

(1991) 04 BOM CK 0060

In the Bombay High Court

Case No : Second Civil Appeal No's. 27 and 31 of 1988

Narayan Hari Naik

APPELLANT

Vs

Inacio Martins, since deceased, through his legal
representatives and Others

RESPONDENT

Date of Decision : 05-04-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 100, 11
Goa, Daman and Diu Agricultural Tenancy Act, 1964 — Section 58, 7

Citation : (1991) 3 BomCR 276

Hon'ble Judges : E.S. Da Silva, J

Bench : Single Bench

Advocate : S.D. Lotlikar, in S.C.A. Nos. 27 and 31 of 1988, for the Appellant;
M.S. Usgaonkar and R.M.S. Khandeparkar, for legal representative of the
respondent No. 1 in S.C.A. Nos. 27 and 31 of 1988 and S.K. Kakodkar and R.V.
Kamat, for the respondent No. 2 in S.C.A. Nos. 27 and 31 of 1988, for the
Respondent

Final Decision : Allowed

Judgement

E.S. Da Silva, J.—These two appeals directed against the same judgement and decree of the first Appellate Court of the District and Sessions Judge, Panaji, can be conveniently disposed of by a common judgment since both involve fundamentally similar substantial questions of law.

2. The respondent No. 1 in both the Appeals, the late Inacio Martins (hereinafter called the late plaintiff), had instituted a Special Civil Suit No. 114/74/A in the Court of the Civil Judge, Senior Division, Panaji, against the two appellants, namely, one Narayan Hari Naik, the appellant in Second Civil Appeal No. 27 of 1988 (hereinafter called the defendant No. 1) and one Nayantara Agrawal, the appellant in Second Civil Appeal No. 31 of 1988 (hereinafter called the defendant No. 2), seeking for eviction of the defendant No. 1 from the suit property known as "Palmar Oiteiral do Predio Aivao" situated at Caranzalem, belonging to the defendant No. 2 as well as for restoration of its possession to him.

3. The relevant facts of the case are that this property which is a coconut grove was consisting of 7 lots. In October, 1968, the late plaintiff filed a suit against the two defendants, being Suit No. 157/1968, in the Court of the Civil Judge, Senior Division, at Panaji, for declaration and permanent injunction, praying for a declaration that an agreement dated 1-1-1968 allegedly entered into between the defendant No. 1 and the defendant No. 2 in respect of the suit property was shame, bogus and inoperative in law and consequently that both the defendants be restrained by a permanent injunction from causing him any kind of interference in the suit property. It was his case in the said suit that he was a lessee of 2 out of the 7 lots of the suit property upto 1963 and that thereafter, the remaining 5 lots were also given on lease to him by the defendant No. 2 on an yearly rent of Rs. 3,600/- payable in 3 instalments, being all instalments payable in advance. The plaintiff paid all the money regularly upto December, 1967. A criminal case bearing No. 106 of 1968 was filed against him by the defendant No. 2 based on the agreement entered into by her with the defendant No. 1,, namely, the agreement dated 1-1-1968 by virtue of which it was alleged that the defendant No. 1 became lessee of the said defendant No. 2. It was further stated by the late plaintiff in his plaint that he was not removed from the suit property by any legal process by the defendant No. 2 and that relying in the said agreement dated 1-1-1968 the defendant No. 1 entered into the entire suit property on or about the end of second week of June, 1968 to the greatest prejudice of the plaintiff. It was also stated that the cause of action arose on or about 15-6-1968 when to the greatest prejudice and contrary to law for the time being in force, the defendant No. 1 entered the suit property, forcibly attempted to evict the plaintiff and got seized the coconuts plucked by him. On the aforesaid averments the plaintiff sought a relief of declaration and injunction against the defendant No. 1. The defendant No. 1 contested the suit and it was his case that the plaintiff was the lessee of only 2 out of the 7 lots of the suit property till the year 1964 by virtue of the auction held in 1956 for a specific period of 9 years; that on the expiry of the lease period, leases of the lessees including that of the plaintiff were duly terminated and the defendant No. 1 was put in possession of the entire suit property consisting of 7 lots in 1965 under the lease agreement which was initially for a period of 1 year, subsequently extended for a further period of 2 years, namely, 1966 and 1967, and again further renewed for the years 1968 and 1969. It was further his case that the amount of stipulated rent was sometimes paid by him directly to the employee of the defendant No. 2 Datta B.S. Quencre and sometimes through the late plaintiff who was then his watchman. It was also his case that the late plaintiff had never been in possession and enjoyment of the suit property or any part thereof after 1964.

4. Issues were framed in the said suit and one of them, the issue No. 6, was treated as a preliminary issue. However, in the said suit, the learned trial Judge having come to the conclusion while trying the preliminary issue that the plaintiff was not in possession of the suit property either on the date of the filing of the

suit or even for many months prior to the filing of the suit, held that a suit for declaration and permanent injunction was not maintainable and was therefore, liable to be dismissed. Accordingly by his order dated 28-3-1974 the learned Judge dismissed the suit of the plaintiff. Thereupon on 6-5-1974 the late plaintiff filed a fresh suit against both the defendants. In this new suit the case of the plaintiff was that he was in possession and enjoyment of the suit property upto June, 1968 at which time he was forcibly dispossessed by the defendant No. 1 in the second week of June, 1968; that his lease was not legally terminated and as such he was not entitled to continue in possession of the suit property and therefore he was also entitled to restoration of possession of the same. As far as the cause of action it was stated by him that it arose in June, 1968 and also in March, 1974 when the judgment and order in the Suit No. 157/1968 was pronounced. This suit was also opposed by the defendants who contended that the same was barred by the principle of res judicata in view of the dismissal of the previous suit filed by him being Civil Suit No. 157/1968 in respect of the same subject-matter. It was further alleged by them that the suit was also barred by the provisions of Order II, Rule 2 of the Civil Procedure Code. The case of the defendant No. 1 was that he was the lessee in respect of the suit property since the year 1965 and that the plaintiff was not in possession of the said property any time after 1964 although he was the lessee of only 2 lots prior to that and that lease had been already duly terminated.

5. It was the dismissal of this suit by judgment of the learned Civil Judge, Senior Division, Panaji, dated 25/9/1985 which gave rise to the First Appeal being Regular Civil Appeal No. 82 of 1985, before the learned District and Sessions Judge, Panaji, who by his impugned judgment dated 25-3-1988 affirmed the earlier judgment of the Civil Judge and rejected the appeal of the late plaintiff Inacio.

6. Before referring to the identical challenges raised by Shri Kakodkar and Shri Lotlikar, learned Counsel appearing for the appellants in Second Civil Appeals Nos. 31 of 1988 and 27 of 1988, respectively, I will first deal with a preliminary submission of Shri Usgaonkar, the learned Counsel for the legal representatives of the original respondent No. 1 in the two aforesaid appeals, before the High Court and to the extent whereof it is permissible for the High Court to interfere with the findings of fact recorded by the trial Court as well as by the first Appellate Court.

7. It has been vehemently urged by Shri Usgaonkar in this regard that the plea of a wrong appreciation of evidence by the Courts below is not at all available to the appellants in a second appeal and as such if the concurrent findings of these Courts remained untouchable there was no scope for the appellants to challenge the impugned decree on any of the grounds sought to be made out by them, namely, on the fact that in view of the nature of the lease agreement pleaded, the plaintiff could not be said as having established a title to the suit property without proving the existence of a written lease, Shri, Usgaonkar, submitted that

the plaintiff's failure in proving this written lease was not even raised by the appellants either in the trial Court or before the first Appellate Court. Further, the reliance placed by Shri Lotlikar in Article 1662 of the Portuguese Supreme Court of Justice dated 27-8-1933 which has ruled that the leases for a period of more than 1 year and not exceeding a period of 4 years are subject to registration only when the actual amount of the advance rent paid by the lessee exceeds the sum of the rent payable to the lessor for the entire 1 year. Shri Usgaonkar, contended that the reference contained in the receipt dated 13-12-1967 purportedly issued by D.B. Quencre, to the plaintiff in respect of advance rent of Rs. 1200/- paid by him was relating to the third instalment of the rent payable and obviously not to the totality of the rent due for the whole year of 1967. Similarly, in para 4 of the plaint the plaintiff had stated that he had paid Rs. 1200/- on 13-12-1967 to the said Quencre merely as advance rent for the part of the year starting from 1-1-1968. Therefore, Shri Usgaonkar, argued, once the evidence on record was totally ruling out any payment of advance rent of the purported lease in the sum exceeding the rent payable towards one whole year, the question of registration of such lease and its reducing in writing could not even arise at all. Shri Usgaonkar, relied also in a judgment of the erstwhile Tribunal de Relacao de Goa, dated 30-1-1952 in Appeal Proceedings No. 291, Pedro Correia Afonso v. Cactano Fernandes, reported in *Acordaos da Relacao de Goa*, 1952, Vol. II., page 11, wherein it was held that although Article 99 of the Decree No. 36020 dated 7-12-1946 was prescribing a written instrument in case of leases of rustic properties, however, since in practice this requirement was never applied in the State of Portuguese India, the same was dispensed as far as this State is concerned by Article 14 of the Decree No. 37125 dated 30-10-1948 and since then the proof of such lease became permissible by any means or type of evidence.

