

(2012) 03 BOM CK 0064

In the Bombay High Court

Case No : Second Appeal No. 21 of 2002

Bhavesh Harischandra Shirodkar

APPELLANT

Vs

Shri Babuli Mahadev Chodankar and Others

RESPONDENT

Date of Decision : 30-03-2012

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 70(b), 85
Penal Code, 1860 (IPC) — Section 34, 427, 447
Specific Relief Act, 1963 — Section 41

Citation : (2012) 03 BOM CK 0064

Hon'ble Judges : S. C. Dharmadhikari, J

Bench : Single Bench

Advocate : S.D. Lotlikar, with Mr. H. Kankonkar, for the Appellant; V. Parsekar, for the Respondent

Judgement

S. C. Dharmadhikari, J.—This is a Second Appeal by the original Plaintiff in Regular Civil Suit no.308/88/C which was dismissed by the Trial Court on 31/7/2000. The Appeal being Regular Civil Appeal No.143/2000 against the Judgment and Decree of the Trial Court has also been dismissed by the First Appellate Court by Judgment dated 24/1/2002. The suit filed by the Appellants in the Court of Civil Judge, Junior Division, Panaji was for a permanent injunction for restraining the respondents (original defendants), their servants, agents, labourers or any person/s claiming through them from interfering with the appellant's possession and enjoyment of the suit property surveyed under nos.191/1 and 191/2, which are part of the property known as " Morod Xeth" belonging to Monica Joy Gonsalves and situate at Chorao in Kerem. It is stated in the plaint that this property is subdivided into various portions, out of which four portions bearing survey nos.191/1, 191/2, 191/7, 191/8 were given on tenancy by Josinho Gonsalves the late father-in-law of Monica Gonslaves to the appellant's father Harischandra Shirodkar more than 40 years ago. Prior to institution of the suit the appellant's father expired in July 1987 after which the appellant/plaintiff inherited the estate of his father. It is the case of the appellant

that his father was a tenant and deemed owner of these portions. It is stated that in the portion surveyed under no.191/2 no cultivation was done, but cereals like moog, nachinim are sometimes grown, whereas in the other plots paddy is grown. The name of the appellant's father was recorded as a tenant in respect of all the aforesaid survey numbers except survey no.191/2. According to the appellant/plaintiff the respondents/defendants have no right in survey holding no.191/1 and 191/2. The original defendant/respondent no.1 made an application to the Mamlatdar of Record of Rights claiming to be a co-tenant of the paddy field "Morod", surveyed under no.191/1 and in joint possession of the same. In the application dated 19/2/1981 Babuli Mahadev Chodankar requested that his name be inserted as one of the tenants in the above survey number in the Record of Rights. The said request of defendant no.1 for inclusion of his name as co-tenant in survey no.191/1 formed subject matter of Dispute Case no.472 of Chorao village. The plaintiff's father made an application on 16/2/1981 for including his name as tenant in survey number 191/2 and this request was subject matter of Dispute Case no.445 of Chorao village. Subsequently, the defendant no.1 also made another application on 30/5/1981 claiming to be joint tenant along with plaintiff's father in respect of survey number 191/2. The said application formed subject matter of Dispute Case no.613 of Chorao village.

2. The Awal Karkun Record of Rights conducted a joint inquiry and by the order dated 18/1/1985 he directed that the name of defendant no.1 be included as tenant in respect of survey no.191/1 and 191/2. The name of the Plaintiff's father was ordered to be included in the tenant column in respect of survey no. 191/2.. The said order was challenged by the plaintiffs father by filing an Appeal before the Deputy Collector Goa, North Division being R.T.S. Appeal No.30/85 to the extent it directed inclusion of the name of defendant no.1 as co-tenant in respect of survey no.191/1 and survey no.191/2. The Deputy Collector was pleased to allow this appeal on 10/2/1987 and the order of the Awal Karkun was set aside. The case was remanded for fresh inquiry to the Mamlatdar, Record of Rights. Despite this order no corrections were made in the entries in the Index of Land. Therefore, there is a patent mistake according to the plaintiff and what the plaintiff alleges is that the defendants have no right, title or any connection of whatsoever nature with the suit property. It is stated that the possession and enjoyment of the plaintiff's father and even of the plaintiff in respect of these two survey numbers was interrupted when the defendants came on the property namely paddy field on 18/12/1988 and threatened to uproot the plants. It is stated that the defendants were trying to take advantage of the obvious mistake of Record of Rights. Taking advantage of such entry the plaintiff apprehended that the defendants were forcibly dispossessing him. It is in such circumstances that the permanent injunction was sought to restrain the defendants, their agents, servants or any body claiming through or under them from interfering with the plaintiff's possession and enjoyment in respect of survey nos.191/1 and 191/2 of Chorao village.

