

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 85 OF 2007**

1. Venkatesh M. Karekar,
major, son of late Manguesh V. Karekar,
businessman,

2. Smt. Rucminibai Venkatesh Karekar,
major, wife of appellant No.1,
housewife,

3. Tukaram M. Karekar,
major, son of late Manguesh V. Karekar,
businessman,

4. Smt. Tanuja Tukaram Karekar,
major, wife of appellant No.3,

5. Shashikant M. Karekar,
major, son of late Manguesh V. Karekar,
businessman,

6. Smt. Shashikant Karekar,
major, wife of appellant No.5,

7. Vishwas M. Karekar, (since deceased). Appellants.

V/s.

1. Rosemary Fernandes, major,
in service,

2. Anastasia Sofia Fernandes, major,
in service,

3. Norman Athaide, major, in service,

4. Anjelica Fernandes, major, housewife,

5. Edwin Pinto, major, in service,
6. Cynthia Anabela Fernandes D'Souza,
major, housewife,
7. Salvador D'Souza, major, in service,
8. Eda Basta Fernandes,
major, unemployed,
9. Genevieve Philomena Fernandes,
aged 21 years, All residents of Gaunsavaddo,
Mapusa, Bardez, Goa.
10. Smt. Gloria Josefina Lopes,
major, housewife, All residents of
Gaunsawado, Mapusa, Bardez, Goa. Respondents.

Mr. S.D. Lotlikar, Senior Advocate with Ms. G. Xettigar, Advocate for the appellants.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. V. Korgaonkar, and Ms. Daksha Lotlikar, Advocate for the respondents.

CORAM :- F.M. REIS, J.

Date : - 15 OCTOBER 2015.

ORAL JUDGMENT :-

Heard Mr. S. D. Lotlikar, learned Senior Counsel appearing for the appellants and Mr. J.E. Coelho Pereira, learned Senior Counsel appearing for the respondents.

2. The above appeal came to be admitted by an order dated 16th January, 2009, on the following substantial questions of law :

(i) Whether the suit could be said to be falling one under Article 59 or Article 60 of the Limitation Act, 1963 ?

(ii) Whether the First Appellate Court fell in error in holding that the limitation should be reckoned from the date of knowledge or the limitation has to be reckoned from the date of attaining majority by the plaintiffs ?

(iii) Whether it was necessary for the plaintiffs to have claimed possession also as a relief along with declaration and injunction ?

3. Mr. S.D. Lotlikar, learned Senior Counsel appearing for the appellants, in support of the first and second substantial questions of law, has pointed out that the suit filed by the appellants has to be considered in terms of Article 60 of the Limitation Act, 1963 as, according to him, it is the contention of the respondents that the disputed sale deed executed in the year 1977 was defeating the rights of the minors and, as such, the suit had to be filed within three years from the date of attaining majority. The learned Senior Counsel has further pointed out that one of the respondents was a minor when the

disputed sale deed was executed and the other respondents immediately after the sale deed was executed and, consequently, the suit filed by the respondents was hopelessly barred by limitation. The learned Senior Counsel further points out that the learned Lower Appellate Court has examined the matter in terms of Article 59 of the Limitation Act. The learned Senior Counsel further points out that even in terms of Article 59 of the Limitation Act, there is no material on record to establish the alleged claim of the respondents that they learnt of the disputed sale deed in the year 1990 which forced them to file the suit in the year 1992. The learned Senior Counsel has taken me through the Judgment of the learned Lower Appellate Court to point out that there is no positive findings with that regard, arrived at by the learned Lower Appellate Court whilst coming to the conclusion that the suit was not barred by limitation in terms of Article 59 of the Limitation Act. The learned Senior Counsel has further pointed out that even in the plaint, there is no averment as to when the respondents learnt about the disputed sale deed. The learned Senior Counsel further points out that as the sale deed itself was a registered document, the knowledge of sale deed is attributed from the date of its registration with the concerned Authority.

With regard to the third substantial question of law, it is

pointed out by Mr. Lotlikar, learned Senior Counsel appearing for the appellants that it is the case of the appellants that pursuant to the disputed sale deed in the year 1977, the appellants entered into the possession of the disputed property. The learned Senior Counsel further submits that as the appellants were in possession of the disputed property, the Lower Appellate Court was not justified to grant a permanent injunction against the appellants not to interfere, in any manner in the disputed property. The learned Senior Counsel further submits that as there is no prayer for restoration of possession, it is well settled that the plaintiffs cannot get a permanent injunction. The learned Senior Counsel further submits that the learned Lower Appellate Court has not examined the said aspect and non-suited the appellants merely on the ground that there is no material on record or particulars furnished by the appellants to establish the nature of the so called possession of the disputed property. The learned Senior Counsel further points out that even assuming that the disputed sale deed is a nullity, as the respondents have not sought for such recovery of possession, such a relief of permanent injunction granted by the learned Lower Appellate Court deserves to be quashed and set aside. The learned Senior Counsel has taken me minutely through the findings of the learned Trial Judge to point out that the learned Trial

