
(1998) 02 BOM CK 0027

In the Bombay High Court

Case No : Second Appeal No. 10 of 1992

Temple of Maruti

APPELLANT

Vs

Balkrishna Suryaji S. Kakodkar and another

RESPONDENT

Date of Decision : 13-02-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 102, 103, 104
Constitution of India, 1950 — Article 133
Evidence Act, 1872 — Section 101, 3, 35, 58, 59
Specific Relief Act, 1963 — Section 37, 38

Citation : (1998) 3 ALLMR 403 : (1998) 3 BomCR 540

Hon'ble Judges : N.J. Pandya, J

Bench : Single Bench

Advocate : V.B. Nadkarni, S.A. and V.P. Thali, for the Appellant; S.K. Kakodkar, S.A. and R.V. Kamat, for the Respondent

Judgement

N.J. Pandya, J.—This appeal arises out of the judgment and decree rendered by the learned District Judge, South Goa, at Margao in Regular Civil Appeal No. 44/1990, on 20-3-92. The said Civil Appeal, hereinafter, referred to as "the First Appeal", was arising out of a decree granted in favour of the original plaintiff in Special Civil Suit No. 7/1976 of the Court of learned Civil Judge, Senior Division, Quepem, South Goa.

2. The plaintiffs are the members of the Managing Committee of a "Devasthan" known as "Marutigad" and the suit relates to the property registered in the Land Registration Office, under No. 17521 and enrolled in the matríz under No. 663 and said to have been surveyed in the old cadastral Survey under No. 497. The property is known as "Xelchi Tembi". The defendant No. 1 was laying claim to it alleging that it is part of his property known as "Bansai Cotumbona", registered in the Land Registration Office under No. 15262 and was wrongly occupied by one Savlaram Tatoba Porob and, therefore, he had to file a suit in the Court of Civil Judge, Sr. Division, Quepem in the year 1959. This was decreed in favour of the defendant of the present litigation, from which Appeal No. 194/73 was filed

in the District Court. Having failed there, the matter was carried to the High Court. As the said Savlaram Porob was claiming under this plaintiff, the plaintiff decided to file said Suit No. 7/76 and, therefore, the appeal in the High Court came to be withdrawn with the knowledge of the present defendants. The defendants had agreed before the High Court that they shall not execute the decree obtained by them and the said litigation against Savlaram Porob will abide by the result of the present litigation.

3. After extensively considering the oral and the documentary evidence, the learned trial Judge by his judgment dated 8-10-1990 was pleased to accept the suit of the plaintiff and passed a decree in their favour. A declaration in favour of the plaintiff was given in favour of the plaintiff to the effect that the disputed land described in para 12 of the plaint, which is northern part of the Survey No. 497 is a part and parcel of the property No. 17521 and that it belongs to the plaintiff. By way of consequential relief, the defendants were permanently restrained from interfering with the said land. The alternative in the plaint, the plaintiff has also sought restoration of possession and mesne profits. Obviously, when the trial Court was pleased to hold that the plaintiffs are in possession, there was neither question of restoration nor of mesne profits.

4. The defendants carrying the matter in appeal before the learned District Judge with the aforesaid result, the original plaintiff has therefore, filed the present appeal. It being a second appeal, obviously there is constraint of section 100 of the Code of Civil Procedure. The High Court will not interfere with the findings as given by the first Appellate Court merely because the decree granted by the trial Court has been set aside. In other words, when the trial Court and the District Court respectively in the suit and the first appeal, in their respective judgments are at variance as to the conclusion of facts and, therefore, in absence of the concurrent findings of the fact by the courts below on that fact alone, the High Court will not be able to interfere with the findings of fact as recorded by the courts below by way of second appeal.

5. At the time when the second appeal came to be admitted, the learned Judge has passed the admission order and had raised the following questions, by order dated 23-10-1992:

"(1) Whether the first Appellate Court misconstrued the document of grant, inspection and delivery of possession ?

