

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NOS. 342 AND 564 OF 2015.

WRIT PETITION NO. 342 OF 2015.

1. Shree Developers A Partnership
firm, constituted under the
Partnership Act, Having its
head office at 3/7,
Navnidhan Bhavan, First Floor,
Dhanji Street. Mumbai, 400003,
through its partners,
 - 1.(a) Mr. Ramesh Kothari,
s/o Mohan Raj Kothari,
aged 52 years, married,
r/o Sagar, 3A 201, Jesal Park,
Bhayder (E), Mumbai.
 - 1.(b) Mr. Rajiv Kumar Agarwal,
s/o Jagdishprasad Agarwal,
aged 47 years, married,
r/o 21 Jadhavji Manation,
Room no.59, III, Fofalwadi,
Bhuleshwar, Mumbai-2
- ...Petitioners.

V/s

1. Mr. Charles Anthony Paco,
Through Power of Attorney
Mr. Joseph Sylvester Carneiro,
Major of age, r/o H.No.1675,
Plot no.51, Journalist Colony,
Alto Betim, Porvorim, Bardez Goa
and Mrs Jean Charlotte Lobo
r/o H.No.2221, Aauchit Vaddo,
Parra, Bardez Goa.
2. Mrs. Ida Paco Madeira,
C/o Sunshine Beach Resort,
Calangute, Baga Road, Calangute,
Bardez Goa, (since deceased through
her legal representatives)
- 2.(a) Mrs. Antoinette Fernandes,
d/o Smt.Ida Madeira, major of age.
- 2.(b) Mr. Romero Fernandes
Son in law of Mrs. Ida Paco Madeira,
Major of age, both r/o Sunshine Beach
Resort, Sautawaddo, Calangute,
Bardez Goa.

- 2.(c) Mrs Barbara D'Souza,
d/o Mrs. Ida Paco Madeira,
major age.
- 2.(d) Mr. Felix D'Souza,
Son in law of Smt. Ida Madeira,
Major of age,
Both Resident of 244,
Fairview Road,
West Messisaga, Ontario,
LSV-3E9,Canada.

...Respondents.

Mr. S. D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar,
Advocate for the petitioner.
Mr. P. Faldessai, Advocate for the respondent no.1.
Mr. V. Menezes, Advocate for the respondent nos. 2a to 2d.

**WITH
WRIT PETITION NO.564 OF 2015.**

1. Mrs. Antoinette Fernandes,
Daughter of late Ida Madeira,
Age 60 years, married,
Indian National,
2. Mr. Romero Fernandes
Son-in-law of late Ida Madeira,
Age 58 years, married,
Indian National,
Both resident of House No.
7/20, Sunshine Beach
Resort, Sautawaddo, Calangute,
Bardez Goa.
3. Mrs. Barbara D'Souza,
Daughter of late Ida Madeira,
Age 58 years, married,
Indian National,
4. Mr. Felix D'Souza,
Son-in-law of late Ida Madeira,
Age 56 years, married,
Indian National,
Both resident of 244,
Fairview Road,
West Messisaga, Ontario,
LSV-3E9,Canada.
Both represented through
Mrs. Antoinette Fernandes,
H. No.7/20, Sunshine Beach

Resort, Sautawaddo,
Calangute, Bardez Goa.

..... Petitioners.

Versus

1. Mr. Charles Anthony Paco,
Through Power of Attorney
Mr. Joseph Sylvester Carneiro,
Age 74 years, Indian National,
Resident of House No.1675,
Plot no.51, Journalist Colony,
Alto Betim, Porvorim, Bardez Goa
Mrs Jean Charlotte Lobo
Resident of House No:2221,
Aaucht Vaddo,
Parra, Bardez Goa.
 2. Shree Developers a Partnership
firm, Constituted under the
Partnership Act, Having it
head office at 3/7,
Navnidhan Bhavan, First Floor,
Dhanji Street. Mumbai, 400003,
Through its partners
 3. Mr. Ramesh Kothari,
Son of Mohan Raj Kothari,
Age 56 years, married,
Indian National,
Resident of Sagar, 3A 201,
Jesal Park, Bhayder (E), Mumbai.
 4. Mr. Rajiv Kumar Agarwal,
Son of Jagdishprasad Agarwal,
age 47 years, married,
Indian National,
Resident of 21 Jadhavji
Menation, Room no.59, III,
Fofalwadi, Bhuleshwar, Mumbai-2
- Respondents.

Mr. V. Menezes, Advocate for the petitioners.

Mr. P. Faldessai, Advocate for the respondent no. 1.

Mr. S. D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar,
Advocate for the respondent nos. 2, 3 and 4.

Coram:- K. L. WADANE, J.

Reserved on: 17th November, 2015.

Pronounced on: 21st December, 2015.

