

PETITIONER:
KASHINATH S BANDEKAR & ORS.

Vs.

RESPONDENT:
ATMARAM VASSUDEVA NAIQUE & ORS.

DATE OF JUDGMENT: 14/03/1997

BENCH:
A.S. ANAND, K. VENKATASWAMI

ACT:

HEADNOTE:

JUDGMENT:
J U D G M E N T
DR. ANAND. J.

This appeal by special leave is directed against the judgment and order of the High Court of Judicature Bombay (Panaji Bench, Goa) dated 5th of July 1990.

The case has a chequered history but we shall refer to the facts to the extent relevant for the purpose of disposal of this appeal. On 23rd July 1961 the predecessors of respondents filed a Civil suit in the Court of Civil Judge (Senior Division, Bicholin) for declaration that they are the owners and possessors of the disputed properties. That suit was tried under the Portuguese Civil procedure Code. After going through the pleadings and the documents and especificacao was drawn up by the trial court besides a questionnaire, (issues in the case). The especificacao and the questionnaire were drawn up under Articles 515 and 516 of the Portuguese Civil procedure Code. Objections filed to the especificacao were decided on 10.3.62. Parties led evidence, both oral and documentary in support of their respective claims. Vide judgment and order dated 27.7.67, the trial court dismissed the suit. The plaintiffs in the suit filed a first appeal against the judgment and order dated 27.7.67 in the court of the learned Judicial Commissioner. After hearing the parties, the learned Judicial Commissioner found the trial court had not applied its mind to the issue of title as also to the effect of certain documents produced by the parties which were in the nature of agreements. The learned Judicial Commissioner appointed Mr. Pinto Menezes, as Local Commissioner who was to inspect the suit land, examine the documents on the record but without recording any further evidence to submit a report, after considering the evidence already on the record, regarding the issue of ownership of the disputed immovable property. The Local Commissioner submitted his report on 8.11.69, holding that at the plaintiffs were the owners of the immovable property known as "Bismachotembo". It was also found by the Local Commissioner that immovable property called disputed land which lay between the aforesaid two immovable properties, belonged to the plaintiffs in the suit, who therefore had title to that property. The learned Judicial Commissioner

perused the report of the Local Commissioner and found that he had not given any report on the question of possession of the property in dispute. Vide order dated 9.2.70, the learned Judicial Commissioner remanded the case to the court of learned Civil Judge (Senior Division) to adjudicate "on the issue of possession and prescription" as claimed by the defendants on the basis of the evidence already available on the record after taking note of the report of the Local Commissioner. The learned Civil Judge (Senior Division), after hearing learned counsel for the parties on the issue of possession and prescription, vide his order dated 4.8.71, came to the conclusion that the plaintiffs were in possession of the disputed piece of immovable property and that the defendants had failed to prove that they had been in possession of the disputed land by prescription, as alleged by them. After recording this finding, the learned Civil Judge forwarded the finding on the issue of possession and prescription along with the record of the case to the court of the learned Judicial Commissioner. In the meanwhile, the Code of Civil Procedure, as applicable to the rest of the courts in India, was also made applicable to the courts in the territory of Goa with effect from 15.6.66. The learned Judicial Commissioner, therefore, noticed that under the Civil Procedure Code read with the Civil Courts Act 1965, the court of the Judicial Commissioner no longer had jurisdiction to entertain and hear an appeal from the judgment, order or decree passed by the learned Civil Judge and that such an appeal could lie only before the concerned District Judge. The learned Judicial Commissioner, vide order dated 31.8.1972 forwarded the record of the case to the District Judge at Panaji for disposal of the appeal. Both the original plaintiff as well as the original defendants having died in the meanwhile, their legal representatives were brought on the record to prosecute the appeal. The learned District Judge at Panaji heard the appeal and vide judgment and order dated 29.3.84, set aside the judgment and decree of Civil Judge dated 27.7.67 and passed a decree in the suit in favour of the plaintiffs. The defendants in that suit, challenged the judgment and decree dated 29.3.1984 passed by the District Judge, through a second appeal in the Panaji Bench of the High Court. (Second Appeal No. 30 of 1984). After hearing learned counsel for the parties, a learned single Judge of the High Court found that the First Appellate Court had failed to take into consideration the *especificacao* prepared by the trial court and vide judgment dated 31.3.89 set aside the judgment and decree of the First Appellate Court dated 29.3.84 and remanded the appeal to the District Judge to decide the first appeal afresh after taking into consideration the *especificacao* and other material on the record. After remand of the appeal, the learned District Judge heard the parties and vide judgment and order dated 30.9.89 set aside the judgment of the trial court dated 27.7.67 and allowing the appeal, the District Judge passed a decree for declaration and possession of the suit property in favour of the original plaintiffs. It was found by the learned District Judge that the plaintiffs were the owners of the property bearing No. 5501, which included the disputed immovable property also. A further declaration was also given to the effect that the defendants were in possession of the property bearing No. 5568 and the claim of the defendants to be in possession of suit property was negatived. The successors in interest of the defendants in the original suit (appellants herein) filed a second appeal against the judgment and order of the District Judge dated 30th