(2) Whether the first Appellate Court ignored the well settled principles that in a dispute between areas and boundaries, the boundaries shall prevail and not the areas ?

(3) Whether the first Appellate Court failed to identify the properties of the parties in loco with reference to the boundaries and areas ?"

6. Keeping in mind, the aforesaid questions, the appeal was argued also on the point that even if these questions are not shown to be arising, the Court below

empowered u/s 100, read with sections 101, 102, 103 and 104, if necessary to formulate questions, on its own, of course, after setting out reasons. It was urged on behalf of the appellant that this Court should exercise its power and set aside the order of the first Appellate Court.

7. It was further urged with reference to section 100, sub-section (1), Clause (c) that there is glaring procedural error on the part of the learned District Judge and that also would call for interference from this Court.

8. In other words, it was submitted on behalf of the appellant that the three questions quoted above, as formulated at the time of admission, do arise, but if at all, it is felt that, that is not the position either, the Court should formulate its own points, after setting out reasons or should decide the matter on the basis of the procedural error.

9. Needless to say, on behalf of the other side, it was strongly urged that though at the time of admission, the aforesaid three questions are formulated, which do not arise at all and, if they do arise, they do not amount to substantial question of law. It was further submitted that there is no occasion for this Court to exercise its power of formulating the points afresh, because no question whatsoever arise. It was also submitted that there is no procedural error at all.

10. The parties herein to will be referred to on the basis of their respective positions before the trial Court, namely as the plaintiff and the defendants. This course I am adopting because the defendants having succeeded in the appeal before the learned District Judge are the respondents, while in the trial Court, they were the defendants. The plaintiffs have become the appellants before the High Court.

11. The procedural error, referred to on behalf of the plaintiff is based on the observations of the learned District Judge, containing last portion of para 15 of his judgment, page 44 of the paper book. That portion is quoted hereinbelow :

".....Evidently, it is for the plaintiffs to establish clearly their case that the same property No. 17521, on the north, extends upto the boundary of Curchorem Village. In this respect the plaintiffs" expert witness P.W. 13 confirms the case of the plaintiffs in the said his plan of Exh. P.W. 13/ A. However, I am unable to accept the stand of the plaintiffs and of the said P.W. 13 that on the north of the property No. 17521 of the plaintiffs touches the limit between Curchorem and Kakoda Villages."

It is urged on behalf of the plaintiff that the entire approach of the learned District Judge, on and after the said observation in para 15, is clearly guided by the aforesaid proposition and from para 10 onwards of his judgment, the learned District Judge has concentrated only on the evidence of the plaintiffs. In the process, he has completely ignored the evidence led by the defendants. The learned District Judge, accordingly, has concentrated on sections 101 to 104 of the Evidence Act and confused the requirement of burden of proof, forgetting

that this being a civil trial. When both the parties have led evidence, the question as to who began the evidence has become academic and the entire material on record should be evaluated or arrived at a conclusion as to the case of which of the two cases is probablised.

12. It being a civil proceeding, it has to be decided on the basis of preponderance of probability. The question of burden of proof will be confined only to the aspect as to who has to introduce the evidence first. The issues having been raised, evidence having been led in respect of the issues of both the sides in the form of oral and documentary evidence the entire material placed before the Court shall, therefore, have to be scanned, considered, weighed and the conclusion arrived at as to probability.

13. On this aspect, there was hardly any dispute from the other side as well and it is an accepted position that it being a civil trial, the question of burden of proof on the need of recording of evidence would become at best be academic. If the authorities are needed, the plaintiff's side has cited decisions in *Moran Mar Basselios Catholicos v. Thukalan Paulo Avira and others* AIR 1959 S.C. 31, *Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others*, , *Kalwa Devadattam and Others Vs. The Union of India (UOI) and Others*, . All the three authorities clearly indicate that when the evidence is led by both sides, this question is of no importance. At best can have a value to decide as to which side will feel after the evidence is led. It is, therefore, the question of introduction of evidence and revolves around the point of burden of proof. Once the evidence is led, then the question becomes abstract and academic. It is obvious that upon whose favour the burden will fell in the suit also. I, therefore do not discuss these authorities any further.

