

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.82 OF 2005

1. Keshav Vithal Prabhu Gaonkar,
(Since deceased through his legal
representatives),
Adult, service and his wife,

1(a) Shri Dattaraj Keshav Prabhu
Gaonkar, son of late Keshav Vithal
Prabhu Gaonkar, major of age, married,
service and his wife.

1(b) Smt. Divya Dattaraj Prabhu
Gaonkar, Major of age, housewife,

1(c) Shri Vipin Keshav Prabhu Gaonkar,
son of late Keshav Vithal Prabhu
Gaonkar, major of age, married, service
and his wife,

1(d) Smt. Shilpa Vipin Prabhu Gaonkar,
Major of age, housewife,

All residing at House No.234-B,
Sadolxem, Poinguinim, Canacona, Goa.

1(e) Smt. Preeti Prasad Nayak
daughter of late Keshav Vithal Prabhu
Gaonkar, major of age, married,
housewife and her husband,

1(f) Shri Prasad Gurudas Nayak,
Son of Gurudas Nayak
Major of age, occupation - service

Both residents of Chamundi Arcade,

A-102, Bainha, Vasco-da-Gama, Goa.

2. Surekha Keshav Prabhu Gaonkar,
adult, housewife, Both residents of ii.
No.234, Sadolxem, Canacona, Goa.

....Appellants

Versus

1. Tambdo Thulo Gaonkar,
adult, labourer and his wife;
Since deceased, through LRs
R-2(a) to 2(e), already on record

2. Laxmi Tambdo Gaonkar,
adult, housewife,
Both residents of H.NO.160,
Shrithal, Gaondongrem,
Canacona, Goa,
expired represented by Lrs.):

2(a) Anand Tambdo Gaonkar,
adult, service and his wife;

2(b) Akshada Gaonkar,
adult, housewife
Both r/o Gaondongri,
Canacona, Goa,

2(c) Reshma Krishna Velip,
adult, housewife and her husband;

2(d) Krishna Velip,
adult, service,
Both r/o Bondai, Betul, Goa.

2(e) Ramdas Tambdo Gaonkar,
adult, service,
r/o Gaondongri, Canacona, Goa.

3. Ram Thulo Gaonkar,
(since deceased through his
legal representatives)
adult, , Tabourer, and his wife;

3(a) Suhas Ram Gaonkar,
since deceased through his legal
representatives,

3(a)(i) Samarth Suhash Gaonkar
Son of late Suhas Ram Gaonkar
Minor in age,

3(a)(ii) Shaunak Suhas Gaonkar
Son of late Suhas Ram Gaonkar
Minor in age,

3(a)(iii) Sahil Suhas Gaonkar
Son of late Suhas Ram Gaonkar
Minor in age,

The Respondent No.3(a)(i), 3(a)(ii),
3(a)(iii) being minor in age are
represented by their natural guardian,
their mother, Respondent 3(b)

3(b) His widow,
Samitra Suhas Gaonkar
39 years, married,

3(c) Shri Subhash Ram Gaonkar
35 years, bachelor,
All residents of H.No-160/2,
Ghanaxem Gaondongrem,
Canacona, Goa.

4. Smt. Chandrawada Ram Gaonkar,
(deceased) adult, housewife,
Both residents of H.No.160/2,

Canacoan, Goa.

5. Gurco Thulo Gaonkar,
adult, labourer, and his wife;
6. Mayawati Gurco Gaonlrar,
adult, housewife,
both residents of H.No.160/1,
Shrithal, Gaondongrem,
Canacona, Goa.
7. Abolem Patu Velip,
adult, widow,
8. Shri Patu velip,
(expired below are his legal heirs);
 - (a) Pital Sonu Gaonkar,
adult, housewife.
 - (b) Shanu sonu Gaonkar,
adult, service.
 - (c) Voval Shanu Gaonkar,
adult, service.
 - (d) Rajendra S. Gaonkar,
adult, service,
 - (e) Shabha P. Velip,
adult, labourer.
 - (f) Bhikaro Gaonkar,
adult, labourer,
All residents of li. No. 158/2,
Shrithal, Gaondongrem,
Canacona, Goa.
9. Kusta Ganesh Gaonkar,

(since deceased through
his legal representatives)
Agriculturist and his wife

9(a) Shri Ganesh Kusta Gaonkar
Son of late Kust Gaonkar
Major of age, married,
And his wife,

9(b) Smt. Premavati Ganesh Gaonkar
major of age, married,

9(c) Smt. Pitol Kusta Gaonkar
Daughter of late Kust Gaonkar
major of age, married,

9(d) Smt. Pomu Kusta Gaonkar
Daughter of late Kust Gaonkar
Major of age, married
And her husband

9(e) Rohidas Gaonkar
Major of age, married

9(f) Sundare Kusta Gaonkar
Daughter of late Kust Gaonkar
Major of age, and her husband,

9(g) Nagu Velip
Major of age,

All residents of H.No.91/1,
Indrawada, Gaondongrem,
Canacona, Goa.

10. Sita Kusta Gaonkar,
(deceased) Adult,
residents of H.No. 91,
Ghanaxem, Gaondongrim,

Canacona, Goa.

11. Bhagirathi Janu Gaonkar,
adult, widow,
resident of H.No. 157/5,
Ghanaxem, Gaondongrim,
Canacona, Goa,

12. Govind Ganesh Gaonkar,
(since deceased through his legal
representatives) adult,
agriculturist and his wife;

12(a) Shri Krishna Govind Gaonkar
28 years of age, married And his wife,

12(b) Smt. Kanika Krishna Gaonkar
27 years of age, married

Both residents of H.No.157,
Ghanaxem, Gaondongrim,
Canacona, Goa.