JUDGMENT

Heard Mr. S. D. Lotlikar, learned Senior Advocate appearing for the petitioner, Mr. P. Faldessai, learned Advocate appearing for the respondent no.1 and Mr. V. Menezes, learned Advocate for the respondent nos. 2a to 2d in Writ Petition No.342/2015 and Mr. V. Menezes, learned Advocate appearing for the petitioners, Mr. P. Faldessai, learned Advocate appearing for the respondent no. 1 and Mr. S. D. Lotlikar, learned Senior Advocate appearing for the respondent nos. 2, 3 and 4 in Writ Petition No.564/2015.

2. Rule made returnable forthwith.

3. Heard by consent of the learned counsel appearing for the respective parties. Mr. V. Menezes, learned Advocate waives notice on behalf of respondent nos. 2(a) to 2(d) and Mr. P. Faldessai, learned Advocate waives notice on behalf of the respondent no.1 in Writ Petition No. 342/2015 and Mr. P. Faldessai, learned Advocate waives notice on behalf of the respondent no.1 and Mr. C. Padgaonkar, learned Advocate waives notice on behalf of the respondent nos. 2, 3 and 4 in Writ Petition No. 564/2015.

4. Writ Petition No.342/2015 is preferred by the

original defendant no.2 and Writ Petition No. 564/2015 is preferred by the original defendant nos.1(a) to 1(d) against the judgment and order passed by the learned Ad-hoc District Judge-I, Fast Track Court at Mapusa in Miscellaneous Civil Appeal No. 47/2012, by which the learned District Judge has dismissed the appeal.

5. Parties are referred as per their original status.

6. Brief facts of the case may be stated as follows:-

Defendant no.1 is the sister of the father of plaintiff. The defendant no.1 died and defendant nos.1(a) to 1(d) are her legal representatives and the defendant no.2 is a partnership firm having partners 2(a) and 2(b). The name of the plaintiff's father is Mr. Dulcet Paco and name of the mother is Mrs. Rita Paco.

7. The plaintiff is owner in possession of the land surveyed under No. 30, sub division nos. 14, 15 and 16 admeasuring 2250 square metres situated at Arpora (hereinafter referred to as "the suit properties") which were allotted to the plaintiff by the Inventory Proceedings no.311/2003/C by the Court of Civil Judge, Senior Division at Bardez, Mapusa which were held on the death of the father of the plaintiff.

8. The defendant no.1 has no right of whatsoever nature with the suit properties. The suit properties are allotted to the plaintiff in the Inventory proceedings that too with the knowledge of the defendant. On 28.7.2007, the plaintiff came to know from the public notice by Talathi of Bardez, that the defendant no.1 has made application to enter her name in Form I and XIV in respect of the suit properties. At that time only, the plaintiff came to know about fraud committed by the defendant no.1 regarding Gift Deed allegedly executed by one Mr. Celso D'Souza, the power of attorney of the plaintiff's mother and the father. According to the plaintiff, no such Gift Deed was ever executed by Shri Celso D'Souza at any point of time in respect of the suit properties. It is further the case of the plaintiff that his father and mother had executed a power of attorney dated 15.5.1992 in favour of Celso D'Souza, because at the relevant point of time, the relations between the father of the plaintiff and the defendants were strained on account of some family misunderstanding. Father of the plaintiff died on 11.4.1997, when he was in Goa. Even after the death of the father of the plaintiff, the defendant no.1 has not claimed right over the suit properties by way of Gift Deed executed by Celso on behalf of the plaintiff parents.

9. On the death of the plaintiff father, inventory

proceedings were initiated by the mother of the plaintiff and the suit properties were allotted to the plaintiff by final order dated 5.10.2005. On the basis of the order dated 5.10.2005, name of the father of plaintiff appearing in Form I and XIV was deleted and name of the plaintiff is recorded. On 28.7.2007, the plaintiff came to know about the public notice regarding the application of the defendant no.1 to record her name in form I and XIV of the suit properties, at that time only plaintiff came to know about the fraud played by the defendant no.1. Subsequently, he obtained all necessary copies i.e the copy of the election card and the copy of the Thumb Impression alongwith photographs of deceased Celso. The signature of Mr. Celso do not match with the signature allegedly to be of Celso in the Gift Deed, therefore, the plaintiff filed the suit for declaration and other consequential reliefs in which he applied for temporary reliefs.

10. During the pendency of the suit, the defendant nos.1(a) to 1(d) have sold the suit properties to the defendant no. 2(a) and 2(b). The application for temporary injunction was heard and accordingly, the learned Civil Judge, Senior Division, "A" Court Mapusa restricted the defendant nos. 2(a) and 2(b) from alienating the suit properties or creating any third party interest in the suit properties till the disposal of the suit. Aggrieved by the order of the temporary injunction, the defendant nos.2(a) and 2(b) have preferred Miscellaneous Civil

Appeal No. 47/2012 and defendant nos.1(a) to 1(d) have preferred Miscellaneous Civil Appeal No. 46/2012 and after hearing both sides, the same was dismissed. Hence, above two Writ Petitions by the defendants.

11. I have heard arguments of Mr. Lotlikar, learned Senior Counsel appearing for the petitioner in Writ Petition No. 342/2015, Mr. V. Menezes, learned Counsel appearing for the petitioner in Writ Petition No. 564/2015 and Mr. P. Faldessai, learned Counsel appearing for respondent no.1 in both the petitions.

