 17.11.1915 was made for himself and for the party of the first part Gones, his brother and that he has paid for half of the price of the said purchase, therefore he undertakes alongwith the said Shantibai to transfer in the name of said

Gones the half of the properties purchased in his name by the aforesaid deed at any time he may desire, to have it transferred and on the occasion of this transfer, the said Gones will have to indemnify him with half of the amount which has now been paid to the party of the second part Laxmi from the money of the dowry of his wife. It is the aforesaid provision which is at the heart of the controversy. We are to unravel its true scope and import. Whether it amounts to an admission or acknowledgment by Suriaji that Gones his younger brother, had half right over the property acquired by Suriaji under the sale deed dated 17.11.1915? Whether on the other hand, the document is of executory nature and contemplating Suriaji executing a transfer in favour of Gones? Whether it contemplated only a transfer of mutation, the title being admitted? Whether the clause contemplated a transfer on the occasion of which Gones was to indemnify Suriaji, half the amount which stood paid to Laxmi that money coming from dowry of Suriaji's wife?

59. The first thing we have to consider in this regard is the argument raised by the respondents that the words 'he' has paid for half the price for the said purchase should be understood as meaning Suriaji has paid for half of the price of the said purchase and this means that Suriaji was the full owner under the sale deed and Gones did not acquire any right as such. This is supplemented by the submission that Gones was a minor in 1915. He began to earn only in 1925 and therefore, there is no question of his having paid any part of the consideration for the sale dated 17.11.1915. On the other hand, it is the case of the appellants that one half of the consideration was paid by Gones.

60. In resolving this controversy, it is but apposite that we may refer to the pleadings of the parties. We may refer to para 11 of the plaint. The same reads as under:

> "11. It is in the said Deed of 21.1.1919 that Suria alias Suriaji Porobo expressly admitted that the th purchase of the 1/4 of the property Mollans and ½ of the property Bainguinim made under the Deed dated 17.11.1915 was for self and for his brother Gones who paid its price at the time of the purchase and therefore Suria and his wife Shantibai undertook to effect the transfer of registration in the name of Gones upon Suria being reimbursed by Gones in the payment of ½ of the amount paid by Suria to Loximi (widow of Vitol Porobo) in consequence of the settlement of accounts made at the time of dissolution of Society. The period for exercising of option by Gones to make the reimbursement was however unlimited." The contesting respondents-defendants 1,2,30 and 31 in their written statement inter alia stated as follows:
>
> "In the year 1919, the undivided joint family of Navelkars came to be dissolved and in the Deed of Dissolution and Settlement dated 21.01.1919, there is a mention that the said Surya had purchased the properties i.e. half of 'Bainguinim' and 1/4th of 'Mollans' and also on behalf of his brother Ganesh and had agreed to transfer a share of the said two properties in favour of the said Ganesh provided the said Ganesh pays to him Rs. 1000/- being reimbursement towards the amount paid by him on behalf of Ganesh to Laxmibai. However, it is not on record that the said Ganesh ever paid the said amount of Rs. 1000/- to the said Surya, which was a condition precedent for effecting transfer of undivided share in the said two properties, in favour of the said

> Ganesh and it cannot be said that the period for payment of the said amount was unlimited." The reply to the averment in para 11 of the plaint are contained in para 25 and it reads as follows:
>
> "25. The contents of para 11 of the plaint are partially admitted. These defendants deny that the period of exercising of option by Ganesh to make the reimbursement was unlimited as alleged. The acknowledgement as mentioned in the said deed dated 21.1.1919 by the said Surya and conditional and it appear that the said Surya performed the said acknowledgment by making a Gift Deed dated 14.04.1925 which was pursuant to the said acknowledgment apart from the fact that the said Gift Deed dated 14.4.1925 also appears to be shaddy document, the same having been executed a little before the death of the said Surya, thereby reflecting on its authenticity on the point of the same being a voluntary act.

It is quite possible that the said Surya and his widow were coerced into making the said Gift Deed dated 14.4.1925 reminding them of the acknowledgment expressed by the said Surya in the Dissolution Deed dated 21.1.1919." In the written statement filed by defendants 3,4,5 and 6 also, the reply to the averment contained in para 11 of the plaint is contained in para 7 of the written statement and the same are extracted below:

> "With further reference to para 11 of the Plaint these defendants say that the subsequent conduct of both Suriaji and Ganesh shows that the idea of transfer in the name of Ganesh ½ of the property purchased by Suriaji by deed dated 17.11.1915, was given up and consequently the said Ganesh never expressed any desire to have the transfer made in his favour nor did he pay any amount concerning the dowry of Shantibai, and no transfer mentioned in the said Deed dated 21-1-1919 was effected. These defendants say that the said statement of Suriaji regarding the transfer was never acted upon either by Suriaji or by Ganesh. The said statement made in the said deed dated 21-1-1919 should at the most amount to a simple promise for the sale on the part of Suriaji in terms of Article 1548 of Portuguese Civil Code, and would not confer in the said Ganesh any right or interest in respect of the suit properties."
>
> 61. There is no denial of the averment of Gones having paid the consideration. We would think that it would be a safe conclusion to reach that consideration was partly paid for at least on behalf of Gones. Case of the respondents that no part of the consideration moved from or on behalf of Gones in regard to the sale deed dated 17.11.1915 cannot be accepted.