14. Coming back to the question of substantial loss, there is serious dispute between two sides. Arguments were urged and various authorities were cited. In view of the importance attached to the area in dispute, I will now, therefore, proceed to discuss the authorities cited at the Bar from both the sides.

15. In *Dr. N.G. Dastane Vs. Mrs. S. Dastane*, are relied on by the plaintiff. The question there was. relating to cruelty in the matrimonial proceedings. It was alleged that the wife had cruelly towards the husband. There was no proof on record that the wife had uttered certain insulting and absolving words, which in the opinion of the courts below amount to cruel behaviour. The High Court, however, interfered on the basis that the wife was provoked to utter those words. The Supreme Court, after setting out that ordinarily it will not interfere with the outcome of the second appeal, after on scrutiny of the evidence, it appeared that the interference drawn by the High Court was not warranted and the Supreme Court will consider the evidence specially when the approach of the High Court turned out to be erroneous in reappraisal of the evidence, interference by the Supreme Court is called. This authority is cited to support the submission of the plaintiff that the learned District Judge, in the instant case, has more or less committed the same mistake.

16. The plaintiff submitted that the District Judge did not deal with the question of burden of proof and the requirement that it is the plaintiff who has to make out a case of being owner of the disputed property. The other material on record, namely the oral and the documentary evidence led by the defendants has been completely overlooked and therefore lack of appreciation of the evidence, as resulted into allowing the appeal, and, therefore, this error gives rise to error of procedure, as also failure to appreciate the evidence. It is, therefore a substantial question of law in itself.

17. In *Tukaram Rajaram Suple and Others Vs. Sonba Chindhu Mali*, the question involved there was that of a right of way for which purpose revenue record and other material had to be considered by the courts below. When the High Court found that the courts below have failed to consider this evidence, had reappreciated the evidence and after holding that under the circumstances, the question of fact would be open to the High Court also.

18. In *Ram Krishna Prasad Vs. Mohd. Yahia*, , it was a matter under Rent Control Legislation. Notice of termination was given, but it did not contain any demand for arrears of rent. This absence of demand of arrears of rent was completely overlooked by the Appellate Court. As per para (5) of this judgment, it was found out that this being statutory requirement for ground of eviction, based on arrears and non-payment of rent, the judgment stands vitiated and hence in the second appeal, the High Court has to interfere.

19. In *Udebhan Zangoji Patil v. Vithoba Ukandaji Dhangar* AIR 1939 Nag 78, it was found that the first Appellate Court had considered the evidence of the plaintiff alone. The case was found to have been decided on the question of burden of proof alone and as the evidence of defendant was not discussed, it was held that the High Court can interfere in the second appeal.

20. The decision in *R. Ramachandran Ayyar Vs. Ramalingam Chettiar*, , is a guiding judgment on the point and will be of great importance for this appeal as well. It refers to earlier Privy Council judgment, particularly the one given in *Mst. Durga Chowdhurani v. Jawahir Singh Chowdhri*, reported in 17 I. A 122. After considering the various aspects, the learned Judges of the Hon'ble Supreme Court have laid down in paras 10, 11 and 12 of the judgment, as also 13 thereof as to what could amount to an error or defect in the procedure to attract section 100(1)(c) of the Code of Civil Procedure. It is definitely not an error or defect in the appreciation of the evidence adduced by the parties on merits, also howsoever erroneous, the finding of the fact may be, it will not amount to a substantial error or defect in the procedure. On the other hand, while dealing with the facts, the Appellate Court has placed onus on a wrong party and the finding is the result substantially of this wrong approach, which may be regarded as a defect in the procedure. Likewise, if the Appellate Court has discarded the evidence on the ground that it is not admissible and if the High Court finds that the evidence is admissible it may introduce an error or defect in the procedure. If the Appellate Court fails to consider the issues which had been tried and found

upon by the trial Court, the decision of the Appellate Court, without consideration of such an issue may be regarded as an error or defect in the procedure. If the lower Appellate Court allowed 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 the party, this may in some cases, amount to defect or error in the procedure.

