



Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 30 OF 2024

1 Sunil @ Anil Culaso Fernandes,
Son of Culaso Fernandes
Age 40 years
Resident of Village Corlim,
Opp. Shirodkar Petrol Pump,
Corlim, Malar, Ilhas Goa.

2 Shri Kakulo Lodu Bhomkar
Age 63 years
Resident of Malar, Corlim Goa.

3 Smt Kakulo Lodu Bhomkar
Age 54 years,
Wife of Kakulo Lodu Bhomkar,
Both resident of Malar, Corlim Goa.

... Appellants

Versus

1 Shri Devidas Batista Fernandes
@ Devidas Balkrishna Kankonkar
Age 63 years, businessman,

2 Smt. Milan Kankonkar,
W/o Devidas Kankonkar,
Age 50 years, housewife,
Both residents of Soklem Bhat,
Carambolim, Tiswadi Goa.

3 Smt Carmelina Uma Fernandes (Since deceased)
Through her legal heirs
a) Mrs Filu @ Mangala Nirmala Hadkonkar
Age 55 years, housewife,

- b) Shri Ramkrishna Gajanan Hadkonkar
Age 60 years,
Retired Govt. Servant,
Both residents of St. Cruz, Goa.

- 4 Smt. Visai Fernandes,
Age 58 years, housewife,
 - a) Shri Jayesh Yeshwant Kankonkar,
Age 34 years, service,
Son of late Yeshwant Kankonkar

 - b) Shri Sanjay Yeshwant Kankonkar
Age 32 years, service,
Son of late Yeshwant Kankonkar

 - c) Shri Sandeep Yeshwant Kankonkar
Age 30 years, service, unemployed,
Son of late Yeshwant Kankonkar

- 5 Shri Rajesh Yeshwant Kankonkar
Age 37 years, Govt. Service,
Son of late Yeshwant Kankonkar

- 6 Smt. Filu Fernandes,
Age 65 years, housewife,
Widow of Hiru Fernandes

- 7 Smt. Chandrakala Fernandes
@ Chandrakala Kankonkar
@ Chandrakala Gopal Kurtikar,
Age 38 years, housewife,
All residents of Soklem Bhat,
Carambolim, Tiswadi Goa.

- 8 Shri Antonio M. F. Fernandes (Since deceased)
Through his legal representatives
 - a) Smt. Chimane Culaso Fernandes

@ Sita Rama Fernandes
(widow of deceased Rama Culaso Antonio)
Fernandes,
Major in age,
Resident of Village Corlim Opp. Shirodkar,
Petrol Pump, Corlim, Malar,
Ilhas Goa (deceased)

b) Mr Onu/Honu Culaso Fernandes (Since Deceased)

Through his legal representatives

i) Mrs Harshada Honu Kankonkar
Wife of Honu Kankonkar,
Age 35 years, Housewife,

ii) Mast Yash Honu Kankonkar,
Son of Honu Kankonkar,
Age 9 years, student

iii) Mast. Nikhil Honu Kankonkar,
Son of Honu Kankonkar,
Age 6 years, student,
Respondent Nos. b(ii) and b(iii)
minor represented by mother and
natural guardian Respondent No.b(i)
All resident of Village Corlim,
Opp. Malik Petrol Pump,
Corlim Malar, Ilhas Goa.

c) Smt. Sukanthi Culaso Fernandes (daughter)
Daughter of Culaso Fernandes
Major in age,

d) Mr Hari/Ravi Culaso Fernandes (Son)
Son of Culaso Fernandes
Major in age,

- e) Smt. Jayashri Culaso Fernandes
(daughter)
Daughter of Culaso Fernandes,
Major in age,
- f) Smt. Rekha Culaso Fernandes (daughter)
Daughter of Culaso Fernandes
Major in age,
- g) Mr Thanu Culaso Fernandes (Son)
Son of Culaso Fernandes,
Major in age,
All resident of Village Corlim,
Opp. Shirodkar Petrol Pump,
Corlim, Malar, Ilhas Goa.
- h) Smt. Shakuntal Culaso Fernandes
(daughter)
@ Shakuntal Vishnu Mangeshkar
Major in age
- i) Shri Vishnu Devo Mangeshkar (Son in law)
Major in age,
Both resident at Puitar, Pale,
Shirdon, Goa.
- j) Mr Subhash Domingo Fernandes
(since deceased)
- k) Smt. Usha Fernandes
Wife of Subhash Fernandes
Major in age,
Resident of Shiren,
Chimbel, Tiswadi Goa.
- l) Mr Yuvraj Domingo Fernandes
Son of Domingo Fernandes,

