

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.70/2016

M/S. Queeny Realty Pvt. Ltd., Rep. by
its Managing Director Shri Agnelo
Alcasoas, Having its office at Queeny
House, Queeny Nagar, Velsao, P.O.
Cansaulim, Goa 404 712.

... APPELLANT

Versus

1. Smt. Maria Fermina Fortes alias
Maria Fermina Michael Vaz, w/o. late
Michael Vaz, major of age, widow and
r/o. H. No. 175, Per Seraulim, Salcete,
Goa.
2. Shri Eugenio Michael Vaz, s/o. late
Michael Vaz, major in age, landlord,
married and his wife.
3. Smt. Annie Eugeno Vaz, w/o.
Eugeno Vaz major of age, married,
housewife and both r/o Room no. 28,
First Floor, 'B' Wing Shree Shakti
Dham Co-op. Housing Society Ltd.,
Mumbai.
4. Shri Christopher Michael Vaz, s/o.
Michael Vaz, major of age, married,
service and his wife.
5. Smt. Janet Christopher Vaz, w/o.
Christopher Vaz, major of age,
married, service and both r/o. Flat F-2
Kurtarkar Hills Borda Margao-Goa.

6. Smt. Conception Mathew Lobo, d/o. Michael Vaz, major of age, married, service and her husband;

7. Shri Mathew Staney Lobo, Son of Staney Lobo, Major of age, married, service and both r/o. B/8, Yashoshri Building, Sector No. 1, Shri Nagar, Wagle Estate, Thane.

8. Smt. Valentine Vincent Sequeira, d/o. late Micahel Vaz and w/o late Vincent Sequeira widow, service and r/o. 401 Sunita Anand Palace, B.R. Road, Mulund West, Mumbai 400 808.

9. Shri Frazer Vincent Sequeira, s/o. late Vincent Sequeira, major of age, service and r/o. 401, Sunita Anand Palace, B.R. Road, Mulund West, Mumbai 400 080.

10. Kum. Belita Vincent Sequeira, d/o. late Vincent Sequeira, major of age, service and r/o. 401, Sunita Anand Palace, B.R. Mulund West, Mumbai 400 080.

11. Shri Armindo Francisco Fortes, s/o. Eriberto Rafael Fortes major of age, retired married and his wife.

12. Smt. Luciana Fortes, w/o. Armindo Fortes, major of age, married, housewife and both r/o. H. No. 175, Per Seraulim, Salcete, Goa.

13. Shri Rosindo A.M. Fortes, s/o. late Eriberto Rafael Fortes, major of age,

married retired and his wife;

14. Smt. Sabina Eulalia Fortes, w/o. Shri Rosindo Fortes, major of age, married, retired and both r/o. Flat No. 6, Christiana Apartments, Alto Porvorim, Bardez, Goa.

15. Smt. Jesul Rosario Fortes, w/o. late Lourenco Fortes, major of age, widow house and r/o H. No. 175, Per Seraulim Colva, Salcete, Goa.

16. Shri Sanjay Fortes, s/o. late Lourenco Fortes, major in age, self employed and r/o. H. No. 175, Per Seraulim, Colva Salcete, Goa.

17. Smt. Adifacina L. Fortes, d/o. late Lorencos Fortes, w/o Tito Joao Marto Cota, major of age, service, married and r/o. H. No. 185, Per Seraulim, Colva, Salcete, Goa.

18. Smt. Melba Fortes, d/o. late Eriberto Rafael Fortes, major in age, housewife, married and her husband;

19. Shri Seneu T.A. Azaredo, s/o. Thomas Aquino Azaredo, major of age, retired, married and both r/o. H. No. 231 Loyola Waddo, Utorda-Majorda, Salcete, Goa.

20. Shri Jose Bernardo Lucas Noronha, s/o. late Jose Santana Bernardino Circumcisao de Menino Jesus Amancio Noronha, Major in age, self

employed, Married and r/o Per Seraulim, Salcete, Goa and Duly rep. by his constituted Attorney Smt. Opelia Mesquita, Major of age, housewife, Married and r/o. Betalbatim, Salcete, Goa.

... RESPONDENTS

Mr C. A. Coutinho with Mr Ivan Santimano, Advocates for the Appellant.

Mr Laxman Assoldekar, Advocate for the Respondent No.20.

CORAM: **M. S. SONAK, J.**

Reserved on: **8th DECEMBER 2023**
Pronounced on: **2nd FEBRUARY 2024**

JUDGMENT:

1. Heard Mr C. A. Coutinho with Mr Ivan Santimano for the Appellant and Mr Laxman Assoldekar for Respondent No.20.
2. This appeal is directed against the Judgment and Decree dated 23.12.2015 in Special Civil Suit No.45/2011/I by which the First Additional Senior Civil Judge at Margao (Trial Court) decreed Special Civil Suit No.45/2011/I, instituted by respondent no.20, in the following terms:-

“ ORDER

The suit is partly decreed. The plaintiff is declared as owner of the part of the suit property admeasuring an area of 1,251 sq. mts. as per the plan (exhibit 165). It is declared that this part is the portion of property bearing survey

no.68/7 of the village Seraulim, Salcete taluka, South Goa district. It is declared that the sale deed dated 29-12-2010 has not transferred title to the suit property admeasuring 1251 sq. mts. as shown in the plan at exhibit 165 to defendant no.20 and is not binding to the plaintiff to that extent. The survey authorities may take note of this and act accordingly. The defendant no.20 shall pay the costs to the plaintiff.

sd/-

(Anil Scaria)

*Ist Addl. Senior Civil Judge,
Margao,"*

3. Thus, respondent no.20 herein was the original plaintiff, and the appellant was the original defendant no.20 in Special Civil Suit No.45/2011/I, which was decreed in the above terms. For convenience, therefore, the appellant will be referred to as defendant no.20 or D-20, and respondent no.20 will be referred to as the plaintiff for the purposes of this appeal.