21. Sounding a word of caution, Their Lordships have said that the High Court cannot interfere with the conclusion of facts recorded by the lower Appellate Court, howsoever, erroneous, the said conclusions may appear to be to the High Court.

22. It is further held that if a finding of fact has been recorded by the first Appellate Court, without any evidence, that finding can be successfully challenged in the second appeal and this would amount to substantial defect or error in procedure. It has been clarified that what is meant by this proposition is that where the evidence which is accepted by the lower Appellate Court is such, as no reasonable person could have accepted and that really amounts to saying that there is no evidence at all.

23. It has also been pointed out in this judgment that merely because the judgment of the Appellate Court is not altered and that it does not deal with each and every point that were dealt with by the trial Court, that by itself would not be a ground for interference in the second appeal by the High Court. This will not amount to substantial question of law.

24. Lastly from that very volume, at page 1279, there is one more judgment where note (b) deals with section 100. It also refers to onus wrongly placed and basis its conclusion by the lower Appellate Court on non-evidence.

25. In reply to this, learned Senior Counsel submitted 10 different authorities, which I will discuss one after other. In *Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.*, which also refers to Article 133 reiterating the well known position that substantial question of law need not be of general interest, but has to be as between the parties, after referring to AIR 1925 RC. 110, Their Lordships have held that interpretation of a document being foundation of a suit it may give rise to a substantial question of law. In the case before Their Lordships, the managing agency agreement was in question and no doubt, it formed the very basis of the suit. It being thus foundation of the suit, its interpretation was held to be a question of law. This decision is cited in support of the submission that according to the defendants, ultimately what remained to be considered by the Court is some documents of survey, gift deed, etc. which are relied on by the plaintiff. When there is a question of only identity of the property and its location, these documents cannot be said to be forming foundation of the suit and, hence if there be any error committed in interpreting the same, no question of law at all would arise. It would be mere question of fact which cannot be gone into by this Court in the second appeal. This aspect will be dealt with subsequently.

26. In *Nedunuri Kameswaramma Vs. Sampati Subba Rao*, it has been held that when a document introduced to prove facts only, unless document being a document of title, it would not be a question of law at all, but it would be a question of fact. However, in this very judgment a word of caution has been sounded by saying that even in such cases if the evidence is misunderstood, it may amount to a procedural error attracting section 100(1)(c). Needless to say the plaintiff had seized upon these observations as a counter to submission made on behalf of the defendants.

27. Decision in *V. Ramachandra Ayyar and another v. Ramalingam Chettiar and another* (supra) was cited on behalf of the defendants, by referring to para (1) at page 305. Admitting for the sake of argument, without conceding at all, it was urged that if at all there be a mistake in appreciation of the evidence on the part of the learned District Judge, it would not amount to a question of law. If the evidence is misunderstood, yes, there will be a question of law, but otherwise not.

28. The decision in *Corporation of the City of Bangalore Vs. M. Papaiah and Another*, reiterates the well known principle that the revenue records are not the documents of title. Therefore, its interpretation will not amount to a question of law. If the findings are given by lower Court on such documents, interference by the High Court will be illegal. This authority is cited keeping in mind the report of the Surveyor and some of the documents indicating the position of record as to the suit property and so on. According to the defendants, when these documents do not amount to a title, even if there be any wrong interpretation thereof, the High Court is not called upon to interfere.

