

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 111 OF 2008

1. Shri Caetano Pereira,
major of age, and his wife,
 2. Smt. Georgina Pereira,
major of age,
both residing at
Vandana Apartment
Thakurvady,
Dombivli (West),
Mumbai.
 3. Shri Thomas Pereira,
major of age, and his wife,
 4. Smt. Maria Pereira,
major of age,
both residing at
Cusmona Quepem.
- Appellants

V e r s u s

1. Shri Simon Pereira,
39 years of age and his wife
 2. Smt. Pia Fernandes e Pereira
major of age, bachelor,
both residing at Cusmona,
Quepem.
 3. Shri Upendra Manguesh Bhende
68 years of age,
 4. Smt. Usha Upendra Bhende
60 years of age,
Both represented by their
power of attorney
Shri Bhagwant Manguesh Bhende,
the respondent no.5
 5. Shri Bhagwant Manguesh Bhende
66 years of age,
Residing at Cusmona, Quepem,
- Respondent nos.
3 to 10 are
deleted as per
order dated
02.07.2008
passed in MCA
No.944/2007

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6. Smt. Sushilabai Narahari Bhende
75 years of age, residing at
Chikalim, Mormugoa
7. Shri Ramesh Narahari Bhende,
55 years of age and his wife
8. Smt. Rekha Ramesh Bhende
50 years of age, both represented
by their power of attorney
Shri Damodar Narahari Bhende,
respondent no.9,
9. Shri Damodar Narahari Bhende,
45 years of age, residing at
Chikalim, Mormugao,
10. Smt. Ulka Damodar Bhende,
44 years of age,
residing at Chikalim,
Mormugao.

11. Shri Bricio Diogo Pereira
major of age, bachelor,
Residing at Cusmona,
Quepem.

Deleted as per order
dated 15.10.2008

... Respondents

Mr. M. B. Da Costa, Senior Advocate with Ms. K. Betquekar, Advocate
for the appellants.

Mr. G. Teles, Advocate for the respondent nos. 1 and 2.

CORAM : F. M. REIS, J

DATE : 21st November, 2015

ORAL JUDGMENT

Heard Mr. M. B. Da Costa, learned Senior Counsel appearing
for the appellants and Mr. G. Teles, learned counsel appearing for the
respondent nos. 1 and 2.

2. The above appeal came to be admitted by an order dated 28.08.2009 on the following substantial questions of law.

(1) Whether right of pre-emption available under Article 2309 of Code of Civil Procedure (Portuguese) is repealed due to S.4 of Goa, Daman and Diu (Extension of Easements Act) Act, 1978 ?

(2) Is the right of pre-emption available under Article 2309 of Code of Civil Procedure (Portuguese) where a traditional way resembling to easement of necessity exists over the property catering to the easement ?

3. Mr. 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 appellants have filed a suit for preemption in terms of Article 2309 of the Portuguese Civil Code as according to him the property belonging to the appellants was landlocked and the appellants had a right of way to the main road through the property purchased by the respondent no.1. The learned Senior Counsel further pointed out that the learned Trial Judge by judgment and decree dated 23.01.2003 after appreciating the evidence on record has come to the conclusion that the subject property belonging to the appellants was landlocked and the appellants had a right of preemption over the purchase effected by the respondent no.1. The learned Senior Counsel further