4. The record shows that only D20 contested the suit, and defendants no.1 to 19 were marked as ex-parte. Even before this Court, only D20 (appellant) and the plaintiff (respondent no.20) have contested this appeal.

5. The suit and, consequently, this appeal concerns the property measuring 1975 sq. mtrs. forming a part of the larger property surveyed under No.68/7 at Seraulim, Salcete-Goa (suit property).

6. The Trial Court has set out the plaintiff's case in the suit in para 2 of the impugned Judgment and Decree dated 23.12.2015, and the same is transcribed below for the convenience of reference:-

"2) The plaintiffs' case is that late Judith Botelho was the wife of Vincente Joao do Rosario. That they had a property called "Dimundy" or "Demundi" or "Malguchem Sit Sotr" in the village of Seraulim, Salcete Goa. That this property is recorded in the land Registration office of Salcete under description no.40102 at page no.190 overleaf of Book 103 of new series. That it is recorded in the land revenue office under matriz no.266 and 267. That it admeasures an area of 1,975 sq. mts. and form the western part of a larger property surveyed under survey no.68/7 of the village of Seraulim, Salcete Goa. This property is hereinafter called the "suit property". That the late father of the plaintiff purchased the suit property from Judith Bothelo and her husband late Vincente Joao Do Rosario by Deed of sale and Quittance dated 07-08-1946. That, as stated above, it is the plaintiffs' case that 10 the suit property is only the western part of property surveyed under survey no.68/7. That the eastern part of property bearing survey no.68/7 is a property described in the land registration office under no.20627 belonging to the defendants. That Mrs. Adifacina da Costa Fortes is the predecessor in title of defendants no.1 to 19. That Mrs. Adifacina da Costa Fortes filed a suit against the late mother of the plaintiff. That in the said suit it was decreed

that the late mother of the plaintiff had also become the owner of the eastern portion of property bearing survey no.68/7 by adverse possession. That the plaintiff is presently residing in Australia. That he has a sister-in-law called Mrs. Ophelia Misquita. That his sister-in-law and her husband (Francisco Misquita) are looking after the suit property. That in 20-11-2011 the plaintiff's sister in-law and her husband visited the suit property and noticed some digging activities. That chalk markings were made on the land to demarcate the area required for foundation and some iron rods were fixed to the land. That they discovered that defendants no.1 to 19 had sold the suit property to defendant no.20 by sale deed dated 29-12-2010. That only the names of defendants no.1 to 19 were entered in the record of rights of survey no.68/7. That the sale was fraudulently made taking advantage of these entries. That defendant no.20 is doing construction and developing the suit property. Therefore, it is prayed that it be declared that the plaintiff is absolute owner in exclusive possession of the suit property. That sale deed dated 29-12-2010 be declared null and void to the extent of suit property. That the Learned Mamlatdar of Salcete be directed to enter the name of the plaintiff in the record of rights of property bearing survey no.68/7 of the village of Per Seraulim, Salcete taluka, South Goa district. That defendant no.20 be directed to remove the iron rods and markings made in the suit property.”

7. Similarly, the Trial Court has set out defendant No. 20's defence in para 3 of the impugned Judgment and Decree, which is transcribed below for the convenience of reference:-

"3) The case of defendants is that the suit property is part of the property bearing survey no.68/7. That the said property was originally described in the land registration office under nos.20627 and 20623. That this property belonged to defendants no.1 to 19. That this property was purchased by the defendant no.20 by sale deed dated 29-12-2010. That the defendant no.20 is exclusive owner in possession of the suit property. That the plaintiff does not have any right in it. Therefore, it is prayed that the suit be dismissed."

8. Based on the rival pleadings, the Trial Court cast the following issues and answered them accordingly:-

<i>“</i>	<i>ISSUES</i>	<i>Findings</i>
	<i>1) Whether the plaintiff proves that he is the exclusive owner in peaceful, continuous and uninterrupted possession of the suit property bearing survey no. 68/7 of village Per Seraulim admeasuring 1975 sq. mts.?</i>	<i>Partly in the affirmative.</i>
	<i>2) Whether the plaintiff prove that the defendants 1 to 19 illegally and fraudulently sold property belonging to the plaintiff to the defendant no.20 by taking undue advantage of the names appearing wrongly in the survey records thereon?</i>	<i>In the negative.</i>

3) Whether the defendant no.20 proves that he is a bonafide purchaser of the suit property having purchased the same after exercising due diligence? In the negative.

4) What relief? What order? As per the order.

ADDITIONAL ISSUE

1) Does the plaintiff prove that the plaintiff acquired title to property bearing land registration no.20627 by adverse possession : In the negative.”