12. During the course of arguments, Mr. Lotlikar has argued that during the pendency of the suit if the property is alienated then certainly it covers by principle of lis pendence for which it is not necessary for Civil Court to grant any relief/injunction.

13. As against this, Mr. Phaldessai has argued that defendant no.1(a) to (d) have sold the suit properties to the defendant no.2 knowing fully well that they have no title and possession over the suit properties.

14. If during the pendency of the suit properties, the defendant no.1 created third party interest then it will be a

multiplicity of the litigation. According Mr. Phaldessai, learned Trial Court as well as the Appellate Court has rightly considered the prima facie case, balance of convenience and irreparable loss in favour of the plaintiff and the relief is only in reference to the alienation or creation of third party interest.

15. Considering the submissions of both sides, it is material to note that the alleged Gift Deed is dated 19.4.1993. The defendant no.1 is claiming title and possession of the suit properties on the basis of the Gift Deed.

16. From the record, it is seen that the name of the father was appearing in the Form I and XIV extract till the name of the plaintiff is substituted by order based upon the inventory proceedings. Therefore, I fail to understand why the defendant no.1 has not recorded her name in revenue record i.e Form I and XIV extract. He tried to do such exercise in the year 2007 i.e. after the name of the plaintiff is recorded based upon the inventory proceedings. It is material to note that inventory proceedings is initiated by the mother of the plaintiff.

17. I have gone through the alleged Gift Deed from which it is seen that there is no signature of the power of attorney of the parents of the plaintiff on each and every page of the Gift Deed as against this, the defendant no.1 has sign

each and every page. Inaction on the part of the defendant no.1 since 1993 to 2007 creates doubt about the genuineness of the Gift Deed. The defendant no.1 started agitating only when the name of the plaintiff was recorded in the revenue record i.e Form I and XIV extract.

18. It is the case of defendant no.2 that title of the suit properties was already transferred in favour of defendant no.1 on the basis of the Gift Deed in the year 1993 and it has purchased from defendant nos. 1(a) to 1(d). Therefore, properties were not available at the time of inventory.

19. According to the defendants, allotment of the properties under Inventory proceeding is a big fraud as on the date of inventory, suit properties did not belonged to the estate leaver i.e. father of the plaintiff.

20. Mr. Lotlikar, learned Senior Counsel appearing for the petitioner has relied upon the observations in the case of ***Kishorsinh Ratansinh Jadeja Vs. Maruti Corp. and others, AIR 2009SC 2882*** and held at para 23 thus:-

“In our view, while passing the interim order dated 7th May, 2008, the High Court ought to have considered the effect which its order would have on the 280 transferees to whom some portions of

the land had already been sold and who had commenced construction thereupon, particularly when they were not even parties in the appeal, nor were they heard before they were enjoined from continuing with the construction work. Such an order affecting third party rights in their absence, as they were not parties to the proceedings, cannot be sustained having further regard to the manner in which the said order was passed. An application for an order which would have far and wide reaching consequences was sought to be disposed of by the Division Bench on the very next day without giving an opportunity of controverting the allegations made therein even to those who were parties in the suit, though it had been brought to the notice of the Court that conveyances had been executed in favour of 280 purchasers. This is not a case where the appellant and the other co-owners had violated any restraint order passed by the Court in transferring the plots in question to the said 280 transferees. The said transfers were effected at a point of time when there was no injunction or restraint order against 23the appellant and the other owners of the property and as far as the said transfers are concerned, the only

order that could have been passed on the said application is the order which was passed at the first instance on 29th January, 2008, based on the principles of [Section 52](#) of the Transfer of Property Act, 1882. The restraint order on the transferees must, therefore, be held to be bad and liable to be set aside.”

21. I have gone through the facts and the observations of the above cited authority, from which it reveals that the order was in reference to 280 transferees to whom some portion of the land has already been sold. They had commenced construction thereupon and they were not parties to the litigation nor they were heard before they were enjoined. Therefore, it was held that such an order affecting third party rights in their absence, as they were not the parties to the proceedings, cannot be sustained having further regard to the manner in which the said order was passed.

22. The facts of the above cited authority are altogether different, here in the present case, the defendant no. 1(a) to 1(d), during the pendency of the suit have sold the suit properties to the defendant no.2. The suit was filed on 7.1.2009 and defendant sold the suit properties on 13.8.2009 to the defendant no.2. All the defendants were aware about the claim

of the plaintiff in a suit.

23. All the above observation are made prima facie while considering the interim relief and such observations will not come in the way of the trial Court while deciding the suit or right of the respective parties.

24. For the reasons stated above, I am of the opinion that the trial Court as well as the Appellate Court has considered the case and the relief claimed by the plaintiff and have rightly granted it. Consequently, there is no merit in the above Writ Petitions and accordingly both the Writ Petitions are dismissed with no order as to costs. Rule stands discharged.

K. L. WADANE, J.

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