12(c) Smt. Anuja Govind Gaonkar
Daughter of late Govind Ganesh
Gaonkar, Major of age, married, and her
husband.

12(d) Shri Pradesh alias Pradip Gaonkar,
Major of age, married,

12(e) Smt. Rekha Govind Gaonkar,
Daughter of late Govind Ganesh
Gaonkar, Major of age, married, and her
husband,

12(f) Shri Umesh Gaonkar,
Major of age, married,

12(g) Smt. Sunita Govind Gaonkar,
Daughter of late Govind Ganesh
Gaonkar, Major of age, married and her
husband,

12(h) Shri Krishna Gaonkar
Major of age, married

12(i) Smt. Nita Govind Gaonkar Alias
Smt. Nita Mohan Gaonkar,
Daughter of Govind Ganesh Gaonkar,
Major of age, married, and her husband,

12(j) Shri Mohan Gaonkar,
Major of age, married,

All residents of H.No.157,
Ghanaxem, Gaondongrem,
Canacona, Goa

12(k) Smt. Pittol Govind Gaonkar,
Daughter of late Govind Ganesh
Gaonkar, Major of age, married, and her
husband,

12(l) Shri Rajendra Bityo Velip
Major of age, married,

Both residents of H.No.261/G-1,
Badsarem, Village Panchayat of
Gaondongrem, Canacona, Goa

13. Smt. Rukmini Govind Gaonkar,
(deceased) adult, housewife,
residents of H.No.157/1,
Ghanaxem Gaondongrim,
Canacona, Goa.

....Respondents

Mr Sudesh Usgaonkar with Ms Rosette Pereira, Advocates for the Appellants.

Mr Shivraj Gaonkar with Mr P. Sirvoicar, Advocates for Respondent Nos.2(a) to 2(e), 3(a) to 3(c), 4,5,6,7 and 8(a)to 8(f).

Mr R.G. Ramani, Senior Advocate with Mr P. Kakodkar and Mr S. Chopdekar, Advocates for Respondent Nos.9(a) to 9(g), 10,11,12(a) to 12(l), and 13.

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

Reserved on: **5th JANUARY 2024**
Pronounced on: **7th FEBRUARY 2024**

JUDGMENT:

- 1.** Heard Mr Sudesh Usgaonkar with Ms Rosette Pereira for the appellants. Mr Shivraj Gaonkar appears with Mr P. Sirvoicar for respondents nos. 2(a) to 2(e), 3(a) to 3(c), 4,5,6,7 and 8(a)to 8(f), and Mr R.G. Ramani, learned Senior Advocate, appears with Mr P. Kakodkar and Mr S. Chopdekar for respondent nos. 9(a) to 9(g), 10,11,12(a) to 12(l), and 13.
- 2.** This Second Appeal is directed against the judgment and decree dated 28.02.2005 by which the First Appellate Court reversed the judgment and decree dated 07.12.2002 in Regular Civil Suit No.23/1992.
- 3.** The appellants in this appeal are the original defendants/legal representatives of the original defendant (who expired during the pendency of this Second Appeal) in Regular Civil Suit No.23/1992

instituted by respondents nos.1 to 8 herein (plaintiffs). The suit was for a declaration that the plaintiffs were the owners in possession of the suit property and for deletion of the defendants' names from the survey records concerning the suit property.

4. Apart from denying the plaintiffs' claims, the appellants filed a counterclaim to declare them as owners in possession of half of the suit property and sought the deletion of the plaintiffs' names from the survey records of the portions in which they claim to be in possession.

5. The Trial Court, by its judgment and decree dated 07.12.2022, dismissed the suit but allowed the counterclaim.

6. Accordingly, vide Regular Civil Appeal No.19/2003, the plaintiffs appealed the Trial Court's judgment and decree dated 07.12.2002. This appeal was allowed by the First Appellate Court, vide the impugned judgment and decree dated 28.02.2005. The First Appellate Court set aside the Trial Court's judgment and decree dated 07.12.2002, thereby dismissing the appellants' counterclaim and decreeing the plaintiffs' suit with costs. Hence, this is the Second Appeal by the original defendant nos.1 & 2 (appellants).

7. This Second Appeal was admitted on 23.09.2005, and this order reads as follows: -

"Coram:- R. M. LODHA, J.
Date:- 23rd September, 2005

P.C.:

Heard Mr. M. S. Usgaonkar, the learned Senior Counsel for the appellants and Mr. C. A. Fereira, the learned Counsel for the respondents No.2(a) to 8(f).

The following substantial questions of law arise in this appeal :

1. *Whether the appellate Court misconstrued the document of "matriz" while holding that the Matriz No.69 wholly is inscribed in the name of Putu Baba Gaonkar, whereas the said document clearly shows that 1/2 is registered in the name of Putu Baba Gaonkar and 1/2 is registered in the name of Damodar Bicu Sinai Cundo, predecessor of the appellants?*
2. *Whether the appellate Court having based on the document of Matriz No.69 to grant relief in favour of the plaintiffs, failed to consider that such relief could have been granted at the highest only in respect of one half of Matriz No.69 and not of other half property No.69 which belonged to Damodar Bicu Sinai Cundo, predecessor of the appellants in whose name 1/2 is registered?*
3. *Whether the appellate Court misconstrued the description No.15312 of Book 42 with its endorsement and inscription No.12468 of 1937 relating to 1/2 in favour of Damodar Bicu Sinai Cundo while holding that it is different than Matriz No.69?*

Admit.