Major in age,

- m) Mr Sham Domingo Fernandes
Son of Domingo Fernandes
Major in age,
All resident of Village Corlim,
Opp. Shirodkar Petrol Pump,
Corlim, Malar, Ilhas Goa.
- n) Mrs. Latika Domingo Fernandes,
@Latika Govind Kavlekar
Daughter of Domingo Fernandes
Wife of Govind Kavlekar
Major in age
- o) Mr Govind Betu Kavlekar
Son of Betu Kavlekar
Major in age,
Both resident at St. Matias,
Malar, Divar Goa.
- p) Smt. Vijaya Antonio Fernandes,
@ Tulxi Vinaeca Fernandes Dhulapkar
Daughter of Antonio Fernandes
Wife of Vinaeca Fernandes Dhulapkar
- q) Mr Vinaeca Fernandes (Since deceased)
Through his legal heirs
 - i. Ms Ganga Dipu Dhulapkar
 - ii. Ms Bharati Dipu Dhulapkar
 - iii. Ms. Sarita Dipu Dhulapkar
 - iv. Ms. Yenu Dipu DhulapkarAll resident of Village Dhulape,
Post Corlim, Ilhas Goa.
- r) Mrs. Shavantu Antonio Fernandes
@ Shevatu Philip Martin

Daughter of Antonio Fernandes
Wife of Philip Martin
Major in age,
Goa, North Goa.

s) Mr Philip Antonio Martin
Son of Antonio Martin
Major in age,
Goa, North goa.

9 Smt. Rozario Fernandes
@Rosario Pereira,
Major in age,
Residing of New Petrol Pump,
Corlim, Malar, Ilhas Goa (deleted)

10 Shri Francis Martins
@ Francisco Martins,
Major in age,
Address not known (deleted) ...Respondents

Mr D. Vernekar and Mr J. Velip, Advocates for the appellants.
Mr Premanand Kholkar, Advocate for the respondents.

CORAM: M. S. KARNIK, J

DATED : 27th SEPTEMBER 2024

ORAL ORDER

1. Heard Mr D. Vernekar, learned counsel for the appellants and
Mr P. Kholkar, learned counsel for the respondents.

2. Prior to the filing of the suit from which the present appeal arises, the respondents/plaintiffs had filed a suit bearing Civil Suit No.4/1954/A for partition and demarcation of the property against the co-owners in the year 1954 which was amicably settled by virtue of the compromise decree dated 18.02.1982.

3. The respondents/plaintiffs filed Regular Civil Suit No.208/1994 praying to restrain the appellants/defendants by permanent injunction from selling, alienating or interfering with the suit plots or any part thereof. The trial Court dismissed the suit. The appeal filed by the respondents/plaintiffs before the First Appellate Court was allowed. By judgment and decree of the First Appellate Court, the appellants/defendants were restrained from selling, alienating or interfering in any manner with the suit plots allotted to the respondents/plaintiffs.

4. Assailing the judgment and decree of the First Appellate Court, learned counsel for the appellants/defendants was at pains to submit that considerations by the trial Court are in detail and based on evidence on record and that the trial Court while framing necessary issues upon rendering findings thereon was justified in dismissing the suit. It is submitted that though the consent decree was drawn in the year 1982, the plaintiffs did not take any steps to execute the consent decree. It is submitted that there was no

partition on the basis of such consent decree and even the suit property of which the possession is sought was not clearly identified. Learned counsel submitted that as the plaintiffs' title was under a cloud and even as per the plaintiffs' case it cannot be said that the plaintiffs were in possession of the suit property. The decree could not be passed in a suit which was filed simpliciter injunction without there being any declaration of title. My attention is invited to the findings of the trial Court to submit that in the light of the evidence on record, the First Appellate Court was not justified in interfering with such findings. Learned counsel submitted that the present appeal gives rise to substantial questions of law as formulated in the appeal memo. Learned counsel for the appellants submitted that the application for appointment of the Court commissioner was made which clearly goes to show that the plaintiffs were not sure about which portion of the property in terms of the consent decree belonged to them and in their possession for maintaining a suit for simpliciter injunction.

5. Learned counsel for the appellants relied upon the decisions in *T. V. Ramakrishna Reddy Vs M. Mallappa and another*¹,

¹ Civil Appeal No.5577 of 2021

Chandna Impex P. Ltd. Vs Commissioner of Customs² and Hero Vinoth (Minor) Vs Seshamma³.

