

**(2014) 06 BOM CK 0218**  
**In the Bombay High Court**  
**Case No : Second Appeal No. 113 of 2004**

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|------------------------------------|----|------------|
| Domingos Jose Rodrigues and Others | Vs | APPELLANT  |
| Constancio Braganza and Others     |    | RESPONDENT |

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**Date of Decision :** 16-06-2014

**Acts Referred:**

**Citation :** (2015) 4 ABR 623 : (2015) 3 ALLMR 657

**Hon'ble Judges :** F.M. Reis, J.

**Bench :** Single Bench

**Advocate :** Valmiki Menezes, Advocate, for the Appellant; Shivan Desai, for the Respondent

**Final Decision :** Partly Allowed

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## Judgement

F.M. Reis, J.? Heard Mr. V. Menezes, learned counsel appearing for the appellants and Mr. Shivan Desai, learned counsel appearing for the respondents. The above appeal came to be admitted on the following substantial questions of law by order dated 17.08.2005.

"A. Having dismissed the respondents counter claim challenging the Sale Deeds dated 02.01.1975 and 06.12.1975 at Exhibits PW/A and PW/F of the appellants, whether the Appellate Court's decree dismissing the appellants prayer for declaration and ownership was legal and justified?

B. In the absence of any other ground challenging the jurisdiction of the Civil Court to decide on the legality of the mutation order in favour of the respondents, is the Appellate Court's finding that the challenge to the revenue records was only possible by way of an appeal under Land Revenue Code was justified?"

2. Upon hearing the learned counsel appearing for the respective parties by consent the following substantial question of law has been framed in substitution to the aforesaid substantial questions of law.

"Whether the Lower Appellate Court was right to come to the conclusion that the appellants were not entitled to file a suit for declaration and other consequential relief without challenging the order of mutation in favour of the respondents herein in respect of the property surveyed under No. 120/1 of Candolim Village."

3. Mr. V. Menezes, learned counsel appearing for the appellants in support of the aforesaid substantial question of law has taken me through the judgment of the learned Lower Appellate Court and pointed out that though the suit filed by the appellants was for declaration of title and for consequential relief on the basis of the sale deed executed in the year 1975, the appellants have been non suited in the suit merely on the ground that the mutation order passed by the Revenue Authority in favour of the respondent No. 1 was not challenged by the appellants under the provisions of the Land Revenue Code. The learned counsel further pointed out that the appellants have brought evidence on record to establish that the property surveyed under No. 120/1 corresponds to the property which has been purchased pursuant to the sale deed dated 02.01.1975 at Exhibit PW/A. The learned counsel further pointed out that the learned Trial Court has decreed the suit filed by the appellants and dismissed the counter claim filed by the respondents herein. The learned counsel further submitted that the counter claim was essentially on the ground that on the basis of the sale deed in favour of the respondents, the property surveyed under No. 120/1 was owned and possessed by the respondents. The learned counsel further pointed out that considering that the counter claim is rejected, the findings of the learned Judge that the appellants have failed to establish their title and ownership in respect of the suit property would not survive. The learned counsel further pointed out that it is well settled that mutation entry do not create or defeat the title of the parties and consequently, it was incumbent upon the learned Trial Court to independently consider whether the appellants have established their claim vis-a-vis the case of the respondents. The learned counsel further pointed out that the respondents have based their claim on the basis of sale deed executed by the testator who according to the appellants has no right to the property. The learned counsel further pointed out that the survey records also stand in the name of the appellants together with the respondents herein and as the claim of the respondents was on the basis of the sale deed which has been discarded in the counter claim, the learned Lower Appellate Court was not justified to set aside the judgment of the Trial Court and dismiss the suit filed by the appellants. The learned counsel thereafter has taken me through the judgment of the learned Lower Appellate Court and pointed out that the learned Lower Appellate Court while considering the counter claim filed by the respondents has come to the conclusion that the relief in the counter claim is barred by limitation. The learned counsel as such points out that the learned Lower Appellate Court was not justified to pass the impugned judgment and consequently the above substantial question of law be answered in favour of the appellants.