Mr C.A. Fereira waives service for the respondents No.2(a) to 8(f)."

8. At this stage, it is necessary to note that there appears to be or at least there were some inter se disputes between respondents nos.1 & 2 (original plaintiffs) on the one hand and respondents nos.9 to 13 (or their legal representatives) on the other hand concerning the suit property. However, Mr Gaonkar and Mr Ramani clarified that at least for the purposes of this Second Appeal, they wish to put up a common front against the appellants, who, according to them, had no rights, title or interest in the suit property. Accordingly, Mr Gaonkar and Mr Ramani urged the dismissal of this Second Appeal without prejudice to the respective claims of the parties they represent against each other concerning the suit property.

9. Mr Usgaonkar learned Counsel for the appellants, submitted that the appeal Court has almost entirely based its conclusions on the matriz document bearing no.69. He submitted that a matriz document is neither a document evidencing title nor possession. Therefore, the findings based upon such a document amounts to a perversity. He relied on the decision of the Hon'ble Supreme Court in the *State of Goa V/s Narayan V. Gaonkar*¹ and the decisions of this Court in

¹ (2020) 15 SCC 233

Fabrica da Igreja de N.S. de Milagres V/s. Union of India² and Balkarishna Nilu Naik Gaonkar and Ors. V/s. Purshottam Voiro Dessai (since dec. through his legal representatives) and Ors.³ in support of this contention.

10. Mr Usgaonkar, without prejudice to the above, submitted that, in any case, the First Appellate Court completely misread the matriz document because even this document referred to the plaintiffs having some rights to half of the suit property and not the entire suit property. He pointed out that even the appellants had conceded without prejudice that the plaintiffs owned half of the suit property but had asserted that the appellants owned the other half. He submitted that this is a clear case of misreading and misconstruing a document; therefore, the substantial questions of law deserve to be answered favouring the appellants.

11. Mr Usgaonkar submitted that the plaintiffs failed to produce any title documents but rested their claim on some execution proceedings. He submitted that the execution proceedings could neither be regarded as sources nor evidence of any title. He submitted that in any case, the plaintiffs could claim rights to only half of the suit property and not the entire suit property. He submitted that, in contrast, the appellants produced title documents like land registration documents, which deserved greater credence given the provisions of Article 953 read with

² 1995 (1) BomCR 588

³ 2022 SCC OnLine Bom 7376

Article 8 of the Portuguese Civil Code, which continues to apply in the State of Goa to date.

12. Mr Usgaonkar submitted that the Appellate Court failed to notice the annotation dated 24.10.1944 to the property inscribed under no.12468. Based upon this, the First Appellate Court recorded a perverse finding that the property described under no.15352 and matriz no.69 were different or distinct. He submitted that this is a clear case of misconstruction of the title documents produced by the appellants.

13. Mr Usgaonkar submitted that there was no evidence whatsoever regarding the plaintiffs' possession. He submitted that there was a clear finding recorded by the Civil Judge Junior Division in Regular Civil Suit No.13/1992 about there being no evidence of the Receiver handing over the possession of the mortgaged property to the plaintiffs. Mr Usgaonkar pointed out that the plaintiffs never challenged this finding and, therefore, was binding upon the plaintiffs as res judicata or at least as issue estoppel. Mr Usgaonkar submitted that the First Appellate Court did not even consider this aspect.

14. For all the above reasons, Mr Usgaonkar submitted that the substantial questions of law ought to be answered favouring the appellants.

15. Mr Shivraj Gaonkar, learned Counsel for respondent nos.2(a) to 2(e), 3(a) to 3(c), 4,5,6,7 and 8(a)to 8(f) (plaintiffs), submitted that the substantial questions of law as framed do not arise and, in any case,

should be answered against the appellants. He defended the impugned judgment and decree based on the reasoning reflected therein.

16. Mr Gaonkar submitted that the plaintiffs' case was not based on the matriz documents. He submitted that the Matriz documents were referred to only to identify the properties of the suit property. He submitted that the plaintiffs' claim was entirely based on the proceedings in Summary Execution Process No.14786 of 1949, which constitutes evidence of the plaintiffs' title to the entire suit property. He submits that this is another reason to hold that the substantial questions of law as framed do not arise in this Second Appeal.

17. Mr Gaonkar submitted that the Summary Execution Process records that the property described under no.21999 was the subject matter of a Mortgage Deed between the predecessor in title of the plaintiffs and the predecessor in title of the original defendant nos.1 and 2. The execution process records that half of the property described at 21999 was mortgaged, favouring the defendants, nos.1 and 2. Defendants nos.1 and 2 assigned the debt to one person, i.e. Raghuvir Bale, but this Bale abandoned the execution proceedings, as a result of which half of the suit property was restored to the plaintiffs. Mr Gaonkar submitted that the plaintiffs thus remained owners in possession of the entire suit property.

18. Mr Gaonkar referred to Articles 888, 894 and 912 of the Portuguese Civil Code to explain the import of mortgages. He submitted that the First Appellate Court was justified in presuming that

the plaintiffs owned the entire suit property since they had mortgaged half of the suit property to original defendants nos.1 and 2. He relied on *Sombhai Adesing V/s. Jagjivan Dayaram and Others*⁴ and the provisions of Sections 114 and 115 of the Evidence Act to support these contentions.

19. Mr Gaonkar submitted that the question of title has to be decided on a preponderance of probabilities and that the plaintiffs are not required to prove the issue of title beyond a reasonable doubt. He relied on *R.V.E. Venkatachala Gounder V/s. Arulmigu Viswesaraswami & V.P. Temple and Anr.*⁵ to support this proposition.