The view we have taken finds reinforcement from the words that follow immediately in the sale deed 21.1.1919. It is stated immediately after stating that he has paid for half of the price for the said purchase, therefore, he has undertaken alongwith the said Shantibai to transfer to Gones, the half of the properties purchased in his name etc. In this behalf the word being in conjunction with his wife Shantibai can only refer to Suriaji. Therefore, the interpretation would be as follows:

The sale deed dated 17.11.1915 was executed in respect of 1/4th of property 'M' and 1/2 of property 'B' in favour of Suriaji. Another 1/4th of property 'M' and other half of property 'B' was sold under the sale deed to the other branch represented by Laxmi Bai. It is obvious that under the sale deed for his share, Gones would have made part of the payment. What is acknowledged in the dissolution deed is that 1/2 of the said consideration emanated from Gones.

62. The next part is where the matter becomes more vexed. The question is what is the nature of the right, if any, which is acquired by Gones on the basis of the undertaking recorded in the document dated 21.1.1919 that Suriaji and his wife Shantibai will transfer in the name of Gones the half of the properties purchased in his name at any time he may desire to have it transferred and further that on the occasion of the transfer Gones will have to indemnify him with half the amount which has been paid the party of the second part, namely, Laxmi bai who represented the other branch in Navalkar family. The undertaking to transfer in the name of Gones, the half of the property is according to the appellants only transfer of mutation. On the other hand, according to the respondents it involved a transfer accompanied by registration. In conjunction with the same, the further question is of the meaning of the words "that on the said occasion" that is when the transfer is effected Gones will have to indemnify the Suriaji with half the amount which stood paid to Laxmi from the dowry amount of Suriaji's Wife. We cannot be oblivious to the fact that a sum of Rs.1000/- was a considerable sum of money in 1919. It is not to be confused with Rs.1000/- as on the date of the suit much less as of today. It was not meant to be a empty formality. We are unable to subscribe to the reasoning of the High Court when it holds that it is not a condition precedent. The payment was to coincide with transfer. No doubt it could have been made prior to demanding the transfer. We cannot understand the clause as meaning as either it need not be paid or the payment could be deferred.

63. In the above perspective, let's consider whether there is a case that Gones offered Rs.1000/-

to Suriaji during his lifetime and the transfer of mutation or of right was refused. We do not see any such case at all. When the appellants are seeking the right solely based on the recital in the deed of dissolution dated 21.1.1919 we fail to see how when complying with the condition for seeking transfer it could be maintained by them that they are entitled without anything more to rights as co-owners. In fact, there is no case that the appellants have paid or offered the amount to the successors-in- interest of Suriaji. As already noticed, PW 1 goes to the extent of deposing that the 'obligation to reimburse Suriaji did not devolve upon the heirs of Gones'. Thus the suit is filed with neither Gones nor even the appellants paying or even offering to pay the sum mentioned in the deed of 1919.

64. We would also have a look at it from another perspective. In the plaint, at para '9', what is stated is in the year 1915, Piru and her husband sold the property by deed of sale dated 17.11.1915 in equal

parts to Suriaji and to Laxmi. Thereafter, in para '11', Suriaji in the deed dated 21.01.1919 is stated to have expressly admitted that the purchase of 1/4th of "M" and 1/2 of "B" made under sale deed dated 17.11.1915, was for himself and his younger brother and who paid its price at the time of purchase and therefore, it was undertaken to transfer the registration, upon Suriaji being reimbursed by Gones in the payment of 1/2.

It is admitted that the sale deed is in favour of Suriaji. It is nearly 4 years thereafter in the document of 1919 that the admission by Suriaji about 1/2 price, being paid and about the undertaking is setup. There is no case for the appellants in the plaint that Suriaji was benamidar or a name lender. The principle of resulting trust underlies Section 82 of the Trust Act. There can be no doubt that Trust Act was inapplicable to Goa in 1915 and in 1919 as Goa was not part of British India. Certain tests are propounded in determining whether a transaction is benami which have to be fulfilled. No doubt, the most important test is who provided consideration. There is no pleading in the plaint about the transac- tion being a benami transaction. If benami was rec- ognized in Goa under Portuguese rule then it could be said that Gones would become the owner provided the transaction is treated as a benami transaction. But there is no case of benami set up. In this regard we notice the following discussion in Controller of Es- tate Duty, Lucknow v.Alok Mitra in AIR 1981 SC 102:-

> 31. ..In Petheperumal Chetty v. Muniandy Servai (1908) 35 Ind App 98, the Judicial Committee quoted with approval the following passage from Mayne's HINDU LAW, 7th ed., para 446:
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> "Where a transaction is once made out to be a mere benami, it is evident that the benamidar absolutely disappears from the title. His name is simply an alias for that of the person beneficially interested." The cardinal distinction between a trustee known to English law and a benamidarlies in the fact that a trustee is the legal owner of the property standing in his name and cestui que trust is only a beneficial owner, whereas in the case of a benamitransaction the real owner has got the legal title though the property is in the name of the benamidar. It is well settled that the real owner can deal with the property without reference to the latter. In Gur Narayan v. Sheo Lal Singh, 46 Ind App 1: (AIR 1918 PC
>
> 140), the Judicial Committee referred to the judgment of Sir George Farwell in Bilas Kunwar v. Dasraj Ranjit Singh 42 Ind App 202: (AIR 1915 PC 96), where it was observed that a benami transaction had a curious resemblance to the doctrine of English law that the trust of the legal estate results to the man who pays the purchase-money, and went on to say:
>
> "... the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned, he is a mere trustee for him." In Guran Ditta v. Ram Ditta, 55 Ind App 235: (AIR 1928 PC 172) the Judicial Committee reiterated the principle laid down in Gopeekrist Gosain case (1854) 6 Moo Ind App 53 (PC) and observed that in case of a benami transaction, there is a resulting trust in favour of the person

providing the purchase-money." Reference may also be made to para '33', which reads as follows: -

