

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 33 OF 2007**

1) Antonio Jose Fernandes
s/o. Joao Caetano Fernandes
and his wife;

2) Antonieta Fernandes,
both of full age,
residing at H.No.2/2033,
Fatorda, Margao, Goa.

3) Joao Caetano Fernandes, son of
Joao Rosario Fernandes (deceased)

a) Placido Fernandes,
b) Mrs. Lizia Fernandes,
c) Mr. John Fernandes,
through their attorney
Antonio Jose Fernandes,
residing at H.No.2/2033,
Fatorda, Margao, Goa.

4) Mrs. Ana Rita alias Florina
Fernandes through their attorney
Antonio Jose Fernandes,
residing at H.No.2/2033,
Fatorda, Margao, Goa.

..... Appellants.

Versus

1) Miss Petornila Fernandes
alias Petronila Fernandes, (deceased)

2) Joaquim Manuel Sebastiao

Domingos Fernandes
son of Sebastiao Fernandes, and
his wife

3) Mrs. Maria Lourenca Fernandes,
Both residents of Andheri, Bombay,
represented by their attorney
Mrs. Olga Godinho,
H.No. 252, Rachol, Raia, Salcete, Goa.

4) Mrs. Josephine Fernandes,
resident of H.No.69, Ward 13,
Malbhat, Margao, Goa.

5) Joaquim Fernandes, son of
Joao Caetano Fernandes,
resident of H.No.69, Ward 13,
Malbhat, Margao, Goa.

..... Respondents.

Shri M. B. Da Costa, Senior Advocate with Ms. Karishma Betquekar,
Advocate for the appellants.

None for the respondents, though served.

CORAM :- F.M. REIS, J.

Date : - 27th April, 2015.

ORAL JUDGMENT :-

Heard Shri M.B. D'Costa, learned Senior Counsel
appearing for the appellants. None appears for the respondent, though

served.

2. The above appeal came to be admitted by an order dated 26th April, 2007, on the following substantial questions of law :

(a) Whether a person holding power of attorney could have deposed when facts relating to the documents allegedly executed/signed by Petornila were relevant and material to decide on the veracity and validity of the documents ?

(b) Whether the suit could have been decreed when the private documents relied upon had not been proved ?

(c) Whether the Court below has failed to apply its mind to material and relevant documents ?

(d) Whether the suit for partition would lie when there was a registered Sale Deed dated 03.08.1977 transferring the entire suit property in favour of the Defendant, which had not been challenged at any point of time ?

(e) Whether there is no Gift in favour of the Plaintiff no.2 and the Courts have wrongly construed the Gift Deed produced ?

3. Shri M. B. Da Costa, learned Senior Counsel appearing for

the appellants, in support of the above substantial questions of law, has pointed out that the suit filed by the respondents No.2 and 3 along with the deceased respondent No.1 is based on a fraudulent document as, according to him, the claim of the respondent No.2 is relying upon a Deed of Gift dated 11/8/1975. The learned Senior Counsel has, thereafter, taken me through the signatures on the said Gift Deed, as well as the documents executed in favour of the appellants to point out that there is a vast difference between such signatures which, itself suggests that the document is fraudulent. The learned Senior Counsel has also brought to my notice the information sought from the Sub-Registrar's Office at Margao under the Right to Information Act, to point out that the relevant pages of the alleged Deed of Gift are missing from the record of the Sub-Registrar's Office. The learned Senior Counsel has, thereafter, pointed out that by a private document dated 28th November, 1957, the whole rights of the deceased respondent No.1 was conveyed in favour of the father of the appellants, on payment of a specific consideration. The learned Senior Counsel further points out that the learned Trial Judge has rightly dismissed the suit filed by the respondents No.2 and 3 and deceased respondent No.1, on the basis that the respondents have failed to establish any right to the disputed

property. The learned Senior Counsel further submitted that house in the property has been re-constructed by incurring substantial expenses by the appellants without any objection from the respondents. The learned Senior Counsel has, thereafter, taken me through the Judgment of the Lower Appellate Court to point out that the Lower Appellate Court has not examined these aspects of the dispute and has erroneously discarded the said documents which, according to him, conclusively establish the ownership of the appellants over the property in dispute. The learned Senior Counsel further points out that the original plaintiff No.1 - respondent No.1 herein had personal knowledge of the facts with regard to the disputed property, but did not enter the witness box, though she was alive at the relevant time, which itself calls to draw an adverse inference against the said plaintiff. The learned Senior Counsel further points out that the deposition in the Court was through a Power of Attorney holder when such evidence could not be considered, considering that the Power of Attorney Holder did not have personal knowledge about the disputed property. The learned Senior Counsel further points out that the Lower Appellate Court, as such, was not justified to rely upon such evidence to come to the conclusion that respondents No.1, 2 and 3 had established their

right to the disputed property. The learned Senior Counsel further points out that the appellants had also taken the plea that since the year 1957, on payment of a sum of Rs.600/-, the right of Petornila in the disputed property was conveyed in favour of the appellants and, their ancestors and, as such, the appellants had acquired a prescriptive right over the disputed property. The learned Senior Counsel further points out that this aspect has been completely overlooked by the learned Lower Appellate Court. The learned Senior Counsel has, thereafter, taken me through the written statement to point out that this defence was raised by the appellants, and such grounds were even raised before this Court in the appeal memo. The learned Senior Counsel further points out that all these arguments were advanced before the Lower Appellate Court which have not been examined by the Lower Appellate Court whilst passing the impugned Judgment. The learned Senior Counsel further submits that though the document of the year 1957 has not been registered, nevertheless, considering that the consideration was less than Rs.1,000/-, registration was not compulsory. The learned Senior Counsel has, thereafter, taken me through the Judgment of the Lower Appellate Court to point out that the learned Judge has not even framed the points for determination whilst deciding the appeal and, as