20. Mr Gaonkar submitted that the inscription documents relied upon by the appellants are not clear and, in any case, not maintained as required by Article 957 of the Portuguese Civil Code. He submitted that the property described under no.15312 is different and distinct, and the same does not correspond to the suit property. He also referred to the import of Articles 893 and 903 of the Portuguese Civil Code to explain that under the Portuguese law, there could be no mortgage of only half of the property, but this was a case of mortgage to the extent of half of the property's value.

21. Based upon the above submissions, Mr Gaonkar submitted that this appeal may be dismissed.

⁴ (1928) BomLR 987

⁵ (2003) 8 SCC 752

22. Mr Ramani learned Senior Advocate for respondents nos. 9(a) to 9(g), 10,11,12(a) to 12(l), and 13, adopted Mr Gaonkar's arguments and defended the impugned judgment and decree based on the reasoning. He submitted that matriz documents were irrelevant and the Summary Execution Process No.14786 of 1949 clinches the issue that the appellants had neither title nor the possession of the suit property.

23. Mr Ramani submitted that except for the annotation relied upon by Mr Usgaonkar, there was nothing to correlate the matriz documents relied upon by the appellants with the suit property. He submitted that the annotations could not be considered unless the same were based upon some substantive evidence based upon which such annotations may have been made in the matriz or other title documents.

24. Mr Ramani submitted that the findings in Regular Civil Suit No.13/1992 were irrelevant to the issues involved in the present suit. He submitted that the scope of interference in a Second Appeal is extremely limited, and since the First Appellate Court, which is the final Court, regards factual findings has assessed oral and documentary evidence on record, the factual findings recorded by the Appellate Court may not be interfered with.

25. For all the above reasons, Mr Ramani submitted that this Second Appeal may be dismissed.

26. The rival contentions now fall for determination.

27. In Regular Civil Suit No.23/1992, the plaintiffs pleaded that the suit property was surveyed under no.283/5 (2550 sq. mtr.), 286/4 (3950 sq. mtr.), 286/5 (3500 sq. mtr.) and 286/6 (2800 sq. mtr.) and that this was a part of the larger property known as 'Ganaxem' or 'Ganashem' situated at Shrithal, Gaondogarem, Canacona Goa.

28. The plaintiffs claimed that the larger property, Ganaxem, was enrolled under matriz no.69 in the name of the plaintiffs' ancestor, Putu Baba Gaonkar. This larger property was surveyed under nos.283/1,2,4,5,13; 285/8,9; 286/1,4,5,6,7,8 and 287/4, etc.

29. The plaintiffs relied on the matriz documents and the Summary Execution Process No.14786 of 1949 and the order dated 24.02.1978 declaring that the proceedings therein stand deserted/abandoned. The plaintiffs claimed that after this execution process was abandoned, half of the suit property mortgaged in favour of the predecessor in title of the appellants was restored to the plaintiffs. As a result, it was contended that the plaintiffs became the owners in possession of the entire suit property. Based on this, the plaintiffs claimed that the appellants had no rights, title or possession over the suit property, and since their names were wrongly recorded in the survey records, the same ought to be corrected.

30. The appellants/defendants claim that the proceedings and order in Summary Execution Process No.14786 of 1949 do not constitute any title documents or evidence of any title. They claimed that in any case, the orders or documents in Summary Execution Process No.14786

of 1949 or the Matriz documents showed that the plaintiffs had rights only for half of the larger property, Ganaxem and consequently half of the rights in the suit property. They submitted that even the Summary Execution Process at the highest shows that the mortgage was in respect of only half of the property Ganaxem since the plaintiffs had no rights greater than half in such property. The appellants submit that the execution process documents and the matriz documents were completely misconstrued by the First Appellate Court to hold that they related to the entire property Ganaxem or the suit property, when in fact, for the face of such documents, they related to only half rights in the property Ganaxem or the suit property.

31. The defendant nos.1 and 2 raised a counterclaim because they claimed that their name was not reflected in the survey records in some of the survey numbers they possessed. Accordingly, they sought a decree to correct such survey records.

32. As noted earlier, the defendants, nos.9 to 13, represented by Mr Ramani, have some disputes with the plaintiffs. However, when it comes to the plaintiffs' disputes with the appellants, defendants nos.9 to 13 support the plaintiffs' case and put up a united front against the appellants, i.e. defendants nos.1 & 2 or their legal representatives. The case of defendants nos.9 to 13 is that even they are the legal representatives of Putu Baba Gaonkar along with the plaintiffs and, therefore, entitled to co-ownership rights along with the plaintiffs to the entire suit property to the exclusion of the appellants.

33. As noted earlier, the inter se disputes between the original plaintiffs and the respondent nos.9 to 13 herein are not the subject matter of this Second Appeal. Therefore, at least for the purposes of this Second Appeal, it would be appropriate to say that the original plaintiffs and respondents nos.9 to 13 claim the right, title and possession of the entire suit property to the exclusion of the appellants, i.e. original defendant nos.1 & 2 or their legal representatives.

34. Although the original plaintiffs and respondents nos.9 to 13 now wish to downplay the matriz documents, from the perusal of the impugned judgment and decree, it is evident that the First Appellate Court has laid considerable emphasis on these documents for setting aside the Trial Court's judgment and decree dated 07.12.2002 in Regular Civil Suit No.23 of 1992 and to decree the plaintiffs' suit and dismiss the appellants' counterclaim. This is the reason why the order dated 23.09.2005, admitting this Second Appeal, frames the first two substantial questions of law in the context of the document of matriz no.69.

