
(2014) 06 BOM CK 0031
In the Bombay High Court
Case No : Second Appeal No. 100 of 2004

Damaciano Fernandes

APPELLANT

Vs

Anthony's Chapel

RESPONDENT

Date of Decision : 13-06-2014

Acts Referred:

Citation : (2014) 4 ABR 596 : (2015) 2 ALLMR 576 : (2014) 5 BomCR 608 :
(2015) 3 MhLj 713

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : A.F. Diniz, Advocate for the Appellant; C.A. Coutinho, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

U.V. Bakre, J.—Heard Mr. Diniz, learned Counsel appearing on behalf of the appellant and Mr. Coutinho, learned Counsel appearing on behalf of the respondents. This Second Appeal is directed against the judgment, order and decree dated 07/08/2004, passed by the learned Additional District Judge, Margao (First Appellate Court) in Regular Civil Appeal No. 84 of 2002.

2. By the impugned judgment, the judgment, order and decree dated 26/03/2002 passed by the learned Civil Judge, Junior Division, Canacona (Trial Court) in Regular Civil Suit No. 106/1988 (Old Regular Civil Suit No. 142/1986) has been confirmed.

3. The appellant was the defendant and the respondent No. 1 was the plaintiff in the said civil suit. The plaintiff, who claimed to be an unincorporated and unregistered Association, had filed the said suit in representative capacity against the defendant for permanent injunction to restrain the defendant from interfering with or constructing any structure in the suit property situated at Mastimola, Canacona, Goa bearing Survey No. 248/37 and also to issue orders to Survey Authorities to delete the name of the defendant from the Survey Records.

4. Case of the plaintiff, in short, was as follows:

There is a chapel known as St. Anthony's Chapel at Mastimola and the plaintiff-association, managed by a managing committee, elected by the members, have been managing the said chapel. The plaintiff is the owner in possession of a landed property bearing Survey No. 248/37 of Mastimola and the chapel is situated in the said plot since last more than 40 years. The said entire survey holding No. 248 was divided into 40 plots and out of these plots, the Government acquired the portion of the same comprising sub-divisions No. 6 to 40 from the comunidade of Nagorcem-Palolem and 32 plots thereof were given by the Government to various individuals who were residents of Delem after leaving certain plots as open spaces and one of those open spaces which was opposite the chapel and in continuation to the plot wherein the chapel is situated, was allotted to the chapel. The entire Survey Holding No. 248 was originally the property belonging to Comunidade of Nagorcem-Palolem. In the year 1938, the Administrator of Taluka Canacona, namely Advocate Jeronio Dias granted portion of this landed property comprising sub-divisions No. 6 to 40 of said survey No. 248 for the use and benefit of the residents of Delem on health grounds and the same received approval of the Governor General. The said land was then divided into plots, open spaces and accesses and duly demarcated plan was made and the entire project was notified by notification in the official Bulletin of 1938. Since then the chapel is in occupation and possession of the said open plot. Plots No. 1 to 5 of the said Survey Holding No. 248 were still with the Comunidade of Nagorcem-Palolem. Said open plot in front of the chapel, allotted to it, bears survey No. 248/34 and is the suit plot bounded on east, west and North by access road and on South by plot No. 37 wherein the chapel exists. The said open space/suit plot was kept for use of activities of the chapel and there was no proposal for allotment of the said plot to any person. The suit plot has been used and possessed by the chapel since beginning and no one has interfered with the same. For the last few years, the premises of the chapel are under use for Government Primary School and the said open space/suit plot is being used by the children as a playground. The Government is also paying rent to the chapel for the use of the said premises. The defendant was the Vice-President of the said chapel and taking advantage of this position, without knowledge of the committee members, he changed the survey records by deleting the name of his grand father having the same name as of the defendant from the plot allotted to the said grand father and putting name of his uncle by name Francisco against the same. This was done in order to show the name of the grand father of the defendant i.e. the name of Damaciano in the Survey Records against the open space/suit plot. By taking advantage of survey entries, the defendant without any authority and without knowledge of the committee of the chapel, made attempts to dig some pits in the suit plot in order to construct some structure for his personal benefit. No licence was issued by the Panchayat nor any conversion Certificate was obtained from the concerned authority. Somewhere in the year 1969, the President of the said Chapel by name Francisco Fernandes, who was

