

FIRST APPEAL NO. 93 OF 1992

1. Rajaram alias Bapu  
Sitaram Kelkar,  
r/o Aarey Housing Colony,  
Building No.14, Room No.7,  
4th Floor, Worli,  
Abdul Gaffar Road,  
Bombay 400 018. ... Appellant

versus

1. Jagu Babani Gaude (since  
deceased) by his legal  
representatives:
- 1(a) Smt. Shantabai Narcinv  
Gaude, widow of the  
predeceased son  
Narcinv Gaude
  - 1(b) Master Mahadev Narcinv  
Gaude, aged 8 years,  
both r/o Pistem-Poltod,  
Nanora via Assonora Goa  
403 504
  - 1(c) Smt. Jaiwanti Janardan  
Parab
  - 1(d) Shri Janardan Narayan  
Parab, both r/o H.No.795,  
Sonarbhat, Saligao,  
Bardez-Goa.
  - 1(e) Smt. Gowari Gowardhan  
Palyekar
  - 1(f) Shri Gowardhan Savlo  
Palyekar, both r/o H.No.373,  
Bhunaga Wada, Asgao,  
Bardez-Goa.

- 1(g) Smt. Sunanda Vishnu  
Karapurkar
- 1(h) Shri Vishnu Karapurkar  
both r/o Nanora,  
Assonora, Goa 403 504
- 1(i) Smt. Sumati Jagu Gaude,  
r/o Pistem-Poltod,  
House No.81, Nanora via  
Assonora Goa 403 504.
- 2. Sita Jagu Gaude,  
wife of Jagu Babani Gaude,  
both r/o Pistem-Poltod,  
House No.81, Nanora, Via  
Assonora-Goa, 403 504. ... Respondents

Mr. R. G. Ramani, Advocate for the Appellant.

Mr. S. G. Dessai, Senior Advocate with Mrs.C. Soares,  
Advocate for Respondent No.1(a), 1(b), 1(e) and 1(f).

CORAM : P. V. HARDAS, J.

DATE : 27TH FEBRUARY, 2004.

#### ORAL JUDGMENT

This Appeal has been filed by the unsuccessful Plaintiff challenging the Judgment and Decree, dated 20th July, 1992, passed by the Civil Judge, Senior Division, Bicholim, in Special Civil Suit No.30/1985, dismissing the suit of the Appellant with costs.

2. The facts in brief as are necessary for the decision of this Appeal may be stated hereunder:-

A property called "Pistem-Poltod" surveyed under Nos. 485/5 and 487/7 at Nanora, Latambarsem, registered in the Land Registration Office under No.5674 B-15, of which the Plaintiff was the owner. A suit came to be filed by the Plaintiff for recovery of possession and for mesne profits. In the suit, it was averred that the Plaintiff is the owner of the suit property and the Defendants have been occupying the suit property as care-takers. The Defendant No.1 had commenced a case before the Mamlatdar, Bicholim, which was decided in favour of the Plaintiff. The Plaintiff by his registered letter dated 21st March, 1985, informed the Defendants that the Plaintiff did not wish to continue the privilege and the Defendants should deliver possession of the suit property within one month of the receipt of the letter. The said letter was duly received by Defendant No.1 on 25th March, 1985, whereas Defendant No.2 refused to accept the letter. The Defendant did not vacate and continued in possession of the suit property and, therefore, the Plaintiff claimed mesne profit at the rate of Rs.200/- per month. The Plaintiff prayed for a decree directing the Defendants to deliver vacant possession of the suit property and ordering the Defendants to pay Rs.200/- per month as mesne profits. The Plaintiff also prayed for permanent injunction restraining the Respondents,

their relatives, agents or anyone acting for them or on their behalf to restrain them from entering the suit property or in any way interfering with it after delivery thereof to the Plaintiff. The Defendants filed their written statement and raised a preliminary objection that as half of the suit property surveyed under No.487/7 was an agricultural land and as the Defendants were tenants the Civil Court had no jurisdiction to entertain and try the suit. Without prejudice to the preliminary objection, the Defendants in their written statement contended that the suit property had been leased to them by an agreement dated 5th June, 1960. It was also stated that the names of the Defendants figure as tenants with respect to the plot surveyed under No.487/7.

3. On the basis of the pleadings of the parties, the learned Trial Court framed the following issues:-

- (1) Whether the plaintiffs prove that the defendants are care-taker of the suit property?
- (2) Whether the defendants prove that they are lessees by virtue of agreement dated 5/6/1960?
- (3) Whether the defendants prove that they made cultivation including paddy in the suit property?

- (4) Whether the defendants prove that this Court has no jurisdiction to try this suit?
- (5) Whether the defendants prove that the suit is barred by law of limitation?
- (6) What relief? What orders?

4. It appears that the Defendants herein filed an application at Exh.29 praying that the issue of tenancy be referred to the Mamlatdar for adjudication. The Appellant/Plaintiff objected to referring the said issue to Mamlatdar for decision and submitted that the scope of the Civil Suit was restricted only to find out if the Defendants were the licensees and to then accordingly pronounce the Judgment. The learned Trial Court by the aforesaid Order held that it was "manifestly evident that it is on the Plaintiffs to establish as to whether the Defendants are trespassers in the suit property as claimed by them". In conclusion, the learned Trial Court observed "being so, the narrow point for consideration is as to whether the Defendants are trespassers in the suit property as claimed by the Applicant or not. The question of tenancy under the facts and circumstances of this Court does not at all arise".