8. It thus follows that consequent upon these submissions of Shri Usgaonkar and also because Shri Lotlikar, has fairly conceded the points made out by Shri Usgaonkar, the question of the existence of any instrument in writing, namely of a written lease in favour of the plaintiff, is to be looked into in a totally different perspective and therefore, the real issue directly concerning the substantial question of law raised by the appellants regarding this specific aspect appears to be narrowed down to the question of determining whether the evidence on record, particularly the one relied by the Courts below, did justify in law the finding rendered by both these Courts that the plaintiff was the tenant of the suit property since 1964-65, apparently based, in the absence of any written lease on a loan receipt dated 13-12-1967 issued to him by Quencre without even considering the explanation given by the same Quencre about this receipt and without also bearing in mind that the plaintiff was not able to produce any other similar receipt of payment of rents for the period between 1965 and 1967.

9. In this respect Shri Usgaonkar, has heavily relied on a decision of the Supreme Court in *R. Ramachandran Ayyar Vs. Ramalingam Chettiar*, which was delivered under the old section 100 of the CPC and prior to its amendment in 1977. The

Supreme Court observed in that case while interpreting the scope of the ground for interference in a second Appeal provided by the said unamended section 100 that the substantial error or defect in procedure to which clause (c) of section 100(1) referred is, as the clause clearly and unambiguously indicates, an error or defect connected with or relating to the procedure, it is not an error or defect in the appreciation of evidence adduced by the parties on the merits. That is why, even if the appreciation of the evidence made by the lower Appellate Court is patently erroneous and a finding of fact recorded in consequence is grossly erroneous that cannot be said to introduce a substantial error or defect in the procedure. On the other hand, if in dealing with a question of fact, the lower Appellate Court has placed the onus on a wrong party and its finding of fact is the result, substantially, of this wrong approach, that may be recorded as a defect in procedure, if in dealing with questions of fact, the lower Appellate Court discards evidence on the ground that it is inadmissible and the High Court is satisfied that the evidence was admissible, that may introduce an error or defect in procedure. If the lower Appellate Court fails to consider an issue which has been tried and found upon by the trial Court and proceeds to reverse the trial Court's decision without consideration of such an issue, that may be regarded as an error or defect in procedure; if the lower Appellate Court allows a new point of fact to be raised for the first time before it, or permits a party to adopt a new plea of fact or makes out a new case for a party, that may, in some cases, be said to amount to a defect or error in procedure. But the High Court cannot interfere with the conclusions of fact recorded by the lower Appellate Court however erroneous the said conclusions may appear to be to the High Court. Being so, the Supreme Court concluded, if a finding of fact has been recorded by the first Appellate Court without any evidence, that finding can be successfully challenged in second appeal, because a finding of fact which is not supported by any evidence can be questioned u/s 100 and in that connection it may be said that the decree proceeding on such a finding discloses a substantial defect or error in procedure. This however does not mean that wherever the High Court thinks that the evidence accepted by the lower Appellate Court could not have been reasonably accepted, the High Court would be justified in interfering with the decision of the lower Appellate Court. All that it means is that it should be a case where the evidence, which is accepted by the lower Appellate Court, no reasonable person could have accepted and that really amounts to saying that there is no evidence at all.

10. In another judgment cited by Shri Usgaonkar, in *Mst. Kharbuja Kuer Vs. Jangbahadur Rai*, , the Supreme Court re-affirmed again the stand that when the two courts approached the evidence from a correct perspective (underlining supplied) and gave a concurrent finding of fact, the High Court had no jurisdiction to interfere with the said finding which was therefore, binding in second appeal. Similarly in one more decision relied by Shri Usgaonkar, in *Bholaram Vs. Ameerchand*, , in a suit for eviction of a tenant decreed by the trial Court and affirmed by the first Appellate Court the High Court reversed the

judgment of the first Appellate Court on an erroneous interpretation of the rent note and overlooking certain clear admissions of the plaintiff. The Supreme Court after observing in that case that by and large the High Court seems to have reversed the concurrent findings of fact arrived at by the trial Court on the ground that the judgments of the courts below were perverse and given in utter disregard of important materials on record and therefore, prima facie, have travelled beyond the limits imposed on its jurisdiction u/s 100 of C.P.C., held that even if they have to accept the main reason given by the High Court, the utmost that could be said was that the findings of fact given by the courts below were wrong or grossly inexcusable but that by itself would not entitle the High Court to interfere in the absence of a clear error of law.

11. Further and on the matter of inadmissible evidence raised in Question 7 of para 1 of the Memo of Appeal in Second Appeal No. 31 of 1988 with regard to the unstamped receipt dated 13-12-1967 which was heavily relied by both the courts below, Shri Usgaonkar, has placed reliance on another judgment delivered in Javer Chand and Others Vs. Pukhraj Surana, on the subject of an unstamped document marked as exhibit in the case and used by the parties in examination and cross-examination of witnesses. In that case the Supreme Court while reversing the decision of the Rajasthan High Court ruled that where a question as to the admissibility of a document is raised on the ground that it has not been stamped or has not been properly stamped, the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. Once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, section 36 comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial Court itself or to a Court of Appeal or Revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction.

12. Shri Usgaonkar, therefore, urged that there could not be any case of inadmissible evidence available for the appellants on the basis of the aforesaid receipt accepted by the courts below as proof of the tenancy created by the defendant No. 2 in favour of the plaintiff.

13. But although the legal position with regard to the extent and nature of jurisdiction of the High Court in Second Appeals is to be deemed as settled and there can be no two opinions that perversity of findings of fact given by the courts below on the basis of improper appreciation of evidence is not by itself a ground for interference and as such concurrent findings of fact cannot be touched when recorded by the courts on a proper application of mind, however, as rightly pointed out by Shri Kakodkar, learned Counsel for the defendant No. 1, while considering this aspect as a substantial question of law, it is to be seen that

the main and real issue in the instant suit is the issue of tenancy or the violation of the alleged tenancy rights claimed by the late plaintiff with regard to the suit property. In fact the said plaintiff has throughout this litigation contended that he has been continuously the tenant of the property "Palmar Oiteiral do Predio Aivao" right from prior the year 1963, firstly in respect of 2 lots only and subsequently of the remaining 5 lots and that by a fake agreement dated 1-1-1968 the defendant No. 1 has caused the defendant No. 2 to violate its traditional tenancy rights by attempting to confer similar rights on the defendant No. 1 as a result of which the plaintiff became dispossessed of the property by illegal means. It is seen also that the courts below entirely accepted this case of the plaintiff and confirmed his tenancy rights despite the objections raised by the appellants either on the aspect of jurisdiction of both the courts to adjudicate such issue or even on its intrinsic merits based on the evidence available on record. Shri Kakodkar is also right when he urges that if there can be no denial that there are always questions of fact to be appreciated while determining a point of tenancy, however, the question of whether a person is a tenant or not is certainly not a question of fact only but instead a mixed question of facts and law and there is no doubt that the principles under which tenancy is to be established or adjudicated are by themselves matters of law. Shri Kakodkar, very usefully placed reliance on the findings in the case of Hira Lal and another Vs. Gajjan and others, wherein the Supreme Court although agreeing and affirming the decision in, R. Ramachandran Ayyar Vs. Ramalingam Chettiar, held that the error or defect in the procedure to which clause (c) of section 100(1) refers is not a error or defect in the appreciation of evidence adduced by the parties on merits and that even the appreciation of evidence made is patently erroneous and the finding of fact recorded in consequence is grossly erroneous that cannot be said to introduce a substantial error or defect in procedure. However, it held that when the first Appellate Court discarded the evidence as inadmissible and the High Court is satisfied that the evidence was admissible that may introduce an error or defect in procedure. So also in a case where the Court below ignored the weight of evidence and allowed the judgment to be influenced by inconsequential matters, the High Court would be justified in re-appreciating the evidence and coming to its own independent decision. In view of this decision which somehow appears to water down the principles enunciated by the Supreme Court in R. Ramachandran Ayyar Vs. Ramalingam Chettiar, , I find myself in full agreement with Shri Kakodkar, when he contends that the matter of legal implication of an alleged rent receipt or the question of the facts of its very contents is again strictly a question of law. Further to be noted also that the finding of non-tenancy against the defendant No. 1 rendered by the trial Court in the first suit was not appealable. Reliance was placed by Shri Kakodkar, in this respect in Ramesh Chandra Vs. Shiv Charan Dass and Others, , which has held that in a question as to whether the findings in earlier case operate as res judicata one of the tests is in ascertain if party aggrieved by finding could challenge it and therefore, in the said judgment, the Supreme Court held that any observation made by Court when there was no pleading nor evidence, this observation was

