

(2012) 11 BOM CK 0067

In the Bombay High Court

Case No : Second Appeal No. 51 of 2004

Smt. Maina Sada Gaude alias Sangodkar and Others

APPELLANT

Vs

State of Goa and The Conservator of Forest, Government of
Goa, Old GMC Complex Panaji, Goa

RESPONDENT

Date of Decision : 23-11-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 2, 106, 80
Evidence Act, 1872 — Section 114III(e)
Forest (Conservation) Act, 1980 — Section 2
Forest Act, 1927 — Section 20, 3, 4, 4(1), 6
Limitation Act, 1963 — Section 3

Citation : (2013) 1 ABR 410 : (2013) 2 ALLMR 652

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

Bench : Single Bench

**Advocate : A.A. Agni, for the Appellant; S. Linhares, Additional Government
Advocate, for the Respondent**

Judgement

U.V. Bakre, J.—This is plaintiffs" second appeal. Heard learned counsel for both the parties. The parties shall be referred to in the manner in which they appear in the cause title of the Regular Civil Suit No. 64/2001/A.

2. The plaintiffs had filed the said Suit for declaration that they are in lawful possession and enjoyment of the suit property and that the name of forest department entered in the other rights column of Form No. I & XIV of record of rights in respect of suit property is illegal and incorrect. A direction was also sought to be given to the Land Survey Department, Panaji, Goa to delete the name of Forest department from the other rights column in Form No. I & XIV in respect of the suit property and to enter the name of plaintiffs in that place and in occupants" column.

3. Case of the plaintiffs, in short, was as follows:-

The suit property known as "Goulewada" or "Zambolichem Mol", admeasuring

38.97.00 hectares, situated in village Melaulim of Taluka Sattari, Goa, consists of cashew trees, mango trees, jackfruit trees and teak wood trees and they and their family members have been cultivating paddy and nachne in a portion of it for last more than 45 years. By deed of title of assignment dated 17/08/1983, the Government of Goa, Daman and Diu granted an area of 20.5259.62 hectares of the suit property in favour of late Sada Seguna Gauda, the husband of plaintiff no. 1/father-in-law of the plaintiffs no. 2 to 10, on payment of annual rent of Rs. 31.75. Late Sada Seguna Gauda had applied for grant of the said land in the year 1981 and accordingly the Government had made the said grant on 17/08/1983. The remaining area of 18.4440.38 hectares of suit property has been developed by the plaintiffs for the last more than 50 years and the plaintiffs are in possession and enjoyment of the said remaining area and have perfected their title to the said area by their continuous possession and enjoyment. In the survey records, the name of forest department has been wrongly entered in the other rights column. They had addressed letter dated 6/5/1991 to defendant no. 2 for correction of the survey records by deleting the name of forest department but Defendant no. 2 did not reply. Legal notice dated 20/6/1991, u/s 80 of the C.P.C., was served on the defendants who did not comply with the same.

4. The defendants resisted the suit and stated as follows :

The suit property has always been in possession and enjoyment of defendant no. 2 and in the year 1977 it was declared as "Reserved Forest". The suit property consists of teak wood trees and other jungle trees and not cashew trees, mangoes trees and jack-fruit trees. The plaintiffs have never objected to the survey records which are in the name of defendant no. 2. The defendant no. 2 have cultivated teak plantation and the said teak trees are more than 10 years old. The plaintiffs are in possession of another property bearing subdivisions no. 1 and 3 of survey no. 60 of Village Melaulim of Taluka Sattari, Goa, in which they are residing and having mango trees and jackfruit trees. Even otherwise, the alleged title of assignment does not relate to the entire property under survey no. 20/1 and the said title of assignment does not confer domain of title of the property under survey no. 20/1, on the plaintiffs. The right conferred under the said title of assignment has ceased to exist in view of the breach of Article 76(a) of the Decree no. 3602. The plaintiffs never cultivated any paddy or nachni in any part of the suit property. The suit property is a forest and by virtue of notification of the Government dated 22/07/1993, published in the Official Gazette, u/s 4 of the Indian Forest Act, 1927, the same is a reserved forest and such forests get protection u/s 2 of the Forest Conservation Act, 1980. The defendants have been holding auction for the sale of timber from the suit property since 1979 and it is false that the plaintiffs had been in possession of the same at any time.