29. In *Madamanchi Ramappa and Another Vs. Muthalur Bojjappa*, adequacy or sufficiency of evidence, would not be a question of law, is the findings given in this decision. However, this being not a question before me, it need not detain me any further.

30. The matter in *National Insurance Company Ltd. Vs. State Bank of India and Others*, related to a truck purchased under a hire purchase agreement. The Bank had filed a suit against the purchaser and two guarantors and during the trial, the truck burnt and the insurance company was joined as party defendant No. 4. The trial Court accepted the bank's case that the insurance company was liable and in the process defence of the insurance company that the purchaser had deliberately set the truck on fire, was disbelieved. The learned Appellate Judge, in First Appeal agreed with the insurance company and set aside the decree against it. The High Court had chosen to interfere. In appeal by special leave the Hon'ble Supreme Court held that even though the findings of fact may be erroneous on the part of the learned Appellate Judge, unless the requirement of section 100 C.P.C. is fulfilled, there could not be interference by the High Court.

31. In *Panchugopal Barua and others Vs. Umesh Chandra Goswami and others*, , the High Court in second appeal had upset concurrent findings of facts by two courts below. It was found by the Hon'ble Supreme Court that a new plea not

raised in the courts below was permitted by the High Court, based on the provisions of the Basements Act. High Court in the process had held that licensee was permitted to put up a permanent structure. Finding of the Court below was that the licence was for 2 years" period only and the licensee was permitted to put up a temporary structure. On top of it, the aforesaid enactment did not apply to the area of the State, namely Assam. Obviously, the High Court could not have interfered with the findings of the Court below and, therefore, the Supreme Court had set aside that order. This is not the situation here.

32. The decision in Ram Das alias Ram Suraj Vs. Smt. Gandiabai and others, is of crucial importance. In my opinion, referring to the controversy between the parties, it clearly lays down that while considering the evidence if no material evidence having direct impact is ignored, there cannot be any interference by the High Court. While it is being so asserted by the defendants, the plaintiffs have been submitting otherwise. Not only the documents produced by the plaintiffs have been wrongly misunderstood, according to them, but the evidence led by the defendants, oral and documentary both having direct impact on the question, has been ignored by the learned Appellate Judge. In view of the aforequoted proposition appearing at the end of para 15 of his Judgment, if this view of the plaintiffs is accepted, clearly interference by the High Court is called for.

33. In Ram Bhajan and another Vs. Abdul Rahman and others, it has been held that when finding of fact, as recorded by the first Appellate Court is based on reasons and no perversity is found, interference from the High Court is uncalled for.

34. The last decision is in Sk. Nasirul Hoque Vs. Johora Khatun Bibi, . It refers to the said decision of the Hon"ble Supreme Court given in Ram Chandra Ayyar v. Ram Lingam Chettiar (supra).

35. Upshot of all these authorities is that merely because the High Court finds that the conclusion arrived at by the first Appellate Court is not acceptable, it cannot interfere in the second appeal. Unless the conclusion is shown to be based on no evidence, only because the High Court reaches to another conclusion cannot interfere. In matter of overlooking the evidence, whether oral or documentary, unless evidence overlooked has a direct impact on the matter under consideration, that also will not call for interference. However, if material evidence is not considered, evidence having direct impact on the question is not considered and if the question of burden is wrongly applied and on that approach, if the finding is given, interference of the High Court is called for.

36. Applying the proposition, if one looks at the matter in hand, the conclusion is inescapable that the interference is called for.

37. The teemed District Judge, in para 16 thereafter concentrates upon the evidence of the plaintiff's and goes on to consider the same all throughout concentrating not only on the exact area of the suit property, but comes to a conclusion that in between the plaintiff's properly and the boundary given in the

survey records and other documents, the defendants" properly situate.

38. If the defendants testimony is considered in the light of the oral testimony at page 131, the boundaries given in the partition deed and the one given by him in the testimony, do not tally. Making this a starting point, I will refer to the factual background as to the controversy.