5. In support of its case, the Plaintiff produced at Exh.PW1/A a certified copy of the Judgment

of the Mamlatdar disallowing the claim of the Appellants as Mundkars. The Plaintiff No.1 also produced the cadastral plan, the survey plan and the documents of title in respect of the suit property. The Plaintiff No.1 also produced the demand notice from the Panchayat for the payment of tax, the receipts etc. Plaintiff No.1 placed on record the notice issued to the Defendants and the reply of Defendant No.1. The Plaintiff stated that he had kept the Defendant as a care-taker but since the Defendant had set up a claim of being a Mundkar, the Plaintiff had issued the aforesaid notice to the Defendants claiming possession of the suit property. In the cross-examination, Plaintiff No.1 admitted that although the property is one, it bears two survey numbers. He has stated that he does not remember when the possession of the plot was given to the Defendants. He corrected himself to state that he corrected in 1963 and there was no written document regarding possession. He also admitted that the Defendant used to give some money after one or two years. He has also admitted that the Defendants used to give the yield to the Plaintiffs and he used to pay them as his services as watchman. He has further admitted in the cross-examination that he does not remember on what basis the Defendants were to give him Rs.100/- per month. He has admitted that the name of the Defendant is shown as a tenant in the

Record of Rights in respect of survey no.487/7. He has admitted that a pump set for drawing water has been fixed on the well by the Defendants. The Plaintiff has also admitted that plantation has been made by the Defendant after taking possession of the suit property. He has also admitted as true that the Defendant is doing the off seasonal cultivation in the suit property. He was confronted with the nine challans in respect of payment of the tax in respect of the suit property but stated that he had authorised the Defendants to pay the land tax on his behalf. He further states that he does not possess any challans evidencing any payment of land challans. He has also admitted that there are no pleadings in his plaint that he had authorised the Defendants to pay the land tax on his behalf.

6. The Defendant No.1 examined himself as D.W.1 and he stated that he was in possession of the suit property for the last thirty two years and was paying rent of Rs.20/- per year. The Plaintiff had refused to accept the rent for the last two or three years. He has produced on record the receipts showing the payment of matríz patial. He has also stated that he had paid Rs.900/- being the purchase price. He has denied the suggestion that the Plaintiff No.1 used to give him payment of money for matríz patial on behalf of

Plaintiff No.1.

7. The learned Trial Court on appreciation of the evidence of the parties recorded a finding that the Plaintiffs had failed to prove that the Defendants were trespassers. The learned Trial Court, therefore, answered Issue No.1 in the negative and answered Issue No.3 in the affirmative. The learned Trial Court struck off Issue No.2 in respect of the tenancy of the Defendants as unwarranted. In respect of the other Issues about the jurisdiction and about the limitation, the learned Trial Court held that no evidence was adduced in this behalf and consequently answered those Issues in the negative.

8. Mr. R. G. Ramani, learned Counsel appearing on behalf of the Appellant has urged before me that the learned Trial Court has dismissed the suit without recording a finding in respect of the character/status of possession of the Defendants. According to him, the learned Trial Court ought to have held whether the Defendants were licensees or tenants instead of dismissing the suit by holding that the Plaintiff had failed to prove that the Defendants were trespassers.

9. The learned Trial Court had framed Issue No.2



on the basis of the pleadings that they were tenants in respect of the suit property. The Defendants had also submitted to the Court for referring the Issue for adjudication to the Mamlatdar. This move was seriously opposed by the Plaintiffs and the learned Trial Court ultimately held that the entire suit would depend on the Plaintiff in proving that the Defendants are the trespassers. Thus, Issue No.2, regarding tenancy, instead of being referred to the Mamlatdar for decision remained for adjudication by the learned Trial Court. On the basis of the evidence of Plaintiff, the learned Trial Court returned the finding that the Plaintiff had not been able to prove that the Defendants were trespassers. Although, the Defendants had set up a plea, the learned Trial Court could not record any finding in this behalf as the Civil Court did not have the jurisdiction in deciding the question of tenancy. The learned Trial Court, therefore, dismissed the suit of the Plaintiff as the Plaintiff had failed to prove that the Defendants were trespassers. Therefore, there is no force in the submission of the learned Counsel appearing on behalf of the Appellant that the learned Trial Court ought to have recorded a finding regarding the capacity in which the Defendants were in possession of the suit property. Admittedly, the learned Trial Court could not have recorded a finding in respect of the tenancy of the Defendants though such a plea had

been set up in the written statement. The evidence of the Plaintiff is woefully short of proving the Issue No.1 and according to me, the learned Trial Court has been right in answering the Issue in the negative. The appreciation of the evidence of the learned Trial Court cannot be faulted with.

10. For the aforesaid reasons, there is no substance in the Appeal and the same is dismissed with costs.

P. V. HARDAS, J.

RD.