5. The plaintiffs examined plaintiff no. 5 namely Shyam S. Sangodkar as PW1 and four other witnesses namely Narayan V. Gaude as PW2, Mahadev N. Gawde as PW3, Harischandra Hazare as PW4 and Govind Girodkar as PW5. The

defendants examined the Range Forest Officer of Valpoi namely Vikas Dessai as DW1, another Range Forest Officer of Valpoi namely V.T. Thomas as DW2, a Forest Guard namely Pandurang Sawant as DW3 and one Prabhakar Gopal Nadkarni as DW4. In the course of proceedings, a Surveyor namely Purshottam R. Dalvi was appointed as Court Commissioner and he submitted his report and was cross-examined on behalf of the defendants.

6. Upon assessment of the entire evidence on record, the Civil Judge, Senior Division, Bicholim (trial Court, for short) held that the plaintiffs could not prove their lawful possession and enjoyment in respect of the suit property for more than 45 years. He held that the title of assignment does not confer upon the plaintiffs title to the property under survey no. 20/1. He also held that the Decree no. 3602 dated 24/11/1917 under which the said assignment was granted stood repealed as per section 201 of the Land Revenue Code, 1968 and the same is not saved by any of the provisos to section 201 of Land Revenue Code. He further held that the plaintiffs could not prove that they were in possession and enjoyment of the remaining area of 18.440.38 hectares of survey no. 20/1 for more than 50 years. The trial Court held that under the notification published in the Official Gazette dated 22/07/1993, the Government proposed to constitute the forest land in Village Melaulim of Taluka Sattari as reserved forest u/s 3 of the Indian Forest Act, 1927 which covers part of survey no. 20/1 of Village Melaulim of Taluka Sattari. He also held that since the notification u/s 4 of the Indian Forest Act, 1927 has been issued by the Government, declaring that it has been decided to constitute above land as reserved forest, the Government acquired certain rights over the said portion. The trial Court therefore held that the plaintiffs are not entitled to any reliefs either of declaration or of correction of survey records. The suit therefore came to be dismissed.

7. The plaintiffs then approached the District Court, Panaji against the judgment and decree passed by the trial Court and in Regular Civil Appeal no. 159/01, the learned Additional District Judge(II) Panaji (first Appellate Court, for short) held that the suit is barred by Law of Limitation. The first Appellate Court further held that the suit property is a forest and hence the State Government had no power to grant the land to any person. The appeal therefore came to be dismissed.

8. Aggrieved by the judgment and decree dated 06/05/2004 passed by the first Appellate Court in the said Regular Civil Appeal no. 159 of 2001 and the judgment and decree dated 17/01/2001 passed by the trial Court in Regular Civil Suit no. 62/01/A, the plaintiffs have filed this second appeal which has been admitted on the following substantial question of law:

Whether source of power to grant land which is vested on the State Government u/s 21 of the Land Revenue Code renders the title of assignment granted in favour of the appellants herein valid and binding and mere omission in reciting the correct provision of law does not denude the power of authority so long as the grant can be legitimately re-traceable to the statutory power u/s 21 of the Land Revenue Code?