39. The land, in question, is situate in an area of Quepem Division, which was under the Portuguese time referred to as "Judicial Division of Quepem". The property was owned by the Communicate of the area as was known as "Xelchi Tembi", with reference to a topographical feature viz. a hillock. Making this as a reference point in almost all the documents, the documents are referred to with reference to the respective parties and so far as different pieces of land are concerned, they may have been recorded in the name of different parties, but a reference to "Xelchi Tembi" is to be found in almost all the documents.

40. The learned trial Judge has done a very good job of summarising the effect of the document in relation to both sides. In para 9 of his judgment at page 83, he refers to the portion in dispute to be 17610 sq. metres, bounded on the north by the boundary of Curchorem Village, on the east by the plot of Communicate; on the west by Bansai Cotumbona and on the south by the remaining part of the property of the Temple. If to the north it is the boundary of Village Curchorem, obviously there could not be any property belonging to the defendants. The defendants on the contrary, have maintained that the area which was encroached upon by the plaintiff was subsequently regularised by appropriate proceedings, including the area said to have been gifted to the plaintiff by the widow of Vishnu Chondru Botto, way back on 28-3-1922.

41. So far as the defendants are concerned their property was held for the first time by their family in the beginning of the 20th Century or even little earlier. However, admittedly, it has been dealt with either by way of partition, mortgage or will on different occasions and as a result, only 1/3rd of 2/5th is now left with the defendants. About this, there is no controversy between the parties.

42. The controversy is as to where the property situate. If the say of the defendant is accepted, it is to the north of the plaintiff's property and to their north, it will be the Village Curchorem.

43. The learned trial Judge has considered all the documents, some of which are in Portuguese language and therefore, while arguing the matter before me, translations were given and these documents have been profusely referred to by both sides.

44. Considering these very documents that is the documents of the plaintiff as well as that of the defendants and also considering the oral evidence led by both the sides, the learned trial Judge has given the findings in favour of the plaintiff. For this purpose, paras 45, 47 to 52 of the judgment of the learned trial Court may be considered. At page 106, para 49 onwards, documents of the

defendants have been considered and after giving effect to it, he has come to the conclusion that the defendants' property cannot be to the north of the plaintiff's property.

45. It has come on record that after the defendants' property was dealt with in the manner stated above and the documents which are on record, it came to be parceled out into different plots, which thereafter came to be sold.

46. Not only the learned Trial Judge has considered the documentary evidence on record, but giving due effect to the deposition of Shri Balkrishna Kakodkar D.W. 1 page 108 onward of the evidence paper book, particularly reference to the cross examination, has held that the defendants are entitled to remaining 1/3rd of 2/5th of the property, but it is not the one which is claimed by the plaintiff. In other words, the plaintiff has succeeded in making out its case of getting declaration as sought.

47. Now coming back to the judgment of the learned District Judge, as one reads it from paras 16 onwards although concentration is on the case as put forth by the plaintiff, tried to be supported by the plaintiff's evidence. With regard to the Village Cadastral Survey conducted somewhere in the year 1955, during the Portuguese regime, a defect is found to the effect that the survey was not published. Learned Senior Counsel Shri Nadkarni appearing on behalf of the plaintiff admitted that it was not published, however learned Senior Counsel Shri Nadkarni promptly replied that it being merely record, it cannot be raised to a level of a public document. For this purpose, he relied on the case of Radehy and another Vs. Board of Revenue, U.P. and others, . This being a report of Surveyor, which was made on the basis of spot inspection, was not considered to be a public document: Obviously, this is a position with reference to the same survey. It is a result of complaint of encroachment, made by the Communicate and in presence of the parties concerned, including the neighbouring owners, when the public official has carried out the work, which is in discharge of his public duty. The proceedings of the survey have been brought on record by P.W. 12/A to show the position as to the boundaries and other related matters pertaining to the disputed property prior in point of time than the starting of the dispute. It is indeed a relevant document when from contemptuous record position of the boundary could be shown particularly prior to the starting of the dispute, the importance thereof cannot be wiped away on the basis that the procedural requirement of publication of the survey was not fulfilled. If the question has been whether the survey itself is binding to the parties, the requirement has to be insisted upon. With regard to the question of the property towards the north, after survey demarcation, carried out by the survey authorities in presence of the concerned parties will have its own importance and will have to be given its due weightage. The fact stated therein is relevant to the facts in dispute. The document itself has, therefore, become relevant and are allowed to be admitted in the evidence without being raised before the trial Court.