"33. The law is succinctly stated by Mayne in his TREATISE ON HINDU LAW, 11th Edn., at p. 953, in the following terms: "A benami transaction is one where one buys property in the name of another or gratuitously transfers his property to another, without indicating an intention to benefit the other. The benamidar, therefore, has no beneficial interest in the property or business that stands in his name; he represents in fact the real owner and so far as their relative legal position is concerned, he is a mere trustee for him. In other words, a benami purchase or conveyance leads to a resulting trust in India, just as a purchase or transfer under similar circumstances leads to a resulting trust in England. The general rule and principle of the Indian law as to resulting trusts differs but little if at all, from the general rule of English law upon the same subject."

65. Thus, a purchase which is made benami, leads to a resulting trust.

Goa continued under Portuguese Rule and it was not a part of British India. There is a definite case for the respondents that the law of trust, as such, did not apply in Civil Law countries and the portuguese who were governed by Civil Law did not recog- nize the law of trust.

66. Incidentally we find that in eBook nº 32 Trusts, Foundations and Fiduciary Structures by Dennis Swing Greene, we may incidentally notice in Part 2: Portugal and Trusts under the head IV. Trusts under Portuguese Law, the same reads as under:

"Trusts as a Contract With the exception of the Madeira Free Trade Zone (where trusts are recognized when created under the laws of another jurisdiction), Porgtuguese law does not formally acknowledge the fiduciary concept implicit in a Trust whereby the rights are divided between the legal title in the hands of the trustees and the equitable rights with the beneficiaries. This lack of legal recognition raises several questions as to their tax and legal treatment.

Portuguese law views a trust as a contract. All transactions involving trusts are deemed to be made with the trustees – the legal owners of the trust's assets – rather than with the entitled beneficiaries under the terms of the trust. Beneficial interest is not a right formally recognized under Portuguese legislation..."

67. The law of trust, as such, did not apply to Goa under the Portuguese Rule. At least the appellants have no case that it did apply. They have not produced anything to show that it applied. If the Trust Act which, undoubtedly, did not apply to Goa in 1915 or even in 1919 and in Section 82 thereof, lay embedded the principle of benami or resulting trust, how can appellant claim that Gones became entitled as owner under the document of 1915 read with the document of 1919. If it was reduced to a contract executory in nature, to perform an obligation upon which alone the title would vest, it was subject to the condition precedent of payment of Rs. 1000/- by Gones. Even according to the

appellants obligation to pay Rs. 1000/-, did not pass to them. This conduct of the appellant's, in seeking to derive rights under the document of 1919, even though, their predecessor in interest has failed either deliberately or otherwise to perform his obligation during his entire life time cannot be approved of.

68. In law, how can Gones claim to be a co-owner? He must first become an owner. Section 82 of the Trust Act recognized that when a person transferred property to another for consideration, which is paid by a third party then the said person would be the beneficial owner. The transferee in name or Benamidar would hold the property in trust for the person who has actually provided consideration. There is, we reiterate no case based on benami ever set up by the appellant.

Therefore, we would come to the conclusion that by sale deed of 1915 and the settlement deed of 1919 it may not be safe to conclude that Gones acquired title as such in the plaint schedule property. In the light of this, we need not render any finding as regards adverse possession or ouster.

69. It is worthwhile to note that after dissolution deed dated 21.1.1919 there took place, another development in the form of execution of gift deed by Suriaji in the year 1925. The case which the defendants had set up about gift deed include the allegation which tends to question the circumstances surrounding the execution of the gift deed. They have a case also that the gift deed was executed pursuant to the acknowledgment in the 1919 document. Before this Court respondents would seek to take advantage of it inasmuch as the contention is taken that the gift deed must be treated as executed in fulfilment of acknowledgment in the dissolution deed dated 21.1.1919. Under the gift deed of 1925 Suriaji has gifted Gones his ¼ right in property 'M' which he acquired under the gift deed executed by his grandfather in the year 1913. Be it remembered that in 1913, the grandfather has also executed gift of another ¼ of property 'M' in favour of Gones. Property 'M' consisted of roughly 90 hectares. Thus, under both the gift deeds together 1/2 of property 'M' or 45 hectares approximately came to be vested with Gones in the year 1925. Suriaji passed away in the year 1925 after the gift. It is thereafter that inventory proceedings took place in regard to the properties of Suriaji under the Portuguese Civil Code. Gones stood as vogal apparently on behalf of the minor children of Suriaji under the Portugues Civil Code. The documentary evidence is found by the first appellate Court to establish that ¼ of property 'M' and ½ of property 'B' stood allotted in the name of Shantibai, the widow of the Suriaji. This is borne out by the inscription which we have referred to of the year 1937. It is here that the question arises as to correctness of the findings that having participated in the inventory proceedings which culminated in the property being allotted to the Shantibai, the rights of Gones stood extinguished.