uncle of the defendant along with Advocate Jeronio Dias, Ex-Administrator of Comunidades of Taluka of Canacona, prepared a plan showing the names of all the allottees of the plots and also showing the open spaces kept for the benefit of the members of the chapel, one in which the chapel is situated and the other in front of it and another plot wherein there exists a common well for the use of the members of the chapel. Out of the remaining 32 plots, in the beginning, 27 plots were allotted to various persons whose names are shown in the said plan. The 5 plots, out the said 32 plots, which were earlier not allotted, were subsequently allotted to 5 persons with the consent of all members and their names are (i) Shri Benedito Fernandes; (ii) Shri Joao Fernandes; (hi) Shri Lucas D'Sousa; (iv) Shri Bento D'Sousa; and (v) Shri Antonio Sebastiao Sousa. In the said plan, the name of the aforesaid persons have been shown as "Requested for allotment" ("Foi Pedido"). The blue print of the said plan was given to each allottee by charging Rs. 50/-. The name of Damaciano Fernandes has been wrongly recorded in the record of survey No. 248/34 by the defendant by playing fraud on the survey authorities. The defendant, on or about 15/06/1986, attempted to start construction of the house in the suit plot, by gathering labourers and laterite stones. Hence, the suit.

5. The defendant, by way of written statement, alleged as under:

It is false that the land belonging to Comunidade was acquired by the Government and divided into plots. The place wherein chapel exists comprises of two plots, which were amalgamated for the use of chapel. No open plot or plot in front of the chapel was given for the benefit or use of the said chapel. The suit plot was originally shown as open plot since there were no claims for the said plot. Subsequently, it was given to the father of defendant. Though in the plan, some plots were shown as open, it was so because there were no claims for the said plots and the interpretation disclosed in the plan about the said open plot by the plaintiff is not correct. Some of the open plots were subsequently allotted to different persons and one such plot still exists as open plot. The said property was divided into plots after obtaining sanction from the Government in the year 1938 and hence, the contention of the plaintiff that they are in possession and enjoyment of the suit plot for many years is wrong. The School Children play in any open plot and that does not mean that such open spaces are meant for playground. Since there were no claims for the plots, which were marked as open plots, the father of the defendant in the year 1940 approached the Comunidade to allot the suit plot to him and somewhere in the year 1941, the same was allotted to the father of the defendant and since then, it was enjoyed by his father and thereafter, by the defendants. The father of the defendant suggested that the plot originally allotted to him should be kept for the mother and three brothers of the father of the defendant and the suit plot, which was subsequently allotted, should be enjoyed by the defendant and as such, the defendant is in possession and enjoyment of the suit plot continuously from the year 1961. Originally, the defendant's father as well as grandfather were allotted two plots namely plot bearing Survey No. 248/29 and 248/35. The said plot

bearing No. 248/35 was allotted to defendant's father and the same is in occupation of the defendant's mother and three brothers of the father of the defendant, whereas the other plot bearing Survey No. 248/29 allotted to defendant's grandfather is in possession of the defendant's uncle by name Francisco Fernandes. There was a cashew tree, a teak wood tree and wild trees in the suit plot which wild trees and the teak wood tree were cut by the defendant whereas the cashew tree perished and even coconut saplings were planted which also perished. The defendant started digging foundation on 24/04/1986. Shri Antonio Sebastiao D'Souza, the President of the said Association approached the defendant on 25th March, 1986 with a plan saying that the suit plot is shown as open plot and the defendant should pay to him Rs. 500/- and since the defendant failed to pay the said amount, he has been falsely implicated in the litigation.