pointed out that the judgment and decree passed by the learned Trial Judge came to be challenged by the respondent nos. 1 and 2 before the learned Lower Appellate Court whereby the appeal preferred by such respondents came to be allowed by the impugned judgment and decree dated 23.02.2007. The learned Senior Counsel has thereafter taken me through the judgment passed by the learned Lower Appellate Court to point out that though the claim of the appellants was in terms of Article 2309 of the Portuguese Civil Code, the learned Lower Appellate Court has erroneously considered the matter on the premise that the claim of the appellants was in terms of Article 1566 of the Portuguese Civil Code on the basis of co-ownership right. The learned Senior Counsel further pointed out that it is not the case of the appellants that they are claiming preemption on the basis that they are co-owners of the property but on the basis that the property of the appellants is landlocked and as such they have a right of preemption on the transfer effected in favour of the respondent nos.1 and 2 by the respondent no.4. The learned Senior Counsel has extensively taken me through the judgment of the learned Lower Appellate Court to point that the claim of the appellants under Article 2309 of the Portuguese Civil Code was not at all examined by the learned Lower Appellate Court and consequently, the impugned judgment passed by the learned Lower Appellate Court cannot be sustained and deserves to be quashed and set aside. The learned Senior Counsel as such submits that without going into the merits of the contention raised by the respondents, it

would be appropriate to quash and set aside the judgment passed by the learned Lower Appellate Court and the matter be remanded back to the learned Lower Appellate Court to decide the appeal preferred by the respondent nos. 1 and 2 afresh after hearing the parties in accordance with law.

4. On the other hand, Mr. G. Teles, learned counsel appearing for the respondent nos. 1 and 2 has pointed out that it is the case of the respondents that they are the co-owners of the property and consequently, they are entitled to the right of preemption in respect of the suit property. The learned counsel further pointed out that in any event, according to the appellants the provisions of Article 2309 of the Portuguese Civil Code stands repealed in view of the extension of the Easement Act and consequently, the claim of the appellants is totally farfetched. The learned counsel further pointed out that in any event, no right of preemption under Article 2309 of the Portuguese Civil Code is available to the respondent nos. 1 and 2 as according to him the facts on record disclose that the appellants are not entitled for such relief as the property of the appellants is not landlocked. The learned counsel further pointed out that as such the appeal be rejected.

5. I have considered the submissions of the learned counsel and I have also gone through the records. Without going into the merits of the rival contention as to whether the appellants are entitled for the reliefs in terms of Article 2309 of the Portuguese Civil Code, I

find that on perusal of the judgment of the learned Trial Judge at para 9 it clearly shows that the learned Trial Judge has granted the relief in favour of the appellants under the provisions of Article 2309 of the Portuguese Civil Code. As such the contention of Mr. Teles, learned counsel appearing for the respondent nos. 1 and 2 that the learned Trial Judge has allowed the claim of the appellants in terms of Article 1566 of the Portuguese Civil Code cannot be accepted. But however, on perusal of the judgment of the learned Lower Appellate Court, I find that the learned Lower Appellate Court has erroneously examined the claim of the appellants in terms of Article 1566 of the Portuguese Civil Code on the premise that the appellants are the co-owners of the suit property.

6. Taking note of the facts and the evidence on record as the submissions of the learned counsel have not been examined in the context of the provisions of Article 2309 of the Portuguese Civil Code, I find that it would be appropriate to quash and set aside the judgment of the learned Lower Appellate Court and remand the matter back to the learned Lower Appellate Court to decide the appeal preferred by the respondent nos. 1 and 2 afresh after hearing the parties in accordance with law. Needless to say that all contentions of both the parties including the contentions as to whether the appellants are entitled for a relief in terms of the said provisions are left open. The contention of the learned counsel appearing for the respondents that the property of the

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appellants is not landlocked and that the appellants are not entitled for a right of preemption under Article 2309 of the Portuguese Civil Code are also left open. The substantial questions of law are answered accordingly.

7. In view of the above, I pass the following :

O R D E R

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and decree dated 23.02.2007 passed by the learned Lower Appellate Court is quashed and set aside.
- (iii) Regular Civil Appeal No.35/2003 is restored to the file of the learned Lower Appellate Court.
- (iv) The learned Lower Appellate Court is directed to decide the appeal afresh after hearing the parties in accordance with law.
- (v) All contentions of both the parties on merits are left open.
- (vi) The parties are directed to appear before the learned Lower Appellate Court on 21.12.2015 at 10.00 a.m.
- (vii) The appeal stands disposed of accordingly.

F. M. REIS, J

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