3. Upon the summons been served, the defendants entered appearance and stated that in survey no.191/1 and 191/2 which are known as "Morod Xet", they are the tenants and one Monica Joy Gonsalves is the landlady. However, they admit that these are paddy fields. They disputed the rights of the plaintiff and then urged that their relationship with the plaintiff is not cordial. They stated that late Harischandra Shirodkar had filed a false and frivolous criminal case against the defendants no.1 and 2 in respect of the property surveyed under no.191/1 of Chorao village. This was a criminal case filed maliciously. However, the said Harischandra could not substantiate his allegations and stated that he does not know whether defendant no.1 is in possession of the property or not. This clearly shows that the late Harischandra himself was not sure who was in possession of the aforesaid property during his life time. The statement shows that the Harischandra was not in possession of the said property at least upto 27.5.1987 and therefore the plaintiff who claims the property by inheritance cannot be said to be in possession of the same. Stating thus they deny all allegations and averments in the plaint and it was prayed that the suit be dismissed.

4. This Written statement was filed on 11.1.1989.

5. Upon these pleadings the issues were framed including the additional issues. The issues framed and particularly issue nos.1 and 2 which were deleted pertain to the claim of Tenancy rights in the suit property. The issue no. 3 is whether the defendants proves that suit is hit by Section 41 of the Specific Relief Act, 1963?. Issue No. 7 clearly dealt with the factum of possession and proof by the plaintiff of the exclusive possession and enjoyment.

6. The plaintiff entered the witness box and deposed consistently with his statements in the plaint. He also produced the copies of the orders passed by the Awal Karkun and Dy. Collector. In his deposition he stated that the defendants interfered with the possession of the suit property on 18.12.1988.

7. In his cross examination he stated that the suit property was given to his father by Josino Gonsalves 48 to 49 years back. However, he stated that he does not know in which year the survey was conducted and it may be that it was conducted in the year 1972. He denied the suggestion that his father was not cultivating chillies in survey no. 191/1. He denied all suggestions with regard to exclusive possession of the defendant no.1 and asserted the exclusive possession as far as the plaintiff is concerned.

8. The learned Trial Judge then considered the oral arguments and proceeded to discuss the same. He held that the suit is for permanent injunction to protect the physical possession, but curiously proceeded to make observations with regard to the claim of tenancy. All that was required was to find out the factum of physical possession but rendering no findings thereon be proceeded to the dismiss the suit.

9. Aggrieved by that dismissal the appellant/plaintiff filed an appeal bearing Regular Civil appeal no.143/200. That Appeal was considered by the II nd

Additional District Judge, Panaji and he concurred with the Trial Court not on other point, but on the point that the appellant/plaintiff has failed to prove that he is in lawful, exclusive possession and enjoyment of the suit property. While giving his finding on point no. 3, what the learned District Judge has done is to refer to the judgment of this Court in the case of Palmira Valadares, reported in 1995 (1) Goa Law Times page 97 and held that even if the claim of interim injunction arising between two co-tenants cannot be considered, protection of possession was of one of the parties will have to be decided in the backdrop of the rival claims. If plaintiff claims to be the tenant then he must prove that his possession is traceable to some legal title. The plaintiff does not have any lease deed executed by late Joshino Gonsalves in favour of his late father, Harischanda. The plaintiff also does not have any lease deed executed by late Smt. Monica Joy Gonsalves. However, he has produced letter dated 18/2/1981 allegedly written to his father and two others by Mrs. Monica stating they are cultivating the same along with others as tenants and that arrears of rent for the years 1979-1981 is Rs. 1448/-. However, this letter does not pertain to the suit property and it contradicts the case of exclusive possession because it speaks of joint tenancy with Govind Karekar and Prakash Mandolkar. The letter is suspicious because Monica is not a party to the suit nor she has been examined as witness, and, therefore there is no documentary evidence to establish even semblance of title. At para 11 and 12 of his order the learned Judge refers to the oral evidence.