48. The learned District Judge has allowed himself to be carried away by the fact

that the survey was never closed or finalised. This is his finding in para 18. In para 19, he refers to his own long experience and holds that he did not accept the survey plan because the parties before him had produced copy of "auto de demarcacao" not signed by all the co-owners including the opposite party. While insisting upon this requirement, the learned District Judge has completely forgotten the fact that the dispute is or alleged encroachment on the part of the "Devasthan on the one hand over the property of the Communicate on the other. It can no longer be called as alleged encroachment as the "Devasthan" had accepted the fact of encroachment and, therefore, Communicate on payment had agreed to get it regularised. In that connection, when the survey officials conducted the survey, the neighbouring holders of land were required to be present including the representatives of the Communicate. As per said survey record, they were all present. Under the circumstances, presence of the defendants was not expected as they are not shown to be the neighbouring co-owners.

49. This, in any way would go against the case of the defendants. As per their own say, between Curchorem Village and the plaintiffs property, their property situate. If that be so, as neighbouring owner of the northern side of the encroached property, like other neighbouring owners, the defendants would have been called upon to remain present.

50. That apart, according to the survey, the northern most boundary of the encroached area, is shown to be Curchorem Village, as also a part of the defendants' property is referred to as bordering northern side in the survey, towards which no encroachment is alleged.

51. It is a common feature that towards the north of plaintiffs property, in all the documents, there is a reference to said village boundary, as well as to the defendants' property. However, inspite of their oral testimony and the various documents which are produced, it is the defendants who are unable to pinpoint exact location of their property.

52. The reason is that with the passage of time, from the beginning of the century, the property has been dealt with by way of partition, mortgage, will, leaving 1/3rd of the 2/5th of the original property of the defendants' family.

53. In para 20 again, the learned District Judge has allowed himself to be swayed by absence of the document at the time of the survey and holding that the survey having been defective, it is reason enough to negate it. As if the issue before him was whether the survey is properly done or not. He dealt with it at length and came to the conclusion that it has not been done properly. Again the plaintiff's evidence alone has been discussed in para 21 and with reference to difference between 30,000 sq. metres and 27,000 sq. metres, he has again held that there were no boundary marks. This would indeed be case, if the survey is given a go by completely.

54. The only testimony of the defendants that is considered in para 22 that of

the defendants" witness No. 4, who is an expert witness to counter the testimony of the plaintiff's expert P.W. 13.

55. Learned District Judge has fallen back upon the inspection note carried out at the time when the original owner Vishnu Chondru Botto had applied for grant of land and then inspection was carried out. This having been done decades back, at the time when the dispute arose, unless it is categorically shown that the situation had remained unaltered throughout, merely because three experts have demarcated the plot, the plaintiff cannot be non-suited.

56. Further analysing defect in the plan prepared by P.W. 13, falls back upon that very inspection note and referring to the measurement given therein on the northern boundary of the "aframento" did not coincide with the limit of Curchorem Village to the south of the same limit. Had plaintiff been relying only on the gift deed made by widow of Vishnu Botto, this finding of the learned District Judge could not have been questioned. The gift having been done decades back, followed by complaint of encroachment addressed to by the authorities in the year 1955 by carrying out the aforesaid survey, it being later in point of time, boundary situation as obtained therein, in my opinion will prevail.