70. We will proceed on the basis that interpretation of clause of the dissolution deed leads us to hold that Gones having paid ½ of the purchase price what is contemplated by the undertaking was that Suriaji and his wife Shantibai were to transfer the mutation. Gones acquired title in the property. We proceed further on the basis that payment of Rs.1000/- was not a condition precedent as found by the High Court. The question is whether the High Court is right in its findings based on no objections being taken to the property being allotted to Shantibai. We have already extracted the findings of the first appellate Court in this regard. We may at this juncture consider the contentions based on inventory proceedings held upon the death of Suriaji. INVENTORY PROCEEDINGS

71. According to the appellants, inventory proceedings arise out of the inheritance by partition among the heirs of the deceased person. It is treated as a deed of partition and requires registration under Section 45 of the Registration Act but it is not registered under Section 17 of the Registration Act, 1908. The burden of proving the case based on inventory proceedings was squarely on the defendants which they have failed to discharge. No details of the precise date in 1925 or of the time and place where the proceedings took place has ever been established. There is no evidence adduced by the defendants. The inventory proceeding itself is not produced. The defendants' witness was 36 years old on the date of evidence and was, therefore, not alive in 1925. Defendant No. 5 who was alive at the time when alleged inventory proceedings took place was not examined. Punit Rai v. Dinesh Chaudhary23, is relied upon apparently to contend that the evidence of Defendant No. 5, was not adduced and it would mean that had the evidence been produced, it would not have supported the case of the defendants. It is sought to be contended that, that Gones has intervened as vogal, is not substantiated. In fact, in this context, reliance is also placed in P. John 23 2003 (8) SCC 204 Chandy and Co., (supra) in regard to inaction is concerned. It is also contended that without prejudice to the aforesaid contention, since Ganesh held property jointly with his sister-in-law, she could not have inherited more than what Suriaji possessed. In regard to the enrolment dated 09.10.1937, it is stated to be wrongly construed as being registration of the inventory proceedings. It is mere a typed document without signature. The property does not pass and the inventory could not have been received in evidence.

72. Per contra, the contesting defendants would point to the evidence of PW-1 himself that Gones was a member of the family council in the inventory proceedings on the demise of Suriaji which is gathered from his records. Reliance is placed in Sheela Rodrigues vs. Lourenchinha Ana D'Cruz Rodrigues Fernandes24 which has recognized that the proceedings were in the nature of declaration of ownership rights to the estate of the deceased. The declaration is like a judgment in rem and therefore, 24 1999 SCC Online Bom 109 paras 8-11 it was all the more necessary for Gones to object at the given time, which he admittedly did not. Inventory proceedings are inevitable under Article 156, Article 2064, upon the opening of the inheritance. By virtue of marriage, the doctrine of communion applies and Shantibai was owner of 50% of all properties of Suriaji and the inheritance was related to the balance 50%. The Family Council is composed to protect the interests of the minors, and was constituted under Article 207. Article 218 prevents any member of the family council from voting or assisting where there is a conflict of interest. Thus, if Gones had ever considered as having title to half of the properties purchased by Suriaji under Sale Deed, it would involve conflict of interest. In the event of any third party having a right of properties. Article 2078, provides listing of such properties separately and the same reads as follows:-

> "Article 2078 – Where there are, in the inheritance some properties belonging to a third person or which devolve to any heir in preferential manner, they shall be listed separately, alongwith the respective documents.
>
> Sole paragraph : The properties belonging to a third person shall not be delivered to him when there are some doubts, unless the said third person proves his right." Gones would never have silently stood by and allowed the property to be listed as property of Suriaji and he would have claimed the property to be listed separately as

belonging to a third party, it is contended.

73. Relying on Dilboo (Smt.)(Dead) by Lrs. and others v. Dhanraji (Smt.)(Dead) and others25, it is contended that where there is a registration, there is deemed knowledge and the limitation runs from the said date. Gones would have objected to the inscription in 1937. He lost right over half of Mollans which was sold in a public auction. The properties have to be appraised for licitation and partition as provided under sub-division V of Article 2126 onwards of the Civil Code.

74. There would be an appraisal in the case of inventory between majors and minors which was the case when Suriaji died. The appraiser is appointed under Article 2091 by the Family Council [of which

25 2000 (7) SCC 702 Gones was a member].

75. In Damodar Ramnath Alve v. Gokuldas Ramnath Alve and others26, relied upon by the appellants, the learned Judge of the High Court of Bombay, Panaji notes that in inventory proceedings there is no de- cree passed as in a suit. In Zacarias Durate Domingos Pereira v. Camilo Inacio Pereira27, Justice M.D. Ka- math had this to say about nature of inventory pro- ceedings:

> "Inventario proceedings are proceed- ings instituted for the administration of the estate of the deceased person. They provide for the preparation of the list of assets of the deceased, payment of debts, collection of cred- its of the estate, payment of lega- cies, distribution of liquid as- sets etc.. These various steps cannot be carried out under the procedure laid down under the Indian Code, for suits." In Victor de Graca Pinto and ors v. Lourdes de Graca Pinto e Nazareth and ors.28, relied upon by the 26 MANU/MH/0535/1996 27 1990 (1) Goa LT 174 28 1999(3)ALLMR39 appellants, a learned Judge of the High Court of Bom-

bay at Panaji held in the context of a decree in the inventory proceedings that since it not only declared the rights of the parties but also had divided the shares by metes and bounds, it had to be registered under Section 17 (2) of the Registration Act, 1908. The learned Judge proceeded to, no doubt, hold that the decree could be executed after such registration.