10. The learned Judge of Lower Appellate Court then refers to the deposition of PW.1 and observes that no documentary evidence of whatsoever nature regarding paddy cultivation or plantation of cereals like mug or nachini or vegetables like chillies etc are produced by PW.1 The learned Judge has then referred to the cross examination of PW1 Bhavesh Shirodkar, and concludes that the late father of PW.1 had filed a criminal case bearing Case No. 185/84/D against the defendants no. 1 and 2 for offences punishable under Sections 447, 427 r/w 34 of I.P.C. for having trespassed on the paddy field and having caused damage to the paddy. The Judgment in the said Criminal Case has been produced on record and according to the learned Judge it shows that the late father of the appellant, PW.1 was not aware whether the accused (defendants no. 1 and 2) are in possession of the paddy field and he was not sure whether he himself was in possession.

11. With reference to the deposition of PW.2 what the learned Judge has held is that his deposition does not indicate as to what is existing in survey no. 191/1 and who is doing that plantation. When the area of survey no. 191/1 is 4400 sq. metres, PW.2 states that it is 3000 sq. metres. When the area of survey no. 191/2 is actually only 1175 sq. metres, PW2 says it is about 7000 sq. metres before the Awal Karun.

12. Thereafter, there is reference made to the deposition of PW.3 who states that survey nos.191/1, 191/2, 191/7 and 191/8 are enjoyed by the plaintiff as tenant

and that in survey no. 191/1 paddy is cultivated during monsoons and other seasons crops like chillies etc are cultivated and in survey no. 191/2 there is cultivation of nachini and cereals. The learned Judge, however, disbelieves this version by observing that PW.3 does not say specifically that the plaintiff either personally or through labourers or otherwise is cultivating the paddy filed and doing the plantation. The learned Judge terms the testimony of PW.2 as not only vague but also faults him for not coming to the Court with clean hands.

13. Thus, the learned Judge concludes that neither the plaintiff nor his witnesses have stated as to what was the consumption of paddy seeds, what was the yield of paddy, what was the yield of cereals, vegetables etc. who was actually working in the fields, what was done of the yield etc. Besides the above, the evidence on record produced is neither sufficient for the Court to believe these facts to exist or to consider their existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they exist. Concluding thus, he holds that the plaintiff has failed to establish and prove his possession in respect of the suit property.

14. Yet there is reference made to the deposition of DW.1 and DW2 and the learned Judge holds that the oral evidence produced by the defendants is mostly on the fact of actual possession and sufficient for the Court to disbelieve the plaintiff's evidence on possession.

15. It is in view of these findings that the Trial Court's decree came to be confirmed but on other grounds and for other reasons.

16. Mr. Lotlikar, learned Senior Counsel appearing on behalf of the appellant/plaintiff submits that the Courts below have failed to take note of the basic controversy which was sought to be raised. In respect of survey nos 191/1 and 191/2 the name of the appellant/plaintiff is recorded in the index of Property/land and there is an application filed for correction of records in respect of survey nos.191/1 and 191/2 by the defendant no. 1 and there was a claim of joint tenancy with the appellant's father so also there was an objection of the appellant that his name be included in other survey numbers. What the Courts below have failed to note is that tenancy Awal Karkurn has allowed all the applications. The Deputy Collector set aside the order and directed that separate inquiry be held. Thus, there was no order in the field with regard to the entries in the survey records. Mr. Lotlikar submits that there is presumption flowing from the entries in law. The presumption is that the name of the person is entered in the record because he has proved the factum of physical possession. If the allegation is that the respondents/defendant no. 1 attempted to disturb that appellant's possession in respect of survey no. 191/1 and 191/2 the learned Judge of the Lower Appellate Court despite the orders of the Dy. Collector directing fresh inquiry has erroneously concluded that the entries will not have any presumptive value. Thereafter, the learned Judge went into the oral and documentary evidence on record. Mr. Lotlikar would submit that if the dispute is of tenancy rights and that is still pending, then, until such a dispute was pending