not only off the mark but unnecessary and could not operate as *res judicata*, it thus follows that as per the law laid down by the Supreme Court in matters of Second Appeals only those findings of fact arrived at the correct perspective cannot be challenged and all other cases wherein such findings have been patently recorded on a wrong or grossly mischievous application of mind are entitled to be interfered with by the High Court in the exercised of its appellate jurisdiction.

14. Shri Lotlikar (Second Appeal No. 27/1988) in his turn has also contended that the findings of fact to be excluded from any challenge in a Second Appeal should have been arrived after a proper appreciation of evidence available on record in a reasonable manner and without jumping to inadmissible conclusions on the basis of mere conjectures and inferences or just crash landing on certain facts hard to be accepted or believed. He therefore submitted that findings arrived in this manner could not be deemed as findings of fact at all and that no issue of tenancy could be adjudicated on the basis of a sole receipt dated 13-12-1967 and this also to reach to the conclusion that this tenancy stood at least right from prior to 1964. Reliance has been placed by him on a decision of a Single Judge of this Court in *Shankar Ramchandra Iparkar since deceased by his Shankar Ramchandra Iparkar since deceased by his heirs Vs. Bhanudas Shankar Iparkar and Others*, . This was a case under Hindu Law here the co-parceners of joint family alleged that the manager of the joint family who had purchased the joint property in his own name had purchased the land with the funds belonging to the joint family. The claimants were not able to prove that the manager did have some nucleus of the joint family property with the help of which the suit land could be purchased. The burden of proof in this respect was lying on them. If they had managed to prove in the first instance that the lands in question were purchased with the aid of joint family funds, the onus to prove that he purchased the lands out of his own funds would shift to the manager. The co-parceners having failed to prove their case, the question whether the manager had proved his capacity to purchase or not would be irrelevant. In this regard the learned Judge held that the word "finding" has got a peculiar legal connotation. It must be after the appreciation of evidence in a reasonable manner. The finding is not the same thing as crash landing where a Judge has failed to appreciate the evidence and has failed to record a judicial finding this Court has jurisdiction not only to interfere with the finding but also to re-appreciate the entire evidence and to arrive at his own findings. The ratio of this ruling and the view taken by the learned Single Judge, according to Shri Lotlikar, seems to have been upheld also by the Apex Court in the case of *Budhwanti and another v. Gulabchand Prasad*, reported in AIR 1987 S.C. 1984, wherein the Supreme Court although re-affirming that in a second appeal a finding on fact even if erroneous will generally not be disturbed, however, where it is found that the finding is vitiated by application of wrong tests and on the basis of conjectures and assumptions then a High Court will be well within its rights in setting aside in a second appeal a patently erroneous finding in order to render justice to the party affected by the

erroneous finding.

15. Both Shri Kakodkar and Shri Lotlikar, have made before me intense grievances on this type of wrong and/or mischievous approach of both the courts below while dealing with the problem and the importance of the disputed receipt dated 13-12-1967 which in their view revealed not only non-application of mind, but also reliance on inadmissible evidence, application of wrong test, refusal to accept reasonable explanation as well as other relevant material in rebuttal of the reputable inference about the validity and scope of its contents and also reliance on mere conjectures and inferences, thus rendering the findings of fact recorded by them wholly vitiated and amenable for interference by the High Court. According to Shri kakodkar, the finding rendered by both the Courts below that the plaintiff was a tenant of the defendant No. 2 and which appears to have been based only on the said receipt is totally perverse. He contended that apart from the oral testimony of the late plaintiff, that is to say, just his plain words, the force if the solitary receipt which ostensibly has been construed by the trial Court as a prima facie evidence of the tenancy when according to the defendants the plaintiff was only a sort of a caretaker of the defendant No. 1 whose rent was being collected by one Quencre, an employee of the defendant No. 2, should not have been overestimated by the courts below. To be noted that in the first suit which was dismissed by the trial Court the said Quencre had stated that the late plaintiff was not the tenant of the suit property although he had acknowledged that he was handing over to him the money corresponding to the rents due towards the tenancy of the said property. Shri Kakodkar, urged that the finding was perverse because the reasons given by the learned trial Judge in the judgment were not acceptable, so much so, the receipt regarding the payment of rent was not inconsistent with the fact that the plaintiff was not the tenant of the suit property. But even assuming was reputable one and the only person who could rebut this presumption was Quencre. But it is seen that the evidence of Quencre even in the first suit was not even considered by the Court which just discarded the explanation given by him on the flimsy ground that Quencre was the employee of the defendant No. 2. Shri Kakodkar, complained that this finding or reason given by the Court was also totally wrong and perverse and there was no reason for the Court to disbelieve the explanation given by Quencre, to the effect that it was the defendant No. 1 who was regularly paying him the rents but at the same time he had authorised the plaintiff to make such payments in his absence; that therefore when he plaintiff was handing over the money Quencre used to issue to him a mere Kutcha receipts as a token of the acceptance of money and the pukka receipt was being given subsequently to the defendant No. 1. The Court has not explained as to why these reasons advanced by Quencre should not be accepted. Besides, Shri Kakodkar, contended that one who pays the rent need not be necessarily treated as a tenant and any presumption which might arise in this regard was to be deemed as always reputable. Being so the only person competent to rebut this presumption would be the person who had actually collected the money or the rent. In the absence of any further evidence

led by the plaintiff to suggest that he was the tenant the explanation given by Quencre should be believed and accepted to rebut the mere presumption raised in the plaintiff's favour on the basis of the receipt dated 13-12-1967. Shri Kakodkar, has also taken exception to the observations of the learned District Judge that as a matter of rule an employee is presumed to lie in favour of the employee by contending that there could not be such presumption in law. Hence, since Quencre had explained as to why the, receipt dated 13-12-1967 had not been issued in the name of the defendant No. 1 and instead had been given to the plaintiff as well as the circumstance under which he accepted the money from him, even if the presumption was to be held as not rebutted by such explanation, the fact remains that the only evidence of a single receipt could be considered, at the most, as a too fragile and precarious evidence which by itself would be unable to establish a right of tenancy in favour of the plaintiff.

16. Shri Lotlikar, in his turn has also expressed his grievance because the receipts which the defendant No. 1 sought to produce were not allowed to be taken no record by the trial Judge on the ground that they were not stamped inspire of the fact that the same receipts were permitted to be taken on record by the trial Court in the first suit. He therefore, only because of a mere bona fide and technical mistake on his part, in not having objected to the production of the receipt dated 13-12-1967, that the same came to be exhibited on record and ultimately relied by the trial Court as the sole basis for its finding on the tenancy claimed by the plaintiff in respect of the suit property Shri Lotlikar has also complained that the plaintiff has not also brought any evidence to show that Quencre was authorised by the owner to collect rents from the suit property and therefore it was not permissible for the monies allegedly collected by him from the plaintiff in order to establish his tenancy rights in respect of the suit property. Shri Lotlikar pinpointed the fact that the receipts issued to the plaintiff at the time of the original lease of 2 plots were printed receipts which was admitted by the plaintiff and that the said receipts were signed by the owner. The agreement in respect of these 2 plots was also a written agreement. It was not also disputed that after 9 years period the said agreement was rescinded by the owners after a written notice was given to the lessees. Therefore Shri Lotlikar contends that the Court should not have believed the claim of the plaintiff that after the expiry of that agreement the owner had granted in his favour a further lease and this also an oral one in respect of the remaining 5 plots only on the basis of the lone receipt dated 13-12-1967 issued by Quencre. On the other hand, the evidence shows that the agreement entered by the defendant No. 2 with the defendant No. 1 is admittedly a written agreement and makes express reference to all the 7 plots. The said agreement is also reflected in the owner's accounts-book. The owner has also admitted the tenancy created in favour of the defendant No. 1. There was no reason therefore for the courts not to believe such evidence, namely, the word of the owner of the property considering that it is not her case that the property was not leased to anybody and on the contrary the tenancy in favour of defendant No. 1 had been expressly acknowledged by the said

