Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 37 OF 2024
WITH
CIVIL APPLICATION NO.67 OF 2024
IN
SECOND APPEAL NO.37 OF 2024

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1. Mrs. Antonette Machado, widow of Mr. Lino Machado, aged about 65 years, widow, Indian National, presently residing at House no.291(part), next to St. Ann's Church, Ward Aradi, Parra, Bardez, Goa.

2. Mr. Manuel Machado, son of late Mr.Lino Machado,agedabout 46 years, unmarried, business, Indian Nationation, presently residing at House no. 291 (part),next to St. Ann's Church,Ward Aradi, Parra, Bardez, Goa.

3. Mr. Simon Machado, son of late Mr. Lino Machado, aged about 45 years, married, business, and his wife ;

4. Mrs. Philomena Machado, aged about 38 years, married, housewife, both Indian Nationals and presently residing at House No. 291(part), Next to St. Ann's Church,Ward Aradi, Parra, Bardez, Goa. ... Appellants

V e r s u s

1. Mrs. Santan Andrade, widow of the late Mr. George Andrade, aged about 65 years, widow, housewife, Indian National, resident of House no. 291, Parra, Bardez, Goa.

2. Mr. Abel Andrade, son of the late Mr. George Andrade, aged about 43 years, married, business and his wife;

3. Mrs. Perpetua Fernandes, wife of Mr. Abel Andrade, aged about 35 years, married, housewife, both Indian Nationals and residents of House No. 291, Parra, Bardez, Goa.

4. Mr. Simon Andrade, son of the late Mr. George Andrade, aged about 48 years, married, business and his wife;

5. Mrs. Lima Andrade, wife of Mr. Simon Andrade, aged about 46 years, married, housewife, both Indian Nationals and residents of House no. 291, Parra, Bardez, Goa.

6. Mr. Rafael Andrade, son of the late Mr. George Andrade, aged about 50 years, married, business, and his wife;

7. Mrs. Cynthia Andrade, wife of Mr. George Andrade, aged about 50 years, married, housewife, both Indian Nationals, and residents of House no. 291, Parra, Bardez, Goa. ... Respondents

Mr. R. J. Pinto, Advocate *for the Appellants.*

Mr. John Abreu Lobo, Advocate *for the Respondents*

CORAM: M. S. KARNIK, J

DATED: 13th DECEMBER, 2024

ORAL ORDER

1. Heard Mr. Pinto, learned Counsel for the appellants and Mr, Lobo, learned Counsel for the Respondents.

2. The challenge in this Second Appeal is to the judgment and decree dated 10.08.2023 passed by the District Judge-2, Mapusa,

thereby dismissing the appeal filed against the judgment and decree of the trial Court.

3. The appellants are the original defendants. The present respondents-original plaintiffs claim to be the owners in possession of two properties, one surveyed under no. 50/32 admeasuring 350 square metres and the other bearing survey no. 50/36 admeasuring 425 square metres. There is a residential house no. 291, which is partly located in survey no. 50/32 and partly in survey no. 50/36.

4. It is the claim of the plaintiffs that they had jointly purchased the suit property by Sale Deed dated 19.02.1997 and that the house tax of the suit house stands in their joint names. It is further the case of the plaintiffs that they had permitted one Edward Machado, a bachelor to reside in the rear portion of the suit house. Upon his death as a bachelor on 14.01.2012, since he was not survived by any family members, the defendants who were found to be occupying the said portion of the suit house, by a legal notice, were asked to vacate and remove themselves with their belongings within 30 days of the receipt thereof. Despite two of the defendants receiving the legal notice, they failed to comply with the terms thereof. Hence, the suit was filed to evict them from the suit house and the suit property.

5. The defendants filed their written statements. They denied the plea of the plaintiffs that the defendants were trespassers and raised the plea of mundkarship.