9. Mrs. Agni, learned counsel appearing on behalf of the plaintiffs, showed from the Written Statement filed by the defendants that the original assignment is admitted by the defendants. She contended that there is absolutely no evidence on record to show that there was a breach of Clause no. 76(a) of the said Decree and also no finding by Lower Courts that there was such a breach. The learned Counsel pointed out that the issues no. 3 and 4 framed by the trial Court pertained to alleged breach of Article 76(3) of the Decree and to reversion of the land back to the Government. According to her, these issues were material but were treated as irrelevant by the trial Court which has resulted in miscarriage of justice. The learned Counsel further submitted that there is power u/s 21 of the Land Revenue Code, for the Government to grant land and therefore merely because some provisions of repealed Decree no. 3602 have been cited in the title of assignment, the same cannot make the said assignment as illegal and non-existing. In this regard the learned counsel relied upon judgment of the Apex Court in the case of B.S.E. Brokers Forum, Bombay and Others etc. Vs. Securities and Exchange Board of India and Others etc., and "High Court of Gujarat and another V/s. Gujarat Kishan Mazdoor Panchayat and others" [(2003) 4 SCC 712]. She also placed reliance upon judgment of the Apex Court in Nutan Kumar and Others Vs. IInd Additional District Judge and Others, . Learned counsel argued that the defendants have not passed any order of reversion of the said land assigned in favour of the plaintiffs back to the Government. She submitted that there is no cancellation of the assignment done by means of any documents. She pointed out from the evidence on record and more particularly from the evidence and report of the commissioner Shri Purshottam Dalvi that there are cashew trees, jack-fruit trees and mango trees and also seasonal crops in the suit property. She showed that according to the commissioner the soil was more susceptible for cashew and for fruit bearing trees. The learned Counsel also invited my attention to Form No. I & XIV of survey No. 20/1 which mentions the land as dry crop. She therefore submitted that the finding of the first Appellate Court to the effect that the land assigned to the plaintiffs was forest land is erroneous. According to her, the application of Section 2 of the Forest (Conservation) Act to the suit property is misconceived. The learned counsel therefore contended that on the basis of title of assignment, the plaintiffs were entitled for declaration of possession and enjoyment in respect of the land covered by the said assignment. Insofar as the point of limitation is concerned, the learned counsel argued that no such point was raised by the defendants previously and that the same was neither argued before the trial Court nor before the first Appellate Court and the plaintiffs were not heard by the first Appellate Court on this point. She further argued that in the plaint it was specifically pleaded that the cause of action for the plaintiffs arose on or about 17/05/1991 when defendant no. 2, in spite of receipt of letter dated 06/05/1991, failed to comply with the same. She, therefore, urged that the suit, filed in September 1991, was well within the period of limitation and not barred by limitation. The learned Counsel, therefore, urged that the impugned judgments and decrees of the lower courts be set aside and the suit be decreed, as prayed

for.

10. Per contra, Ms. Linhares, learned Additional Government Advocate, appearing on behalf of the defendants, argued that u/s 106 of the Land Revenue Code there is specific provision for amendment to the survey records. Relying upon the judgment of the learned Single judge of this Court in the case of "Narendra Voikunt Raikar V/s. Amaral Pereira" [2007 (3) Mh.L.J. 52], the learned Counsel submitted that the trial Court could not have issued any direction to the Land Survey Department to correct the survey records. Insofar as possession and enjoyment of suit property is concerned, the learned Counsel contended that there are concurrent findings of fact given by the Lower Courts that the plaintiffs have not proved the same. She pointed out that on this ground itself this court had declined to grant interim relief to the plaintiffs. She pointed out that the title of assignment is of the year 1983 whereas the assignee namely Sada S. Gaudo had already expired prior to that and in the year 1982, she therefore submitted that the deed of assignment granted in favour of dead person is ab-initio void. The learned Counsel also submitted that Section 201 of the Land Revenue Code has repealed the Decree no. 3602 under which the said assignment was made. According to her, plaintiffs' entire evidence pertained to survey no. 60/1 and 3 in which they have their house, mango trees, jack fruit trees and other fruit bearing trees. Regarding some cashew trees and mango trees existing in the suit property, the learned Additional Government Advocate contended that there is evidence to show that there was natural growth of such trees. She argued that the defence evidence sufficiently proves the possession of the Government in respect of the suit property. She contended that there is absolutely no evidence to prove adverse possession of the plaintiffs in respect of the land which is not covered by the deed of assignment, but claimed by the plaintiffs. She supported the finding of the first Appellate Court that the land is forest land covered by Section 2 of the Forest (Conservation) Act and hence the State Government could not have assigned the land in favour of any person. She urged that there is no scope for interference with the impugned judgment and decree of the lower courts and prayed that the appeal be dismissed.