September 1989. Vide judgment and order dated 5.7.90, impugned herein, the High Court dismissed the second appeal.

Mr. Dhruv Mehta, learned counsel appearing for appellants, submitted that both the First Appellate Court and the High Court had failed to consider the *especificacao* which reflected the admissions of the parties and that an order of *especificacao* being final and conclusive could not be controverted through evidence as had been done by the respondents in the present case. It was urged that an *especificacao* is binding on the parties and both the courts could not go behind it more so because the respondents herein had not challenged the correctness of the *especificacao* through an appeal. Learned counsel further submitted that the First Appellate Court also fell in an error in describing the "tombacao" (survey document) as a private document, having no sanctity of law, ignoring the fact that the respondents herein had neither raised any objection nor filed any "reclamacao" against the tombacao.

Mr. Verma, learned senior counsel appearing for the respondents on the other hand submitted that the *especificacao* did not reflect the correct state of affairs and the evidence on the record exposed its incorrectness and as such the first appellate court as well as the high Court were right in preferring the evidence to the *especificacao*, which had been drawn up even before the issues were framed.

The proceedings of the trial court dated 10th March 1962, settling the *especificacao* in the present case read as follows:

"I consider as proved by way of documents and by the agreement of the parties the following documents:

a) The plaintiff is the owner and possessor by himself and through his conveyers of the property described at the land Registration Office of this Comarca under No. 5501 of book B 912 new.

b) This property was described and apportioned in the "Inventario" among minors carried out at the Bardez Comarca court in the years 1907-08, on the demise of the previous possessor, Jose Jovem Flaviano Ferreira, late notary public of Bardez, with the boundaries mentioned in the endorsement on the description No. 5501, having been purchased with the same boundaries by the plaintiff and his brother Govinda by deed dated 13.12.1913, ratified by that of 19.9.1915.

c) The properties Motouvadi, bordering the property No. 5501 are described at the same land Registration Office under No. 5668 of Book b(15) new and 761 of Book B old, and the right to 1/3 of this latter belongs to the plaintiff.

d) Vishnu Porobo, member of the joint Hindu family to which the property No. 5668 belonged did intervene as instrumental witness in the deed dated 19.9.1915,

referred to in clause (b) of this "Especificacao: (facts admitted).

e) The defendant Xencora stored outside the stone-wall, which exists on the western side of the property; No.5668, sterile mineral-ore and thereafter he felled a "Satondo" tree, valued at Esc. 360\$00, this felling having taken place probably in the month of September, 1960.

f) According to the predial description No.5501 the property referred to lies in the village, Bicholim, while the controverted strip lies in the bordering village of Bordem.

g) The conveyer of the defendants, Indira Dondo, sold to the latter the property 'Motou-Vadda' with its adjoining plot "Gumtachi-Molly".

h) The property 'Motou-Vadda' has on the west a stony-wall throughout its extension.

i) At the time of the Land Survey of the Comunidade of Bordem against which the plaintiff did not file a claim of objections when it was liable to "reclamacao" of the interested parties, the plot identified in para 13 of the written-statement was surveyed as belonging to the conveyer of the defendants, or beit, upto the row of stones referred to in para 10 of the same and the usurpation of 19,322 sq. metres unconfessed but paid by the defendants, has been found.