6. Learned Counsel for the appellants submitted that the present appeal involves substantial questions of law. It is submitted that the plaintiffs have no file and have not proved their title in respect of the portion of the suit house where the defendants are residing. He submits that a specific plea is raised in the cross examination of Pw.2 that they do not have title in respect of the portion in which the defendants are residing and that the evidence of Pw.2 would clearly go to show that Pw.2 admits that the plaintiffs do not have title of the portion of the suit house where the defendants reside. Learned Counsel further submitted that the appellate Court proceeded completely on an erroneous premise that the trial Court should not have framed the issue as regards title of the plaintiffs over the suit property. It is submitted that when admittedly the defendants are in possession of the suit property, it was for the plaintiffs to have established their title over the property and establish a case as to in what capacity the plaintiffs are seeking eviction of the defendants who are in settled possession. Learned Counsel submitted that it was an error on the part of the first appellate Court as well as the trial Court in shifting the burden of

proving the title over the suit portion where they reside on the defendants.

7. Learned Counsel invited my attention to the findings of the trial Court as well as the appellate Court to submit that it is only on the basis of certain revenue records having a presumptive value that the Courts below presumed that the plaintiffs have established their title. According to the learned Counsel, the present appeal involves a substantial question of law as both the Courts have completely misconstrued the Sale Deed relied by the plaintiffs, which does not confer title upon the plaintiffs over the suit premises where the defendants are residing. It is submitted that the defendants are in occupation of premises which are completely different and distinct from the one that the plaintiffs claim to have purchased under the Sale Deed in as much as there is a dead wall separating the properties. Learned Counsel, relying on various decisions relied upon in support of his submissions, submits that the Courts have completely misdirected themselves in deciding against the appellants/defendants.

8. On the other hand, Mr. Lobo, learned Counsel for the respondents-original plaintiffs, invited my attention to the findings recorded by the First Appellate Court as well as the trial Court to

submit that on the basis of the materials on record, the Courts have factually concurrently found against the defendants. The findings are based on cogent evidence in consonance with law and hence the present appeal does not involve any substantial question of law.

9. Before I proceed to deal with the submissions of learned Counsel, a reference to the decisions relied upon by the learned Counsel for the appellants will prove useful. The principles related to Section 100 of the Civil Procedure Code are summarised by the Hon'ble Supreme Court in **Hero Vinoth (minor) vs. Seshammal**[1]**,** Their Lordships held thus :

> "To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of

1 AIR 2006 SC 2234

each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See :Santosh Hazari v. Purushottam Tiwari (deceased) by Lrs. [(2001) 3 SCC 179].

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

> (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
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> (ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court

> below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.
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> (iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where,
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> (i) the courts below have ignored material evidence or acted on no evidence;
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> (ii) The courts have drawn wrong inferences from proved facts by applying the law erroneously; or
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> (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

10. Then in **Chandrabhan (deceased) through LRs. & Ors. vs. Saraswati & Ors.**[2], Their Lordships formulated the principles relating to Section 100 of the CPC relevant for the decision in the case before the Supreme Court. Paragraph 33 reads thus :

> "33. The principles relating to Section 100 of the CPC relevant for this case may be summarised thus:

2 2022 SCC OnLine SC 1273

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

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

(iii) The general rule is that the High Court will not interfere with findings of facts arrived at by the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence,

> taken as a whole, is not reasonably capable of supporting the finding."

11. In **Balraj Taneja & anr. vs. Sunil Madan & anr.**[3] the Supreme Court dealt with the scope of Order 8 Rule 5 of the Code of Civil Procedure Code. Learned Counsel for the appellants placed emphasis on the fact that the proviso appended to the Rule is important in the sense that though a fact stated in the plaint may be treated as admitted, the Court may, in its discretion, still require such "admitted fact" to be proved otherwise than by such admission. This is an exception to the general rule of evidence that a fact which is admitted need not be proved. It is then submitted that sub-rule (2) provides that if the defendant has not filed his written statement, it would be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint. The rule further proceeds to say that notwithstanding that the facts stated in the plaint are treated as admitted, the Court, though it can lawfully pass the judgment, may before passing the judgment require such fact to be proved. This decision is relied by the learned Counsel for the appellants in the context that notwithstanding the plea taken by the defendants in the written statement, the burden was still on the plaintiffs to establish their ownership over the portion of the property from which they were seeking to claim possession from the defendants.