the Civil Court should not have recorded any finding even with regard to the presumptive nature of the Revenue Authorities or the claim of tenancy, the Civil Court's jurisdiction in so far as claim of tenancy is concerned is clearly barred. If both the parties claim to be tenants of the same landlord the Mamlatdar has no jurisdiction. The Jurisdiction lies with the Civil Court that is how the learned Judge relied upon the judgment in Palmira Valadares' case. When the learned Judge has set aside the finding of the Trial Judge with regard to the appellant/plaintiff having efficacious remedy, then, it was not open for him to proceed further and consider the depositions of parties in details.

17. For the above reasons according to Shri Lotlikar a substantial question of law arises and that is when two contesting parties state that they are tenants in respect of the suit paddy field, was it was necessary for the Court to frame requisite issue requiring both the appellant and the respondents to establish their claim of tenancy and directing them to get declaration to that effect from the Mamlatdar who is only the competent authority in view to the provision of the Goa, Daman and Diu Agricultural Tenancy Act, 1964.

18. Mr. Lotlikar places reliance upon A Full Bench Judgment in the case of Rajaram Totaram Patel Vs. Mahipat Mahadu Patel and Others, and submits that *pari materia* Section 70(b) r/w Section 85 of the Bombay Tenancy and Agricultural Lands Act has been considered by the Full Bench and it is held that is the function of the Mamlatdar to decide whether a person is a tenant and when the Legislature has used that expression, there is no reason for curtailing its amplitude by saying that the issue which the Mamlatdar has to decide is only an issue whether a person is tenant of a particular landlord. He also relies upon the conclusion of the Full Bench that issue whether the plaintiffs was the sole tenant or were joint tenants on the tillers day falls within the ambit of Section 70 (b) and it could not be tried by the Civil Court. Therefore, this is not a case where according to Shri Lotliakar in garb of deciding the suit the question of co-tenancy can also be settled by the Civil Court.

19. Reliance is also placed upon a Division Bench Judgment of this Court in the case of Bhagwanrao s/o Jijaba Auti Vs. Ganpatrao s/o Mugaji Raut and anr, 1987 (3) Bom. C.R.258 by Shri Lotlikar and he submits that the Division Bench has held that even in a suit for permanent injunction simplicitor, where rival contentions as regards possession are made, it has to be considered on merit as to who has a better right for possession. Obviously, when a tenant is in possession and it is established that he is in possession on the date of the suit, perpetual injunction can be granted in his favour, only if the defendant has no better right than plaintiff. If the defendant is the owner of the property, then according to the Division Bench the plaintiff has certainly better right than the owner for possession, provided he establishes tenancy rights and it is only in such a case that perpetual injunction can be issued in his favour. However, according to the learned counsel the Division Bench has further held that for deciding the issue of perpetual injunction the question as regards the rights of

either the plaintiff or the defendant as a tenant is necessarily involved and has to be decided first and when such a question has to be dealt with only by the authority under the Tenancy Act and Civil Court's jurisdiction to consider and decide such a question is barred.

20. For all these reasons Shri Lotlikar submits that the orders and judgments of the Lower Appellate Court are vitiated and should be set aside.

21. On the other hand Mr. Parsekar, learned counsel appearing on behalf of respondents original defendants (no.1 and 2) would submit that this case is squarely covered by the decision of the Single of this Court in the case Smt. Palmira Valadares Vs. Shri Inacio Mariano Dias and ors., 1998 (1) Goa L.T. 220. He submits that after referring to all the decisions in the field what the learned Judge has held that any person claiming to be a tenant of a landlord can come under the purview of Section 8-A of the Goa, Daman and Diu Agricultural Tenancy Act, 1964. In other words this Section can be invoked only by a tenant when in a suit for injunction and possession by a landlord whether a person is a tenant or not it is that question which is to be decided and settled by the authority under the aforesaid Act. But in a suit for injunction the Civil Court is not precluded from examining the factum of possession so as to entitle the plaintiff to claim a permanent injunction. According to Shri Parsekar this a case simplicitor for injunction based on possession. There was absolutely no necessity of deciding any other claim and once the plaintiff fails to establish his physical possession then the suit instituted by him should be dismissed. The concurrent finding requires no interference in Second Appeal.