11. In rejoinder, Mrs. Agni, learned counsel appearing on behalf of the plaintiffs, submitted that defence regarding death of Sada S. Gaudo prior to the date of assignment was not taken in the Written Statement and the said point was also not raised before the trial Court as well as first Appellate Court. Placing reliance in a decision of the Supreme Court in the case of "Krishnapasuba Rao Kundapur Vs. Dattatray Krishnaji Karani", reported in AIR 1966 SC 1024, the learned Counsel submitted that the defendants cannot be permitted to raise this point in the Second Appeal. She submitted that the application for grant of the said land was made by said Sada Gaudo in the year 1981. She further argued that in terms document of assignment, the Government had put the plaintiffs in possession of land described therein. She therefore argued that possession of the plaintiffs is proved by the document itself.

12. I have carefully gone through the entire material on record in the light of the submissions made by the learned Counsel, for the parties.

13. At the outset, I would consider the effect of death of Sada Gaude prior to the date of title of assignment. In paragraph (I) of the Written Statement, the defendants have averred that the title of assignment does not relate to entire property under survey no. 20/1 and does not confer domain of title to the property under survey no. 20/1. In paragraph (II), it has been alleged that right conferred under the title of assignment has ceased to exist in view of breach of the Article 76(a) of the Decree no. 3602. In paragraph (4) of the Written Statement, it has been pleaded that though the title of assignment was granted in favour of late Sada Sagun Gaudu, husband of Plaintiff no. 1, no cultivation of any crop was made by late Sada or any of the plaintiffs, in the suit property, due to which part of the suit property which was assigned to late Sada Sagun Gaudu reverts back to the State and no right survives in favour of the plaintiffs. From the above pleadings, it is clear that it is an admitted fact that the Government has assigned the land admeasuring 20.5259.62 hectares from survey no. 20/1 to late Sada, the husband of plaintiff no. 1, by virtue of which the plaintiffs were handed over possession of the said land.

14. For the first time in this second appeal, the learned Government Advocate, appearing on behalf of the defendants, has raised the point that the title of assignment is dated 17/12/83, when the assignee namely Soda Seguna Gaudu had already expired. According to her, the assignment in favour of a dead person is non-est and ab-initio void. In this regard, the plaintiffs themselves had produced before the trial Court the death certificate of Sada Sagun Gaudu as Exh. PW/1/G which revealed that he died on 4/7/1982. However, neither during the course of the Regular Civil Suit nor that of the first Appeal, the defendants had raised such an objection. It is a settled principle of law that if a plea is not raised in the trial Court or first Appellate Court, a party cannot raise it for the first time before the High Court. In this regard, reliance has been rightly placed, by the learned Counsel appearing for the plaintiffs, in the case of "Krishnapusuba Rao Kundapur" (supra). In such circumstances, the defendants cannot be allowed to raise this point in this second appeal. The records reveal that Sada Gaudu had applied for the said grant somewhere in 1981 and the same was processed in the Office of the Collector of Goa, under file no. RB/AGR/I/35/75, which culminated into the said grant of title of assignment dated 17/12/83. There is, therefore, no substance in the objection of the learned Counsel for the defendants that the grant is ab-initio void, as the same was in the name of dead person.

15. The title of assignment, along with the plan, in respect of an area of 20.5259.62 hectares, in the name of Soda Segun Gaudu, is at Exh. PW1/F and the receipts of payment of annual rent of Rs. 31.75 are at Exh. PW1/H colly. The title of assignment says that the Government is pleased to assign the land under Article 140 of Decree No. 3602 dated 24/11/1917. Indisputably, till 1/3/1971, the above Decree was in force. Section 201 of the Land revenue Code, 1968 (The

Code, for short) has repealed the said Decree as from 1/3/1971. The provisos to Section 201 of The Code cannot protect the said grant made after 1/3/1971.