3 AIR 1999 SC 3381

12. Learned Counsel then relied upon the decision in **P. Kishore Kumar vs. Vittal K. Patkar**[4] in support of the submission that mutation in revenue records neither creates nor extinguishes title, nor does it have any presumptive value on title. All that the mutation entry does is entitle the person in whose favour mutation is made to pay the land revenue in question. Relying on paragraph 24, it is submitted that the Supreme Court has succinctly summarized the law on burden of proof in suits for declaration of title. Paragraph 24 reads thus :

> "24. This decision was affirmed, and further elaborated upon, in **Jagdish Prasad Patel (Dead) thr. LRs. and Ors. vs. Shivnath and Ors.**, wherein this Court has succinctly summarized the law on burden of proof in suits for declaration of title as follows:
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> > "44. In the suit for declaration for title and possession, the Plaintiffs- Respondents could succeed only on the strength of their own title and not on the weakness of the case of the Defendants-Appellants. The burden is on the Plaintiffs-Respondents to establish their title to the suit properties to show that they are entitled for a decree for declaration. The Plaintiffs-Respondents have neither produced the title document i.e. patta-lease which the Plaintiffs-Respondents are relying upon nor proved their right by adducing any other evidence. As noted above, the revenue entries relied on by them are also held to be not genuine. In any event, revenue entries for few Khataunis are not proof of title; but are mere statements for revenue purpose. They cannot

4 (2023) SCC OnLine SC 1483

> confer any right or title on the party relying on them for proving their title."

13. According to learned Counsel for the appellants, the decision in **P. Kishore Kumar vs. Vittal K. Patkar (supra)** is in support of his submission that the plaintiffs in the present case have not established their title and that they cannot succeed on the weakness of the case of the defendants.

14. In **Anathula Sudhakar vs. P. Buchi Reddy (Dead) by Lrs & Ors.**[5], the position as regard suits for prohibitory injunction relating to immovable property has been summarized. Paragraph 17, which is significant, reads thus :

> "17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :
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> > (a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

5 AIR 2008 SC 2033

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

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

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

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

> title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

15. In **Smriti Debbarma (Dead) through Legal representative vs. Prabha Ranjan Debbarma & Ors.**[6]**,** Their Lordships in paragraphs 30 and 31 held that for the plaintiffs to succeed, they had to establish legal title to the property, whereafter, they are entitled to a decree of possession. Relying on this decision, learned Counsel for the appellants submitted that the respondents cannot be dispossessed unless the plaintiff has established a better title and rights over the property. Their Lordships in paragraph 31 have observed that the burden of proof to establish a title lies upon the plaintiff as this burden lies on the party who asserts the existence of a particular state of things.

16. In **Rame Gowda (D) by Lrs. vs. M. Varadappa Naidu (D) by Lrs & anr.**[7]**,** the Supreme Court laid down the following tests as a working rule for determining the attributes of 'settled possession', :

> "i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;
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> ii) that the possession must be to the knowledge (either express or implied) of the owner or without

6 (2023) SCC OnLine SC 9

7 2003(8) Supreme 928

> any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;
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> iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and
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> iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession.

17. In the present case it is submitted that the plaintiffs have failed to prove their title and when the defendants were found in settled possession, it was not then open for the Courts to have decreed the suit.

18. In **M/s. CliniRX Research Pvt. Ltd. vs. Bicare Limited & Ors.**[8], the Single Judge of this Court held that a plain reading of the provisions of Order 8 Rule 5 of CPC, clearly indicates that the failure to file a written statement does not necessarily entail passing of a judgment and decree. This provision gives discretion to the court either to pronounce the judgment on the basis of the uncontroverted

8 AO(ST) No. 8010 of 2017 decided on 14.11.2017

facts contained in the plaint or to call upon the plaintiff to prove such facts. Placing reliance on this decision, learned Counsel submitted that the Trial Court having framed the issue regarding the title of the plaintiffs over the suit property, the appellate Court was not justified in observing that there was no need for the trial Court to frame such an issue.