35. In the above regard, it will have to be held that the First Appellate Court failed to appreciate the scope of matriz documents in the context of deciding the issue of title, and secondly, the First Appellate Court also failed to appreciate that even the matriz documents relied upon by the plaintiffs referred to the plaintiffs' right only to the extent of half of the suit property and not the entire suit property. These are apparent errors in reading or construing the matriz documents. This is clear from the

discussion that now follows. Besides, it is well settled that matriz documents are not title documents.

36. In *Fabrica da Igreja de N.S. De Milagres* (supra), the learned Single Judge of this Court has explained that it was a settled position that the matriz document was neither an instrument of title nor a source of possession. This decision explains that the organisation of the “matriz predial” is a mere administrative exercise aimed at collecting tax revenues from the land. As such, no legal evidentiary value can be attributed to the registration to establish ownership title or presume possession of the land.

37. In the *State of Goa V/s. Narayan V. Gaonkar* (supra), the Hon’ble Supreme Court, specifically endorsed the above-referred position in *Fabrica de Igreja de N.S. De Milagres* (supra). In paragraph 24, the Hon’ble Supreme Court held that the Matriz documents claimed to be the basis of rights are not documents of title. Therefore, based on the decision in *Fabrica de Igreja de N.S. De Milagres* (supra), which was duly approved by the Hon’ble Supreme Court, it was held that a claim based on past or present entries in the matriz documents is unsustainable.

38. *Balkrishna Nilu Naik Gaonkar* (supra), takes note of *Fabrica de Igreja de N.S. De Milagres* (supra) and *Narayan V. Gaonkar* (supra) and reiterates the position that matriz documents are neither sources of title nor evidence of possession. In *Balkrishna Nilu Naik Gaonkar* (supra), the Courts have preferred the matriz documents to the land registration

document and registered deeds of sale. Accordingly, it was held that such preference amounted to an error apparent on the face of the record warranting interference in a Second Appeal.

39. Secondly, in this case, the plaintiffs and the appellants (original defendant nos.1 & 2) have produced two different matriz documents relating to matriz no.69. The plaintiffs produced matriz documents at Exhibit PW1/B, which records the following under no.69:-

“Right to half of the rustic property of paddy field known as “Ganaxem”, situated in Sristol of Gaundongrem and bounded as a whole on the east by Gaundem of the village of Canacona and rivulet, on the west by Ganaxem of Xaba Crisna Naique and Nomosso of Duclo Purso Gauncar, on the north by the rivulet, Ganaxacodil Usmostol of Putu Baba Gauncar and Bocreacondicodil of Sidu Nilu Taxildar and on the south by Chonvatiamola of the Exchequer and Ganaxem of Xaba Crisna Naique.”

40. The First Appellate Court entirely relied upon the matriz document at Exhibit PW1/B (at page 157) but failed to notice that even this document referred to the **right to half of the rustic property of the paddy field known as ‘Ganaxem’ situated in Sristol of Gaundongrem**. The First Appellate Court apparently missed that this matriz document relied upon by the plaintiffs concerned only the right to half of the suit property and not the entire suit property and proceeded based on the erroneous premise that it referred to the entire property, Ganaxem.

41. Even the appellants have laid a claim only to half of the suit property. They produced on record matriz certificate DW1/A (at page 225) concerning matriz no.69. The same reads as follows:-

Under the number sixty nine.- Rustic property paddy field known as "GANAXEM", situated at Sristol of Gaundongrem and bounded on the east by Gaundem, village of Canacona and the rivulet, on the west by Ganaxem of Xaba Crisna Naique No.68 and Nomosso of Dulco Pursso Gauncar No.66, on the north by the rivulet, Ganaxacodil Usmostal of Putu Baba Gauncar No.70 and Bocreacondicodil of Sidu Nilu Taxildar No.71 and on the south by Chovateamola No.64 of the "Fazenda Nacional" and Ganaxem of Xaba Crisna Naique No.68. 1/2 is inscribed in the name of Putu Baba Gauncar, of Vindramwada and 1/2 in the name of Damodora Bicu Sinai Cundo, of Cuncolim.

42. Both the matriz documents of matriz property under matriz no.69 were admitted in evidence and marked as Exhibit PW1/B and Exhibit DW1/A. The first document produced by the plaintiffs (Exhibit PW1/B) only records that Putu Baba Gaonkar, through whom the plaintiffs claim, had rights to half of the rustic field known as Ganaxem situated at Sristol Gaundongrem.

43. The second matriz document produced on behalf of the appellants (Exhibit DW1/A) also records that Putu Baba Gaonkar had half rights to the property Ganaxem but adds that the remaining half was in the name of Damodora Bicu Sinai Cundo, meaning that it was Damodora Bicu Sinai Cundo who had rights to the remaining half of the property Ganaxem. This crucial statement was missing in the matriz

document at Exhibit PW1/B produced by the plaintiffs. Still, even Exhibit PW1/B recorded that Putu Baba Gaonkar had rights only to half of the property Ganaxem. The position was made clear by the matriz document produced by the appellants at Exhibit DW1/A since this document stated that Damodora Bicu Sinai Cundo, the predecessor in title of the documents, held the balance half rights.