57. This position taken with the documentary evidence as considered by the learned trial Judge with reference to the evidence of the defendants themselves, as per paras 53 and 54 of his judgment and the evidence of D.W. 1 referred to above, it has to be held that the plaintiff has succeeded in making out its case. Further, it is the defendants who are failing to point out that their property is situate in between Curchorem Village and the plaintiff's property.

58. As regards the aforesaid survey of the year 1955, the learned Senior Counsel Shri Nadkarni has submitted that it would amount to act of a public servant and hence, treating it as such u/s 35 of the Evidence Act, read with 74 thereof, presumption u/s 114 of the Official Act having been done in proper manner, should be invoked to the extent that is record of the act on the public official.

59. The learned District Judge, in para 24 has gone to the extent of saying that the plaintiffs have not succeeded in showing that they were in possession for a number of years, as alleged by them. In the written statement, as rightly noted by learned trial Judge in para (6), the plaintiff's property is referred to as "Xelchi Tembi", is admitted to be that of the plaintiff. The only question is where exactly is it situate and what are its boundaries.

60. The learned District Judge having concentrated on the aspect of requirement of the plaintiff to prove its case, which, in other words would mean that the burden is on the plaintiff to prove it, has lost sight of not only the aforesaid admission, but also the documents which were considered by the learned trial Judge. Once these documents are taken into consideration, disputed boundary of the disputed area is clearly established by the plaintiff. Once that is done on the basis of the aforesaid admission, the case of the plaintiff also made out.

61. It is an established position that if there is a conflict between area and the boundary, boundary will prevail, The Palestine Kupat Am Bank Co-operative Society Ltd. v. Government of Palestine and others, AIR 1948 PC 207 is the case on the point. It is a very interesting case. It relates to then State of Palestine, which is now referred to as Middle East area. The Surveyors sitting at Jerusalem were dealing with the question. The grant referred to 34 old dunams, a measurement, which was also given with reference to new measurement as 32 dunams. On measurement, it was found that it was much larger and therefore, the Government on one hand on its own and through its authorities, on the other, claimed that it cannot be given to a private party. The private party, in the meantime, had become owner of 2/3rd of the area. This conflict was resolved by referring to the boundaries which are found to be fixed and ascertained it and in the process a large tract of 625 dunams came to be granted to the private party. The Government claim to that extent was defeated. In the instant case, if at all, there be any discrepancy, it is roughly about 3000 sq. metres. In view of the aforesaid 1955 survey, when the boundaries are clearly made out, obviously that will prevail over the area. Thus, the findings of the learned District Judge shall have to be set aside.

62. Learned Senior Counsel Shri Kakodkar, relying on this very decision, has submitted that the boundaries shall prevail only if they are so fixed, which, according to him was not the position. However, the said survey make the position to be otherwise.

63. Learned Senior Counsel Shri Nadkarni has relied upon, Shikharchand Jain Vs. Digamber Jain Praband Karini Sabha and Others, and submitted that before the Hon'ble Supreme Court it was found that as per this decision Khasra entry was ignored by the first Appellate Court and the case called for interference by the High Court for the reasons set out in paras 5 and 6 of the judgment.

64. This can have application on the said survey document, which, under the circumstances will have a direct impact on the result of the suit. This document, as well as the documents produced by the defendants themselves discussed so thoroughly by the learned trial Judge as stated above, would clearly show that the learned Appellate Judge has committed jurisdictional error, calling for interference from the High Court.

65. For the aforesaid reasons, the three questions formulated in earlier part of the judgment too will have to be answered in favour of the appellant. The net result, therefore, is that the appeal is allowed. The judgment and the decree of the first Appellate Court has to be set aside and that of the trial Court restored and confirmed.

Orders accordingly.

In the facts and circumstances of the case, the parties are left to bear their own costs.

66. Appeal allowed.