4. On the other hand, Mr. Shivan Desai, learned counsel appearing for the respondents has pointed out that the appellants have failed to establish the

nexus between the said sale deed at Exhibit PW/A and the disputed property surveyed under No. 120/1. The learned counsel further pointed out that as the boundaries of the sale deed have not been co-related with the property surveyed under No. 120/1 the learned Lower Appellate Court was justified to come to the conclusion that the appellants have failed to establish their claim in the suit. The learned counsel further pointed out that while rejecting the claim of the appellants, the learned Lower Appellate Court has taken a view that the presumption on the basis of the survey records would flow in favour of the appellants and the respondents as they were the co-holders of the property. The learned counsel further pointed out that this presumption has influenced the learned Lower Appellate Court while examining the counter claim filed by the respondents and as such merely because the relief sought by the respondents in the counter claim is barred by limitation by no stretch of imagination can such dismissal of the counter claim in any way in her any benefit on merits to the appellants herein. The learned counsel further pointed out that it is well settled that limitation does not defeat or create right/title and as such even assuming the claim of the respondents to set aside the sale deed is barred by limitation it does not prevent the respondents from raising all such contentions as defence to the suit filed by the appellants. The learned counsel further pointed out that as the nexus between the said sale deed and the property surveyed under No. 120/1 has not been established by the appellants, the question of any interference in the impugned judgment by this Court in the present Second Appeal would not arise.

5. I have considered the submissions of the learned counsel and I have also gone through the records. The learned Trial Court while examining the evidence on record and the material produced by the parties has come to the conclusion that the appellants were entitled for the relief sought in the suit. The counter claim filed by the respondents was also rejected. The learned Lower Appellate Court while examining the correctness of the findings of the learned Trial Court has taken a view that an order of mutation in favour of the respondents has not been challenged by the appellants in proper proceedings under the Land Revenue Code and it was not open to the appellants to file a suit for declaration of title and consequential relief. I am afraid that the said findings of the learned Lower Appellate Court cannot be sustained in law. An order of mutation does not create or defeat title and it is always open to the Civil Court to independently consider whether a party who approaches the Court has established his title over the suit property. On this short ground alone without going into the remaining aspect of the rival contentions, the impugned judgment passed by the learned Lower Appellate Court cannot be sustained.

6. Be that as it may, Mr. V. Menezes, learned counsel appearing for the appellants has pointed out that as the respondents have not challenged the findings as far as the counter claim is concerned, the question of interfering in such findings would not arise. On perusal of the judgment of the learned Lower Appellate Court, I find that the learned Lower Appellate Court has not dismissed the claim

of the respondents in the counter claim on merits of the claim. But however, only on the ground that the relief was barred by limitation. In fact, on perusal of the findings of the learned Lower Appellate Court on that count, the learned Lower Appellate Court has taken note of the fact that the sale deed was registered in the year 1975 and the counter claim was filed on 03.04.97 and as such is hopelessly barred by limitation. It is well settled that limitation bars the remedy and not a right. Though a period of limitation prescribed in the Limitation Act precludes the plaintiff from bringing a suit which is barred by limitation there is no such limitation so far as any defence is concerned. In the present case, as such even assuming the counter claim disputing the sale deed was held to be barred by limitation, it would not prevent the respondents to raise the defence disputing the validity of such document. In any event, the finding of the learned Judge that the cause of action to challenge the sale deed would arise from the date of its registration prima facie does not appear to be correct as it is the contention of the respondents that they learnt about the disputed sale deed when the appellants tried to interfere in the suit property on the basis of such document. The veracity of the said statement and the effect thereof have not been examined by the learned Judge while holding that the counter claim was barred by limitation.

7. Be that as it may, considering the view I propose to take in the above Second Appeal, this aspect will have to be re-examined by the learned Lower Appellate Court on its own merits in accordance with law. The learned Judge has also been influenced on the findings arrived at while deciding the first point for determination in the impugned order while dismissing the counter claim. It cannot be disputed that the findings can be challenged by the respondents even without filing the counter claim. The Apex Court in the judgment reported in *Hardevinder Singh Vs. Paramjit Singh and Others*, has observed at para 21 thus :

"21. After the 1976 amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. In *Banarsi v. Ram Phal*, it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes

against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post- amendment, read in the light of the Explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended Code."

In such circumstances, it would be appropriate to direct the learned Lower Appellate Court to decide the appeal preferred by the respondents afresh after hearing the parties in accordance with law.

8. Considering the view taken by me while deciding the said substantial question of law, in the interest of justice, I find it appropriate to quash and set aside the impugned judgment passed by the learned Lower Appellate Court dated 25.06.2004 and remand the matter to the learned Lower Appellate Court to decide the appeal afresh on its own merits in accordance with law. In view of the above, I pass the following:

ORDER

"(i) The appeal is partly allowed.

(ii) The impugned judgment dated 25.06.2004 passed by the learned Lower Appellate Court is quashed and set aside.

(iii) Regular Civil Appeal No. 10/2003 is restored to the file of the learned Lower Appellate Court.

(iv) The learned Lower Appellate Court is directed to decide an appeal afresh on its own merits after hearing the parties in accordance with law.

(v) All contentions of the parties on merits are left open.

(vi) The parties are directed to appear before the learned Lower Appellate Court on 25.09.2014 at 10.00 a.m.

(vii) The appeal stands disposed of accordingly."