In Sheela Rodrigues and another v. Lourencinha Ana D'Cruz Rodrigues Fernandes29 relied upon by the respondents, the contention was taken that inventory proceedings were not suits. Section 22 of the Civil Courts Act provided the context. After referring to Zacarias Durate Dorningos Pereira v. Camilo Inacio Evaristo Pereira30, wherein it was held that inventory proceedings are not suits, it was found that the dis- cussion in the said judgment was to find out whether an order in inventory proceedings could be executed under Order XXI of the Code of Civil Procedure or not. Finally, the Court held as follows:

> 29 (1999) SCC ONLINE Bombay 109 30 AIR 1984 Bom 295 "11. As already seen above, the inventory proceedings are initiated to enforce the remedy available under

the law in relation to right of inheritance.

To enforce the claim of inheritance to the estate left behind by the ancestors of a party or parties, it is necessary to have legal recognition to the claim of the party or parties as regards the ownership of the estate left behind by the ancestors and the same can be obtained by instituting proper inventory proceedings in the Court of law.

12. Therefore what follows from the above, is that the inventory proceedings are "suits" for the purpose of Section 22 of the Civil Courts Act and therefore the appeal against order in inventory proceedings where the value of the assets exceeds Rs. 1,00,000/- would lie to the High Court. The point for consideration is therefore, answered accordingly." ABANDONMENT AND ESTOPPEL

76. The question is however proceeding on the assumption Gones had acquired title could he be said to have lost the title by his conduct. The High Court finds that having acquiesced in the inventory proceedings Gones and his heirs are estopped from opening of succession after about two decades. It is further found that whatever right and interest may have survived with Gones was lost as he did not challenge the allotment of property to the Shantibai. The High court has therefore employed the principle of acquiescence, estoppel and loss of right.

77. In Sha Mulchand and Co.Ltd. v. Jawahar Mills Ltd, Salem AIR 1953 SC 98, 500 shares which stood in the name of company stood forfeited. One of the contentions which was taken was on principles of estoppel and laches forfeiture cannot be challenged. Justice S.R. Das who wrote the main judgment proceeded to hold as follows inter alia:

> "12. The Appeal Court, it will be observed, reversed the decision of the trial Judge and decided the appeal against the Company on two grounds only, namely, (1) that the Company had by the conduct of its two members abandoned its right to challenge the forfeiture, and (2) that the form of the order could not be supported as one validly made under Section 38 of the Indian Companies Act. The learned Attorney General, appearing in support of this appeal, has assailed the soundness of both these grounds. The learned Attorney General contends, not without considerable force, that having, in agreement with the trial court, held that no plea of acquiescence, waiver or estoppel had been established in this case, the appeal court should not have allowed the Mills to raise the question of abandonment of right by the Company, inasmuch as no such plea of abandonment had been raised either in the Mills' affidavit in opposition to the Company's application or in the Mills' grounds of appeal before the High Court. Apart from this, the appeal court permitted the Mills to make out a plea of abandonment of right by the Company as distinct from the pleas of waiver, acquiescence and estoppel and sought to derive support for this new plea from the well known cases of Prendergast v. Turton [1 Y & CCC 111 : 62 ER 807] , Clark & Chapman v. Hart [2 HLC 632 : 10 ER 1443] and Jones v. North Vancouver Land and Improvement Co. [LR 1910 AC 317] .

Further, whatever be the effect of mere waiver, acquiescence or laches on the part of a person on his claim to equitable remedy to enforce his rights under an executory contract, it is quite clear, on the authorities, that mere waiver, acquiescence or laches which does not amount to an abandonment of his right or to an estoppel against him cannot disentitle that person from claiming relief in equity in respect of his executed and not merely executory interest. See per Lord Chelmsford in Clarke case [2 HLC 632 : 10 ER 1443] at p. 657. Indeed, it has been held in Garden Gully United Quartz Mining Company v. Hugh McLister [LR 1 AC 39] that mere laches does not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture. Sir Barnes Peacook in delivering the judgment of the Privy Council observed at pp. 56-67 as follows:

> "There is no evidence sufficient to induce Their Lordships to hold that the conduct of the plaintiff did amount to an abandonment of his shares, or of his interest therein, or estop him from averring that he continued to be the proprietor of them. There certainly is no evidence to justify such a conclusion with regard to his conduct subsequent to the advertisement of 30th of May, 1869. In this case, as in that of Prendergast v. Turton [1 Y & CCC 111 :
>
> 62 ER 807] the plaintiff's interest was executed. In other words, he had a legal interest in his shares and did not require a declaration of trust or the assistance of a court of equity to create in him an interest in them.