6. Learned counsel for the respondents/plaintiffs supported the impugned judgment and decree.

7. Heard. The plaintiffs and defendants were co-owners in respect of the property situated at Corlim and Ilhas Goa. The plaintiffs had filed suit in the year 1954. The suit was filed by the ancestors of the plaintiffs and defendants in the year 1954 which was amicably settled by virtue of compromise decree dated 18.02.1982. It is the plaintiffs' case that the defendants tried to interfere in the suit plots allotted to the plaintiffs by virtue of the consent decree dated 18.02.1982 on the basis of the wrong entry of their names in respect of the suit plots and hence the plaintiffs filed a suit for injunction.

8. The trial Court came to the conclusion that the title of the suit property under Survey Nos. 17/1, 17/2, 15/3, 15/4 and 15/2 was nowhere established by the plaintiffs. According to the trial Court, the plaintiffs had failed to prove that they were in possession and enjoyment of the property under the aforesaid survey numbers.

² 2011 (7) SCC 289

³ 2006 (5) SCC 545

The trial Court was of the opinion that if the plots were already surveyed before the consent decree was passed then nothing precluded the parties from mentioning the survey numbers of the property in the consent decree. On the footing that though the consent decree shows survey numbers, the plaintiffs have failed to establish that the plots correspond to the survey numbers, hence, the trial Court was of the opinion that it is necessary for the plaintiffs to seek a declaration. On the basis of the findings rendered, the trial Court was of the opinion that the title to the property surveyed under Nos.17/1, 17/2, 15/3, 15/4 and 15/2 was not established by the plaintiffs.

9. Before advertng to the rival contentions in a challenge to the First Appellate Court's decision, it would be useful to refer to the judicial pronouncements on the law governing the subject relied by the learned counsel.

10. In *Chandna Impex P. Ltd.* (supra), the Supreme Court held that it was expected of the High Court to record some reason, at least briefly in support of its opinion that the order of the tribunal did not give rise to any substantial question of law.

11. The position as crystalised in *Anathula Sudhakar Vs P. Buchi Reddy (dead) by L.Rs and others* (2008) 4 SCC 594 in

regard to suits for prohibitory injunction relating to immovable property reads thus:

“21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for

consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific or implied as noticed in *Annaimuthu Thevar* [*Annaimuthu Thevar v. Alagammal*, (2005) 6 SCC 202]). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, in stead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for

injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

12. The Supreme Court in *T. V. Ramakrishna Reddy* (supra) has held in Para 10 as under:-

“10. It could thus be seen that this Court in unequivocal terms has held that where the plaintiff’s title is not in dispute or under a cloud, a suit for injunction could be decided with reference to the finding on possession. It has been clearly held that if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.”

13. In *Hero Vinoth* (supra), Their Lordships made the following observations.

“The principles relating to Section 100 CPC, relevant for this case, may be summarised thus:-

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law.

Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence;

(ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or

(iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

14. I have carefully perused the findings of the First Appellate Court. The First Appellate Court observed that the defendants in the written statement have not denied the consent decree. The First Appellate Court took into consideration the submissions of the learned counsel for the defendants that the corresponding survey numbers of some of the plots are not correctly mentioned in the consent decree. It is pertinent to note that the First Appellate Court observed that there is no title dispute involved in the suit as the title was settled in the partition suit way back in the year 1982. A perusal of the consent decree reveals that the same refers to two plans showing the plots allotted. The plans at Exhibit PW1/E certified by the Court reveal the plots allotted to the respective

parties vis-à-vis the survey numbers. The First Appellate Court held that the plans corroborated the case of the plaintiffs as regards the allotment and survey numbers as pleaded in paras 9, 10 and 11 of the plaint. In Para 59, the First Appellate Court has observed thus:-

“59. As regards the entry in the survey record the plaintiffs have explained that after passing of the consent decree, the names of the defendants continued to appear in the survey records inspite of their allotment in their favour. They approached the Survey department and the Mamlatdar and were informed that an Order is required to effect the changes. Thereafter, they filed application before the Civil Court to direct the Survey Department, which was allowed by Order dated 16.02.1982. However, till date no changes have been effected. These pleadings are not controverted by the defendants and therefore it is proved that the survey records were not changed as per the allotment made in the consent decree and the Plans attached thereto.”

15. The plaintiffs examined PW2 Engineer Sitakant Kamat who has carried out the exercise of identifying the plot nos.4, 8 and 11 allotted to the plaintiffs vis-à-vis the new survey plans. The observations of the First Appellate Court from Paras 61 to 69 are relevant which read thus: -

“61. He has stated that after superimposing the Plan A annexed to the consent decree and based on physical verification at loco, it is observed that Plot 4

admeasuring 7387 sq.mts is surveyed under no.17/1(part), 17/2(part) and 17/3, plot 8 admeasuring 2482 sq.mts bears survey no. 15/3 (part), 15/4 (part) and 15/5 (part) and plot no. 11 admeasuring 616 sq.mts corresponds to survey no. 15/1 (part) and 15/2(part). The Engineer has also produced the Plans prepared by him in support of his above findings.