6. Following issues were framed by the Trial Court:

"1. Whether the plaintiff proves that he is the owner in possession of the open plot surveyed under No. 248/34 which was allotted to it by the Administrator of Taluka of Canacona and after acquiring a portion of the property from the Comunidade of Nagorcem, Palolem and surveyed under No. 248 (part)?

2. Whether the plaintiff proves that the defendant played fraud on the plaintiff and survey Authorities thereby changing the survey records by deleting the name of his grand father Damaciano and inserting the name of his uncle Francisco and by inserting the name of his grandfather Damaciano in the open space surveyed under No. 248/34?

3. Whether the plaintiff proves that he is entitled for the reliefs claimed?

4. Whether the defendant proves that the Comunidade of Nagorcem, Palolem allotted to the defendant's father in the year, 1941, the suit plot surveyed under No. 248/34 and since then the suit plot was enjoyed by the defendants father and upon his death by the defendant?"

7. The plaintiff examined himself as PW1, Mr. Custodio D'Souza as PW2 and Mrs. Ana Dias as PW3, before the Trial Court. The defendant examined his wife namely Mrs. Luiza Barreto as DW1, Mr. Madhu Kankonkar as DW2 and Mrs. Maria Conceicao Fernandes as DW3.

8. Upon consideration of the entire material on record, the learned Trial Court held that the plaintiff proved that it is owner in possession of the open plot bearing Survey No. 248/34 which was allotted to it by the Administrator of Taluka of Canacona, after acquiring the portion of the property from the Comunidade of Nagorcem-Palolem surveyed under No. 248 (part). The Trial Court further held that the plaintiff proved that the defendant played fraud on it and on Survey Authorities thereby changing survey records by deleting the name of his grand father Damaciano from the plot allotted to the grand father and inserting the name of his uncle Francisco therein and by inserting the name of

his said grand father Damaciano in the survey record of open space/suit plot surveyed under No. 248/34. The defendant failed to prove that the Comunidade of Nagorcem-Palolem allotted to his father in the year 1941 the suit plot bearing Survey No. 248/34 and that since then, the same was enjoyed by his father and thereafter by the defendant. The issues No. 1 to 3 were answered in the affirmative and issued No. 4 was answered in the negative. The plaintiff was, therefore, held to be entitled to the reliefs claimed. The suit was decreed. The defendant, his servants, agents, relatives, etc. were permanently restrained from constructing in and/or interfering with the suit plot bearing Survey No. 248/34 in any manner. The Survey Authorities/Talathi of village Nagorcem-Palolem was directed to delete the name of Damaciano Fernandes from the index of Survey Record in Form No. I and XIV of Survey No. 248/34 of village Nagorcem-Palelem and to insert the name of the plaintiff in its place.

9. Aggrieved by the judgment, order and decree dated 26/03/2002 passed by the Trial Court, the defendant filed Regular Civil Appeal No. 84/2002. The learned First Appellate Court formulated the following points for determination:

"1. Whether the plaintiff have established the right over the suit plot?

2. Whether the suit for simpliciter injunction is tenable?

3. Whether the suit is barred by limitation?"

10. Upon consideration of the entire material on record, the First Appellate Court held that the notification/ordinance dated 21/06/1938 at Exhibit PW1/A clearly proves that the plot belonging to the Comunidade of Nagorcem-Palolem was acquired by the Government for the purpose of public utility i.e. shifting of the residents of Ward Delem into the said property and even the price of the said land was fixed. The First Appellate Court held that this fact was also admitted by the defendant in paragraph 4 of the written statement. The First Appellate Court further held that the suit plot bearing Survey No. 248/34 was kept as open plot for the benefit of all the allottees and specifically to the chapel which existed in the adjoining plot bearing Sub-division No. 37. He found that the plan at Exhibit PW1/C shows the suit plot as open plot. The First Appellate Court observed that Survey Records are not the documents of title, but they only show possession of a person in whose name the land is recorded, but the said presumption is rebuttable and the person who remains in possession has to show title of title over the said property along with the possessory right. According to the First Appellate Court, the presumption with regard to the correctness of the Survey entries in respect of the suit plot has been satisfactorily rebutted by documentary proof produced by the plaintiff. The plaintiff was held to have established the right over the said property and that the plaintiff was entitled for injunction simpliciter as prayed for. It has been held that the suit is not barred by law of limitation. The first two points have been answered in the affirmative and the point No. 3 has been answered in the negative. The appeal has, thus, been dismissed.