Mere laches would not, therefore, disentitle him to equitable relief:

> Clarke and Chapman v. Hart [2 HLC 632 : 10 ER 1443] . It was upon the ground of abandonment, and not upon that of mere laches, that Prendergast v. Turton [1 Y & CCC 111 : 62 ER 807] was decided." Two things are thus clear, namely, (1) that abandonment of right is much more than mere waiver, acquiescence or laches and is something akin to estoppel if not estoppel itself, and (2) that mere waiver, acquiescence or laches which is short of abandonment of right or estoppel does not disentitle the holder of shares who has a vested interest in the shares from challenging the validity of the purported forfeiture of those shares.

In his concurring judgment Justice Vivian Bose further took the following view:

> "21.The position is different when the interest is executed and the man has a vested interest in the right, that is to say, when he is the legal owner of the shares with the legal title to them residing in him. This legal title can only be destroyed in certain specified ways. It is in my view fundamental that the legal title to property, whether moveable or immovable, cannot pass from one person to another except in legally recognised ways, and normally by the observance of certain recognised forms. Confining myself to the present case, one of the ways in which the title to shares can pass is by forfeiture; but in that case an exact procedure has to be followed. A second way is by transfer which imports agreement. There again there is a regular form of procedure which must be gone through. A third is by estoppel, though, when the

> position is analysed, it will be found that it is not the estoppel as such which brings about the change. The expressions abandonment, waiver and so forth, when used in a case like the present, are only synonyms for estoppel and despite hallowed usage to the contrary, I prefer to call a spade a spade and put the matter in its proper legal pigeon hole and call it by its proper legal name. These other terms are, in my view, loose and inaccurate and tend to confuse, when applied to cases of the present nature.
>
> A man who has a vested interest and in whom the legal title lies does not, and cannot, lose that title by mere laches, or mere standing by or even by saying that he has abandoned his right, unless there is something more, namely inducing another party by his words or conduct to believe the truth of that statement and to act upon it to his detriment, that is to say, unless there is an estoppel, pure and simple. It is only in such a case that the right can be lost by what is loosely called abandonment or waiver, but even then it is not the abandonment or waiver as such which deprives him of his title but the estoppel which prevents him from asserting that his interest in the shares has not been legally extinguished, that is to say, which prevents him from asserting that the legal forms which in law bring about the extinguishment of his interest and pass the title which resides in him to another, were not duly observed."

78. We may also profitably refer to the judgment of this Court in Dr. Karan Singh v. State of J & K and Another 2004 (5) SCC 698:

> "19. The Division Bench in the impugned judgment, as earlier noticed, has held that "either there was relinquishment of right or waiver voluntarily". Before we examine the facts to decide this issue, reference may be made to certain decisions on the aspects of estoppel, abandonment and waiver. The leading case on estoppel is that of Pickard v. Sears [(1837) 6 Ad & El 469 : 112 ER 179] wherein Lord Denman, C.J.

in delivering judgment, inter alia, said:

> (ER p. 181) "His title having been once established, the property could only be divested by gift or sale; of which no specific act was even surmised.
>
> But the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; (See Bigelow on Estoppel, pp.606,607.)
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> 20. In Mitra Sen Singh v. Janki Kuar [AIR 1924 PC 213 : 51 IA 326] (AIR at p. 214) with regard to estoppel, it was stated:

> "There is no peculiarity in the law of India as distinguished from that of England which would justify such an application. The law of India is compendiously set forth in Section 115 of the Indian Evidence Act, Act 1 of 1872. It will save a long statement by simply stating that section, which is as follows:
>
> 'When one person has, by his declaration, act or omission, intentionally caused or permitted
>
> another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.' "
>
> 21. In Dhiyan Singh v. Jugal Kishore [AIR 1952 SC 145 : 1952 SCR 478] this Court stated: (AIR pp. 146-47, para 11) "11. Now it can be conceded that before an estoppel can arise, there must be, first, a representation of an existing fact as distinct from a mere promise de futuro made by one party to the other;

second, that the other party, believing it, must have been induced to act on the faith of it; and third, that he must have so acted to his detriment."

22. In Gyarsi Bai v. Dhansukh Lal [AIR 1965 SC 1055 : (1965) 2 SCR 154] the principles were reiterated in the following words:

(AIR p. 1061, para 8) "To invoke the doctrine of estoppel three conditions must be satisfied: (1) representation by a person to another, (2) the other shall have acted upon the said representation, and (3) such action shall have been detrimental to the interests of the person to whom the representation has been made." In regard to abandonment the Court referred to the judgment in Mulchand's case (supra) and apparently approved the same.

79. Therefore, we would hold that a when vested right is established such as ownership it can be divested only by sale or gift. It will not be possible to hold that mere laches or standing by itself may be sufficient to extinguish title. The majority view is Mulchand (supra) appears to suggest that there must either be abandonment or estoppel. Justice Vivian Bose takes the view that title can be lost only when estoppel is established. Merely saying that a person has abandoned his property does not lead to extinguishing of vested right such as right to ownership in property. Certainly, an abandonment which amounts to an estoppel would result in stopping a party or his representative from seeking legal redress or setting up the claim in a court of law.

80. In the facts of this case there is an added feature. Under the document dated 21.1.1919 Gones was to make a reimbursement of Rs.1000/- as it turns out being half the amount paid by his brother Suriaji from out of the proceeds of his wife's dowry to Laxmi who represented the other branch. Something remained to be done on the part of Gones and thereupon it was for Suriaji to transfer. In that sense it could be described as an executory contract. Even proceeding on the basis that it is understood that Gones has 1/2 right of over the rights, transferred in favour of Suriaji under the sale

deed dated 17.11.1915, the question arises what is the effect of the inventory proceedings of which Gones was certainly aware of and admittedly he was a vogal.