defendant No. 2. Shri Lotlikar, has also taken strong exception to the fact that both the courts below have unduly rejected the explanation of Quencre with regard to the receipt issued by him and failed to take the same in its proper perspective. The statement of Quencre given before the trial Judge in the first suit and the explanation given by him ought to have been read in the background of his own deposition, he being the proper person to clarify the whole controversy centring around the said receipt dated 13-12-1967. Shri Lotlikar, also brought to the notice of the Court the gross inconsistencies and contradictions which flow from the stand taken by the plaintiff during his deposition on material points concerning the subject-matter of the suit. He has referred to the fact that in the first suit, at page 167, the plaintiff deposed that all the 7 plots had been leased to him by the defendant No. 2 for Rs. 2,900/-. However in the second plaint of the Suit No. 114/74, at its para 2, he has mentioned that the plaintiff was initially lessee of only 2 plots out of the 7 lots of the suit property upto 1963 and since 1964 the entire property was given on lease to him by the defendant No. 2 for an agreed rent of Rs. 3,000/-. Similarly in his deposition before the trial Judge in the Suit No. 114/74 he clearly admitted that the previous lease had expired in 1964 which means that the new agreement or lease started in his favour in January 1965. This stand is obviously contradicting his own pleading in para 2 of the plaint wherein he has stated that the new lease was given to him since 1964. Further in para 4 of the plaint in the Second Suit No. 114/74 the plaintiff has averred that he has paid Rs. 1200/- on 13-2-1967 to Quencre as advance rent for the part or the year starting on 1-1-1968. However, the said receipt allegedly issued by Quencre on 13-12-1967 and relied by the plaintiff himself clearly mentions that the payment of Rs. 1200/- has been made by the plaintiff towards the third instalment of the rent related to the year 1967. Shri Lotlikar, has also stressed the point that in the present case the plaintiff who is alleged to have paid rent was admittedly out of possession as per his own pleadings in the Second Suit No 114 of 1974. Besides he has only succeeded in showing that the rent was paid by him not directly to the owner or to her employee but instead to the employee of the Company belonging to her husband. Further the plaintiff was not able to produce any receipts from the period starting from 1964 and prior to the year 1967. The Court has also wrongly accepted the plaintiff's explanation with regard to his failure to produce such receipts. Thus, Shri Lotlikar, contended, the findings rendered by both the courts in this respect could not be said to be findings at all and therefore, the issue of the plaintiff's tenancy should not have been decided on the strength of such evidence because on the basis of a sole receipt of 1967 it was not permissible to give a clear finding about the existence of a tenancy right from the year 1964.

17. There is considerable merit in all these submissions of Shri Kakodkar and Shri Lotlikar and I am inclined to accept them as correct. As such I hold that the preliminary objection raised by Shri Usgaonkar, regarding the non-availability for the appellants of any chance to challenge in this case the concurrent findings

recorded by the courts below in respect of the subsistence of tenancy rights in favour of the late plaintiff is not only incompetent but also devoid of any substance. On the contrary I am of the view that this Court is justified in exercising its appellate jurisdiction to adjudicate on the same findings in the special circumstances of the case arising out of the fact that the findings recorded by the courts below are mixed findings of fact and law and also because both the trial Court and the first Appellate Court have rendered these findings without a proper appreciation of evidence in a reasonable manner and arrived at the same by application of wrong tests and indulging on mere conjectures so as to render them vitiated and bound to be interfered with in this Second Appeal. This answers also the first challenge raised by both Shri Kakodkar and Shri Lotlikar, on the matter of perverse findings given by the courts below on the basis of inadmissible and/or non-existing evidence wrong relied by the late plaintiff.

18. The next submission of Shri Kakodkar and Shri Lotlikar, centres around to jurisdiction of the courts blow either to take cognizance and/or adjudicate the issue of tenancy claimed by the late plaintiff. It was contended by both the learned Counsels that it was during the pendency of the suit filed on 6th May, 1974, that, by virtue of the Fifth Amendment which came into force on 8-10-1976, the Tenancy Act, stood amended so as to bring within its fold and within the definition of the word "agriculture" garden produce also which includes, amongst others, coconut plantation. In fact, in the amended Act the definition of "agricultural" given in sub-section (1-A) to section 2 includes horticulture and raising of food crops, grass or garden produce but does not include allied pursuits. In sub-section (7-A) the definition of "garden" is given as "land used primarily for growing coconut trees, arecanut trees, cashewnut trees or mango trees". Sub-section (7-B) classifies "garden produce" as "any produce from a garden". It follows therefore, that coconut grove came within the purview of the Tenancy Act only after the introduction of the Fifth Amendment to the Act. On the other hand, as per section 7 if any question arises whether any person is a tenant or should be deemed as tenancy under the Act, the Mamlatdar shall, after holding an inquiry, decide such question. Section 7-A provides that if any question arises as to whether any land is or is not used for agricultural purposes, the Mamlatdar shall, after holding an inquiry, decide such question. However, by Ordinance No. 4/90 published in Government Gazette dated 20-11-1990, the word "is" and/or "should be deemed" was amended so as to add the word "was" also. Section 58(2) imposes a bar to the jurisdiction of any Civil Court to decide a question regarding tenancy by providing that no Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with the by Mamlatdar, Tribunal, Collector or Government, and no order passed by these authorities under the Act shall be questioned in any Civil or Criminal Court.

19. It is also Shri Kakodkar's say that although the suit was instituted somewhere in 1974, however, after the Fifth Amendment in 1976 when the

District Court passed the impugned decree on 25th September, 1988 by virtue of sections 7 and 58 of the Act, the Civil Court had no jurisdiction to give any finding about tenancy and as such the same decree became a nullity and without jurisdiction. Shri Kakodkar, also urged that since the jurisdiction of Civil Courts to adjudicate matters of tenancy and to decide the question as to who is the tenant under the Act ceased after the coming into force of the Fifth Amendment it should be construed, however, that the jurisdiction of the Civil Courts regarding the same subject-matter stood withdrawn even in respect of the pending suits once there was no bar for such withdrawal. Shri Kakodkar, further submitted that in the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (hereinafter called the Mundkars Act) there is a special provision, being its section 13, which expressly prescribes for transfer of pending suits of other proceedings for eviction from any Court, on the appointed date, to the Mamlatdar within whose jurisdiction the dwelling house from which the eviction is sought is situated and although there is no similar provision in the Tenancy Act the judicial pronouncements of the higher courts have been on the same line as provided in the Mundkars Act. Shri Kakodkar has also urged that even assuming that there is always a presumption in favour of prospective legislation, however, when it comes to enactment involving welfare legislation like the Tenancy Act such bar should not operate. Therefore, in his view there was no particular harm in holding that sections 7 and 58 would also apply to all pending cases because both these provisions are directly concerned with matters of procedure to the extent that it was only the forum to decide and define as to who is the tenant which was changed by the new enactment. The Tenancy Act prescribing that the competent authority for this purpose is the concerned Mamlatdar without any alteration as to the principles to be applied for the definition of a tenant, only provided an alternative or changed forum. And the question of jurisdiction falling strictly within the field of procedural matters no vested rights could accrue for the landlord to get the definition of a tenant and the adjudication of the issue of tenancy in a pending suit necessarily done by the Civil Court. Apart from that Shri Kakodkar, also contended that by looking at the matter from a different angle admittedly on the day the Civil Judge passed his decree the law in force was the Fifth Amendment and as per the amended enactment, the person competent to decide who is the tenant of the coconut grove was the concerned Mamlatdar. Being so it should be held that the Civil Court has ceased to have jurisdiction to adjudicate the same issue and hence the decree passed by the Civil Court was rendered void and without jurisdiction. Shri Kakodkar, tried to impress upon the Court that since the advent of the Fifth Amendment question of tenancy of coconut gardens was to be decided only by the Mamlatdar, being the Civil courts expressly barred and excluded from adjudicating such issue, it could be reasonably said that this issue should not necessarily arise only in a pending suit before the Civil Court. It could arise either in a pending suit or in subsequent proceedings as well. Section 7 could not thus be read as referring to the suits instituted only after coming into force of the Fifth Amendment to the Tenancy Act and similarly the provision of section 58 was also to be understood and applied in

the same context. Therefore, from a plain reading of both sections 7 and 58 it would follow that consequent upon these two provisions the Civil Court lost its jurisdiction to decide and adjudicate on matters of tenancy and both were deemed to operate in pending as well as in subsequent proceedings either with regard to the paddy fields or coconut groves as well. Therefore, there was nothing in the language of these provisions so as to restrict its applicability to the tenancies arising only subsequent to the enactment of the Fifth Amendment and to exclude the ones subsisting during the pendency of the suits filed before the Civil Courts for the purpose of adjudication of any such issue involving the definition of a tenant.