62. The defendants have not produced any evidence, to contradict the report of the Engineer. The defendant no. 3 and 4, who claimed that the corresponding survey numbers given by the plaintiff are not correct, did not produce any evidence to rebut the expert evidence of PW2.

63. The testimony of PW2 is sought to be assailed only on his statement that the tracing at exhibit 173 dated 17.07.1995 was never seen by him and not relied by him as the time of superimposition carried out by him. Based on this sole statement the evidence of PW2, who is an expert witness is sought to be discredited overlooking the scope of his work vis-à-vis his oral testimony before the Court.

64. PW2 was extensively cross examined by the defendants and the cross examination has gone beyond the pleadings of the defendants. The witness has time and again reiterated that the scope of his work was only to identify the plots vis-à-vis the new survey numbers and the same has been done by him by superimposing the plan A annexed to the consent decree and the new survey plan and also physical verification. He was questioned whether he was provided with the Plan in respect to Plot no.4 and the Plan of survey no. 17/1, 17/2 and 17/3 and he has answered in the affirmative.

He has admitted that on the basis of the Plan he carried out the superimposition.

65. During the cross examination he was shown a Survey Plan tracing which is at exhibit 73 and he was asked to match the said Plan with the Plan prepared by him to see if these two plans on superimposing matches with each other and he has answered that the tracing dated 17.07.1995 shown to him was never seen by him earlier and he had not relied on the same at the time of superimposition. Further, he has stated that the scale of the Plan at exhibit 73 is 1:1000. The tracing is issued in the year 1995 i.e. about 15 years prior and therefore, shrinkage factor is applicable to the tracing and he is of the opinion that superimposing cannot be done by an expert off-hand by standing in the witness box. PW2 has admitted that at the relevant time he did not have the survey Plan provided to him by the party at the time preparing his report.

66. From the above cross examination, it is clear that the defendants without producing any independent survey report sought to use the services of PW2 to get the Plan prepared by him superimposed on the tracing Plan given by them to the witness in the witness box and the said tracing Plan is at exhibit 73. PW2 has expressed his inability to do the super imposing off hand by standing in the witness box and has also given the specific reason for not doing so. In spite of the same, the defendants did not choose to examine an independent expert to rebut or falsify the report, Plan or the oral testimony of PW2.

67. As regards the tracing Plan at exhibit 73, the same is dated 25.06.1995 and the same was shown to the

witness by the defendants, which proves that it was procured by them. The witness has rightly admitted that the same was never seen by him earlier and he had not used the same to prepare his report. While saying so, the witness has specifically mentioned the date of the Plan. Without further cross examination of this aspect, no implication can be drawn that the witness had never seen the survey Plan of the property to do the superimposing and the denial of the witness was only in respect of the document at exhibit 73 given to him off hand by the defendants, which could not have been seen by him earlier. Based on such vague cross examination and the refusal on the part of PW2 to do the superimposing of plan in the court, the entire testimony of the witness that he has done the superimposing vis-à-vis the Plan A and the Government Survey Plans cannot be said to be rebutted.

68. Therefore, I am of the view that the plaintiffs have successfully proved their ownership and possession of the suit property. The defendants had not raised any title dispute of the property and there is a vague dispute only of the identification of plots vis-à-vis the survey numbers. The evidence led by them also did not raise cloud over the title which would warrant a suit for declaration in view of the ratio laid down by the Hon'ble Supreme Court in the case of Anathula Sudhakar (supra).

69. The claim of the defendants is only based on the survey records which were admittedly not rectified pursuant to the consent decree dated 18.02.1982 in spite of the order of the Court dated 16.02.1993. The defendants who have not challenged the decree and have acted upon the same cannot take advantage of such

survey records. As rightly argued by Ld. Advocate Kholkar and as held in the above decisions by him the survey records do not convey any title or to re-agitate the issue of partition settled by the decree of the Court dated 18.02.1982.”

16. As regards the possession of the respective plots, the First Appellate Court found that the consent decree speaks about the partition was done as per the possession of the parties of which was confirmed by them. I do not find any reason to interfere with the factual findings rendered based on a proper appreciation of the evidence on record. In my opinion, the present appeal does not involve any substantial question of law. As such, the second appeal is dismissed. No costs.

M. S. KARNIK, J