22. Reliance is placed on the other decision of the Hon''ble Supreme Court in the case of Anathula Sudhakar Vs. P. Buchi Reddy (Dead) By Lrs. And others, (2008) 4 Supreme Court Cases 594 and the conclusions that have been rendered by the Supreme Court in para 21. According to Shri Parsekar, if one looks at the pleadings on these lines the Second Appeal does not involve any substantial question of law much less any question of law and therefore it deserves to be dismissed.

23. For properly appreciating these contentions, it is not necessary to refer to the entire case as set out in the pleadings and the oral and documentary evidence. Suffice it to note that the suit was filed by the appellant/plaintiff who is the son of the late Harchandra Shirodkar claiming that in the village Chorao in Ward Kherem there is a property known as " Morod Xet". That property belonged to Monica Joy Gonsalves. It is sub-divided in various portions and four portions surveyed under survey nos.191/1, 191/2,191/7 and 191/8 of this village were given on tenancy by Josino Gonslaves, late father-in-law of Monica to the late father of the plaintiff Harischandra more than 40 years prior to the institution of the suit. The appellant/plaintiff is the only son of the deceased Harischandra who expired in July 1987 and therefore, claimed to have become a deemed purchaser and stepped into the shoes of his late father who was the tenant in respect of the aforesaid four portions. The appellant/plaintiff himself asserts that the property

predominantly is a paddy field. It has some portion which have not been brought under cultivation. He states that survey no. 191/2 is not brought under cultivation. However, cereals, like nachini are sometimes grown in the said portion and in the rest of the plot paddy is grown. Besides cereals are also grown in portion property under survey no. 191/1, 191/7 and 191/8. The claim of the appellant/plaintiff is that his father's name as tenant was recorded in all these survey numbers except in survey no. 191/2. The respondents/defendants reside in the same property in which the appellant resides. Their relations are strained since the year 1980 and none of the defendants have any right, interest of whatsoever nature in the four portions and the appellant/plaintiff claims to be in exclusive possession and enjoyment through his father.

24. It is the appellant/plaintiff who makes reference to the application made to the Mamlatdar of Record of Rights by Defendant no. 1 claiming to be co-tenant of the paddy field "Morod" surveyed under survey nos.191/1 and to be joint possession of the same. In the said application dated 19/2/1981 a request was made that the respondent no. 1's name be inserted as one of the tenants in the aforesaid survey number in the Record of Rights. That claim was disputed by the father of the appellant/plaintiff in his life time who made an application for including his name as tenant in the survey record in respect to survey no. 191/2. There is another application of joint tenancy which is made in respect of this very survey number by defendant no. 1 before the Awal Karkun Record of Rights. He conducted joint inquiry and ordered the name of the defenant no. 1 to be included as tenant in respect of survey no. 191/1 and 191/2. The name of the appellant/plaintiffs father was ordered to be included as tenant in survey no. 191/2. This order of Awal Karkun, Record of Rights dated 18/1/1985 was challenged before the Deputy Collector, North Goa by the appellant's father and he has allowed the Appeal on 10/2/1985. He has quashed and set aside the order in respect of Dispute Case no. 613. Dispute Case no. 472 of Chorao village was an application made by the respondent/defendant no. 1 for inclusion of his name as co-tenant in respect of survey no. 191/1. Dispute Case no. 613 of Chorao was also an application made on 30/5/1981 by the original defendant no1, claiming to be joint tenant along with the appellant/plaintiff's father in respect of survey no. 191/2.