20. In the Bombay Tenancy and Agricultural Lands Act, 1948, section 70(b) and section 85 are similar provisions corresponding to sections 7 and 58 of the Goa Tenancy Act. There is also a special provision being section 85-A. Section 70(b) prescribes that amongst others it will be the duty and function of the Mamlatdar, which he will be required to perform for the purposes of the Act, to decide whether a person is or was at any time in the past, a tenant or a protected tenant or a permanent tenant. Section 85 expressly imposes a bar of jurisdiction by providing that no Civil Court shall have jurisdiction to settle, decide or deal with any question (including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him) which is required to be settled decided or dealt with by the Mamlatdar..... Section 85-A. provides that if any suit instituted in any Civil Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under the Act the Civil Court shall stay the suit and refer such issues to such competent authority for determination.

21. Admittedly there is no similar provision in the Goa Tenancy Act but Shri Kakodkar argued, by relying in the case of Dhondi Tukaram v. Dadoo Piraji and others, reported in AIR 1954 Bom 100 , which was approved by the Supreme Court in the case of Bhimaji Shanker Kulkarni Vs. Dundappa Vithappa Udupudi and Another, , that in the absence in the Goa Tenancy Act of a repealing section like section 89 of the Bombay Tenancy Act, the Mamlatdar, should have jurisdiction to decide the question of tenancy even in pending cases which have been already instituted when the relevant provisions of the Fifth Amendment to the Tenancy Act came into force. Section 85 of the Bombay Tenancy Act appears to have been inserted in view of the observations of the Bombay High Court in Dhondi Tukaram's case. In that case, the High Court observed :

"Therefore, we hold that in a suit filed against the defendant on the footing that he is a trespasser, if he raises the plea that he is a tenant or a protected tenant, the Civil court would have no jurisdiction to deal with the plea. That is the view which has been expressed by the learned Chief Justice in Trimbak Sopana Vs. Gangaram Mhatarba, and with respect we agree with that view. We would, however, like to add that in all such cases where the Civil Court cannot entertain

the plea and accepts the objection that it has no jurisdiction to try it, it should not proceed to dismiss the suit straight way. We think that the proper procedure to adopt in such cases would be to direct the party who raises such a plea to obtain a decision from the Mamlatdar within a reasonable time. If the decision of the Mamlatdar is in favour of the party raising the plea, the suit for possession would have to be dismissed, because it would not be open to the Civil Court to give any relief to the landlord by way of possession of the agricultural land. If, on the other hand, the Mamlatdar rejects the plea raised under the Tenancy Act, the Civil Court would be entitled to deal with the dispute on the footing that the defendant is a trespasser. It would have been much better if Legislature had provided for the transfer of such cases as they have done in the Bombay Agricultural Debtors Relief Act. We would, therefore, like to invite their attention to this aspect of the matter in the hope that some suitable provision would be made in the Tenancy Act."

22. Similarly in *Bhimaji Shanker Kulkarni's* case, the Supreme Court observed that with regard to suits and proceedings by a landowner for possession of agricultural lands the combined effect of section 29, 70, 85 and 85-A of the Act is as under; while Mamlatdar has exclusive jurisdiction to entertain an application by a landlord for possession of agricultural lands against a tenant, he has no jurisdiction to try a suit by a landowner for recovery of possession of agricultural lands from a trespasser or from a mortgagee on redemption of a mortgage; and while the Civil Court has no jurisdiction to entertain and try a suit for possession of an agricultural land against a tenant, it has jurisdiction to entertain a suit by a land holder for recovery of possession of agricultural land from a trespasser or from a mortgagee on redemption of a mortgage. But if the defendant to the suit pleads that he is a tenant or a protected tenant or a permanent tenant and an issue arises whether he such a tenant, the Court must refer the issue to the Mamlatdar for determination, and stay the suit pending such pending such determination, and after the Mamlatdar has decided the issue, the Court may dispose of the suit in the light of the decision of the Mamlatdar.

23. Shri Kakodkar, strongly submitted that since a plain reading of sections 7 and 58 does not exclude the possibility of the issue of tenancy being raised either in the pending suits or in a suit filed subsequently there should be nor bar that in this case of a mere charge of procedure and while dealing with the welfare legislation the law should be applied retrospectively. He also urged that if a welfare legislation was not to be applied retrospectively the very object of the legislature would be defeated and that would amount to a negation of justice.

24. In the case of *Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subbash Chandra Yograj Sinha*, , it was that a section may be prospective in some parts and retrospective in other parts. While it is the ordinary rule that substantive rights should not be held to be taken away except by express provision or clear implication, many Acts though prospective in form, have been given retrospective operation, if the intention of the Legislature is apparent. This is

more so when Acts are passed to protect the public against some evil or abuse.

25. Shri Kakodkar, contended that the prospective applicability of sections 7 and 58 of the Tenancy Act would be discriminatory and not supported by any intelligible differentia. By inserting sections 7 and 58 in the Tenancy Act, the Legislature had clearly intended that the Mamlatdar should exclusively determine all tenancy matters, namely by deciding who is or was a tenant. As such, the date of 8-10-1986 makes an invidious discrimination between members of the same class. Now to divide or differentiate this class according to the date of the relevant enactment (Fifth Amendment) was no doubt arbitrary and discriminatory. Hence it would be unconstitutional and void. He also added that the basic canon of interpretation of a statute is that we should not interpret any law so as to render it void in terms of Article 14 of the Constitution. Therefore, this manner of interpretation which would defeat its very purpose should be avoided at all costs. Besides, substantial rights and procedural rights are always composite. Rights and remedies are thus integrated. When certain rights are created corresponding remedies and adequate machinery to implement those rights must be created and exist. It is not permissible to sever the question of competent forum for the adjudication of the substantial rights from the very actual right to enforce them so as not to destroy and negatify the very purpose of the legislature. As such, since there is nothing in the language of sections 7 and 58 of the Tenancy Act, which is admittedly a welfare legislation, to indicate that it should not be applied retrospectively, there is no question that its applicability should be necessarily prospective.

26. In his turn, Shri Lotlikar, has also sought to raise the point of jurisdiction of the Civil Courts to deal with the suit filed by the plaintiff on the strength of section 18-A(1) of Tenancy Act which reads as follows :---

"On the tillers" day, every tenant shall, subject to the other provisions of this Act, be deemed to have purchased from his landlord the land held by him as a tenant and such land shall vest in him free from all encumbrances subsisting on the said day.