44. Thus, upon examining the matriz documents produced by the plaintiffs and the appellants in respect of the property under matriz no.69, it is apparent that the predecessor in title of both the parties held equal rights in the property Ganaxem, i.e. larger property of which suit properties are but a part. The First Appellate Court completely misconstrued the matriz documents produced by the plaintiffs (Exhibit PW1/B) and possibly did not even advert to the matriz documents produced by the appellants at Exhibit DW1/A. Besides, the First Appellate Court also failed to appreciate the scope and import of matriz documents as was explained by the decisions of this Court in *Fabrica da Igreja de N.S. De Milagres* (*supra*) and *Balkrishna Nilu Naik Gaonkar* (*supra*) and by the Hon'ble Supreme Court in the case of *State of Goa V/s. Narayan V. Gaonkar* (*supra*).

45. For the above reasons, the first and the second substantial questions of law must be answered favouring the appellants.

46. Possibly realising the difficulties due to the overreliance on the matriz documents by the First Appellate Court, given the decisions of this Court and the Hon'ble Supreme Court, Mr Gaonkar and Mr

Ramani submitted that it was not the matriz document but the Summary Execution Process no.14786 of 1949 which constituted the source of title or at least the evidence of title based upon which the plaintiffs and respondent nos.9 to13 were entitled to rights in respect of the entire suit property and not merely half of the suit property.

47. The Summary Execution Process No.14786 of 1949 at Quepem Court refers to property described at no.21999, which was apparently the subject matter of a Deed of Mortgage between the predecessors in title of the plaintiffs (mortgagors) and the predecessors in title of the appellants, i.e. Damodora Bicu Sinai Cundo (mortgagee). Again, here there is a reference to only half of the property described under no.21999 being mortgaged by the predecessor in title of the plaintiffs to the predecessor in title of the appellants, i.e. defendant nos.1 & 2 as security for repayment of a loan of Rs.300/-.

48. The fact that only half of the property described under no.21999 was mortgaged shows that the plaintiffs had at least *prima facie* rights to only half of the suit property and not the entire suit property. The contention of Mr Gaonkar based on Articles 893 or 903 of the Portuguese Civil Code was not at all the basis of the Appellate Court's interference with the Trial Court's decree favouring the appellants herein.

49. Even otherwise, neither Article 893 nor Article 903 of the Portuguese Civil Code suggest that half of the property cannot be mortgaged, favouring the owner of the other half. As a principle, there

could be no bar to such a transaction, and nothing in Articles 893 or 903 of the Portuguese Civil Code militates against such a transaction. In any case, since the plaintiffs and respondents nos.9 to 13 now emphasise almost entirely on the Summary Execution Process No.14786 of 1949, it was for them to explain why even the Summary Execution Process refers to the mortgage of only half of the property described at no.21999, which, according to the plaintiffs is the description of the suit property.

50. The Summary Execution Process further records that this debt of Rs.300/- which remained unpaid, was assigned by the predecessor in title of the appellants, i.e. defendant nos. 1 & 2 to one Raghuvir Bale as recovery creditor. This Raghuvir Bale, in the Summary Execution Process No.14786 of 1949, attached the mortgaged property, i.e. half of the property described under no.21999. However, on the ground that these execution proceedings were not pursued diligently by said Raghuvir Bale, the Executing Court closed the execution proceedings by holding that the same were abandoned or deserted by the mortgagee or the assignee of the mortgagee. There was also an order made to lift the attachment of the mortgaged property, i.e. half of the property described under no.21999. There is also an order directing the liquidator who was placed in possession of the mortgaged property to restore the same to the mortgagors, i.e. the predecessor in title of the plaintiffs.

51. Admittedly, the plaintiffs produced neither title documents like land registration documents nor inscription documents to the suit property. However, the plaintiffs and respondents, nos.9 to 13, only relied upon the statements in the execution process, no.14786 of 1949. They submitted that the references in this Summary Execution Proceedings must be regarded as evidence of their title. Mr Gaonkar also invoked the principle of estoppel by relying upon *Sombhai Adesing* (*supra*).

52. Although it is doubtful whether source of title or even evidence of title could have been established in the Summary Execution Process No.14786 of 1949 in the absence of the plaintiffs producing the Mortgage Deed and other title documents like land registration certificate, inscription, description, etc., still the plaintiffs can be held to have right to half of the suit property mainly because this position was not even disputed by the appellants, i.e. defendant nos.1 & 2 in their written statement. The appellants, i.e., defendants nos.1 & 2, had only denied that the plaintiffs owned the entire suit property. The appellants, i.e. defendant nos.1 & 2, admitted that the plaintiffs were owners of half of the suit property and pleaded that the other half was owned and possessed by the appellants, i.e. defendant nos.1 & 2.

53. Therefore, from the pleadings coupled with the statements in the summary execution proceedings and the matriz documents, it can be said that the plaintiffs established their right to half of the suit property. Such a finding can be sustained by applying the test of preponderance

of probabilities, which, according to Mr Gaonkar, was the proper test to apply in such matters. *R.V.E. Venkatachala Gounder* (supra) relied upon by Mr Gaonkar indeed holds that such matters have to be decided on the touchstone of preponderance of probabilities, and there is no requirement to establish such matters beyond a reasonable doubt.

54. However, applying the very same test, it will have to be held that the appellants, i.e., defendants nos.1 & 2, have rights to the remaining half of the suit property. This is more so because unlike the plaintiffs or respondents nos.9 to 13, the appellants, i.e. defendants nos.1 & 2, have produced title documents like land registration certificates and inscription and description records relating to their rights of half of the suit property. Besides, as discussed above, even the matriz documents, which may not be sources of title, also support the appellants' case about the plaintiffs having rights to half of the suit property and the appellants having rights to the remaining half.