25. Thus, what should have been noted in this case and which is a very pertinent fact throughout the pleadings is that the original defendant no. 1 made an application for inclusion of his name as a co-tenant in respect of both survey numbers, whereas, the only application made on 16/2/1981 by the appellant/plaintiff's father is for including of his name as tenant in respect of survey no. 191/2 which is subject matter of dispute Case no. 445 of Chorao village.

26. The Dy. Collector has remanded the matter to the Awal Karkun, Record of Rights for fresh inquiry and the learned Judge of the Lower Appellate Court in para 7 of his order after recording all this concludes that because of the order of the Dy. Collector the survey records have no presumptive value. The disputed

issue about survey number is still pending. The learned Judge at the same time states that Form no. III in respect of survey no. 191/1 cannot be given any presumptive value and admittedly Form no. III in respect of survey no. 191/2 did not show the name of the plaintiff or otherwise. The learned Judge concludes that the survey records therefore neither help the appellant nor the defendants. Yet, in such a situation the learned Judge proceeds to trace the title of the appellant/plaintiff, despite being aware that his claim of tenancy cannot be settled by the Civil Court. Presumably, the learned Judge proceeded on the basis of evidence in the suit that even for claiming injunction simplicitor a right in the property will have to be established and the case is relating to agricultural land or fields and based on the claim of tenancy thereof that physical possession is claimed. Tenancy dispute is an issue which must be settled by the authority under the Tenancy Act and not by the Civil Court. The finding on jurisdiction of the trial Court has been reversed by the learned Appellate Judge.

27. However, the learned Judge while recording his reasons has lost sight of the fact that Form III of survey Index (Exh.PW1/D) depicts the name of Monica J. Gonsalves as occupant. Whereas, the name of Harischandra Vishnu Chodankar has been shown as tenant. The deposition of the appellant/plaintiff Bhavesh Shirodkar also mentions the name of Monica Gonsalves. It refers to the subdivision of the property and the various survey numbers. He categorically states that in the survey index and the Form in relation to survey nos.191/1, the name of his father is recorded and with the consent of the parties in the suit, a xerox copy of this Form in respect of survey no. 191/1 was taken on record and marked as exhibit. Concededly, the appellant does not say that the name of his father is recorded in respect of survey no. 191/2, but states that his father had also made an application for insertion of his name by correcting the Record of Rights in relation to this survey number and that application was registered as Dispute Case No. 445 of Choarao village. It is thereafter the other assertions proceed.

28. His complaint was that inspite of the order of the Dy. Collector, the name of Babuli Chodankar continues in Record of Rights in relation to survey nos.191/1, and 191/2. If the Dy. Collector had allowed the appeal filed by the appellant's father, the records should have been corrected. On this aspect, there is absolutely no cross examination. In fact the assertion of the respondent/defendant no. 1 was that the appellant's father was not cultivating chillies in survey no. 191/1. There was a reference to a criminal case and various suggestions indicate that the cross examination went to the extent of suggesting whether Monica Gonsalves had given on lease survey nos.191/1 and 191/2 to the original defendant no. 1.

29. It is because of this assertion coupled with the claim of tenancy raised by the respondents in the Written statement that the learned Judge of the Lower Appellate Court possibly considered other matters. However, when the undisputed factual position with regard to the Record of Rights in relation to

survey no. 191/1 having not been brought to the learned Judge's notice, the Lower Appellate Court was not required to go into other aspects in further details. It is the appellant/plaintiff who states fairly before the Courts below and even before me that in relation to survey no. 191/2, neither the name of the appellant or his father is recorded as tenant, but the Record of Rights continues in the name of Monica as an occupant.