11. This Second Appeal, preferred against the said judgment and decree dated 07/08/2004 passed in Regular Civil Appeal No. 84/2002, has been admitted on the following substantial questions of law :

"(1) Whether on a true construction of the Notification dated 21.6.1938 the same is merely an intention to acquire the land mentioned therein and is not a document of implementation of acquisition?

(2) Whether the suit for permanent injunction was maintainable on the facts pleaded, without seeking any declaration of title?

(3) Whether the findings of the Court especially as to acquisition of the suit property by Government and allotment thereof to the Chapel or being kept as an open plot are based on no evidence and/or are perverse?"

12. Mr. Diniz, learned Counsel appearing on behalf of the defendant submitted that following additional substantial questions of law arise in this Second Appeal:

"1. Whether the suit seeking relief of correction of the survey record was maintainable and/or any relief could be granted by the Courts below in this regard, in view of the bar u/s 106 of the Goa Land Revenue Act?

2. Whether the suit for permanent injunction simpliciter could have been decreed without finding as to actual possession on the date of the suit or on a finding that the defendant (appellant) had not shown title to hold possession?"

13. Mr. Diniz, learned Counsel appearing on behalf of the defendant, invited my attention to the extract of the Ordinance which is at Exhibit PW1/A-Colly and pointed out that in this notification, neither the plot number nor the area of the plot has been described to identify various plots including the suit plot. He further submitted that this notification only shows the intention to acquire the land and there is nothing on record to prove the completion of acquisition. He pointed out that the promulgated Survey Records admittedly show the name of the defendant, against the suit plot. He further submitted that the plan Exhibit PW1/C is a private plan of allotment, which is not proved. He pointed out that what is produced on record is mere copy of that plan. He submitted that admittedly the suit plot belonged to Comunidade and since the plan(Exhibit PW1/C) was not an allotment plan prepared by the Government, the plaintiff had to prove the allotment of plots as shown in the same. He submitted that since title of the plaintiff was in dispute, suit for permanent injunction simpliciter would not lie and the plaintiff had to seek declaration of title. Learned Counsel further urged that even otherwise, in the suit for permanent injunction simpliciter, the plaintiff had necessarily to prove actual possession which has not been proved. He relied upon the judgment of the Hon'ble Supreme Court in the case of Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others, and contended that the plaintiff had to prove possession as on the date of the suit and since it is proved that the defendant's name appears in the promulgated survey record and he had already constructed the house, the plaintiff could not be said to have

proved its possession. He pointed out that the said notification at Exhibit PW1/A-Colly itself says that the same should be followed in terms of the law. The learned Counsel urged that there cannot be an admission by party in respect of acquisition as the acquisition has to be done by a document. He submitted that in view of Section 106 of the Land Revenue Code, the Trial Court could not have granted the relief of directing the Survey Authorities to correct the Survey Records. He, therefore, urged that the Second Appeal be allowed and the impugned judgment be quashed and set aside.