(2)

(3)"

Section 18 of the Act provides that a tenant entitled to possession of any land or dwelling house under any of the provisions of this Act may apply in writing for such possession to the Mamlatdar. The application shall be made in such form and within such period as may be prescribed by or under the Act. Under Rule 7(2) the period for making application u/s 18 shall be two years from the date on which the right to obtain possession of the land or dwelling house, as the case may be, is deemed to have accrued to the applicant or within one year from the commencement of the Act, whichever is later, Shri Lotlikar, has contended that when the suit was filed by the late plaintiff he was admittedly out of possession. However even after the Fifth Amendment it is not his case that he has made any

application to the Mamlatdar within the stipulated period prescribed by the rules. On the other hand, there is no dispute that, according to the plaintiff himself who filed the suit for restoration of possession, the defendant No. 1 was in possession of the suit property not only at the time of the filing of the suit but even subsequently till the same was decreed. Hence, in terms of section 18(3), the defendant No. 1 is deemed to be the purchaser of the suit property on the strength of his admitted tenancy. This very fact that the defendant No. 1 was acknowledged by the plaintiff as a tenant flows also from the circumstance that in the first suit filed by the plaintiff, being Civil Suit No. 157 of 1968, the plaintiff sought for a declaration of nullity of the tenancy allegedly created by the defendant No. 2 in favour of the defendant No. 1 under the agreement of lease dated 1-1-1968. Shri Lotlikar, has further relied on the sub-section (4) of section 18-A according to which if a tenant is not in possession of the land on the tiller's day on account of his being dispossessed otherwise than in the manner provided in section 11 and the land is,- (a) in possession of the landlord or his successor in interest; and (b) not put to a non-agricultural use, the Mamlatdar shall notwithstanding anything contained in this Act, either suo motu or on the application of the tenant hold an inquiry and direct that such land shall be taken from the possession of the landlord or, as the case may be, his successor in interest and shall be restored to the tenant and the provisions of the Chapter shall, in so far as they may be applicable, apply thereto, subject to the modification that the tenant shall be deemed to have purchased the land on the date on which the land is restored to him; provided that the tenant shall not be entitled to restoration under this sub-section unless he undertakes to cultivate the land personally. Based on this provision Shri Lotlikar, urged that in view of that any suit for restoration of possession of the suit property which was deemed to be on lease and in possession of the defendant No. 1 as a tenant could be entertained only by the Mamlatdar the moment the Fifth Amendment came into force because till that time the defendant No. 1 was in its possession and the plaintiff had not yet secured recovery of such possession from him. Shri Lotlikar submitted that there could be no bar for this change of forum consequent upon the enactment of the Fifth Amendment by relying on a decision rendered in the case of Maria Cristina De Souza Sodder and Others Vs. Amria Zurana Pereira Pinto and Others, , wherein the Supreme Court has held, with regard to the right of appeal and the forum where the same is to be prosecuted, that if it is no doubt well settled that a right of appeal is a substantive right and it gets vested in a litigant no sooner the list is commenced in the Court of the first instance, however, the forum of appeal and also the limitation for it are matters pertaining to procedural law and being so the appeal, the right to which has arisen under the repealed Act, has to be lodged in a forum provided for by the repealing Act and this being a substantial question law, although not formulated by the defendant No. 1 in his Memo of Appeal, the same should be permitted to be raised and argued in the Second Appeal in terms of the last part of the proviso to section 100 C.P.C.

27. There is a lot of substance in all the above submissions of both Shri Kakodkar and Shri Lotlikar. Shri Usgaonkar's reliance on section 6 of the General Clauses Act as a sparing device to support the proposition that in the absence of any express provision to save the jurisdiction of the Civil Courts as far as the proceedings pending before it at the time of coming into force of the Fifth Amendment are concerned appears to have grossly overlooked the fact that the same provision lays down also that when a repealing Act repeals any enactment the said repeal shall not affect any right, or any investigation, legal proceedings, etc. unless a different intention appears from the said repealing Act. We have seen already that the tenancy legislation as a welfare legislation carries with it the presumption of being retrospective in nature so as not to defeat its very purpose thus leading to a negation of justice. There is no doubt that the manifest intention of the Amending Act (in this case the Fifth Amendment) is to do away with certain rights of landlords and give them to the tenants. In fact once the Legislature, in its wisdom, intended, by inserting sections 7 and 58 in the Act, that only the Mamlatdar should alone and exclusively deal with and determine all the tenancy matters by deciding who is or was a tenant, the only logic conclusion, in the absence of anything in the contrary flowing from the very language of both these provisions to point out that it should be necessarily applied in prospectively appears to be that its applicability should be construed with retrospective effect. Thus it seems obvious that the ratio of the decision in T.S. Baliah Vs. T.S. Rengachari, , which was also relied by Shri Usgaonkar, is not at all attracted in this case. Similarly with regard to another case cited by Shri Usgaonkar, in Musamia Imam Haider Bax Razvi Vs. Rabari Govindbhai Ratnabhai and Others, , the same refers to a suit filed after the tillers' day and the main issue to be decided in the suit was to determine whether the plaintiff was or not the deemed owner. The issue of tenancy was only incidental and the case was adjudicated on facts. The aforesaid judgment is clearly distinguishable because in the case in dispute the plaintiff came to the Court seeking recovery of possession on the ground of his claimed tenancy which practically amounts to a prayer that he should be so judicially declared and/or acknowledged as a real tenant of the property. Further this decision was also distinguished by another judgment in Gundaji Satwaji Shinde Vs. Ramchandra Bhikaji Joshi, , wherein it was clearly held that the combined effect of sections 70, 85 and 85-A of the Act is that where in a suit properly constituted and cognizable by the Civil Court upon a contest an issue arises which is required to be settled, decided or dealt with by a competent authority under the Tenancy Act, the jurisdiction of the Civil Court to settle, decide or deal with the same is not only ousted but the Civil Court is under a statutory obligation to refer the issue to the competent authority under the Tenancy Act to decide the same and upon the reference being answered back to dispose of the suit in accordance with the decision of the competent authority under the Tenancy Act. Shri Usgaonkar's contention is that this judgment fell on interpretation of section 70(a) and not section 70(b) of the Bombay Tenancy and Agricultural Lands Act, 1948 which have different scope. Section 70(a) which was not amended exclusively deals with an agriculturist who may be a tenant to not.

Hence there is no question of conferring ownership rights as a deemed purchaser to an agriculturist who is not a tenant. But the fact remains that whether an agriculturist must be or not a tenant to claim the right of being held as a deemed purchaser of an agricultural land, the main issue which appears to have been decided by the Supreme Court is that the question of the plaintiff being declared as an agriculturist is an issue within the jurisdiction of the Mamlatdar and as such it is incumbent upon the Civil courts to refer the issue to the competent authority under the Tenancy Act because the Civil courts have no jurisdiction to decide or deal with the same. Shri Usgaonkar's further submission that u/s 18-A of the Goa Tenancy Act the right of the tenant of a coconut garden which was dispossessed prior to the coming into force of the Fifth Amendment to get restoration or recovery of its possession in the Civil Courts is not affected in respect of any suit already pending and validly instituted suffers from the same infirmity of not being consistent with the very purpose of the Amending Act and for grossly overlooking the manifest intention of the aforesaid Fifth Amendment. Therefore, the circumstance of the dispossession having taken place in 1968, i.e. much prior to the enforcement of the said Fifth Amendment seems to be totally irrelevant for the above purpose.

28. The next contention of Shri Usgaonkar, is that the Fifth Amendment is a beneficent piece of legislation intended to protect the tenant. The suit instituted by the plaintiffs is not in his capacity of landlord who wants to get back the land from the tenant but just the contrary, i.e. of the tenant who seeks back the possession of the land from which he was deprived by the landlord in connivance with a third person. Therefore, Shri Usgaonkar contended that even if there was any doubt the same had to be resolved with the help of the tenant. This has been the consistent view of the Supreme Court in the matter of interpretation of beneficent legislation which has been enacted for the benefit of the tenant. But I am again afraid that this kind of argument of Shri Usgaonkar does not also carry any conviction. Obviously the dispute before us was an alleged attempt of the landlord to grab or take away land from the plaintiff who claims to be a tenant. The dispute arose because the plaintiff who is seeking to recover possession from the defendant by invoking his tenancy in the suit property is trying to deny the acknowledged tenancy of the defendant No. 1 on the same property which was purportedly created in his favour by defendant No. 2. This being the case the submission of Shri Usgaonkar that this dispute should be decided by tilting the balance towards the tenant does not survive and is also not going to help him not only because here there is no question of any beneficial legislation being required to favour the tenant but also on account of the fact that the applicability of this legislation with retrospective effect to pending proceeding is not likely to affect or prejudice in any manner whatsoever the rights of the tenants once by the aforesaid Act only the forum of its adjudication was changed by the amending legislation.