30 In these circumstances, when in relation to at least partial claim and particularly regarding survey no. 191/1 the appellant/plaintiff claiming through his father had proved the factum of possession by demonstrating that his father's name is entered as a tenant, then, the presumptive value attached to the Record of Rights of this survey number should not have been lost sight of by the Courts below. In my opinion, subject to the claims of tenancy or joint tenancy that may have been raised by the parties and which may have been pending post, the remand and fresh inquiry directed by the Deputy Collector, at least to the extent of survey no. 191/1, the least that the Courts below could have directed was to maintain the status quo in relation to this survey number. Thus, if the Record of Rights raise a presumption regarding physical possession about this survey number, then, that should have been protected by directing that without prejudice to the rights and contentions in relation to claims of tenancy or otherwise which are pending, the appellant/plaintiffs physical possession should not be disturbed by the defendants in relation to this survey number. A partial decree could have been granted once the plaintiff and his witnesses prove the Record of Rights in relation to this survey no. 191/1. It may be that there is fresh inquiry/de novo inquiry pending post the order of the Dy. Collector dated 10/2/1987, yet, when the contents of the application made by the first defendant and late father of the appellant were brought to the notice of the Courts below, consistent therewith and the stand of the parties, the status quo could have been directed to be maintained. Ultimately the issues of Tenancy of agricultural lands are beyond the purview of the ordinary Civil Court. However, if the suit is for injunction simplicitor based on previous possession, the law does not prohibit the Civil Court from protecting subject matter of the dispute until the claims in relation to tenancy are settled by the competent and appropriate authorities. Precisely that is the course which should have been adopted and which I propose to adopt, so as to balance the equities and not prejudice the claims of the parties.

31. After this was indicated to the counsel appearing for parties, Mr. Lotlikar, learned Senior Counsel appearing on behalf of the appellant/plaintiff fairly states that the compilation of documents on behalf of the appellant which have been tendered in the Second Appeal would show that whatever may be the direction of the Dy. Collector, now, the appellant/plaintiff has filed an application before the Mamlatdar u/s 7 of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 and that application is pending. Mr. Lotlikar submits that the appellant/plaintiff is ready and willing to abide by the order and direction of this Court to maintain status quo in relation to the properties and the survey numbers involved in this

application made on 29/1/2004. In other words, to the extent of the suit property, namely in survey nos 191/1 and 191/2, since the claim of tenancy has been made by the appellant/plaintiff exclusively he will have to abide by the outcome of the proceedings before the Mamlatdar, subject of course to his legal rights. However, once there is a presumptive value attached to the Record of Rights until the title claims are settled by the competent authorities then, based on such presumption, the status quo may be directed to be preserved and protected in relation to survey no. 191/1.

32. Mr. Parsekar states that he has presently no instructions. However, he fairly states that the original defendants no. 1 and 2, the respondents to this appeal have not filed any application in the Court of Mamlatdar, but have raised a counter claim claiming tenancy rights in relation to survey nos. 191/1 and 191/2 (suit property) and that would be prejudicially affected if this Court were to render any finding in this Second Appeal. Any clarification also may not be of any assistance because the observations and findings in this judgment would influence the Mamlatdar while adjudicating the tenancy application u/s 7 of the Goa, Daman and Diu Agricultural Tenancy Act, 1964.

33. I do not see how this Court's interference in Second Appeal on a limited point or issue would influence the authority under the Goa, Daman and Diu Agricultural Tenancy Act, 1964. Firstly, neither the judgments of the Courts below nor of this Court conclude the issue of tenancy of the agricultural land bearing survey nos. 191/1 and 191/2. The Civil Court being incompetent to render any finding on the issue of tenancy admittedly and the controversy being limited to the factum of physical possession in relation to these survey numbers, then all the more, neither the judgment of the Courts below nor of this Court in Second Appeal can influence the Mamlatdar in the pending inquiry in any manner. However, I clarify that the interference of this Court in this Second Appeal is to the extent of the substantial question of law that has been raised for determination and consideration and in regard to which I am of the opinion that it squarely arises in this case. That substantial question of law is that when the parties are claiming to be tenants in respect of a Agricultural land (Paddy field) either the trial Court should have framed the issue of Tenancy requiring both of them to get it settled through the competent authorities under the Tenancy Act or to await their adjudication or pending such claims it ought to have only scrutinized the materials for recording a finding with regard to physical possession. The later part was open for the Civil Court despite pendency of the application before the Mamlatdar. That is not a contested issue nor the position in law is disputed before me. The reference, therefore to the judgments in the field becomes unnecessary. Therefore, assuming that the controversy was restricted to finding out as to whether the appellant/plaintiff was in physical possession of the suit property that finding should have been recorded by raising a presumption in relation to the revenue entries popularly known as entries in the Record of Rights. Such rights do not decide the issue of title to immovable property, but have certain presumptive value. When in respect of survey no.