9. Based on the above findings/answers to the issues cast, the Trial Court partly decreed the suit by declaring the plaintiff as the owner of the part of the suit property measuring 1251 sq. mtrs. as per the plan at Exh.165. The Trial Court declared that this part is the portion of the property surveyed under No.68/7 of Village Seraulim, Salcete Taluka, South Goa District. The Trial Court further declared that the sale deed dated 29.12.2010 by which D20 (appellant) had purchased the suit property did not transfer the title to D20 (appellant) to the extent of 1251 sq. mtrs. as shown in the plan at Exh.165. The Trial Court held that the sale deed dated 29.12.2010 would, therefore, operate in respect of the balance area, and such sale deed did not extinguish the plaintiff's right and title to the area of 1251 sq. mtrs. from out of the suit property. The Trial Court directed the survey authorities to take note of this and to act accordingly. Aggrieved by all this, D20 (appellant) has instituted the present appeal to question the impugned Judgment and Decree dated 23.12.2015 in Special Civil Suit No.45/2011/I.

10. Mr C. A. Coutinho, learned counsel for the appellant, submitted that there was no evidence of any “addo” and, therefore, the Trial Court erred in splitting the property, which was the subject matter of the registered sale deed dated 29.12.2010 and holding the plaintiff's right, title and interest to the portion of the suit property admeasuring 1251 sq. mtrs.

11. Mr Coutinho submitted that the Trial Court failed to appreciate that the existence of the so-called “addo” (loose stone wall) allegedly being within the property surveyed under No.68/7 was never pleaded in the plaint. Further, the suit was filed based on the report of one Glen Andrade who also did not show such an addo in the plan prepared by him. Mr Coutinho submitted that the Trial Court completely erred in accepting the plaintiff's case about the existence of an Addo and decreeing the suit on the said basis.

12. Mr Coutinho submitted that even otherwise, the Trial Court failed to discuss the evidence on record and approached the matter as if it were deciding a Second Appeal. He submitted that the plaintiff failed to establish that his property allegedly registered under No.40102 corresponded to the property surveyed under No.68/7. He submitted that the plaintiff also failed to establish that the property surveyed under No.68/7 corresponds to the property bearing Matriz Nos.266 and 267 of Matriz Predial, as was pleaded in the plaint. He submitted that unless such correlation was established, there was no question of decreeing the suit.

- 13.** Mr Coutinho submitted that since there was a serious question of the extent and area of the suit property claimed by the plaintiff, the Trial Court should have appointed a surveyor/Court Commissioner. Having failed to appoint a surveyor/ Court commissioner, the impugned Judgment and Decree is vitiated and deserves to be set aside.
- 14.** Mr Coutinho submitted that the survey records were in the name of the predecessor in the title of the appellant's vendor. He submitted that the presumption arising from out of the survey records was not given due weight by the Trial Court even though the plaintiff never rebutted such presumption.
- 15.** Mr Coutinho submitted that the Trial Court erred in relying upon the decree made in the 1969 suit when admittedly, the suit was in respect of the property bearing Land Registration No.20627 and 40104. He submitted that the present dispute was in respect of property registered under No.40102 corresponding to survey no.68/7. He submitted that the principal issue in the suit was the extent of the properties under Land Registration No.40102, 40104 and 20627.
- 16.** Mr Coutinho finally submitted that the impugned judgment and decree was based upon surmises and conjectures warranting interference in this appeal.
- 17.** Mr Assoldekar, learned counsel for the plaintiff (respondent no.20), defended the impugned judgment and decree based on the findings and reasoning reflected therein. He submitted that

more than sufficient evidence was produced to show the correlation between the property registered under No.40102 and the property surveyed under No.68/7. He submitted that clear evidence (both oral and documentary) about the existence of an addo was produced, and it is only upon the appreciation of such evidence that the suit came to be partly decreed.

18. Mr Assoldekar submitted that the vendors led no evidence to the sale deed dated 29.12.2010, based on which the appellant claims title to the suit property. He submitted that the vendors, through whom the appellant claims title, did not even contest the suit or the averments made by the plaintiff in the plaint. He submitted that still the Trial Court, upon considering both oral and documentary evidence, has partly decreed the suit by holding that the appellant acquired rights in the suit property to the extent of 724 sq. meters. and not 1975 sq. mtrs. He submitted that the area of 1251 sq. mtrs. from out of the suit property formed a part of the property registered under No.40102 corresponding to survey no.68/7 owned and possessed by the plaintiff (respondent no.20). He submitted that there was evidence of the Addo at the site and based upon the same the Trial Court was justified in partly decreeing the suit and declaring the sale deed dated 29.12.2010 as being restricted only to the area of 724 sq. mtrs. and not the balance 1251 sq. mtrs.

19. Mr Assoldekar, based on the above, submitted that this appeal was liable to be dismissed with costs.

20. Based upon the rival contentions, the following points arise for determination in this appeal:-

- (A) Whether the plaintiff has established ownership of the property registered under No.40102 at page 190 (overleaf) of Book 103 of New Series measuring 1975 sq.mtrs.?
- (B) Whether the plaintiff has established that the property measuring 1975 sq. mtrs. registered under No.40102 corresponds to the property surveyed under No.68/7?
- (C) Whether the plaintiff has established that the suit property was bifurcated by an Addo (loose stone wall) and the portion measuring 1251 sq. meters. separated by the Addo from the balance of 724 sq. meters. which was a part of the property registered under No.40102 and corresponds to the property surveyed under No.68/7?
- (D) Whether the impugned Judgment and Decree are vitiated because the Trial Court failed to appoint a Court Commissioner to ascertain the extent and boundaries of the property registered under No.40102 and whether this property corresponded to the property surveyed under No.68/7.
- (E) Whether the impugned Judgment and Decree is vitiated on account of the Trial court considering the findings in the RCS No. 49/1969?