On the same occasion, the western part in respect of the row of stones wall surveyed and the usurpation of 19,052 sq. metres discovered, confessed by Baburao, was paid its value.

j) The Villages of Bordem and Bicholim are surveyed and their boundaries defined, although the survey cadastre may not be finalised.

k) From the deed of purchase of the property No. 5501, it is seen that this property is bounded on the north by the property of the Comunidade of Bordem and not by that of Aleixo Joao Lobo, according to what is mentioned in the predial description, which is also confirmed by the cadastre of Bordem."

With a view to appreciate the submissions made at the bar. it is first necessary to consider as to what is the nature and status of the especificacao.

Articles 515 and 516 of the Portuguese code deal with

the settlement of especificacao and the questionnaire. These Articles read as follows:

"Art. 515:- When the trial is to be held, the Judge within eight days shall specify the facts which he considers as admitted for want of denial, admitted by agreement of parties and proved by documents and he shall fix in serial order the points of fact in controversy and which are relevant for the decision of the case. From this questionnaire as well as from the specification, a copy shall be given to the parties, who may file, in duplicate, the objections which they deemed fit. The duplicate shall be handed over to the opposite side; within next two subsequent days the latter may give its say in the matter. After the expiry of such period, the objections shall be decided.

Para 1:- The questionnaire shall be amongst the facts pleaded, consist of all facts controverted relevant to the case and those which may be indispensable for its resolution.

Para 2:- The objection may be related to specification or questionnaire. The latter may be objected for deficiency, excess, complexity or obscurity.

Para 3:- From the order deciding the objection, appeal lies to Relacao (High Court) from the decision of the latter no appeal shall lie to the supreme court.

Article 516- once the questionnaire is settled the parties shall be notified to give the list of witnesses and apply for any other mode of evidence."

From a combined reading of Articles 515 and 516 (supra) it becomes obvious that an especificacao is only a step in the proceedings during the trial and is a record of settlement aimed at narrowing down the controversy in the case. It certainly has probative value but cannot be given the status of a binding judicial order which cannot be given the status of a binding judicial order which cannot be controverted through evidence led at the trial on the basis of the pleadings of the parties and the issues raised. The High Court therefore, rightly found that the matters sorted out at the time of settlement of the especificacao are required to be borne in mind while deciding the dispute and that the facts detailed in the especificacao should be taken into consideration for the purpose of adjudicating various issues raised in the suit but nonetheless the controversy in the suit is to be decided on the basis of evidence, both oral and documentary, led at the trial bearing in mind the especificacao. That an especificacao is only a step in the proceedings aimed to narrow down the controversy and is only a procedural step is also obvious from the fact that in clause (i) of especificacao reliance has been placed on 'tombacao' treating it as a document of