Judge has come to the conclusion that as the appellants were in possession of the disputed property and as there is no prayer for recovery of possession, the respondents were not entitled for the relief sought in the suit. The learned Senior Counsel further points out that in any event, it is not disputed that the mother of the respondents who was the original defendant No.8, had executed the sale deed and, as such, at least to the extent of her share the sale deed cannot be considered to be a nullity. The learned Senior Counsel further points out that the findings of the learned Lower Appellate Court that the sale deed is a nullity merely because the respondents were not parties to the said sale deed are erroneous and deserves to be quashed and set aside. The learned Senior Counsel has, thereafter, taken me through the Judgment of the Lower Appellate Court to point out that the findings of the learned Judge to the effect that the property is in co-ownership are totally contrary to the well settled principles of law and consequently, the appeal preferred by the appellants deserves to be allowed and the suit filed by the respondents be dismissed.

4. On the other hand, Mr. J.E. Coelho Pereira, learned Senior Counsel appearing for the respondents, supported the impugned Judgment. The learned Senior Counsel has pointed out that admittedly,

the respondents who are the children of the original respondent No.8 are not parties to the disputed sale deed. The learned Senior Counsel further points out that upon the death of the father of the respondents No.1 to 7, there was no partition proceedings initiated, whereby the respondent No.8 could claim to be the exclusive owner of the property. The learned Senior Counsel further submits that as such, as the estate of the deceased had not been partitioned, the respondents along with the respondent No.8 were in possession and ownership of the disputed property and, consequently, the respondent No.8 was not entitled to execute the sale deed, without the consent or without making the respondents No.1 to 7 as parties to the said sale deed. The learned Senior Counsel further points out that the sale deed has been executed by undue influence and by playing fraud by the respondent No.8 upon the death of her husband. The learned Senior Counsel has taken me through the written statement filed by the respondent No.8 who has categorically stated that at the most a sum of Rs.2,000/- was paid to the respondent No.8 while executing the disputed sale deed. The learned Senior Counsel has further pointed out that the disputed property is situated in a prime locality of the City of Mapusa and, as such, the question of disposing of such a property for an illusory consideration of Rs.2,000/- would itself suggest that the sale deed

stands vitiated and has been executed by fraud and undue influence. The learned Senior Counsel further points out that it is the case of the appellants that the rights of the respondents who are children of the respondent No.8 cannot be affected by the disputed sale deed as, according to them, the sale deed would at least convey the rights of the respondent No.8 in the disputed property in favour of the appellants herein. The learned Senior Counsel further points out that as such, the respondents are treated to be in joint possession of the disputed property and, as such, the question of seeking any recovery of possession would not arise at all. The learned Senior Counsel further points out that the learned Lower Appellate Court has come to the conclusion that the claim of the appellants that they were in possession of the disputed property has not been established by any evidence on record. The learned Senior Counsel, however, submits that as far as the relief sought by the respondents at prayer clause (d) for permanent injunction not to interfere with the disputed property is concerned, upon instructions, the respondents shall not press for such a relief. The learned Senior Counsel, as such, submits that the reliefs granted by the learned Lower Appellate Court at prayer clauses (a), (b) and (c) deserve to be confirmed and the appeal preferred by the appellants be rejected.

5. Upon hearing the learned Counsel appearing for the respective parties, and taking note of the fact that Mr. Coelho Pereira, learned Senior Counsel appearing for the respondents, does not press for the relief at prayer clause (d), the impugned Judgment passed by the learned Lower Appellate Court restraining the appellants from interfering with the disputed property, stands quashed as not pressed by the respondents/plaintiffs.

6. With regard to the contention of Mr. Lotlikar, learned Senior Counsel appearing for the appellants that the disputed sale deed cannot be declared to be null and void as the respondent No.10/original defendant No.8 was entitled to execute the sale deed upon the death of her deceased husband, I find that this issue is no more *res integra* in view of the Judgment passed by this Court in Second Appeal No. 3/2006 dated 9/12/2011 in the case of **Norberto Paulo Sebastiao and ors., vs. Gabriel Sebastiao Idalino Fernandes and others**, wherein this Court has observed at para 10 thus.