(F) Whether the impugned Judgment and Decree is vitiated due to the failure of the Trial Court to give due weight to the survey records and the presumptions arising from such survey records?

(G) Whether the impugned Judgment and Decree is vitiated because it proceeds on surmises and conjectures but not on legal proof?

21. In the suit, the plaintiff, besides examining himself (PW1), examined three other witnesses, namely Ludomilo Rebello (PW2), Constancio Lucas (PW3) and Manuel Fernandes (PW4). All these witnesses, apart from orally deposing in the matter, produced documentary evidence which was duly exhibited and admitted into evidence. Only one of the plans produced by PW4 was marked as 'X' for the purpose of identification.

22. The appellant (D20), apart from examining himself as DW1, examined the surveyor Vikas Desai (DW2). The appellant and DW2 also produced some documents like survey records, survey plan, a certified copy of the inscription, description, sale deed dated 29.12.2010, etc., which documents were duly exhibited and admitted in evidence.

23. As noted above, the appellant (D20) claims title to the suit property based upon the sale deed dated 29.12.2010, of which the vendors are defendants no.1 to 19 or respondents no.1 to 19 herein. Admittedly, defendants no.1 to 19 chose not to contest the suit, and consequently, they were marked ex-parte. Thus,

though the appellant claims title to the suit property through defendants no.1 to 19, at least defendants no.1 to 19 did not contest the suit or file any written statement to deny the case pleaded by the plaintiff in the plaint or in the amended plaint. Not that this is fatal to the appellant's case. However, this is an aspect which will have to be borne in mind for appreciating the oral and documentary evidence placed on record by both parties, including, in particular, the oral evidence on behalf of the appellant (D20) before the Trial Court.

24. In the plaint, the plaintiff has described the suit property by its various names, such as "DIMUNDY" or "DEMUNDI", also known as "MALGUCHEM SIT SOUTRE". Further, the plaintiff has pleaded that the suit property was described under No.40102 on page no.190 (overleaf) of Book 103 of New Series in the Land Registration Office of Salcete and recorded under Matriz Nos.266 and 267 of Matriz Predial. The plaintiff has also pleaded that this suit property now corresponds to the property surveyed under No.68/7 of Village Seraulim, Salcete, Goa. The plaintiff has also pleaded that the suit property so described measures 1975 sq. mtrs.

25. The plaintiff, in para 3 of the plaint, has also stated the boundaries of the suit property. They read as follows:-

On the North: by Survey No.68/17 and Survey No. 68/5 with the property of the same denomination.

- On the East: by remaining property bearing Survey No.68/7 belonging to Defendants Nos.1 to 19 and the Seraulim - Margao Road.
- On the West: by property bearing Survey No.68/6 with the property of the same denomination.
- On the South: by the residential house of the Plaintiff surveyed under Survey No.68/9 and the property bearing Survey No.68/8 of the property of the same denomination.

26. The plaintiff has made detailed pleadings about the flow of title. He pleaded that his father late Jose Santana Bernardino Circumcisao de Menino Jesus Amancio Noronha, also known as Amancio Noronha, purchased the suit property from one Judith Bothelo and her husband Vincente Joao do Rosario by Deed of Sale and Quittance dated 07.08.1946. This deed was referred to in the list of documents and also annexed with the plaint/list of documents.

27. The deed of Sale and Quittance dated 07.08.1946 was produced by the plaintiff (PW1) in evidence, and the same was exhibited as Exh.42 Colly. This sale deed, in terms, describes the suit property, which was the subject matter of the said Deed of Sale and Quittance dated 07.08.1946 as one described under No.40102 named as "Demundi". The sale deed also sets out the boundaries of the suit property, and the same read as follows:

- On the North: Property of Fabrica of the Church and that of Camilo Cotta;
- On the South: Property of Jose Menino Noronha;

On the East: Property of heirs of Antonio Menino Fortes;

On the West: Property of heirs of Vishnum Poi.

28. In the plaint, the plaintiff disclosed that he was working in Australia, and the suit property and the residential house situated therein were looked after by his brother-in-law and sister-in-law, i.e. Francisco Mesquita and Ophelia Mesquita, constituted attorneys of the plaintiff. In the plaint, the plaintiff gave a description of the trees in the suit property.

29. The plaintiff also pleaded about the access in the form of a gate which leads from the plaintiff's residential house in survey no.68/9 to the suit property. The plaintiff also pleaded about the existence of access from the old residential house of the plaintiff, which was now in ruins, and even produced photographs taken on 23.11.2011 along with the plaint. Contrary to Mr Coutinho's contentions, the plaintiff, in para 9 of the plaint, clearly pleaded that the suit property and the property belonging to defendant no.1 to 19 existing on the eastern side of the suit property was demarcated and separated by a laterite stone addo existing on the eastern side of the suit property as shown in the plan prepared by Engineer Glen Andrade.