19. I have carefully perused the pleadings, the materials on record, the findings of the first Appellate as well as the trial Court. So far as the Sale Deed 19.02.1997 on the basis of which the plaintiffs claim, it records that the seller along with her late husband and the purchasers' parents are having equal half right to the said property in the house and that the father of the purchasers is dead. The seller sold 387.50 square metres along with the part of the house which is towards the southern side of the house of the plaintiffs. The trial Court framed the following issues :

ISSUES	FINDINGS
1. Whether the plaintiffs prove that they are the owners of the suit property ?	In the affirmative
2. Whether the plaintiff proves that they had permitted one Mr. Edward Machado to reside in the rear portion of the suit house on humanitarian grounds ?	In the affirmative

3. Whether the plaintiffs prove that the defendants are mere trespassers in the suit house and the suit property ?	In the affirmative
4. Whether the defendant nos. 1, 2 and 3 prove that they are the mundkars in respect of the suit house ?	This issue no.4 has been struck off vide order dated 28/6/2016
5. What order ? What relief ?	As per final order

20. The First Appellate Court framed the following points for determination :

Sr. No.	Points for determination	Findings
1.	Whether the Ld. Trial Judge erred in holding that the Plaintiffs have proved their ownership of the suit property and the suit house and that the Defendants were tresspassers therein ?	Negative
2.	Whether the impugned Judgment, Order and Decree are contrary to the pleadings and the evidence on record, illegal, arbitrary and perverse, causing injustice to the Appellants, warranting an interference in Appeal ?	Negative

21. It is pertinent to refer to the observations in paragraph 30 to 33 of the First Appellate Court order, which reads thus :

> "30. As per the Sale deed dated 19.02.19 97, which is at exhibit-18, executed between Conceicao Andrade as seller and Santan Andrade, Rafael Andrade, Abel Andrade and Simon Andrado, plaintiff Nos.1, 2, 4

and 6 herein as purchasers, it is mentioned therein that by an agreement for Sale dated 16/01/1993, which is at exhibit-40 (in cross), the seller and her late husband, Joaquim Andrade has agreed to sell to the purchasers their undivided half share along with the half share in the house situated in property bearing Survey No. 50/36 of village Aradi, Parra, Bardez, Goa and that the area of the land agreed to be sold therein admeasures 387.50 Sq. mtrs along with the part of the house which is towards the southern side of the house and as per the Schedule of the Sale deed dated 19/02/1997, which at exhibit-18 at page No. 12, part of the house bearing No. 291, situated in Survey No. 50/32 and an open area in Survey No. 50/36 situated at village Parra is sold to the purchasers therein. It also mentioned therein that the total house and the is area of the open land admeasures 387.50 Sq. mtrs and that the part of the house and the open land is bounded on the north by pathway, towards south by house of Leo Pinto, towards cast by house of west by main road and therefore, from Mary Alvares and towards the said Sale deed produced on record it is clear that the vendor to the said Sale deed has sold only a part of the house bearing No. 291 situated in property bearing Survey No. 50.32 and an open area in property bearing Survey No. 50/36, situated at village Parra totally admeasuring 387.50 Sq.mtrs and not the entire house bearing No. 291 which is partly situated in property bearing Survey No. 50/32 and partly in property bearing Survey No. 50/36 of village Parra. Even Simon Andrade (PW2) in his cross examination has admitted that vide Sale deed

dated 19/02/1997, the plaintiffs have purchased the part of the "Suit house" situated in Survey No. 50/32 and an open area in Survey No. 50/36 of village Parra. Although, the defendants have brought on record at the time of cross examination of Simon Andrade (2), that the vendor, Joaquim had children and that subsequent to his death his properties devolved upon his children and that since they were not parties to the Sale deed at exhibit-18, the said deed is incomplete, however, it is pertinent to note that the said deed is not challenged by anybody nor legal heirs of said Joaquim Andrade have challenged the said deed till date and therefore, the defect if any to the said deed can be cured and rectified by the parties to the said deed.

31. Secondly, it is pertinent to note that vide agreement for Sale dated 16/01/1993, which is at exhibit-40 (in cross), the vendors have agreed to sell their entire 1/3rd share in property bearing Survey No. 50/36 and it is also mentioned therein that “the sellers shall give no objection to the purchasers for obtaining electricity connection, water connection or any other connection to the shed or premises or land" to presumption that what and therefore, this gives a was agreed to be sold vide said agreement for Sale is the vendors 1/3rd share in the said property bearing Survey No. 50/36 along with the shed or premises existing therein. Although, in Sale deed dated 19/2/1997, which is at exhibit-18 only the area of the property bearing Survey No. 50/36 is mentioned without mentioning the part of the suit house or the

shed or premises existing therein but the vendors to the said agreement have intended to sell the premises situated therein.