“ 10. Before I consider as to whether the provisions of Article 1565 of Portuguese Civil Code stand repealed in view of the extension of the Transfer of Property Act to

the State of Goa, it would be appropriate to ascertain as to whether the appellant no.3 who was the widow of Jose Piedade Fernandes was entitled to dispose of the suit properties under Article 1565 of the Portuguese Civil Code. In the present case as already stated herein above at para 2 of the plaint, there was a specific averment to the effect that the suit property was registered in the name of said Jose Piedade Fernandes who was the husband of appellant no.3. Whilst dealing with the said allegation in the written statement, though there was a denial to that effect, there was nothing pleaded either by appellant no.3 or appellant nos. 1 and 2 disputing the said fact in the pleadings. It is well settled that bare denial is no denial in law. In the present case, even the appellant no.3 while dealing with the contentions in paras 1 and 2 of the plaint has clearly stated that the impugned sale deed was within the disposal of her share. There was no dispute raised by the appellant no.3 to the effect that the suit properties were not within the communion of assets of the couple. Article 1108 of the Portuguese Civil Code clearly provides that the marriage as per the custom of the country consists in the communion between the spouses of all their properties present and future, not excluded by law. Considering that the property was registered in the name of the husband of appellant no.3 which has not been disputed by the appellants, it can be safely assumed that the suit properties were part of the

communion of assets which belongs to appellant no.3 and her deceased husband. Article 1766 of the Portuguese Civil Code further provides that those married as per the custom of the country were not under penalty of nullity entitled to dispose of certain and specific properties of the couple, except if the said properties have been allotted to them in partition or are not included in the communion or if the disposition has been made by one of the spouses in favour of the other or if the other spouse has given consent by authentic form. In the present case, considering that it is not in dispute that upon the death of the husband of appellant no.3, no inventory proceedings were initiated to partition his estate nor any partition in fact has been carried out whereby the suit properties were allotted to the appellant no.3, the question of the appellant no.3 disposing the said properties in favour of appellant nos. 1 and 2 has no legal effect. It is also to be noted that the appellant no.3 had lineal descendants and such exercise on her part would affect the legitime of such descendants. In fact reading of provisions of Article 1766 of the Portuguese Civil Code, if such transfers are made and the above circumstances exist, the transaction is null and void. As such, on this ground alone the impugned sale deed is null and void and has no legal effect.”

Taking note of the observations therein, I find that the original defendant No.8, who was the mother of the respondents, was not entitled to execute the disputed sale deed as the respondents have not given their consent nor the estate of the deceased husband was partitioned and, as such, the sale deed entails nullity in law. Hence, the finding of the learned Lower Appellate Court to the effect that the disputed sale deed is null and void, does not call for any interference.

7. The next relief granted by the learned Lower Appellate Court is that the appellants should not put up any construction in the disputed property. Taking note of the fact that the respondents are held to be co-owners of the disputed property whilst examining the effect of the disputed sale deed and as the appellants have no right therein based on the said sale deed, which is null and void, the relief of permanent injunction restraining the appellants from carrying out any construction activity in the disputed propriety does not call for any interference.

8. With regard to the contention of Mr. Lotlikar, learned Senior Counsel appearing for the appellants that the suit is barred by limitation in terms of Article 60 of the Limitation Act, I find that the Lower Appellate Court was justified to come to the conclusion that the

suit has to be considered in terms of Article 59 of the Limitation Act. On perusal of the Judgment of the learned Lower Appellate Court, I find that the learned Judge, upon appreciation of evidence on record, has come to the conclusion that the respondents learnt about the disputed sale deed only in the year 1990 when they received notice in connection with a mundkarial application filed by an alleged mundkar in respect of the disputed property. The learned Lower Appellate Court further noted that the contention of the appellants that on account of the acts done by the appellants in respect of the disputed property knowledge can be attributed to the respondents, the learned Lower Appellate Court has come to the conclusion that such acts cannot lead to any conclusion that the respondents had knowledge of the disputed sale deed. The findings arrived at by the learned Lower Appellate Court upon appreciation of the evidence brought on record, cannot be reappreciated in the present appeal. Hence, considering the findings arrived at by the learned Lower Appellate Court that the respondents had knowledge of the disputed sale deed in the year 1990, I find that the contention of Mr. Lotlikar, learned Senior Counsel appearing for the appellants to the effect that the suit is barred by limitation, cannot be accepted. The suit is within limitation in terms

of Article 59 of the Limitation Act, 1963.

9. With regard to the contention of Mr. Lotlikar, learned Senior Counsel appearing for the appellants to the effect that no permanent injunction not to interfere in the disputed property can be granted when there is no prayer for restoration of possession as, according to the learned Senior Counsel, the appellants are in possession of the disputed property, I find that the question of going into that aspect is not at all required to be considered, as the prayer of permanent injunction as sought by the respondents not to interfere with the disputed property has been set aside, as not pressed by the respondents herein. Apart from that, there is a finding of the Court below that the appellants have not established their alleged claim of prescription which has attained finality, and such findings have not been challenged by the appellants. Hence, the substantial questions of law are answered accordingly.

10. In view of the above, I pass the following Order :

(I) The appeal is partly allowed.

(II) The impugned Judgment of the learned Lower Appellate Court dated 15/01/2007 is partly modified and the relief of permanent

injunction granted by the learned Judge not to interfere in the suit property is quashed as not pressed by the respondents herein. Remaining reliefs granted by the learned Lower Appellate Court stand unaltered and confirmed.

(III) The appeal stands disposed of accordingly.

F.M. REIS, J.

ssm.