30. By amending the plaint, the plaintiff pleaded that the property of defendant no.1 to 19 was described in the Land Registration Office of Salcete Taluka under No.20627. Even the boundaries of this property were set out in para 13(a) of the plaint. The plaintiff referred to the acquisition of this property by

defendant no.1 to 19 vide Deed of Conveyance dated 19.07.1909 from Maria da Graca Souza, mother of Judith Bothelo.

31. In para 13(b) of the plaint, the plaintiff referred to litigation between the predecessors in title of defendant no.1 to 19, i.e. Mrs Adifania da Costa Fortes and Mrs Rubina Dias Noronha, i.e. plaintiff's mother vide Regular Civil Suit No.49/1969 in the Court of the Civil Judge, Junior Division at Margao. The plaintiff pleaded that this suit was decided in favour of Mrs Rubina Dias Noronha, i.e. the predecessor in title of the plaintiff (mother). The plaintiff pleaded that in the Judgment and Decree dated 29.06.1974 made in Regular Civil Suit No.49/1969, based upon which the defendants no.1 to 19 claimed title to the property which was the subject matter of Conveyance Deed dated 19.07.1909 and the Deed of Sale and Quittance dated 07.08.1946, based upon which the plaintiff claims title to the suit property.

32. In para 13(c) of the plaint, the plaintiff pleaded that by virtue of the Judgment and Decree dated 29.06.1974 in Regular Civil Suit No.49/1969, the plaintiff's mother Mrs Rubina Dias Noronha was declared to be the owner of the suit property described under No.20627 which the predecessor in title of defendants no.1 to 19 had purchased from Maria Graca D'Souza vide Deed of Conveyance dated 19.07.1909 by way of prescription.

33. Apart from the above pleadings, there are pleadings as to how the plaintiff's sister-in-law noticed a banner advertising

construction in the suit property. The plaintiff has pleaded about how his brother-in-law made inquiries in the office of the Sub-Registrar and got knowledge about the sale deed dated 29.12.2010 executed by defendants no.1 to 19 in favour of the appellant (D20). The plaintiff has pleaded about how he was in exclusive possession of the suit property and why, according to him, defendant no.20 in the suit had no right, title or interest in the suit property by virtue of the sale deed dated 29.12.2010 or even otherwise.

34. Thus, there are detailed pleadings in the plaint about the identification and description of the suit property. The suit property is identified by its names, description/registration numbers, matriz numbers, boundaries and even survey numbers. As noted earlier, the plaintiff examined himself as PW1 and produced not only the copy of the Deed of Sale and Quittance dated 07.08.1946 but also the Land Registration Certificates, Succession Deed, Survey record, Certified Copy of Judgment and Decree in Regular Civil Suit No.49/1969, Certified Copy of the Sale Deed dated 29.12.2010 along with Form I & XIV, Certified Copy of the Judgment in Land Acquisition Case No.33/2010 and Inspection Report.

35. The plaintiff's evidence was duly considered by the Trial Court, and the contentions about the Trial Court not considering the evidence on record or proceeding with the matter as if it was deciding Second Appeal cannot be accepted. In any case, on perusing the oral and documentary evidence it can be safely concluded that PW1 has deposed to the contents of the plaint

and also produced documentary evidence in support. As noted above, the documents produced indeed refer to the name, registration details, matrix details and survey details of the suit property. PW1 has also deposed to the boundaries of the suit property and explained how they correspond to the property surveyed under No.68/7. The Deed of Succession also establishes the correlation between the plaintiff and his predecessors in title who acquired the suit property vide Deed of Sale and Quittance dated 07.08.1946.

36. The record also shows that the predecessors in title of defendants no.1 to 19 had instituted Regular Civil Suit No.49/1969 against the plaintiff's mother, who was decided in favour of the plaintiff's mother. The findings in the said suit suggest that the plaintiff's mother had acquired a prescriptive title in the property described under No.20627, which the predecessors in title of defendants no.1 to 19 had purchased vide Conveyance Deed dated 19.07.1909. Admittedly, this decree dated 29.06.1974 was never challenged by the predecessors in title of defendants no.1 to 19 through whom the appellant (D20) claims title.

37. Judgment and Decree dated 29.06.1974 in Regular Civil Suit No.49/1969 is on record and marked as Exh.46 Colly. A perusal of this judgment and decree indicates that the predecessors in title of defendants no.1 to 19 had claimed right, title and interest in the property "demundy", including half of the house existing therein described under No.20627 based upon the Conveyance Deed dated 19.07.1909 by which this property was

purchased from Maria Graca D'Souza, widow of Bonifacio Bothelo. This judgment and decree also records the predecessor in title of the plaintiff, i.e. the plaintiff's mother claimed right, title and interest in this property based upon the Conveyance Deed dated 19.07.1909 by which her deceased husband Amancio Noronha purchased the property named "Demundi" from Judith Bothelo.

38. This decree discusses the evidence on record in the context of the boundaries of the property. This decree also refers to the inspection by the Court. This decree describes the extent of the properties which were the subject matter of conveyances dated 19.07.1909 and 07.08.1946. The Court has recorded the detailed findings based on oral evidence, documentary evidence and also inspection by the Court. Based upon all this, the claim of the predecessors in title of defendants no.1 to 19 was dismissed. The predecessor in title of the plaintiff (plaintiff's mother) was declared to be the owner of the property, which was the subject matter of Regular Civil Suit No.49/1969.