14. On the other hand, Mr. Coutinho, learned Counsel appearing on behalf of the plaintiff, submitted that the Trial Court by judgment dated 26/03/2002 held that the suit plot was allotted to the plaintiff by the Administrator of Taluka of Canacona after acquiring a portion of the property from the Comunidade of Nagorcem-Palolem and surveyed under No. 248(part). He pointed out that the defendant had not challenged the decree passed by the Trial Court on the said question which is now framed as substantial question of law at serial No. 1. He pointed out from the Memo of Appeal filed before the District Judge that no ground that the land was not acquired by the Government was taken up in the First Appeal and even no arguments were advanced on that ground. He pointed out that the defendant had filed written arguments and the issue whether the land was acquired by the Government was not a ground of appeal. He further submitted that after filing the written statement, the case that the property was not acquired by the Government was not put to the witnesses of the plaintiff and on the contrary, DW1 has admitted acquisition by the Government. He, therefore, urged that the substantial question of law at serial No. 1 does not arise. He further pointed out that the Trial Court had framed the issue of ownership as well as of possession of the plaintiff by way of issue No. 1, whereas the ownership of the defendant was also in issue as per issue No. 4. He further pointed out that the First Appellate Court had framed the point over the entitlement of the defendant. According to him, therefore, there was complete adjudication on the question of ownership and possession. He, therefore, submitted that the judgment of the Hon'ble Supreme Court in the case of Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others, does not apply to the present case. According to him, therefore, the substantial question of law at serial No. 2 also does not arise. The learned Counsel submitted that the notification of the year 1938, the extract of which is at Exhibit PW1/A-Colly shows that there was a clear declaration to acquire the property and the plaintiff had led evidence on the completion of acquisition proceedings, whereas no evidence was led by the defendant over the plea that the plot was given to him by the Comunidade. He pointed out that there was no challenge to the evidence led by the plaintiff and its witnesses to the effect that the property was acquired by the Government. Learned Counsel submitted that the defendant was 49 years old in the year 2001 when the evidence was recorded, but he did not enter the witness box and thus, avoided the cross-examination, due to which, adverse inference drawn by the Trial Court and by the First Appellate Court was correct.

He pointed out that DW1 admitted acquisition of the land by the Government. According to him, DW1 destroyed the case set up by the defendant and confirmed the case of the plaintiff. Learned Counsel then submitted that the plan at Exhibit PW1/C has been exhibited after the order passed by the Court and PW1 was extensively cross-examined on the said document and DW1 has also been questioned on the same. He submitted that challenge to the order permitting admission of the said plan at Exhibit PW1/C was not a ground of appeal before the First Appellate Court and hence, the objection cannot be raised in Second Appeal. Learned Counsel appearing on behalf of the plaintiff submitted that the Trial Court found the plaintiff to be in possession of the suit plot and the First Appellate Court held that the entry in Survey Record has been rebutted. He, therefore, contended that the question of plaintiff not being in possession would not arise. He urged that all the points raised in this Second Appeal have been answered by the Courts below based on appreciation of the evidence and hence, none of the substantial questions of law as claimed by the defendant arise in this Second Appeal. He, therefore, prayed that the Second Appeal be dismissed.

15. Learned Counsel appearing on behalf of the plaintiff relied upon the following judgments :

- (i) Mr. Guy Vigney Athanasius D'Melo Married Vs. The Government of Goa Daman and Diu and Others,
- (ii) A.E.G. Carapiet Vs. A.Y. Derderian,
- (iii) Vidhyadhar Vs. Manikrao and Another,
- (iv) R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another,
- (v) Hemendra Rasiklal Ghia Vs. Subodh Mody,

16. I have gone through the material on record. I have considered the submissions advanced by the learned Counsel for the parties and the judgments relied upon by them.

17. PW1, Mr. Antonio S. Souza produced the copy of the Government Official Gazette No. 49 dated 21st June, 1938 along with the translation of extract of the Notification at No. 3.188, as Exhibit PW1/A-colly, which reveals that the ward Delem of Canacona was very strongly affected by malaria. It further reveals that the application of the inhabitants of the said ward, requesting that a plot, selected in accordance with the respective authority, situated at the plateau of Delem, belonging to the Comunidade of Nagorcem-Palolem, mentioned in the respective plan and map of acquisition, and valued at Rs. 318.08/-, be acquired for transfer to the said inhabitants, was considered. The notification further shows that the in-charge of the Government of the State of India, officiating with powers which were conferred upon him u/s 31 of the Colonial Act and u/s 21 of Section 33 of "Carta Organica", of the Portuguese Colonial Empire, determined as follows:-- "It is declared that the acquisition of the mentioned plot is of public