81. In regard to the inventory proceedings, no doubt, it is true that the inventory proceedings per se are not produced. The plea relating to inventory proceedings are undoubtedly taken by the contesting respondents. It may be true that burden of adducing evidence relating to inventory proceeding was on the contesting defendants but it is equally true that they have produced final inscription which manifest the culmination of the inventory proceedings and shows that plaint schedule property stood allotted to Shantibai.

82. It is true that under the sale deed dated 17.11.1915 Suriaji was a transferee of 1/4 share of property 'M' and 1/2 in property 'B'. When Suriaji died, the inventory proceedings was to be held only in respect of the properties left behind by him. It is the appellants case inter alia stated Suriaji had only 1/8 share in property 'M' and 1/4 share in property 'B'. Having regard to acknowledgment of ½ rights over the said property in favour of Gones as contained in settlement deed dated 21.1.1919, it is the appellants case that the inventory proceedings could have been concerned only with what was owned by the deceased Suriaji and it could not have resulted the entire 1/4 right in property 'M' and 1/2 right in property 'B' being allotted to Shantibai. It is contended that it involved fraud to give such excessive right to Shantibai.

83. It is next contended by the appellants that even if it is that under the inventory proceedings allotment was made of 1/4 share in property 'M' and 1/2 right in property 'B', the status quo under the dissolution deed dated 21.1.1919 would continue. In other words even under the settlement deed of 1919 Suriaji alongwith his wife had undertaken transfer of 1/ 2 share to Gones. After inventory proceedings under the inscription of even of the entire right belonging to Suriaji and Gones stood allotted to Shantibai, Shantibai would continue to remain liable as a trustee.

It is further contended as vogal on behalf of the minor children, during the inventory Gones was only obliged to protect the interest of the minors. Therefore even if property is shown allotted to Laxmi Bai, it would not have any impact on the property of Gones.

84. In regard to the aforesaid contentions when we are dealing with the case with the perspective of acquiescence, abandonment and estoppel we come to the following conclusions. Gones was himself a major, by the time inventory proceedings commenced and culminated. He was aware of his rights under the sale deed of 1915 as declared in the dissolution deed of 1919. We must proceed on the basis that the inventory proceedings culminated with ¼ right in 'M' and 1/2 in 'B' being allotted to Shantibai. As to how the said property came to be so allotted despite the settlement deed of 1919 which according to the appellants carved out rights in favour of Gones and towards ½ of the properties 'B' to the appellants is a matter which this Court is unable to embark upon but it is clear that Shantibai stood allotted the property in tune with the sale deed.

85. What is important is nothing is produced by the appellants to show that Gones protested in any manner either during or at the end of proceedings. Nothing is produced to show that allotment to Shantibai was ever challenged in any manner by Gones. In other words, Gones by his conduct must

be treated as having held that he has accepted that the property which was allotted in the inventory proceedings will belong to Shantibai. Since 1937 when the said allotment took place for all purpose, the property stood acknowledged by Gones as property allotted to Shantibai. We are unable to accept the case that it would amount to fraud. There is no case of fraud as such set up by the appellants. There is a definite case for the respondents that there is no concept of trust in the Portuguese law and that there is no distinction between legal and equitable estate. We have taken the view that the concept of trust may be inapplicable.

86. There may be a plausible reason as to why it all happened. After 1919 as we have already noticed Suriaji executed a deed of his entire ¼ right which he acquired under the gift from his grandfather in favour of Gones which translated to roughly 22.5 hectares. There is no case that the said gift was not accepted by Gones. In fact, the property covered by said gift and also the property gifted by the grandfather to Gones with another 1/ 4 right in property 'M' came to be sold in the year 1937.

87. It is also most significant that not only did Gones did not raise any objection during or immediately after inventory proceedings but though he lived till the year 1978 which is nearly 41 years after 1937 Gones is not shown to have ever raised any claim in regard to the plaint schedule property while he was alive. Equally as found by the High Court and the first appellate Court there is no material to show that Gones was in receipt of income from property which is specific case of the appellants. In fact P.W.1 states as follows:

> "It is a conditional agreement to transfer registration in the name of Gones by Suriaji. He further says "I also do not know what was the exact amount which had to be paid by Gones to Suriaji to effect registration of the property". He further categorically states that the last time he went to the property was in 1940/1941 (at that time he was apparently about 9 years) and he says he remembers plucking of the produce. He does not have a case of receiving income after the death of his father Gones as he states that from 1979 payments were stopped.
>
> As far as payment received prior to 1979 we have already found that his testimony has not been believed by the two courts and we see no reason either to take a different view."