39. Admittedly, this decree was not challenged by the predecessor in title of defendants no.1 to 19 or by any of the defendants. Therefore, neither defendants no.1 to 19 nor the appellant (D20) who claims title from defendants no.1 to 19 can wish away the consequences of the findings recorded in the Judgment and Decree in Regular Civil Suit No.49/1969. Though the suit was in respect of the adjacent properties, there are findings on the title documents that were common to the adjacent properties and the suit property. But this far cry from

saying that the Trial court has fully based its conclusions on the findings in the 1969 suit.

40. The plaintiff also examined Ludomilo Rebello (PW2). He deposed that he is the owner of the property surveyed under No.68/6 existing on the western side of the suit property surveyed under No.68/7 belonging to the plaintiff. He deposed that the property surveyed under No.68/6 is demarcated in two parts by an Addo, thereby demarcating the plaintiff's property on the western side and the property of defendants no.1 to 19 on the eastern side. He deposed to the number of trees in the plaintiff's suit property, and this description corresponds to that pleaded in the plaint and deposed to by PW1. He also deposed substantially to what was pleaded by the plaintiff in the plaint in the context of access and how it was the plaintiff or, rather, the plaintiff's brother-in-law and sister-in-law who were engaging coconut pluckers to pluck coconuts from the suit property.

41. PW2 was cross-examined, and he deposed that presently, there was no compound wall separating the property surveyed under No.68/7 from 68/9 in cross-examination as well; PW2 deposed about the Addo along the rest of the boundary. He explained that Addo is a loose stone wall. He deposed that the Addo is on the eastern side, and the wall of the house is also on the eastern side. He described Addo as of the height of one or two loose stones. He deposed that the suit property where defendant no.20 was seeking to make a structure belongs to the plaintiff. Although PW2 was cross-examined in great detail, there

is no clear suggestion put to him denying the existence of the Addo.

42. The plaintiff examined Constancio Lucas (PW3), who was engaged as a coconut plucker by Francisco Mesquita and Ophelia Mesquita, the brother-in-law and sister-in-law of the plaintiff, who was looking after the suit property because the plaintiff was in Australia. This witness clearly deposed to visiting the property surveyed under No.68/7 for plucking coconuts every three months, i.e. four times in a year. He deposed the number of coconut trees in the suit property, which corresponds to the pleadings in the plaint and the evidence of PW1 and PW2. In his cross-examination, apart from denials, nothing further was elicited from PW3. This evidence is relevant in the context of the plaintiff asserting his ownership rights and possession over the suit property surveyed under No.68/7.

43. The plaintiff also examined Manuel Fernandes (PW4). This witness was the retired Head Surveyor of the Directorate of Settlement and Land Records, Goa. He deposed to having been engaged by Francisco and Ophelia Mesquita along with the Plaintiff for identification of the location of the properties bearing Land Registration No.40102 and 20627 which were together surveyed under Survey No.68/7 of Village Seraulim. PW4 deposed that he visited the property on 06.09.2015 and by reference to Land Registration Certificates bearing No.401002, 40103, 40104, 40291 and 20627 along with the Survey Plan concerning Survey Nos.68/9, 68/7 and based on the survey records identified the properties under Land Registration

No.40102, part of property bearing Land Registration No.40104 and property bearing Land Registration No.20627 in loco and as shown by him in the plan dated 10.09.2015 prepared by him.

44. PW4, in para 7 of his affidavit in evidence stated as follows:-

“7. I say that the property identified under Land Registration No. 40102 is bounded on the Eastern side for a length of 18 metres and 7.55 metres by loose stone boundary separating the same from the property identified under Land Registration No. 20627 and which are both together surveyed under Survey No. 68/7 and further with the ruins of the old house for a length of 11.40. metres. I further say that towards the West it is bounded by compound wall, towards the North it is bounded by loose stones and on the South partly by the compound wall of Jose Mario Noronha and partly of the Plaintiff and the same is shown as Plot A and part of Survey No. 68/7 (part) admeasuring an area of 1251 sq. metres. I further say that the said property further consists of seven coconut trees, one bhendi tree and one mango tree.”

45. PW4 was cross-examined by the Advocate for the appellant (D20). He admitted never having met Shri Jose Noronha, i.e. the plaintiff in the suit. However, nothing much turns on this because the plaintiff had admitted that he was in at the relevant time in Australia and the services of the retired Head Surveyor (PW4) were engaged by Francisco and Ophelia Mesquita, his

brother-in-law and sister-in-law, i.e. his duly constituted attorneys who were taking care of the suit property. In cross-examination, PW4 gave the precise date of his visit to the property accompanied by Francisco and Ophelia. He deposed that he visited the property no less than three times to prepare his report and was always accompanied by Francisco and Ophelia. He deposed that on one of the visits, he was also accompanied by the plaintiff. He deposed of taking measurements, and how he confirmed the plan on his third trip in the presence of the plaintiff.

46. In the cross-examination, the Surveyor/expert deposed to the process of inspection and preparation of the plan based upon the documents referred to by him in his affidavit in evidence. He explained that according to his plan, the entire Plot B corresponds to the entire land described under No.20627, and the entire Plot B corresponds to the entire land described under No.40102, and Plot C is part of the land described under No.40104. He admitted that according to his plan, Plots A and B were not the parts of the property described under No.40104.