conclusive nature and a 'public document'. The 'tombacao' has been found that the 'tombacao' record took place in the year 1948. It was "incomplete" and in respect of the same there was "no promulgation". The High Court, therefore, rightly found that the District Judge was justified in not relying upon that record which was not of a conclusive nature to arrive at its findings. There relevancy, the proof and the evidentiary value of a document has to be decided at the trial notwithstanding, the record of the *especificacao* because in the event, the documents on the basis of which an *especificacao* is drawn up, treating the statements in those documents as admissions, is found at the trial either not proved or not genuine or otherwise not relevant, it cannot be said that the statements made in the *especificacao* would over-ride the doubtful nature of the document and the trial court would be unable to pronounce upon the correctness, relevancy and authenticity of the document. The court is duty bound to pronounce upon the relevancy and authenticity of the document on the basis of evidence led at the trial notwithstanding what is settled in the *especificacao*, drawn up at the initial stages of the case, as not to do so would result in miscarriage of justice. We, therefore, find it difficult to accept the submission of Mr. Mehta that the First Appellate Court or the High Court could not have recorded findings on the basis of the evidence led at the trial, strictly in support of the pleadings, which run contrary to the record of the *especificacao* and we are of the view that an *especificacao* is only in the nature of a step in the proceedings of the trial, which has probative value and is required to be borne in mind but the same cannot be preferred to the evidence led at the trial which conclusively shows the statement or any part of it in the *especificacao* to be either incorrect or not 'proved' or having no evidentiary value or relevance or suffering from any like defect.

At the time when a Local Commissioner was appointed by the learned Judicial Commissioner in exercise of the judicial powers, the *especificacao* stood already settled. The Local Commissioner was still directed to examine the question of ownership, title, possession and prescription and none of the parties raised any objection to that course being adopted. After the receipt of the report of the Local Commissioner, the case was remanded to the trial court for determination of prescription because of the claim to possession raised on its basis by the defendants. Admittedly, the *especificacao* dated 10.3.62 did not concern itself with claim based on prescription for deciding which the case had been remanded, and therefore, the question of prescription had to be decided independent of the *especificacao* on the basis of the relevant material. Once the claim of the defendants to ownership and possession on the basis of prescription falls, the statements in the *especificacao*, which make a record contrary thereto, have to be ignored and the findings recorded by the first appellate court after remand and by the High Court that the defendants appellants had failed to substantiate their claim to ownership and possession of the disputed land on the basis of adverse possession, must be preferred, notwithstanding any statement to the contrary contained in the *especificacao*.

Coming now to the merits of the instant appeal. The defendant appellants did not file any objections to the report of the local commissioner, who found the Indira Dando did not sell the disputed plot known as "Motou-Vadda" to the defendants who were owners of the adjoining plot

"Gumtachi-Molly" notwithstanding the ***** in clause (g) of the especificacao. At the trial, defendants-appellants in the suit did not claim title to the suit property by way of any transfer, conveyance, sale or gift. They rested their claim on title by adverse possession. The issue relating to adverse possession of the suit property by the defendants has been considered by the courts below. After the learned Judicial Commissioner referred the issue of possession vide order dated 9.2.1970, to the civil Judge (senior Division) the same was debated before the learned Civil Judge, who vide order dated 4.8.1971, came to the conclusion that the defendants had failed to prove that they were in possession of the suit land for the prescribed period of 30 years. The learned District Judge, in appeal also found that the defendants had failed to prove their adverse possession over the disputed property and on the contrary the plaintiffs had proved their possession and title to the said property throughout. After the report of the local Commissioner, the District Judge, Panaji, once again by his judgment and order dated 30.9.1989 came to the conclusion that the defendants had failed to prove their possession of the suit property for a period of 30 years or more and that the plaintiffs on the other hand had proved their title and possession of the suit land. The High Court agreed with the concurrent findings of fact recorded by the courts below, both on the issue of possession as well as on the issue of title and by a well considered and detailed order negated the claim of the defendants (appellants herein) to possession by prescription. The concurrent findings recorded by the courts below to negative the claim of ownership of the defendant appellants are based on proper appreciation of evidence, both oral and documentary on the record. In our opinion, the courts below have taken considerable pains to decide the issues between the parties after applying correct principles of law. The High Court to the extent necessary also examined the record, including the evidence, while hearing the arguments in the second appeal filed by the appellants under section 100 of the code of civil procedure, with a view to do complete justice between the parties. We find no error to have been committed by the courts below. The impugned judgment and order do not call for any interference. This appeal, therefore, fails and is dismissed, but in the peculiar facts of the case without any order as to costs.