32. As per the legal notice dated 25.11.2014, which is at exhibit-19 Colly, the defendants were given notice by the plaintiffs through their Advocate J. Souza to vacate themselves from house bearing No. 291 (part), standing in property bearing Survey No. 50/32 of village Parra and what is purchased by the plaintiffs vide Sale deed dated 19/2/1997 which is at exhibit-18 is a part of the house bearing No. 291 (part), situated in the same property bearing Survey No. 50/32 of village Parra and the defendants No.s 1 and 4 although duly served with the said notice have not not replied the same or have unclaimed the same which fact is not denied by the defendants and therefore, this gives a presumption that the defendants have admitted and accepted its contents. Since, the defendants have accepted the contents of the said notice by not replying to the said notice, this also give. a presumption that the defendants are occupying the part of the Suit house", situated in property bearing Survey No. 50/32 and not in the part of the suit house situated in property bearing Survey No. 50/36 of Village Parra and what is purchased by the plaintiffs vide Sale deed dated 19/2/1997 which is at exhibit-18 is the part of the "Suit house" situated in property bearing Survey No. 50/32 and therefore, they are lawful owners of the same. On the other hand in cross examination suggestion was put to Simon Andrade (PW2) by advocate for the defendants that “the portion of

house bearing No. 291 occupied by the plaintiffs falls in Survey No. 50/32 and the portion of the house occupied by the defendants (suit portion) is in Survey No. 50/36 and are distinct and separated by a dead wall" to which Simon Andrade (PW2) has stated that "there is a dead wall between the rear portion as described in the plaint and the remaining portion of the house. From this suggestion from the advocate for the defendants, it is the case of the defendants that they are residing in the portion of the suit house bearing No. 291 (part), situated in property bearing Survey No. 50/36, however, the defendants have not led any evidence to show that they are residing in the part of the suit house situated in property bearing Survey No. 50/36 nor have taken the said defence in their written statement although they have stated that they are residing in the part of the "Suit house" and therefore the said suggestion have no meaning and relevancy but it is an admitted fact that the defendants are residing in the part of the suit house.

33. It is pertinent to note that even if vide Sale deed dated 19/2/1997, which is at exhibit-18, the plaintiffs have purchased part of the "Suit house" bearing No. 291 (part), situated in property bearing Survey No. 50/32 and the plaintiffs have not produced any other title documents to show that they are the owners of the "Suit property" and the "Suit house", in the form I and XIV of property bearing Survey No. 50/32 and 50/36 of village Parra, the names of the plaintiffs are duly recorded in the occupants column and no other names are recorded

in respect of the said survey holdings and therefore, the presumption under Section 105 of Land Revenue Code as regards the correctness of the said entries recorded in the survey records can be drawn and therefore, the presumption that the plaintiffs are in possession of the said properties/ Suit property is in favour of the plaintiffs and the said presumption is not rebutted by the defendants herein. The documents such as water bill, electricity bill, House tax with respect to the "Suit house bearing No. 291 (part) is also in the names of plaintiffs which fact and which documents are not denied by the defendants herein. On the other hand when it is the case of the defendants that they are residing in the "Suit house" as mundkars since the year 1971, they have not produced any document to substantiate the same nor their names are recorded as mundkars in other right column of Form I and XIV of property bearing Survey No. 50/32 nor in Survey No. 50/36 of village Parra, in the agreement for Sale dated 16/01/1993, which is at exhibit 40 (in cross), the vendors have agreed to sell their is at entire share in property bearing Survey No. 50/36 and have also stated that "they do not have any objection for the plaintiffs to obtain electricity connection, water connection, any other connection to the shed or premises or land and that hey shall not claim any right, interest over the property/the premises in future" and therefore, the vendors to the said agreement have intended to sell the suit portion of the suit house existing in Survey No. 50/36 of village Parra and when they have agreed to sell their entire share in the said property, the said entire share shall also include the suit

> portion of the Suit house bearing No. 291 (part) and therefore, all this gives a presumption that the plaintiffs are the owners in possession of the "Suit house"/"Suit portion" and the "Suit property". On the other hand the defendants having failed to prove that they are having any right into the "Suit house/Suit portion" or the "Suit property" either as mundkars or otherwise and therefore, the defendants are mere trespassers in the "Suit house/ “Suit portion”. Hence, issue Nos. 1 and 3 are answered in the affirmative.”