47. PW4, the expert and retired Head Surveyor, in the cross, emphatically stated that the property shown on the east of the property registered under No.40102 is also surveyed under No.68/7/part. He candidly admitted that from the description of No.40102 and 20627, the area of either of the properties cannot be determined. He deposed to the boundaries of the property described under registration no.40102 and withstood the cross-examination this witness gave clear, cogent and confident answers

to the questions posed to him on the issue of identification, correspondence to the property with the present survey numbers and the boundaries. No dent was made in his clear and cogent testimony. He denied the suggestion that Plot A does not correspond to property registered under No.40102. Although PW4 had deposed to the loose stone boundary, which means the Addo by giving detailed measurements and areas, significantly, there was no significant cross-examination on this precise aspect. However, an attempt was made to generally discredit PW4. There was no clear denial in the context of the clear and cogent evidence in para 7 of the affidavit in evidence referred to above.

48. Thus, on the assessment and evaluation of the plaintiff's evidence, the appellant is not justified in contending that the plaintiff had failed to either identify the suit property in the context of his title documents or that there was any failure to establish that the suit property indeed corresponds to Survey No.68/7. Plaintiff's evidence is clear and cogent on these aspects. However, even clearer is the evidence of PW4, a retired Head Surveyor and an expert in surveys. His testimony withstood the cross-examination, and his report clearly describes the status of the properties at the site and the status of the properties vis-a-vis the title documents and survey records produced on behalf of the plaintiff. Applying the test of preponderance of probabilities, certainly, the plaintiff's evidence, including in particular the evidence of PW1 and PW4, deserves acceptance and the same was justifiably accepted and relied upon by the Trial Court.

49. Evidence of PW2 and PW3 is also relevant. PW2 is the owner of the neighbouring property, and he has deposed to the acts of ownership and possession of the plaintiff over the suit property surveyed under No.68/9. Similarly, PW3 was the coconut plucker who used to actually pluck coconuts from trees in the suit property. PW3 deposed to being engaged to do this work by the plaintiff or by the attorneys of the plaintiff. The testimonies of both these witnesses were not dented in the cross-examination.

50. The evidence on record, including in particular the evidence of PW1 and PW4 does establish that the property described under Land Registration No.40102 corresponds to Survey No.68/7. At this point in time, there is bound to be some variation in the description of the boundaries. The Land Registration document, sale deed, and matriz records adopt different modes for stating boundaries. Therefore, simply because there may not be any exact correlation, no case is made to conclude that the plaintiff has failed to either identify the suit property or establish its correlation with the title documents and survey records.

51. The plaintiff has taken pains to produce clear and cogent evidence. The testimony of PW4, the retired Head Surveyor, inspires confidence and deserves to be accepted. He prepared the report after three visits and based on the documents that were furnished to him. His answers during cross-examination show that he was quite candid and was frank enough to explain the basis of his conclusion as reflected in the report prepared by him.

No serious dent was made to his testimony in the cross-examination.

52. Regarding the first point for determination, from the pleadings itself, there was no serious dispute about the plaintiff being the property owner described under Land Registration No.40102 by virtue of the Deed of Sale and Quittance dated 07.08.1946. This position was not even seriously disputed in the written statement filed by the appellant (D20). The defendants no.1 to 19, from whom the appellant (D20) claimed title, chose not to contest the suit and were marked ex-parte.

53. The plaintiff has produced the Deed of Sale and Quittance dated 07.08.1946 on record, and the same was exhibited as 42 Colly. There is oral and documentary evidence showing how the plaintiff has asserted his title and possession to the suit property. This is more so through the evidence of PW1, PW2 and PW3. Based on all this, the first point for determination will have to be answered favouring the plaintiff.

54. In view of the above discussion, including, in particular, the evidence of PW1 and PW4, the second point for determination about the identification of the suit property and its correspondence with the property surveyed under No.68/7 will have to be accepted. However, this will have to be with the rider that the suit property does not correspond to 1975 sq. mtrs. as pleaded by the plaintiff in the plaint but to only 1251 sq. mtrs. as deposed to by the plaintiff's witness PW4 and as shown by this witness in the plan produced by him.

55. This is the case accepted by the Trial Court, and since this case is supported by the oral and documentary evidence on record, the same calls for no interference in this First Appeal. Accordingly, even the second point for determination will have to be decided to favour the plaintiff subject, no doubt, the rider about the area is 1251 sq. meters. and not 1975 sq. mtrs.

56. There are both pleadings as well as evidence about the Addo. PW1 has deposed about the Addo, so also PW2 has deposed about the Addo. PW4, who inspected the site on no less than three occasions, has also deposed about the Addo, though he may not have used the expression Addo. Instead, PW4 referred to a partition by a loose stone wall. Some photographs have also been produced on record about this Addo. There was no significant cross-examination on this aspect of Addo. From the location of the house as well, the existence of Addo deserves acceptance by applying the test of preponderance of probabilities. For all these reasons, even the third point for determination will have to be answered favouring the plaintiff.

57. In this case, none of the parties applied for the appointment of a Court Commissioner. In particular, the appellant (D20) never sought for appointment of any Court Commissioner. Besides, this was a matter where there were clear pleadings and the plaintiff (PW1) and the expert (Head Surveyor – PW4) deposed to the extent, boundaries and areas of the suit property. Therefore, this was not a case where the Trial Court was obliged, *suo moto*, to appoint any Court Commissioner.