16. After the commencement of The Code and u/s 21 thereof, the Government is empowered to grant land vested in the central Government and Section 26 thereof empowers the Collector to grant any uncultivable land for any purpose, subject to Rules made thereunder. The learned first Appellate Court has observed that learned Advocate for the defendants has not disputed the settled proposition of law set out in various judicial pronouncements which states that wrong mentioning of provisions of law would not invalidate the order if a source thereof can be found out either under general law or a statute law. In the case of "B.S.E. Brokers" Forum" (supra), the Apex Court has held that mere omission or error in reciting the correct provisions of law does not denude the power of the authority from taking statutory action so long as its action is legitimately traceable to a statutory power governing such action and in such cases, Courts will always rely upon Section 114 III (e) of the Evidence Act to draw a statutory presumption that the official acts are regularly performed and if satisfied that the action in question is traceable to a statutory power, the courts will uphold such State action. In the case of "High Court of Gujarat and another"(supra), the Apex Court has held that it is trite that non-mentioning or wrong mentioning of a provision of law under which power has been exercised would not invalidate an order if a source therefor can be found out either under general law or a statute law. It is further held that it is well settled that when there are two sources of power, even if one is not applicable, the order will not become invalid if the power of the statutory authority can be traced to another source. In view of the above, merely because the provision of Article 140 of the Decree No. 3602 dated 24/11/1917, has been mentioned in the title of assignment (Exh. PW1/F), it cannot become invalid.

17. The rent receipts in Exh. PW1/H colly show that such rent has been paid from June 1984 till January 1998, by the plaintiffs. There is no explanation as to why the Government collected rent if the said assignment was not valid and if the possession was not handed over to the plaintiffs. Article 76, which is one of the terms and conditions of the said title of assignment, provides for cancellation of the assignment if particular amount of cultivation work is not done within one year; thereafter by the end of two years; and when in each year, after cultivation of 1/5 of the land, the cultivated area is not increased, at least by 1/10 of the total area, till the cultivation is complete. The defendants in their written statement have alleged that there is breach of Article 76(a) of the title of assignment and hence the right conferred under the said title ceases to exist. Admittedly, the assignment has not been cancelled. Article 76 speaks about cancellation of the assignment. There is no provision in the said title of assignment for automatic cancellation of the same. On the contrary, there is a covenant that in the event of the assignee failing to comply with all or any of the conditions, the assignment shall thereupon be cancelled and the Government shall have the right to re-enter the land and enjoyment of rights of the entire

land assigned shall revert in favour of the Government, etc. However, here also the assignee can compromise by paying the total initial ground rent fixed and retain the cultivated portion. Then, if the land is required for public purpose, the Government, by giving notice in writing, can terminate the assignment, in which case the assignee would be entitled to reasonable compensation. Nothing like the above has happened.

18. Therefore, there is no material on record to establish that the land admeasuring 20.5259.62 hectares given under the title of assignment (Exh. PW1/F), in possession of the plaintiffs has reverted back to the Government on account of alleged breach of Article 76(a) of the said title, or that the assignment has been cancelled for any other reason, mentioned in the said title of assignment.

19. The learned first Appellate Court has held that in view of Section 2 of the Forest (Conservation) Act and since the defendants have pleaded that the suit property is forest land which mainly consists of teak trees, the State Government had no powers/authority to grant title of assignment at Exh. PW1/F in favour of Sada Gaude. It has been further held by the first appellate court that in the light of observations in the judgment in the case of Vitthalrao Mahale Vs. State of Madhya Pradesh and Others, and the provisions of Section 2 of the Forest (conservation) Act, 1980, the title of assignment (Exh. PW1/F) cannot be construed to mean that title to the said land vests in the plaintiffs. Section 2 of the Forest (Conservation) Act, 1980 imposes restrictions on the de-reservation of forests or use of forest land for non-forest purpose. In the case of "Vithalrao Mahale" (supra), it has been held that the Government would not be bound by the act of its officers and agents who act beyond the scope of their authority and a person dealing with the agent of the Government must be held to have notice of the limitation of his authority. Section 4(1) of the Indian Forest Act, 1927 (Forest Act, for short) does not require that the land should be forest land before a declaration under said provision is made. For application of Section 2 of the Forest (Conservation) Act and the ratio in the case of "Vithalrao Mahale" (supra), first of all, it had to be established that the land from survey no. 20/1 assigned under the title of assignment (Exh. PW1/F) was forest land. The title of assignment does not say that the land assigned under it is forest land. On the contrary, it specifically says that the said land is assigned for the purpose of cultivation. The assignment is after the coming into force of the Forest (Conservation) Act. The concerned officers of the Government very well knew that forest land cannot be assigned to any person. The Form No. I & XIV of survey No. 20/1 shows the entire land as dry Crop and not forest land. There is no definition of "forest" in the Forest (conservation) Act. No issue as to whether the land assigned under the title of assignment was forest, was framed by the trial Court. Obviously, no evidence was led by the parties, with regard to such a point. There is no specific finding of the trial Court on this point. The trial court has taken it for granted that the land is forest land. For the first time in the Regular Civil Appeal No. 159/2001, the learned first Appellate court, merely on