utility and pressing, and it should be followed in terms of the law". Thus, it is clear from the above that there was a declaration published in the Government Gazette that the acquisition of the plot situated at the plateau of Delem belonging to the comunidade of Nagorcem-Palolem, for Rs. 318.08/- was for public purpose and was utmost necessary. There is on record the oral evidence of PW1, Mr. Antonio S. Souza in respect of the said acquisition. He, inter alia, deposed that the Government paid Rs. 318/- as compensation for the said acquisition. This fact of payment of compensation towards acquisition has not been denied by the defendant. There is not even a suggestion to PW1 and other witnesses of the plaintiff to the effect that the property was not acquired by the Government. In paragraph 4 of the written statement, the defendant himself has averred that the property was divided into plots after obtaining sanction from the then Governor in 1938. DW1, Mrs. Luiza Barreto, wife of the defendant, has admitted in her cross-examination that prior to the allotment of the said plot, they were residing at Delem and that their people, on that occasion, had applied to the Government to give them some place somewhere as Delem was affected with malaria. She initially stated that she does not know whether the Government acquired plot belonging to the comunidade of Nagorcem-Palolem and that the said plot was divided into small plots. However, She admitted that in the said plots, the internal roads were constructed by the Government. DW1 has further deposed as under:--

"I admit that the Governor General, in the said notification, has fixed the price for the said plot of the comunidade of Nagorcem-Palolem acquired by the Government for distribution, at Rs. 318/-. I say that in the said Gazette, it is not mentioned that the Govt, paid Rs. 318/- but it is mentioned that it was valued at Rs. 318/-. I do not know who paid the said amount of Rs. 318/-. I am not in a position to deny that the said amount of Rs. 318 was paid by the government."

Subsequently, DW1 specifically admitted that the Government acquired a plot from the comunidade of Nagorcem-Palolem to be given to the residents of Delem. She stated that all those persons from Delem who applied for plots and were allotted places at Mastimol by the Government were Catholics and that the said plots start from 248/6 and end with 148/40. She stated that all the plots were allotted by the Government, free of cost. The suit plot is amongst the above survey holdings, being surveyed under No. 248/34.

18. Though in the judgment and order dated 26/03/2002, the learned Trial Court specifically held that the Government had acquired the portion of the property bearing Survey No. 248(part) from the Comunidade of Nagorcem-Palolem, however, in the Regular Civil Appeal No. 84/2002, filed by the defendant, the defendant did not challenge the said finding at all. In the Memo of Appeal, the defendant did not take up the said ground which is now being framed as substantial question of law at serial No. 1, to challenge the judgment and decree of the Trial Court. From the judgment of the First Appellate Court, it can be understood that no arguments were advanced on such ground. The defendant

had filed written arguments before the Court and the issue whether the land was acquired by the Government, was not at all taken up in those written arguments. For the first time in this Second Appeal, the defendant has contended that on a true construction of the Notification dated 21/06/1938, merely an intention to acquire the land is revealed and the said Notification is not a document of actual acquisition. But the defendant has miserably failed to prove the same. There was ample evidence on record for the Courts below to render the finding that the suit property bearing survey Nos. 248/6 to 248/40 (which included the suit plot) was acquired by the Government. The said finding based on the Notification dated 21/06/1938 at Exhibit PW1/A-colly and oral evidence on record, cannot at all be termed as perverse.