29. The second challenge raised by Shri Kakodkar and Shri Lotlikar against the impugned judgment and decree of the first Appellant Court is that the suit filed

by the plaintiff before the trial Court was ab initio void as barred by the principle of res judicata and /or principle analogous. It was urged by the learned Counsels that the plaintiff filed his first suit bearing No. 157/68 for declaration and permanent injunction. In para 6 of his plaint it was expressly pleaded by him that consequent upon the agreement dated 1-1-1968 the defendant No. 1 became purportedly the lessee of the defendant No. 2 but, however, the plaintiff was not removed by any legal process by the defendant No. 2 from the suit property . This is clearly an acknowledgment that he had been illegally removed evicted by the defendant No. 2 from the said property. Further in para an of the plaint the plaintiff again reiterated the fact of his physical removal from the property by averring that on or about the end of the second week of June, 1968 the defendant No. 1, probably relying on the agreement of 1-1-1968, entered into the entire suit property to the greatest prejudice of the plaintiff to the greatest prejudice of the plaintiff from whom the defendant No. 2 had accepted on or about 30th March, 1968 Rs. 1000/- as usual towards the payment of the first instalment of that year. Further in para 8 of the plaint the plaintiff once more admitted his physical dispossession from the property by pleading that thereafter in order to evict the plaintiff from the property , he (defendant No. 1) got him arrested and a criminal case is pending against him in the Court of Judicial Magistrate. First Class, Panaji. Shri Kakodkar, argued that on the strength of these pleadings the only relief available to the plaintiff in the circumstances was obvious and since the plaintiff, who otherwise was acknowledged by the Civil Court as a tenant of the suit property, chose to file a suit for injunction only which was ultimately dismissed because at the same time the Court found him out of his possession and as such no injunction would lie against the defendant No. 1. It was on account of this dismissal of the first suit that the plaintiff instituted the second suit bearing No. 114/74 for restoration of possession where he unmistakably admitted that he had been out of possession by defendant No. 1 right from 1968 consequent upon the agreement dated 1-1-1968. Shri Kakodkar, contended that the cause of action in both the suits filed between the same parties being the same, namely, the actual breach of the plaintiff's alleged tenancy right and his physical dispossession of the suit property somewhere in the second week of June, 1968, irrespective of the relief sought for by him in the first suit, it was clear that the second suit was hit and barred by the principle of res judicata.

30. Shri Usgaonkar, on the other hand, emphatically disputed this proposition of law by contending that on the facts the conclusion arrived at by Shri Kakodkar is not justified. He took me through the contents of para 10 of the plaint in Civil Suit No. 157/68 wherein it was pleaded by the plaintiff that the cause of action for the suit arose on or about 15-6-1968 when "to the greatest prejudice and contrary to the law for the time being into force the defendant No. 1 entered the suit property, forcibly attempted to evict the plaintiff and got seized the coconuts plucked by the plaintiff's. Shri Usgaonkar, submitted that obviously in a coconut garden, one single plucking did not mean complete dispossession of the plaintiff

and one may read the entire plaint together with the relief sought for the plaintiff in the suit. As the facts stood at the time the first suit was instituted, there was no actual dispossession of the plaintiff but a mere attempt to evict him. It is a fact that the trial Court recorded a finding of dispossession against the plaintiff but in all fairness this finding could not operate as a bar for the plaintiff so far the cause of action expressly pleaded by him was concerned. Certainly dispossession was not the cause of action pleaded by the plaintiff but this was only the actual finding given by the trial Court in the earlier suit. Shri Usgaonkar, urged that in the first suit the plaintiff claimed that he, was the tenant of the suit property and that the defendant No. 1 was not its tenant. The trial Court affirmed the plaintiff's claim and rendered a finding of tenancy in his favour while recording a contrary finding against the defendant No. 1 by observing also that the alleged agreement dated 1-1-1968 was bogus and sham. However the plaintiff's suit was dismissed because he being not in possession of the property no injunction could be granted to him and only the relief of recovery of possession was available to the plaintiff in the circumstances. It is Shri Usgaonkar's further say that for the purpose of res judicata what is important and material is that the decision of the first suit must be substantially on the same issue to be adjudicated in the second suit. Shri Usgaonkar contended that in the second suit the plaintiff did not ask for any declaration of nullity of the agreement dated 1-1-1968 entered between the defendant No. 1 and defendant No. 2 and his only relief against the defendants was for possession of the suit property on the ground that he had been illegally dispossessed by them. But although impressive and strictly logic it may appear this line of argument drawn by Shri Usgaonkar, I am afraid that it is not permissible for me to accept it as sound and correct. I am fortified in this conclusion that one should not overlook the fact that in the second suit the plaintiff has clearly admitted his dispossession of the suit property (para 5 of the plaint) prior to the filing of the first suit. This means that the cause of action arose for him before the institution of the first Suit No. 157/68. In other words, the plaintiff on the strength of his own pleadings in the Original Suit (No. 157/68) which he expressly reiterated in the subsequent Suit (No. 114/4) has acknowledged that the cause of action was the same in both the suits otherwise filed also between the same parties. Being so, it is obvious therefore, that the relief sought for by the plaintiff in the earlier suit becomes inconsequential once the only relief available to him in the said suit was, in the circumstances, the relief which he has prayed in the second suit.

31. Thus it is compelling to acknowledge that the subject-matter of the second suit was directly and substantially in issue in the previous suit between the same parties. The facts of the case clearly reveal that the res invoked in both the suits is the same. The lite is also the same. Hence the relief by itself is neither material nor relevant for the direct adjudication of the real issue. The relief is only a consequence. Therefore, the second suit is to be deemed as barred by res judicata and there is real merit on the submissions of both Shri Kakodkar and Shri Lotlikar in this regard.

32. Coming now to the next contention of the appellants learned Counsels, it has been again submitted by both Shri Kakodkar and Shri Lotlikar that the second suit also stands barred by the principle of constructive res judicata embodied in Order II, Rule 2 sub-Rule (3) of the C.P.C.. It was contended by them that the first suit of the plaintiff was filed by him on the footing that he was not in possession of the property and the Trial Court itself rendered a finding that the plaintiff was out of possession right from 1968 and prior to the institution of the suit. Hence there was no question of the plaintiff filing again a suit on the same footing and asking this time for an alternate relief. The law permitted the plaintiff to seek alternative reliefs in the very first suit instituted in 1968. Having failed to do so he should be debarred from filing the second suit for an alternate relief which he himself did not ask on the earlier occasion, without express permission or leave of the Court which leave also admitted the plaintiff did not even care to secure.

33. Shri Kakodkar, vehemently argued that the plaintiff was not supposed to choose or take chances in this litigation and should have asked for all available or alternate reliefs in the first suit itself or, at least, should have sought for leave of the Court to file a second suit for an alternate remedy.

34. Shri Usgaonkar, opposing to these appellants' contentions has attempted to impress upon me that at no time the plaintiff has admitted dispossession when the first suit was filed. It is a fact that he alleged that the defendant No. 1 had interfered in the suit property and taken possession of the coconuts plucked by him in the month of June, 1968. But that does not necessarily mean that he had been actually dispossessed from the suit property on account of this single act of trespass on the part of the said defendant No. 1. Shri Usgaonkar, argued that at the most the action of the defendant No. 1 could amount to an attempt to dispossess and as such the seizing of the coconuts done by him would not mean that the plaintiffs dispossession of the property, if any, was completed. Shri Usgaonkar urged that the plaint in the first suit should be read as a whole and it was not permissible to draw any conclusion from a finding of fact rendered by the trial Court in that very suit so as to infer that the plaintiff himself has pleaded dispossession as its cause of action bearing also in mind that the relief sought for by the plaintiff was shaped according to the factual foundation sent on by him as representing the real cause of action in the suit. Shri Usgaonkar insisted, when a pointed question was put to him by the Court, that the cause of action in a suit is the bundle of facts on which the suit is based as per the plaintiff's own pleadings and therefore, for the purpose of the bar provided in Order II, Rule 2(3) what really matters is the actual frame of the suit instituted by the plaintiff and not the relief actually sought for by him in the plaint. Shri Usgaonkar placed reliance on the case of Nanjedevaru v. H.V. Rama Rao, reported in AIR 1959 Mys 173, in support of the proposition that when the frame of both the suits is different there is no question of Order II, Rule 2(3) being attracted. In the aforesaid case instituted by the plaintiff in relation to certain properties allegedly purchased by him from some members of an undivided joint Hindu Family the subject-matter