the basis of the observations of the Division Bench of this Court made in the oral judgment in Writ Petition No. 162/87, to explain as to what constitutes a "forest" and stating that it is pleaded by the defendants that suit property is a forest land mainly consisting of teak trees, has held that the land was forest land and `State Government had no powers to grant title of assignment. In fact, the trial Court has held that only a part of survey No. 20/1 is covered by the notification proposing to constitute the land as reserved forest and there is no specific plan showing what part of survey no. 20/1 is reserved as forest. Even otherwise, the defendants could not convincingly prove as to which part of survey no 20/1 has been declared as reserved forest. The learned first Appellate Court has held that though the notification at Exh. DW1/A declaring suit property as reserved forest has been issued, however, the same is in the year 1993 and DW1 Vikas Dessai was unable to say as to what part of survey no. 20/1 is reserved forest making it clear that contention of defendants to the above effect does not help them to prove that suit property is reserved forest. There is no evidence on record or the finding of the lower Courts that the teak wood trees were existing in the said land granted under the title of assignment prior to the date of said assignment. Hence, it was not proved that the land assigned to Sada Segun Gaude, under the title of assignment (Exh. PW1/F) was forest land. In the circumstances above, Section 2 of the Forest (Conservation) Act and ratio of the decision of this Court in Writ Petition No. 162/1987 is not applicable to the present case.

20. The official Gazette dated 23/6/1993 at Exh. DW1/A, produced by the defendants through DW1 reveals that the Government, u/s 4(1) of the Forest Act, has declared that it has been decided to constitute, inter alia, part of survey no. 20 of Melaulim Village as reserved forest. Indisputably, a notification u/s 4(1) of the Forest Act merely declares the intention of the Government to constitute certain land as a reserved forest. After that, a proclamation u/s 6 has to be issued; inquiry u/s 7 has to be held, claims u/s 9 have to be disposed of, etc., etc. Final notification declaring the proposed forest as reserved forest is issued u/s 20 of the Forest Act, which admittedly, in the present case has not yet been issued. Be that as it may, such process had started in the year 1993 whereas the assignment of title in favour of Sada Gaude was in the year 1983. Even otherwise, the defendants could not convincingly prove as to which part of survey no 20/1 has been declared as reserved forest. Hence, the said title of assignment, being prior in time as compared to the declaration u/s 4(1) of the Forest Act, would prevail.

21. In the circumstances above, the substantial question, as framed, is answered in favour of the plaintiffs.

22. Possession of the plaintiffs, in respect of the land admeasuring 20.5259.62 hectares, by virtue of title of assignment (Exh. PW1/F) cannot, therefore, be said to be illegal or unlawful.