19. The deposition of PW1 reveals that after acquisition of the property by the Government, the plaintiff-Chapel was allotted two plots out of which one open plot is opposite to the chapel and the second is the one containing a well built by the Government. PW1 deposed that all the plots were demarcated and provided with access roads and that the Administrator of the Taluka had drawn the plan. He deposed that all 35 plots are surveyed from survey Nos. 248/6 to 248/40 and that the plot of chapel is surveyed under No. 248/37 and the open plot in front of the chapel is surveyed under No. 248/34. He deposed that in the year 1971, there was a meeting and resolution was passed regarding the preparation of plan and collection of Rs. 50/- from each member. PW1 produced the copy of the original resolution along with translation as Exhibit PW1/B-colly. According to PW1, pursuant to the said resolution each member paid Rs. 50/-for each plot and made endorsement on the reverse of the said resolution. PW1 produced the plan of the plots as Exhibit PW1/C. DW1 admitted that the plots which are marked with remark "C", were given in the year 1938. She admitted that there is no remark "C" on the plot claimed by them. She admitted that the plot claimed by them is the one in front of the chapel. PW1 admitted that on the plot wherein there is well, there is no remark "C". She admitted that the said well was kept for the occupants of the plots. She admitted that on the plot claimed by them, which is in front of the chapel, the words "open" are written. She admitted that in case of other plots which are allotted to persons, their names are mentioned in the said plots. This plan shows the suit plot as an open plot. It can be certainly said to have been established from the evidence on record that the said plot in front of the chapel was purposely kept open for the use of the the chapel. The testimony of PW1 has been duly corroborated by PW2 and PW3. The testimonies of PW1, PW2 and PW3 are not shaken in the cross-examination.

20. Insofar as the said plan is concerned, the same was exhibited after the order passed by the Trial Court thereby rejecting the objections of the defendant. It is seen that PW1 was extensively cross-examined on the said plan and DW1 has also been questioned on the same. It is pertinent to note that the order permitting the exhibition of the said plan at exhibit PW1/C was not challenged by taking such objection as one of the grounds in the Memo of Appeal before the First Appellate Court. Therefore, the issue cannot be raised now in the Second

Appeal.

21. This Court in the case of "Guy Vigney Athanasius D'Melo" (supra), has referred to the judgment of the Supreme Court in the case of R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, wherein the Apex Court has explained the rule of fair play. The Supreme Court has held that where the objection does not dispute the admissibility of the document in evidence, but is attracted towards the mode of proof alleging the same to be irregular or insufficient, the objection should be taken when the evidence is tendered and when document has been admitted in evidence and marked as an exhibit. The objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular, cannot be allowed to be raised at any stage subsequent to marking of the document as an Exhibit. Hence, the objection that Exhibit PW1/C is a copy and not the original plan has no substance.

22. In the case of Hemendra Rasiklal Ghia Vs. Subodh Mody, the Full Bench of this Court has dealt with the point as to when the question of admissibility of document can be raised. Inter alia, it has been observed that if the objection to the proof of document is not decided and the document is taken on record giving tentative exhibit, then the right of cross-examination is seriously prejudiced. It is held that once the document is used in cross-examination, then the document gets proved and can be read in evidence as held in the case of Ram Janki Devi and Another Vs. Juggilal Kamapat, In the present case the plan Exhibit PW1/C was taken on record after deciding the objections by a judicial order and besides that the same was extensively used in the cross-examination. Hence, the said plan which was signed by most of the allottees has been rightly relied upon by the lower courts.

23. DW1 admitted that she had no document showing her title to the suit plot and that the defendant had not obtained any licence for construction of structure in the suit plot. It is not known as to why the defendant, who was only 49 years old in the year 2001 when the evidence was recorded, did not enter the witness box. Adverse inference as drawn by the Trial Court and the First Appellate Court appears to be absolutely correct. In the case of Vidhyadhar Vs. Manikrao and Another, the Apex Court has held that where a party to the suit does not appear into the witness box and state his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. Merely because the Form No. I XIV of survey No. 248/34 shows the name of one "Domaciano Fernandes" as the occupant, that does not mean that the said suit plot was allotted to the defendant. It is well settled that survey records do not confer title. A perusal of the entire evidence on record shows that there was manipulation of survey records. As has been rightly held by the First Appellate Court, the presumption u/s 105 of the Land revenue Code has been rebutted. The possession of the plaintiff, in respect of the suit plot is established. The defendant, unauthorizedly, interfered with the

possession of the plaintiff by starting some construction activity in the suit plot. Hence, the judgment in the case of Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LR.s. and Others, is not applicable to the present case. Suit for permanent injunction was maintainable.

