

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 64 OF 2006**

1. Shankar A. Amonkar,
(since deceased) through LRs.

1(a) Mrs. Pushpalata Amonkar,
major of age, widow of late
Shanker A. Amonkar,

1(b) Shri Mahesh Shankar Amonkar,
major of age, s/o. Shankar Amonkar,

1(c) Mrs. Namita Mahesh Amonkar,
major of age, wife of Mahesh Amonkar,

1(d) Shri Vidhayanand Shankar Amonkar,
major of age, wife of Vidhayanand Amonkar.

1(e) Mrs. Amisha Vidhyanand Amonkar,
major of age, wife of Vidhayanand Amonkar.
All residing at City Plaza Building,
2nd Floor, Flat No.4, Phase II,
Pedda, Margao, Salcete, Goa.

1(f) Mrs. Madhavi A. Govekar,
major of age, wife of Ajay Govekar,

1(g) Mr. Ajay S. Govekar, major of age,

Both residents of City Plaza Building,
2nd Floor, Flat No.4, Phase II,
Pedda, Margao, Salcete, Goa.

1(h) Mrs. Anju Amonkar alias
Anju Shirodkar, major of age,
wife of Jayant Shirodkar,

1(i) Jayant Shirodkar, major of age,

Both residing at Sunflower Apartment,
3rd Floor, Malbhat, Margao, Salcete, Goa.

All represented by Mrs. Anju Amonkar
alias Anju Shirodkar Appellant No.1(h) Appellants.

V/s.

1. Mr. Anthony Rebello,
(original defendant No.3)
2. Mr. Joseph Barreto,
3. Mr. Felix Fernandes,
4. Mr. Avertano Rebello,
5. Mr. Custodio Rodrigues,
6. Mr. Damaciano Colasso
7. Mr. Seby Mascarenhas,
8. Mr. Robert Fernandes,
9. Mr. Rosario Mascarenhas,
10. Mr. Costao Paul Rodrigues,
11. Mr. Rosario Fernandes,

All residents of H.No. 119/C,
Nagmoddem, Navelim, Salcete, Goa.

12. Rosary Youth Club,
A Society registered under the
Society Registration Act, having office at
H.No.119/C, Nagmoddem,
Navelim, Salcete, Goa
through its President
Mr. Avertano Rebello,

13. Miss Vicentina Pereira,
resident of H.No.104, Nagmoddem,
Navelim, Salcete, Goa. Respondents.

Shri Iftikhar Agha, Advocate for the appellants.

Shri C. A. Ferreira, Ms. R. Almeida, and Shri Ashwin C. Costa,
Advocates for respondents No.1 and 4.

CORAM :- F.M. REIS, J.

Date : - 6th/12th February, 2015.

ORAL JUDGMENT :-

Heard Shri I. Agha, learned Counsel appearing for the appellants and Shri C.A. Ferreira, learned Counsel appearing for the respondents.

2. The above appeal came to be admitted by an order dated 16th August, 2006 on the following substantial questions of law :

(a) Whether the appellate Court, after accepting in para 61 of the judgment, based on judgment of the Calcutta High Court that :-

"in a suit for declaration of title and recovery of possession all the co-owners are necessary partners and for non-joinder of necessary partners, such a suit

becomes incompetent."

having declined to grant the relief of declaration as prayed in prayer (A) of the counter claim, erred in granting as per para 63 the relief that sale deeds are null and void ?

(b) Whether the appellate Court failed to consider that as per Section 99 of the Civil Procedure Code proviso non-joinder of necessary parties is an incurable defect ?

(c) Whether the appellate Court erred in granting the relief for correction of the Survey as per para 64 despite the same is contrary to Section 106 of the Land Revenue Code ?

(d) Whether the appellate Court erred in granting the prayer for injunction as per para 65 solely because sale deeds have been declared null and void and without addressing to the question of the possession of the plaintiff Amonkar ?

(e) Whether the judgment of the appellate Court is perverse inasmuch as in para 57 there was a clear suggestion put to DW.1 as follows :

"It is not true to suggest that my statement that I and other co-owners allowed the defendant no.1 to use the suit property is false" (page 9 of the deposition).

and that the defendant No.1 had not stepped into the witness box and defendant no.1 despite being a

Society registered under the Registration of Societies Act and had not produced any documentary or oral evidence to substantiate the allegation about the possession ?

3. Shri Igha, learned Counsel appearing for the appellants has pointed out that the appellants have purchased the property pursuant to Sale Deeds dated 04.04.1974 and 22/01/1976, totally admeasuring 2220 sq. metres, and surveyed in the record of rights under survey Nos. 102/8, 102/10 of village Navelim, Salcete Taluka. The learned Counsel further points out that after execution of the said sale deeds, the appellants got their names mutated in the survey records and continue to be in possession of the disputed properties. The learned Counsel further submits that there was interference with the possession of the appellants by the original defendant No.1/respondent No.1 herein and, as such, the appellants filed a suit for permanent injunction to restrain the defendants from interfering with the possession of the appellants. The learned Counsel further submits that the appellants have relied upon the sale deeds, as well as the survey records in support of their case that they are the owners in possession of the disputed properties. The learned Counsel further submits that it is the case of the respondent No.3 that he is son of the Vendor No.1 and, as