23. As per the condition under Article 14 of title of assignment, the right to mines, stones, quarries, springs of mineral waters and also to springs of potable

water is reserved in favour of the Government. The sole para 1 to this Article says that assignee can use the waters that pass through the land assigned to him but the portion of these waters, which are not required for agricultural uses of assignee, continues to vest in the Government. Article 20 which is also a condition of the said assignment says that the assignee shall not cut or fell or destroy trees which serve as landmarks to his plots, without permission from the land survey department. By virtue of Article 24, the assignee is bound to give the right of way or passage to the neighbours who do not have any other more accessible or convenient way or passage to any of the nearest populational centre, under prior payment of compensation by the neighbours. Then, as already discussed above, there are powers of cancellation of the assignment, vested in the Government and there are also powers of reversion of land, vested in the Government. In terms of clause (3) of the other conditions, the assignee cannot, without permission of the Government, cut or fell any standing timber unless such action is necessary to prevent imminent danger to life or property, without prior permission of government. As per clause no (4), the assignee cannot transfer the rights inherent to the said title, without the prior permission of the Government. Thus, there are restrictions on the plaintiffs over the enjoyment of the said granted land. The control of the State Government is still there on the said land under the title of assignment. The name of the Government cannot therefore be deleted from the occupant's column of survey records.

24. Admittedly, the remaining land admeasuring 18.4440.00 hectares from survey no. 20/1 is not part of the title of assignment. The plaintiffs claim this area by way of continuous possession and enjoyment of the same. The alleged claim of perfection of title to this additional land is merely on the basis of possession. In the Written Statement, nature of the right is not pleaded whether it is by way of adverse possession or by way of prescription, or otherwise. The trial Court has held that the plaintiffs have failed to prove that they have acquired a title to the said land by adverse possession. Before the first Appellate court, it was contended by the learned Counsel, appearing on behalf of the plaintiffs, that they had never claimed adverse possession with respect to the remaining portion of land but their claim was of prescription. The learned first Appellate Court rightly found that in the memo of appeal, at ground (m), the plaintiffs had claimed the said land by way of adverse possession. She has concurred with the findings of the trial Court, with regard to the claim to additional land from survey no. 20/1. The substantial question framed in this second appeal pertains only to the land granted under the title of assignment. The plaintiffs are not entitled to any relief with respect to the land which is beyond the area mentioned in the title of assignment but included in survey no. 20/1 of Melaulim village. In view of the above, the plaintiffs cannot make any grievance about the name of the Government of Goa figuring in the occupants column and the name of the Forest Department figuring in the other rights column of the Form No. I & XIV of survey no. 20/1, since the possession of the

said additional area of survey no. 20/1 is exclusively with the Government.

25. The learned first Appellate court, on the basis of facts pleaded and the facts which came on record in the evidence, has held that the suit is barred by limitation, in view of the provision of Article 58 of the Limitation Act. No doubt, u/s 3 of the Limitation Act, inter alia, it is the duty of the Court to consider whether the suit is barred by limitation or not, whether the defendants take such defence or not. However, Rule 2 of Order VIII of C.P.C. provides that the defendant must raise by his pleadings all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance or facts showing illegality. Thus, it is necessary that limitation should be pleaded. It is also not open to the defendant to raise a substantive plea of limitation without stating the necessary facts in the Written Statement. It is a general rule that effect should be given to a plea of limitation raised at the hearing even though it is raised for the first time. But the point of limitation should not be allowed to be raised for the first time in appeal where it involves the question of fact and that also without putting the plaintiffs on notice. In paragraph 5 of the plaint, the plaintiffs have pleaded that since they found that the name of forest department was wrongly entered in the other rights column in the survey records, the plaintiff no. 5 vide letter dated 6/5/1991 addressed to the defendant no. 2 requested to agree for the correction of survey records, but the defendant no. 2 did not respond. In paragraph 9 of the plaint, the plaintiffs have pleaded that the cause of action arose on or about 17th May 1991 when the defendant no. 2 in spite of receipt of letter dated 6/5/1991 failed to comply with the same. In paragraph 11 of the plaint, it was specifically pleaded that the suit is not barred by the law of limitation. The suit was filed on 21/9/1991. The defendants, in their Written statement, did not deny the contents of paragraphs 9 and 11 of the plaint. The issue of limitation was a mixed question of law and facts, in the present case. There was no issue of limitation framed by the trial Court and no evidence was led on this point. The trial Court had not dealt with the point of limitation as the same was not raised before it. In the Regular Civil Appeal, the learned Counsel for the defendants had not raised the point of limitation. The first Appellate court could not have considered the point of limitation suo motu without putting the plaintiffs to notice.