55. The provisions of Article 888 of the Portuguese Civil Code only provide that mortgage is a right conferred upon certain creditors of being paid from the value of certain immovable assets of the debtor, in preference to other creditors, where their credits are duly registered Article 894 of the Portuguese Civil Code provides that only those who have the power to alienate assets, may create a mortgage and only those assets which may be alienated may be mortgaged. Article 912 provides that mortgages by the will of parties arising from contracts may be proved by public deed or public proceeding.

56. None of the above articles support the plaintiffs' case. Article 912, which was relied upon by Mr Gaonkar, also provides that mortgages arising from contracts must be proved by a public deed or proceedings. Merely because the Summary Execution Process no.14786 of 1949 refers to the mortgage, is doubtful whether it could be said that the plaintiffs have proved such a mortgage without actually explaining why it was not possible for them to produce the registered mortgaged deed itself. Be that as it may, such failure need not prejudice the plaintiffs because the appellants, i.e. defendants nos.1 & 2, virtually admitted that the plaintiffs had half rights to the suit property and claimed that the other half of rights were held by the appellants, i.e. defendant nos.1 & 2.

57. The documentary evidence on record refers to Regular Civil Suit No.13/1992 instituted by Kusta Ganesh Gaonkar (defendant no.3 in Regular Civil Suit No.23/1992 from which this Second Appeal arises) against Janu Ganesh Gaonkar and Ghurko Thulo Gaonkar (plaintiff no.5 in Regular Civil Suit No.23/1992) defendant no.5 in Regular Civil Suit No.23/1992 seeking permanent injunction. The plaintiffs in the said suit applied for an injunction to restrain the defendants in the said suit from interfering with the properties Ganaxacodil Usmostal under matriz no.70 and property Ganaxem under matriz no.69. This suit was decreed on 20.03.1993 by Civil Judge Junior Division at Canacona. The appeal against the same was dismissed by the First Appellate Court on 31.07.1995. In this suit, reliance was placed on the orders in Summary Execution Process No.14786 of 1949 to direct the receiver to

hand over the attached property to the mortgagors. However, the Civil Court and the First Appellate Court recorded a finding that there was no evidence about the receiver actually handing over such possession to the mortgagors or their legal representatives. The concurrent decrees of the Trial Court and the First Appellate Court in Regular Civil Suit No.13/1992 were never challenged by Ghurko Thulo Gaonkar (plaintiff no.5 herein).

58. However, suffice it to say that based upon the pleadings and oral and documentary evidence on record, the Trial Court should have declared the plaintiffs as owners of at least half of the suit property instead of dismissing the suit. Similarly, the First Appellate Court could have declared the plaintiffs as having the right to half of the suit property and decreeing the suit to that extent. The First Appellate Court would then be bound to decree the appellants' counterclaim to the extent of half rights of the suit property.

59. The First Appellate Court, however, has misread and misconstrued the documents on record and even failed to consider some vital documents like the land registration documents, inscription description and even the matriz documents produced on behalf of the appellants herein. Accordingly, the impugned judgment and decree warrants interference.

60. The First Appellate Court simply brushed aside the title documents like land registration certificate, inscription and description records relied upon by the appellants, i.e. defendant nos.1 & 2, on the

ground that such documents related to the property described under no.15312 and there was no evidence that this property was the suit property Ganaxem situated at Sristol, Gaondongrim. However, the First Appellate Court completely failed to give credit to the annotation made on 24.10.1944 in the registration certificate produced on record on behalf of the appellants.

61. The description of the property under no.15312 (at pages 245 to 247 of the paper book) reads as follows:

"BOOK OF DESCRIPTION OF PROPERTIES
Description of property and endorsement
No.15312

----*Rustic property known as "Gotecodil gotul", situated in the ward Undranvado of the village of Gaundongrem.parish and Taluka of Canacona, of the cultivation of paddy, coconut trees and other trees, and bounded on the east, north and the south by the top of the hillock and on the west by the rivulet of rainy waters. A drain of rainy waters is passing through this property in the middle.*-----

-----*The venal value of this property is of two hundred rupees.*

-----*Real index No.3013 at fols.10.*-----

-----*The Substitute of the Assistant of the Public Prosecutor.*

-----*Sd) Illegible.*-----

-----*Reference to other books of registration - C.14*-----
fols.127 overleaf.- C 14 fols.128.- F 7 fols.7 No.4575.- G 16-----
fols.82 overleaf No. 12468.-----

-----*Year 1944 - Month October – Day 24 - Serial*
No.9, -----No.1.- At the application of Damodora Bicu
Sinai Cundo, married, landowner, resident of Cuncolim,

and in view of the documents, below mentioned, it is declared that the above mentioned property No.15312 enrolled in the matriz under the No.69 is known also as "Ganoxem" and it is situated in the ward Sristol of Gaundongrem and its boundaries, according to the matriz are:- on the east - Gaundem, of the village of Canacona and the rivulet, on the west - Ganaxem of Xaba Crisna Naique and Nomosso of Duclo Purso Gauncar, on the north rivulet, Ganaxacodil Usmostol of Putu Baba Gauncar and Boncreacondicodil of Sidu Nilu Taxildar and on the south - Chovateamollo of "Fazenda Nacional", Ganaxem of Xaba Crisna Naique.-----Certificate of auction issued from the suit of recovery of costs instituted by the Public Prosecutor in this Judicial Division against Babu Tambdo Gauncar, of Gaundongrem, by the escrivao of the second Office of the Court, Sirvoicar, on 22nd June 1937.- Two certificates issued by the Head of Revenue Office of Canacona, on 12th November 1943 and on 2nd of the current month of October, which I have filed alongwith the application.-----