58. PW4 has precisely done the job of a Commissioner or an expert witness. PW4 was extensively cross-examined, but there was no dent in his testimony. Even the appellant (D20) examined Vikas Desai (DW2) as an expert. DW2's evidence was also duly considered by the Trial Court. Thus, this is a case where both the parties examined their expert witnesses. At this stage, therefore, it is too late for the appellant to contend that the Trial Court's decree is vitiated on account of any failure on the Trial Court's part to appoint a Court Commissioner.

59. It is well settled that the role of a Court Commissioner is not to collect any evidence for the parties. Here, both the parties examined the surveyor/experts. Both the survey experts were examined and duly cross-examined. Their reports are a part of the record. The Trial Court, upon evaluation of the reports and the testimony of these experts/surveyors, accepted the plaintiff's case at least partly. There is no illegality in the appreciation of the evidence. In fact, on re-appreciation of the evidence as well, it must be stated that PW4's testimony is to be preferred over DW2's testimony.

60. For all the above reasons, even the fourth point for determination will have to be answered favouring the plaintiff.

61. Regular Civil Suit No.49/1969 was admittedly between the predecessor in title of defendants no.1 to 19 and the predecessor in title of the plaintiff (plaintiff's mother). Admittedly, the appellant (D20) claims title through defendants no.1 to 19, as discussed earlier. Regular Civil Suit No.49/1969 was decided

against the predecessor in title of defendants no.1 to 19 and in favour of the plaintiff's mother. Admittedly, this decree was never challenged by defendants no.1 to 19.

62. The only saving grace is that Regular Civil Suit No.49/1969 was not directly concerning the property under Land Registration No. 40102. However, this decree discusses the scope and import of the Deed of Conveyance dated 19.07.1909, based upon which defendants no.1 to 19 and consequently even the appellant claim their title and the Deed of Sale and Quittance dated 07.08.1946, based upon which the plaintiff claims title to the suit property. Though the suit was in respect of the adjacent properties, there are findings on the title documents that were common to the adjacent properties and the suit property. But this far cry from saying that the Trial court has fully based its conclusions on the findings in the 1969 suit.

63. Accordingly, even the fifth point for determination will have to be decided in favour of the plaintiff and against the appellant.

64. Regarding the sixth point for determination, it is well settled that the survey records are not very relevant when it comes to the determination of issues of title. No doubt, at the *prima facie* stage or where there are no title documents, some weight will have to be assigned to the presumption that flows from the survey records.

65. In this case, the survey records concerning the property under Survey No.68/7 were not in the plaintiff's name. However, based on the title documents, Land Registration Certificates, and description of the suit property, this slight presumption favouring the defendants stands watered down. Mr Assoldekar explained that the Trial Court had found that the plaintiff was the owner to the extent of 1251 sq. meters. and the balance area was owned by the defendant nos.1 to 19 and consequently, defendant no.20 as well. He submitted that this is the reason why names of defendants no.1 to 19 or rather their predecessors may have found a place in the survey records. This explanation is plausible.

66. In any case, from the documentary evidence on record in the form of title documents and Land Registration Certificates, the slight presumption will have to be held as substantially rebutted. The Trial Court was alive to this position, and it is not as if the Trial Court has ignored this aspect. Accordingly, no case is made out to interfere with the impugned Judgment and Decree based upon the slight presumption favouring the defendants by virtue of entry in the survey records.

67. For the above reasons, the sixth point for determination will also have to be answered against the appellant.

68. The last point for determination will also have to be answered in favour of the plaintiff and against the appellant. This is not a matter where the Trial Court has proceeded on mere surmises or conjectures. The Trial Court has analysed and evaluated the oral and documentary evidence on record. The

Trial Court has applied correct legal principles in evaluating and analysing the documentary evidence on record. Applying the test of preponderance of probabilities, the Trial Court was justified in holding that the plaintiff's case carries greater weight as compared to the case put up by the appellant (D20).

69. As noted earlier, defendants no.1 to 19, from whom defendant no.20 (appellant) claims title, chose not to even contest the suit. On evaluation of the appellant's evidence or evidence of DW2, the Trial Court quite correctly concluded that the same made no dent in the plaintiff's case or the plaintiff's evidence. Both the appellant and DW2, unfortunately, were handicapped because defendants no.1 to 19, from whom they purchased some property, did not contest the suit, nor were any of these defendants persuaded to depose in this matter not to say the value of such deposition without the same being backed by any pleadings. For all these reasons, therefore, it cannot be said that the impugned Judgment and Decree is based on mere surmises or conjectures.

70. On examining the impugned Judgment and Decree, it is apparent that the same is based upon the oral and documentary evidence led by the parties. Based on the grounds urged in this appeal, no case is made out to set aside or interfere with the impugned Judgment and Decree. The oral and documentary evidence on record was virtually reassessed with the assistance of the learned counsel for the parties since this was a First Appeal. Upon such reassessment and re-evaluation, no case is made out to interfere with the impugned Judgment and Decree.

71. For all the above reasons, this appeal fails and is hereby dismissed.

72. There shall be no order for costs.

M. S. SONAK, J.

SUCHITRA
NANDAN
SINGBAL

Digital signature of
SUCHITRA NANDAN
SINGBAL
Date: 2024.02.02
14:49:15 +05'30'