26. Be that as it may, Article 58 of the Limitation Act says that to obtain any other declaration, the limitation would be three years from the date when the right to sue first accrues. There can be no right to sue until there is an accrual of right asserted in the suit and its infringement or a clear threat to infringe that right by the defendant. In the case of Daya Singh and Another Vs. Gurdev Singh (Dead) by L.Rs. and Others, , the Apex Court has held that mere existence of adverse entry in revenue records does not give rise to cause of action and that the cause of action to sue accrues when right asserted in suit is infringed or

there is threat to infringe that right. In the case *supra*, in paragraph 16 of the plaint, it was pleaded that the right to sue accrued when such right was infringed by the defendants about a week back when the plaintiffs had for the first time come to know about the wrong entries in the record of rights and when the defendants had refused to admit the claim of the plaintiffs. It was held that right to sue accrued when the defendants refused to admit the claim of the plaintiffs i.e. only seven days before the filing of the suit and hence the suit cannot be held to be barred by limitation. Entries in the record of rights have only presumptive value and they are presumed to be true until the contrary is proved. In the case at hand, since the wrong entries in the survey records created a cloud of suspicion over the claim of lawful possession and enjoyment of the plaintiffs with regard to the suit property, the plaintiffs had sent letter dated 6/5/1991 to the defendant no. 2 informing about the wrong entries in the survey records and requesting to agree for correction of the same. Since the defendant did not reply, the plaintiffs sent legal notice u/s 80 of C.P.C. The defendants still did not reply. This non-compliance gave cause of action to the plaintiffs and hence the prayer of declaration has been sought. The suit, therefore, was not barred by limitation.

27. Insofar as the prayer to direct the Land Survey department to amend the survey record, is concerned, it is well settled that such a direction cannot be given by Civil Court in view of express bar u/s 106 of The Code which provides that no suit shall lie against the Government or any officer of the Government in respect of a claim to have an entry made in any record or register that is maintained under this Chapter or to have any such entry omitted or amended. Such function is assigned to revenue authorities under The Code. In the case of "*Narayan Mugu Teli (since deceased) Vs. Ramchandra Mugu Teli*" [2004 (3) All M.R. 880], it has been held that it is neither the function of Civil Court to issue direction for making or deleting entries in the record of rights and that this function is assigned to the revenue authorities under the Maharashtra Land Revenue Code. It is further observed that the proper relief which could be prayed for was declaration of the title to the suit land and once such a declaration is obtained from the Court, the revenue authority will have to make or correct the entries accordingly in the record of rights in respect of the suit land. The provisions of The Code are almost similar to the Maharashtra Land Revenue Code. In the case of "*Anandi Bhicar Veluskar and others Vs. Kustanand Vithu Veluskar and others*" [2006 (6) Bom. C.R. 384], the learned Single Judge of Panaji Bench this Court has relied upon the judgment in the case of "*Narayan Mugu Teli*" (*supra*) and has held that the Appellate Court could not have directed insertion of the names of the plaintiffs in the survey records. Again in the case of "*Narendra Voikunt Raikar Vs. Amaral Pereira*", a similar view has been taken. Therefore, the question of directing amendment to the survey records does not arise.

28. The plaintiffs would therefore be entitled only to a declaration that they are in lawful possession and enjoyment of the land admeasuring 20.5259.62

hectares which is part of survey no. 20/1 of Melaulim Village of Sattari Taluka, by virtue of the title of Assignment which is at Exh. PW1/F. The impugned judgments are therefore not sustainable insofar as the above relief is concerned. In the result, the Appeal is partly allowed.

(a) The impugned judgments of the lower courts are quashed and set aside.

(b) The Regular Civil Suit No. 64/2001/A is partly allowed.

(c) The plaintiffs are declared to be in lawful possession and enjoyment of the land admeasuring 20.5259.62 hectares from survey no. 20/1 of Melaulim Village of Sattari Taluka.

(d) Appeal stands disposed of accordingly.

Parties to bear their own costs.