24. Insofar as the relief directing the survey authorities of Village Nagorcem-Palolem to delete the name of Damaciano Fernandes from the Index of survey record in Form Nos. I & XIV of survey No. 248/34 of Village Nagorcem-Palolem and to insert the name of the plaintiff in its place, is concerned, it is well settled that such a direction cannot be given by the Civil Court in view of express bar u/s 106 of the Land Revenue Code, 1968, (the Code, for short) which provides that no suit shall be against the Government or any officer of the Government in respect of a claim to have an entry made in any record or register as maintained under this Chapter or to have any such entry omitted or amended. Such function is assigned to revenue authorities under the Code. In the case of Narayan Mugu Teli, Since deceased through heirs and legal representative (Smt. Bhagirathibai Narayan Rahate, Shri Vasant N. Rahate, Shri Sakharam N. Rahate, Shri Sakharam N. Rahate, Shri Anant N. Rahate, Shri Chandrakant N. Rahate, Smt. Vaishali Yeshwant Rahate, Smt. Indira Dhondur Salunke and Smt. Bhagyashri Prakash Ikade) Vs. Ramchandra Mugu Teli and Others it has been held that it is neither the function of Civil Court to issue direction for making or deleting entries in the record of rights and that this function is assigned to the revenue authorities under the Maharashtra Land Revenue Code. It is further observed that the proper relief which could be prayed for was declaration of the title to suit land and once such a declaration is obtained from the Court, the revenue authority will have to make or correct the entries accordingly in the record of rights in respect of the suit land. The provisions of the Code are almost similar to the Maharashtra Land Revenue Code. In the case of AIR 2006 241 (Bom.) this Court relied upon the judgment in the case of "Narayan Mugu Teli" (supra) and held that the Appellate Court could not have directed insertion of the names of the plaintiffs in the survey records. Again in the case of Narendra Voikunt Raikar Vs. Amaral Pereira, a similar view has been taken. The Land Revenue Code provides for the procedure for correction of the land records. Therefore, the trial Court could not have directed the Survey Authorities/Talathi to delete the name of "Damaciano Fernandes" and insert the name of the plaintiff in the index in Form Nos. I and XIV of Survey No. 248/34.

25. In view of the above, the substantial questions of law as already framed and incorporated in paragraph 12 at serial Nos. (1), (2) and (3) and the additional substantial question of law raised by the learned Counsel for the defendant and incorporated at serial No. 2 in paragraph 13 above get answered against the defendant. The substantive question of law raised by the learned Counsel for the defendant and incorporated at serial No. (1) in paragraph 13 above, however is answered in favour of the defendant.

26. The second appeal, is, therefore, partly allowed. Impugned Judgment, Order

and Decree dated 07/08/2004, in Regular Civil Appeal No. 84/2002 stands modified as follows: Judgment, Order and Decree passed by the Civil Judge Junior Division, Canacona, in Regular Civil Suit No. 106/1988 (N) : Regular Civil Suit No. 142/1986 (O), thereby granting relief of Permanent Injunction restraining the defendant, his servants, agents, relatives or any other person or persons from constructing in or interfering with the suit plot bearing survey No. 248/34 is maintained whereas the order directing the survey authorities/Talathi of Village Nagorcem-Palolem to delete the name of Damaciano Fernandes from the Index of Survey record, in Form Nos. I & XIV of survey No. 248/34 of Village Nagorcem-Palolem and to insert the name of the plaintiff in its place is quashed and set aside. Appeal stands disposed of accordingly, with no order as to costs.