such, according to him, on this ground alone the appeal deserves to be allowed and the impugned Judgment of the Lower Appellate Court be quashed and set aside. The learned Senior Counsel has thereafter taken me through the evidence on record, as well as the admitted signatures of Petornila to point out that all the documents relied upon by the respondents No.1, 2 and 3 are forged and fraudulent documents and, as such, the Lower Appellate Court was not justified to pass the impugned Judgment. The learned Senior Advocate has also pointed out that the power of attorney in favour of PW.1 is also a fabricated document.

4. The respondents though served failed to remain present.

5. I have considered the submissions of the learned Senior Counsel appearing for the appellants. With his assistance, I have also gone through the record. On perusal of the Judgment of the Lower Appellate Court, Shri M. B. Da Costa, learned Senior Counsel appearing for the appellants is justified to point out that the learned Lower Appellate Court failed to frame any point for determination whilst deciding the appeal preferred by the appellants. Even, by minutely going through the reasoning of the Lower Appellate Court, I

find that the essential points to be considered based on the rival claims have not been duly examined, nor discussed by the Lower Appellate Court whilst passing the impugned Judgment. This itself would show that the requirements of Order 41, Rule 33 of the C.P.C. which clearly provides that the Appellate Court has to frame the points for determination whilst deciding a first appeal, have not been complied with by the learned Judge. The points for determination are framed to examine the real issues in controversy which is being considered by the Appellate Court. Apart from that, the Lower Appellate Court also has to examine as to whether evidence of PW.1, based on the power of attorney can be relied upon to establish the contentions raised by the respondents in their pleadings. This aspect also had to be examined by the Lower Appellate Court whilst deciding the appeal.

6. Beside that, the learned Judge whilst passing the impugned Judgment in the appeal has set aside the Judgment of the learned Trial Judge. In such situations, the Lower Appellate Court is expected to examine each and every piece of material on record and after appreciating the rival contentions, render a concrete finding on the aspects raised by the parties. There is no scrutiny of the evidence by the

learned Appellate Court whilst unsettling findings of fact by the learned Trial Judge. In the present case, I find that the learned Lower Appellate Court has not exercised its jurisdiction in accordance with law, whilst deciding the First Appeal which calls for interference by this Court. The effect of the documents relied upon by the Appellants in the context of the aforesaid submission of the learned Senior Advocate appearing for the appellants has also not been examined by the learned Judge.

7. Be that as it may, on perusal of the Judgment of the Lower Appellate Court, Shri M. B. Da Costa, learned Senior Counsel appearing for the appellants is justified to contend that the stand taken by the appellants to the effect that the appellants have also acquired a right by prescription over the disputed property has not been examined by the Lower Appellate Court. No doubt, before this Court in the earlier round, the appellants gave up the plea of adverse possession by amending the written statement. But, however, whether the alleged possession of the appellants over the disputed property would defeat the relief sought by the respondents, would also have to be examined based on the pleadings of the parties especially when it is contended

by the learned Senior Advocate that substantial expenditure has been incurred by the appellants to re-construct the house in the disputed property. In the present case, the learned Appellate Judge has failed to carry out this exercise and, as such, I find that the impugned Judgment passed by the Lower Appellate Court cannot be sustained. Mr. M.B. Da Costa, learned Senior Counsel has also brought to my notice signatures of Petornila Fernandes on different documents to contend the discrepancy in such signatures in the documents produced by the respondents. These aspects are to be examined by the fact finding Court based on the material on record. This Court, in a second appeal, cannot reappreciate the evidence with that regard, in a Second Appeal. The failure by the learned Lower Appellate Court in exercising its appellate jurisdiction in accordance with law, will call for interference in the impugned Judgment of the learned Appellate Court.

8. Considering the above and view that I propose to take in the present appeal and without going into the merits of the other contentions raised by the appellants, I find that these aspects can be examined by the learned Lower Appellate Court by deciding the appeal afresh in accordance with law. The substantial questions of law are

answered accordingly.

9. In view of the above, I pass the following order :

(I) The appeal is partly allowed.

(II) The impugned Judgment and Order dated 21st December, 2006 passed by the Adhoc Addl. District Judge – 1, FTC-I, South Goa, Margao in Regular Civil Appeal No.124/2002 is quashed and set aside.

(III) Regular Civil Appeal No. 124/2002, is restored to the file of the learned Appellate Court.

(IV) The learned Judge is directed to decide the above appeal afresh, in the light of the observations made herein above, in accordance with law.

(V) All the contentions of both the parties, on merits, are left open.

The appeal stands disposed of accordingly, with no order as to costs.

(VII) No date is fixed for appearance before the Lower Appellate Court as the respondents have failed to remain present. But, however, the learned Judge shall dispose of the appeal as expeditiously as possible, within a period of six months from the date of receipt of the copy of this Judgment.

F.M. REIS, J.

ssm.