22. No doubt the Appellate Court observed that there was utter absence of any denial of the title of the plaintiffs in the written statements and that the trial Court ought not to have allowed any evidence on this aspect and that it ought not to have framed issue no.1 as the same did not arise at all. However, I find that having observed thus, the First Appellate Court then took into consideration the materials on record and held at paragraph 35 that on a wholesome reading of the pleadings of the parties, as well as the oral and documentary evidence on record, found that the trial Court has not erred in drawing the statutory presumption under Section 105 of the Goa Land Revenue Code, 1968. The appellate Court held that the Form I and XIV of the suit property contains the names of the plaintiffs. The appellate Court further held that there is nothing therein to suggest that let alone the Defendants, any other person or persons,

had any other right in the suit property surveyed under no. 50/32 and survey no. 50/36 of village Parra. The First Appellate Court in paragraph 36 and 37 therefore held thus :

> "36. No doubt the presumption under Section 105 is rebuttable but it is well-settled that the statutory presumption cannot be rebutted by mere affidavitory evidence. The defendants in this case have not stepped into the witness box to prove their case. They have not given any explanation in the cross-examination of Pw.2 Mr. Simon Andrade to show what is their title to remain in possession of the suit house and the suit property.
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> 37. The only irresistible conclusion which can be drawn is that the plaintiffs have established that the defendants are rank trespassers in the suit house and the suit property. Hence, I cannot fault the Ld. Trial Judge for holding that the plaintiffs have proved their title to the suit house and the suit property and that the dfendants are rank trespassers in possession thereof. I, therefore, answer pint no.1 in the negative."

23. As regards issue no.2, the trial Court on the basis of the evidence of Pw.2, observed that after the purchase of the suit property, the plaintiffs on humanitarian ground had permitted one Mr. Edward Machado who was a bachelor to reside in the rear portion of the suit house which comprised of two rooms, kitchen and a passage/veranda and that the said use was only permissive. On the other hand the defendants in their written statement have denied the same and have

stated that "the husband of the defendant No.1 was allowed to occupy part of the suit house by Mrs. Conceicao Andrade and other Co-owners, somewhere in 1970-71 and that since then the family of the defendant no.1 is residing in the said part of the suit house with a fixed habitation as mundkars and that somewhere in the year 1975 or so late Edward, the brother-in-law of the defendant no.1, started staying with her family. In answer to the issue no. 2, in paragraph 34, the trial Court held thus :

> "34. Simon Andrade (Pw2) has deposed that after the purchase of the "Suit Property" the plaintiffs on humanitarian ground had permitted one Mr. Edward Machado who was a bachelor to reside in the rear portion of the suit house which comprised of two rooms, kitchen and a passage/veranda and that the said use was only permissive. On the other hand the defendants in their written statement have denied the same and have stated that "the husband of the defendant No.1 was allowed to occupy part of the suit house by Mrs. Conceicao Andrade and other Co-owners, somewhere in 1970-71 and that since than the family of the defendant no.1 is residing in the said part of the suit house with a fixed habitation as mundkars and that somewhere in the year 1975 or so late Edward, the brother-in-law of the defendant no.1 started staying with her family but the defendants have not led any evidence to rebut the case of the plaintiffs that one Edward Machado was permitted by the plaintiffs to reside in the rear portion of the "suit house" nor have led any evidence to show that

> they are occupying the "Suit house" as mundkars and hence, the presumption is in favour of the case of the plaintiffs that said Edward Machado was permitted to reside in the "Suit house" by the plaintiffs on humanitarian ground. Hence, issue no. 2 is answered in the affirmative."

24. The defendants in their written statement took a stand that they are occupying the suit property in the capacity as a mundkar. Though the issue whether the defendants nos. 1, 2 and 3 prove that they are the mundkars in respect of the suit house was initially framed, the same came to be deleted by the trial Court as it found that such a plea was merely raised which was not bonafide and legally sustainable. The issue was therefore deleted.

25. I do not see any reason to interfere with the concurrent findings recorded by the Courts which is based on a proper appreciation of the evidence on record. No substantial question of law arises in the present appeal. The same is therefore dismissed. No costs.

26. Civil Applications, if any, stand disposed of.

27. All concerned to act on the basis of an authenticated copy of this Order.

M. S. KARNIK, J.