88. Thus, Gones was not in receipt of any income. Property was shown in the name of Shantibai. Still further in 1969 Shantibai executes a gift deed of the plaint scheduled properly. Immediately thereafter partition deeds are executed between Shantibai and children. Thus, Shantibai treated the property as belonging to her and she has accordingly executed the Gift deed and subsequently partition deed entered into on the said basis. Still later land acquisition proceedings were held in respect of part of the plaint schedule property. The compensation determined was paid on the basis that Gones did not have any right. When such is the position, we would think that on the face of it abandonment may not be inappropriate in the peculiar facts of this case. If the legal requirement is it must further amount to estoppel, one of the conditions to be fulfilled is acting on the representation, the representee must act to his detriment. We proceed on the basis that there was representation by conduct of Gones, that he acknowledged the right of Shantibai. It may be difficult

to establish that Shantibai acted to her detriment. Further there is no defence pleaded as to estoppel or abandonment. No doubt the latter objection may be a milder obstacle if the pleading as a whole could imply such a case.

DISCRETION IN AN APPEAL GENERATED BY SPECIAL LEAVE

89. We will however assume and proceed on the footing that Gones was entitled for 1/2 share, payment of Rs.1000/- was not a condition precedent in a suit based on title that adverse possession has not been proved (particularly having regard to the inconsistent plea based on title) and since Gones had title and the substantive prayer is to be treated as one for partition [even though the declaratory relief may be barred] and therefore suit is not barred by time and there is no estoppel. Still we would not exercise our discretionary power in an appeal which is generated by special leave. It will be wholly inequitable to intervene in favour of the appellants as successors of Gones. The decree of the first appellate court as confirmed by the High Court in our view has resulted in a decision which is otherwise just. In Taherakhatoon (D) by LRs v. Salambin Mohammad31, it has been held that even after the grant of special leave in an appeal this Court is not bound to interfere. This Court inter alia held as follows:

> "15. It is now well settled that though special leave is granted, the iscretionary power which vested in the Court at the stage of the special leave petition continues to remain with the Court even at the stage when the appeal comes up for hearing and when both sides are heard on merits in the appeal. This principle is applicable to all kinds of appeals admitted by special leave under Article 136, irrespective of the nature of the subject-matter. It was so laid down by a Constitution Bench of five learned Judges of this Court in Pritam Singh v. State [AIR 1950 SC 169 : 1950 SCR 453]. In that case, it was argued for the appellant that once special leave was granted and the matter was registered as an appeal, the case should be disposed of on merits on all points and that the discretionary power available at the stage of grant of 31 1999(2) SCC 635 special leave was not available when the appeal was being heard on merits.
>
> 16. This Court rejected the said contention and referred to the following dicta of the Privy Council in Ibrahim v.

R. [AIR 1914 PC 155] :

"[T]he Board had repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: Reil case [Riel v. R., (1885) 10 AC 675 : 58 LJPC 28] ;

Deeming, ex p [1892 AC 422 : 8 TLR 577]. The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it." This Court observed that the rule laid down by the Privy Council is based on sound principle and only those points could be urged at the final hearing of the appeal which were fit to be urged at the preliminary stage when leave to

appeal was asked for and it would be illogical to adopt different standards at two different stages of the same case. This Court observed (para 8) that, so far as Article 136 was concerned, it was to be noted firstly that it was very general and was not confined merely to criminal cases, and that (see para 9), the wide discretionary power with which the Court was concerned was applicable to all types of cases. The power under Article 136 according to this Court, "is to be exercised sparingly and in exceptional cases only, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this article. By virtue of this article, we can grant special leave in civil cases, in criminal cases, in income tax cases, in cases which come up before different kinds of tribunals and in a variety of other cases".

(emphasis supplied) This Court emphasised:

> "The only uniform standard which in our opinion can be laid down in the circumstances is that Court should grant special leave to appeal in those cases where special circumstances are shown to exist." This Court then concluded:
>
> "Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against."
>
> 20. In view of the above decisions, even though we are now dealing with the appeal after grant of special leave, we are not bound to go into merits and even if we do so and declare the law or point out the error — still we may not interfere if the justice of the case on facts does not require interference or if we feel that the relief could be moulded in a different fashion..." (emphasis supplied) In this case, as we have noticed apart from 22.5 hectares in property 'M' which was obtained by gift deed executed by grandfather in favour of Gones, in 1925. Gones acquired another gift by Suriaji's wife 22.5 hectares of land in property 'M'. As we have noticed there was 91 hectares in property 'M' and nearly 31 hectares as property 'B'. Thus Gones got 45 hectares approximately as a result of the gift deeds of 1913 and 1925. The case of the appellant is based on the settlement deed of 1919, no doubt read with sale deed of 1915. If instead of Gift deed of 1925 and Suriaji had to strictly confirm to the deed of 1919 as appellants contended Suriaji would have had to transfer only 19 hectares it would be a little more than 11 hectares from property 'M' and a little more than 7 hectares from property 'B' but the grand total would have been only 19 hectares. Gones in other words would have got 19 hectares but admittedly Suriaji has gifted Gones 1/4 share in property 'M' in 1925 which translated to about 22.5 hectares. Thus he was given almost more than 3 hectares than he would have got if the settlement deed of 1919 was enforced.

If the suit is decreed in this case, the result would be that Gones would stand allotted a little more than 64 hectares whereas the branch of Suriaji would have to rest content with just 19 hectares. This fact as also the fact the Gones during his whole lifetime and it be remembered that Gones died only

in 1978 did not raise his little finger against the exclusive right being given to his brother's family dissuades us at any rate from interfering in this matter. Consequently, the Civil Appeals stand dismissed. Parties to bear their own costs.

.....J. (Navin Sinha) .....J. (K.M. Joseph) New Delhi;

August 21, 2019