was referring also to two suits. In the first suit the plaintiff had asked for a declaration of title and for injunction. The said suit came up to the High Court for final decision and the High Court took the view that in order to succeed in the case as framed by him the plaintiff should have established that he was in possession of the properties which he, however, was not able to do since it was clear that such possession was not with him. Hence the decision of the trial Court and its finding that the possession of the properties was with the defendants were upheld by the High Court who also did not think it proper to go into the question of title unless the plaintiff proceeded to take necessary action for recovery of possession of the lands of which he claimed to be the purchaser. Then the plaintiff filed afresh suit for declaration of title and possession. While in the earlier suit the plaintiff's case was that he was in possession and the defendant wanted to interfere with the said possession, the reason why he asked for an injunction, in the subsequent suit the plaintiff's case was that he was not in possession and therefore, he asked for possession. In this second suit the title claimed by the plaintiff was the same which had been claimed in the earlier suit. However, there was also a claim for possession which was not made in the first suit. When the question of applicability of Order II, Rule 2(3) was raised by the defendants the Court observed that the rule would apply in a case where the plaintiff was entitled to more than one relief in respect of the same cause of action and the cause of action was the same in both the cases. If the plaintiff in the earlier suit had omitted to ask for a relief which arose out of the cause of action on which the said suit was based, then, he would be debarred from asking for a relief in a subsequent suit based also on the same cause of action. Further, on facts, the Court held that the cause of action as framed in the earlier suit was not exactly the same on which the present suit was based. However on a close scrutiny of this decision, I am of the view that the same is clearly distinguishable from the case under dispute because, while in Mysore case there is nothing on record to show as to when the plaintiff was actually dispossessed from the suit property, in our case the plaintiff has unmistakably admitted that the cause of action in the second suit arose for him prior to the filing of the first suit thus conceding that the relief of recovery of possession sought for in the subsequent suit was already available to him at the time of the institution of the earlier suit. I am therefore not at all impressed by the ratio of this decision nor I am of the opinion that this is going to hold Shri Usgaonkar once we should have no difficulty in admitting that the provision of Order II, Rule 2(3) C.P.C. has been enacted and inserted in the Code as a matter of public policy and procedural economy. In fact, the Legislature has found in its wisdom that in matters of litigation of this type the plaintiff should not be allowed to take chances when he has no doubts about his own position and it cannot be said that he is bona fide mistaken or ignorant of the factual foundation on which his stand is based. In the instant case the plaintiff himself admits that he was out of possession since June, 1968 and it is nobody's case that because the trial Court found him out of possession in the first suit he has pleaded so in the subsequent suit. The plaintiff throughout the second suit has relied as cause of action for the restoration of

possession of the suit property allegedly lost consequent upon the action of the defendants on the same facts occurred prior to the institution of the earlier suit.

35. In the instant case we have seen as to how the plaint in the first suit disclosed the factual stand of the plaintiff with regard to the cause of action pleaded by him to the effect that in his own words the defendant No. 1 entered or trespassed in the second week of June 1968 in the entire suit property which means that he took possession of it and this action of his could not be treated as a casual encroachment. He also averred that the defendant No. 1 trespassed into the property to the greatest prejudice of the plaintiff which could only mean that consequent upon this encroachment he lost possession of the same and that the said defendant No. 1 in order to evict the plaintiff got him arrested which once again suggests that as a result of this encroachment the act of dispossession was complete. It is seen also from the records that the learned trial Judge construed the plaintiff's pleadings as his admitting dispossession in June 1968, the reason why by his judgment dated 28-3-1974 he dismissed the plaintiff's suit on the ground that he was already out of possession prior to the filing of the suit. To be noted also that the plaintiff even in para 5 of the plaint in Suit No. 114/74 conceded that he was in possession of the suit property upto June 1968. In spite of that the plaintiff in the first suit chose to ask for the relief of injunction only instead of recovery of possession. Therefore he should be deemed as barred from seeking the relief which he failed to ask in the first suit. This vital aspect seemed to have been overlooked by both the Courts below and therefore it was not permissible either to the learned Trial Judge and also to the learned District Judge to give a different interpretation to the finding rendered by the trial Court in the first suit with regard to the fact that the plaintiff had lost possession of the suit property in June 1968 even prior to the filing of that suit. Shri Lotlikar, is therefore, justified when he makes a grievance against the judgment of the learned District Judge by complaining that since the finding of the learned trial Judge given in Suit No. 157/68 became final he could not construe this finding in a different manner and uphold a wrong finding given by the learned trial Judge in Suit No. 114/74 on the issue of possession of the suit property by the plaintiff after June, 1968. He is also right when he contends that Suit No. 157/68 was dismissed by the court as far as both the prayers sought for by the plaintiff since neither declaration nor injunction were granted to him. The finding given by the learned trial Judge in the earlier suit was clear and unequivocal and could mean only that the plaintiff was out of possession when the suit was filed and hence no prayers either of declaration or injunction were available to him. This being the case no new suit could also be instituted by the plaintiff to obtain the same relief.

36. Shri Lotlikar, placed reliance in support of his submission on the decision of the Nagpur Bench of this Court in the case of Dayadam Raghobaji Bolsaro v. Vishrantibai G., reported in 1990 MLJ 277. It was a case wherein the earlier suit for injunction, wherein the plaintiff was out of possession and the cause of action alleged to be breaking open of the lock by the defendant, the suit was ultimately withdrawn. Subsequently a fresh suit was filed for possession and damages on

the same cause of action. The Trial Court disallowed the plea of the defendant by holding the second suit as not barred under Order II, Rule 2(3) C.P.C.. The learned Single Judge of this Court while reversing on revision the finding of the Trial Court has expressly held that more than one reliefs were available to the plaintiff on 28-3-1985, including possession and damages, but none of these reliefs had been claimed and what was claimed was only the relief of injunction, other reliefs were omitted. The case thus clearly fell within the mischief of Order II, Rule 2(3) C.P.C.. If the cause of action gave occasion for a firm foundation of the subsequently filed suit, then the averments to the effect that on 22-3-1985 itself the possession was lost and that the defendant had come in possession could not be ignored. If this was the cause of action then the plaintiff could have claimed legitimately the relief of possession in the earlier suit. On 28-3-1985 when the suit was instituted earlier the relief of possession and damages was already available but these reliefs were not claimed. Consequently more than one relief were available to the plaintiff but the plaintiff omitted to claim this relief. The said omission did not entitled the plaintiff to claim such reliefs in the subsequent suit, and the suit subsequently filed was therefore barred under Order II C.P.C.

37. Shri Usgaonkar's submission that this decision has not been tested by the Supreme Court and that the same is distinguishable since in this case the first suit has not been adjudicated and simply withdrawn is totally irrelevant not only because as a matter of judicial discipline the decision of a Single Judge is always binding on another Single Bench of the same Court unless it is reversed or modified by a large Bench but also because the fact of the first suit having been withdrawn does not make any difference on the real issue at stake or change in any manner the situation whatsoever. Therefore, Shri Usgaonkar's further submission that because in such cases there is no operation of any res judicate on merits but only a mere technical bar of Order II, Rule 2(3) of C.P.C. should not apply is also not likely to find any favour with me once I am inclined to accept the appellants view that in the present circumstances no fresh suit was available for the plaintiff after the dismissal of the earlier suit for the purpose of obtaining the relief which he was free to secure at the time of the filing of the first suit on the same cause of action which had already arisen for him prior to its institution in the year 1968.

38. The last submission of Shri Kakodkar is against the granting to the plaintiff by the trial Court of mesne profits to the extent which were allowed by the learned Civil Judge. It is Shri Kakodkar's plea in this respect that no mesne profits were available to the plaintiff, if any, for more than 3 years. As such the order of the learned trial Judge directing the payment of mesne profits till the restoration of possession is patently wrong. There is no doubt lot of substance in this submission of Shri Kakodkar also. The Full Bench decision of the Andhra Pradesh High Court in the case of Kudapa Subbanna v. Chitturi Subanna and others, reported in AIR 1962 A.P. 500, held that a decree providing for the ascertainment of mesne profits until delivery of possession of property should be

so construed as to harmonise with the provisions of Order XX Rule 12(c)(iii). It is not competent for a Court to allow profits for a longer period by reason of Order XX, rule 12 C.P.C. The Court should construe such a decree as providing for the determination of the mesne profits until the recovery of possession but for not more than three years from the date of the decree. Hence the right of the decree-holder to recover future mesne profits should be restricted to three years from the date of the decree inspite of the provision in the decree directing enquiry as to mesne profits till recovery of possession of the property by the decree-holder. Therefore, the awarding of the mesne profits by the learned trial Judge of more than 3 years is manifestly an error of jurisdiction thus rendering the decree, in this part, a nullity.

39. In the result, both the appeals are bound to succeed and are hereby allowed. The judgment and decree of the learned District Judge dated 25-3-1988 affirming the judgment and decree of the learned Civil Judge, Senior Division, dated 26-9-1985 are quashed and set aside with no order as to costs.