such, has right to the disputed property. The learned Counsel further points out that after execution of the sale deeds, the appellants had also obtained sanad for conversion of the said portion of the property for non-agricultural purposes, besides obtaining sanctioned plan for the purpose of putting up construction thereon. The learned Counsel further submits that the appellants disputed the claim of respondent No.3 that he had any right to the disputed property, as according to the appellants, they were owners in possession thereof on the basis of the said sale deeds. The learned Counsel further points out that the learned Trial Judge, after recording the evidence and hearing the parties, by judgment and decree dated 27/08/2004, decreed the suit filed by the appellants. The learned Counsel further submits that respondent No.3 also purported to file a counter-claim to, *inter alia*, seeking a declaration that he is the owner of the disputed properties. The learned Counsel further points out that the learned Trial Judge, by the said Judgment dismissed the counter-claim filed by the respondent No.3. The learned Counsel further submits that the respondent No.3 preferred an appeal before the Lower Appellate Court, which came to be allowed by the impugned Judgment. The learned Counsel further points out that the lower appellate Court has misconstrued the

documents produced by the appellants to come to the conclusion that sale deeds executed in favour of the appellants were null and void. The learned Counsel further submits that the claim of the respondent No.3, at the most can be to an undivided right in the estate of his deceased mother who is alleged to be the first wife of the vendor No.1 and unless such right is crystallized in appropriate proceedings, the finding that the respondent No.3 is a co-owner of the disputed property, as recorded by the lower appellate Court, is totally erroneous. The learned Counsel further points out that the survey records stood in the name of the vendors and the execution of the sale deeds in favour of the appellants by the vendors has created full ownership of the disputed property. The learned Counsel further points out that the Lower Appellate Court has misconstrued the evidence on record, as well as the documents of title, to erroneously come to the conclusion that the sale deed of the appellants is a nullity and that the respondent No.3 is entitled for a declaration that he is the owner in possession of the disputed property. The learned Counsel has, thereafter, taken me through the judgment of the Lower Appellate Court to point out that the learned Judge has erroneously allowed the appeal on untenable grounds and as such, submits that the substantial questions of law be

answered in favour of the appellants.

4. On the other hand, Shri C. A. Ferreira, learned Counsel appearing for the respondents No.1 and 4 has supported the impugned Judgment. The learned Counsel has taken me through the flow of title of the disputed property, and pointed out that there were inventory proceedings initiated upon the death of the mother of vendor No.1, wherein half of the disputed property which was described under No.23944 was allotted to the vendor No.1, who was then a bachelor. The learned Counsel further points out that the marriage certificate produced on record, clearly suggests that the vendor No.1 had married, in the first nuptial, to Pascoalinha Conceicao Maria Fernandes on 8/9/1936. The learned Counsel has, thereafter, taken me through the second marriage of the vendor No.1 which took place in Goa and pointed out that the claim of the respondents is based on the inheritance of the first nuptial. The learned Counsel, as such, points out that as the inheritance devolved after the death of the wife of the first nuptial has not been partitioned, the learned Judge has rightly allowed the claim of the respondents.

5. During the course of the hearing of the above Appeal, it

was pointed out that it is not in dispute that the Appellants had purchased the disputed property pursuant to two Sale Deeds dated 04.04.1974 and 22.01.1976. By the first Sale Deed dated 04.04.1974, the vendors therein who are the father and his second wife, conveyed an area of 1400 square metres. By the second Sale Deed dated 22.01.1976, the said Vendors had conveyed an area of 820 square metres. It is not disputed by the Counsel that in fact, both the said properties are surveyed in the Record of Rights under Nos.102/8 and 102/10. The Survey Records of the said two survey numbers disclose a total area of 2550 sq. metres.

6. Shri Agha, learned Counsel appearing for the Appellants, upon instructions of the Appellants, has pointed out that the title of the Appellants is restricted only to an area of 2220 square metres.

7. The Courts below have come to the conclusion that the Respondent no. 1 has a right in the disputed property. In fact, the claim of the Respondent no. 1 is on the basis that he is the son of the first wife of the Vendor no. 1 in the said Sale Deed. It is also not in dispute that there were no Inventory Proceedings initiated upon the death of the said mother of the Respondent no. 1 to determine the shares of

heirs therein. In such circumstances, the rights of inheritance of the Respondent no. 1 to the extent of his share in the undivided estate of his said mother in the said two plots cannot be affected by such sale transactions executed in favour of the Appellants herein. The Lower Appellate Court has declared that the said two Sale Deeds are null and void. But, however, I find that the said findings of the First Appellate Court cannot be sustained and deserve to be quashed and set aside in the peculiar facts of the case. But, however, the said Sale Deeds would be restricted to the said area of 2220 square metres and will not affect the rights, if any, of the Respondent no. 1 whose shares would have to be determined in appropriate proceedings, in accordance with law. The Sale Deeds in favour of the Appellants have legal effects to the limited extent without affecting the share of the respondent No.1, if any, in the disputed property. The Lower Appellate Court has also granted a permanent injunction against the Appellants herein. Once it is held that the Appellants were in possession of the disputed property on the basis of the said Sale Deeds, the injunction granted by the Lower Appellate Court cannot be sustained and deserves to be quashed and set aside. The substantial questions of law are answered accordingly.

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

(I) The appeal is partly allowed.

(II) The impugned judgment dated 8th March, 2006 of the Lower Appellate Court and the judgment dated 27th August, 2004 of the Trial Court are modified.

(III) The Suit and the Counter-claim filed by the Respondents are disposed of by holding that the Sale Deeds dated 04.04.1974 and 22.01.1976 would not affect the rights of the Respondent no. 1, if any, in the inheritance of his deceased mother, which right will have to be determined in appropriate proceedings, in accordance with law.

(IV) Needless to say, the two Sale Deeds shall be restricted to the area of 2220 square metres in the light of the observations made herein above.

Appeal stands disposed of accordingly.

F.M. REIS, J.

ssm.