191/1, the entry discloses the name of the landlady as occupant and the late Harischandra father of the appellant as tenant, than the presumption that this was in the possession of the late father of the appellant/plaintiff can be safely raised. It is only to that extent that the substantial question of law arises for determination and needs to be answered by this Court accordingly. It is only to that limited extent interference is necessary with the concurrent judgement of the Courts below. Beyond that, in relation to survey 191/2, the Trial Court's and District Court's judgment need not be interfered with, however, subject to the clarification that it will not prejudice the case of either parties before the under the Tenancy Act.

34. As a result of the above discussion the substantial question of law framed for determination and consideration is answered by holding that the learned Judge of the Lower Appellate Court by confirming the decree of dismissal of the suit has omitted from consideration a vital piece of evidence namely the Record of Rights which have a certain presumptive value in law at least in relation to the physical possession of the appellant - plaintiff of the property bearing survey no. 191/1. That having been completely ignored and the oral evidence to the contrary being considered, I find that the finding of the learned District Judge is contrary to law. That finding is vitiated by completely overlooking the contents of the Record of Rights and omitting from consideration the presumptive value attached to it in law.

35. The Second Appeal, therefore, succeeds to this extent. The decree of dismissal of the suit stands substituted with a direction and order that the status quo as prevailing on the date of entry in Record of Rights in relation to survey no. 191/1 shall be maintained by the parties until the Mamlatdar settles and decides the application made u/s 7 of the Goa Daman and Diu Agricultural Tenancy Act, 1964 preferred by the appellant/plaintiff and pending before him. None of the finding and conclusions recorded in the impugned judgements and decrees nor in the present judgment and order shall influence the Mamlatdar in any manner and he must decide the application pending before him on the basis of the documents and materials produced by parties and in accordance with law. Needless to clarify that the judgment and order passed in the instant suit would be subject to the claims of Tenancy raised and the orders of the Mamlatdar and the legal rights of both sides flowing therefrom. It is clarified that the claim raised by the appellant so also the original defendant nos.1 and 2 in relation to tenancy of agricultural land by way of counter claim shall also be considered on its own merits and in accordance with law. All contentions in relation thereto are kept open and shall not stand concluded by the judgment and order rendered in this Second Appeal.

36. In the result there would be a decree in favour of the appellant/plaintiff in Regular Civil Suit no. 308/88/C to the extent indicated above namely order and direction to maintain status quo in relation to survey no. 191/1. That shall be maintained by both sides. The status quo means the position in the Record of

Rights and particularly, the names of Monica Gonsalves and Harischandra Shirodkar be retained in relation thereto and if any correction is made in the record by entering the name of the plaintiff/appellant Harischandra Shirodkar even that need not be disturbed till the Mamlatdar decides the matter in accordance with law. The suit claim in relation to survey no. 191/2 stands disallowed and the judgment and decree of the Trial Court as confirmed by the Lower Appellate Court in relation thereto is uninterfered with. However, it is clarified that the judgment and decree of the Trial Court as well as of the District Court in relation to this survey number and the confirmation thereof by this Court in Second Appeal will not prevent both sides from raising appropriate pleas in the pending application before the Mamlatdar and the Mamlatdar to deal with and decide them in accordance with law. In the result and finding that there is an error which gave rise to the substantial question of law as noted above, there would be no order as to costs.

37. Mr. Parsekar states that the original defendant no. 1 Babuli would also like to make an application u/s 7 of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 and assert his claim of tenancy in relation to the survey numbers which are covered by pending application of the appellant-plaintiff. Mr. Parsekar in all fairness states that the said Babuli has contested the claim of the appellant, in which he has also independently asserted his rights. Be that as it may, if the said Babuli (original defendant no. 1) desires to make an application even at this stage he can do so and if it is so filed, the Mamlatdar to consider this application and take them up for decision and make endeavour to dispose of all the applications as expeditiously as possible and within a period of four months from the receipt of a copy of this judgment. Registry to communicate this order to the Mamlatdar, Tiswadi Taluka.