-----The Land Registrar, Sd) Barreto Valeriano.----

1937	July	9	6
------	------	---	---

-----No.12468-----
-----It is inscribed in favour of Damodora Bicu Sinai Cundo, married, landowner, resident of Cuncolim, of Salcete Taluka, the transmission of 1/2 (half part) of the property No.15312, described at fols.92 of the book B.42, for having purchased the same at the price of 13 (thirteen) rupees, in the public auction held in the Court of this Judicial Division on 15th December 1936 in the suit of recovery of costs instituted by the Public Prosecutor against Babu Tambdo Gauncar, resident of Gaundongrem, appended to the file of the suit of recovery of the mortgaged debt instituted by Ananta Naraina Naique, resident of Sadolxem of Poinguinim against the said Babu.-----

-----Certificate of auction issued from the said suit by the escrivao of the second office of the Court of this Judicial Division on 22nd June last.-I have filed the application.-

-----Personal index No.1058 of the letter D, at fols.9 overleaf.
Correction follow-----

-----The Land Registrar, Substitute,
-----Sd) Illegible.-----

-----The xerox copies of the description and of the inscription were issued on one sheet of paper.-----”

62. The above document relied upon by the appellants, i.e. defendant nos.1 & 2, firstly establishes that the property described under no.15312 and enrolled under matriz no.69 was also known as “Ganaxem” and it is situated in the Sristol of Gaondongrim. Even the boundaries of this property are set out in the document. The above document then refers to the half part of the property being inscribed in favour of Damodora Bicu Sinai Cundo, who was admittedly the predecessor in title of the appellants, i.e. defendant nos.1 & 2. This document records that Damodora Bicu Sinai Cundo purchased this property or rather half right in this property at the price of Rs.13/- in the public auction held in the Court of this Judicial Division on 15.12.1936 in the suit of recovery of costs instituted by the Public Prosecutor against Babu Tambdo Gauncar, resident of Gaundongrem appended to the file of the suit of recovery of the mortgaged debt instituted by Ananta Naraina Naique, resident of Sadolxem of Poinguinim against the said Babu.

63. Significantly, the appellants have produced the auction certificate from the suit records to recover costs instituted by the Public Prosecutor against Babu Tambdo Gauncar of Gaundongrem. This is a part of the above-quoted document and is dated 22.06.1937. Besides, there are documents dated 09.07.1937 that again describe the transmission of rights to Damodora Bicu Sinai Cundo. This is also backed by a deed of hypothecation dated 24.12.1937 and other documents establishing the appellants' rights to half of the suit property.

64. The First Appellate Court misconstrued the above-quoted documents and, without assigning any cogent reasons, refused to take cognisance of the annotation of 24.10.1944, which had clearly established the correlation between the property described under no.15312 enrolled in Matriz no.69 and the suit property or the larger property Ganaxem. Such misconstruction or misreading gives rise to the third substantial question of law, which again must be answered favouring the appellants herein.

65. Thus, for all the above reasons, the third substantial question of law framed in this appeal will also have to be answered in favour of the appellants herein.

66. Despite answering all three substantial questions of law favouring the appellants herein, the question of what would be appropriate relief that could be granted to the parties requires some independent consideration.

67. As noted earlier, the plaintiffs' claim in the suit was that they were the owners in possession of the entire suit property and the larger property, Ganaxem. The appellants, i.e. the defendant nos.1 & 2, had, however, claimed that the plaintiffs were entitled to only half of the suit property or the property Ganaxem and the remaining half was owned and possessed by the appellants, i.e. defendant nos.1 & 2.

68. Based on the pleadings and the documentary evidence on record and by applying the test of preponderance of probabilities, it will have to be held that the plaintiffs and the appellants, i.e. the defendant nos.1 & 2, have established that they have equal rights, i.e. 50% rights each in the suit property or the larger property Ganaxem. However, there is no evidence about either any partition or about the plaintiffs and the appellants, i.e., defendants no.1 & 2, being in possession of any specified half share of the suit property or the property Ganaxem. The evidence in this regard is quite sketchy.

69. Therefore, based on the premise that the plaintiffs and the appellants, i.e. defendants nos.1 & 2, have half rights each in the suit property or the property Ganaxem, no relief for rectification of any survey records as claimed can be granted. Even otherwise, such decrees are not made by the Civil Court. After the declaration of rights, it is left to the parties to seek mutation.

70. Therefore, the plaintiffs' Civil Suit will have to be partly decreed by declaring the plaintiffs to own half of the suit property or half of the larger property of Ganaxem. Similarly, the appellants, i.e. defendant

nos.1 & 2's counterclaim will also have to be decreed by declaring that the appellants, i.e. defendant nos.1 & 2, are the owners of the remaining half of the suit property or the larger property Ganaxem. However, no case is made out to grant either the plaintiffs or the appellants, i.e., defendants nos.1 & 2, any decree for correction of survey records as prayed for by them in the plaint and the counterclaim.

71. Accordingly, the impugned judgment and order made by the First Appellate Court is modified by declaring that the plaintiffs have half rights in respect of the suit property or the larger property Ganaxem and the appellants, i.e. defendant nos.1 & 2 have rights to balance half of the suit property or the larger property Ganaxem. The impugned judgment and decree will stand modified to this extent. This is without prejudice to the inter se disputes between the plaintiffs and respondents 9 to 13 or their legal representatives regarding the half share of the suit property now declared to be owned by the plaintiffs.

72. The Second Appeal is disposed of in the above terms without any order for costs.

M. S. SONAK, J.

NITI K
HALDANKAR

Digitally signed by NITI
K HALDANKAR
Date: 2024.02.12
12:23:55 +05'30'