

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 101 OF 2008**

1. Ramesh Martoba Dalvi (deceased
through LRs.

1(a) Nilesh Ramesh Dalvi,
son of late Ramesh Mortoba Dalvi,
major of age, married, occupation
businessman, and his wife;

1(b) Smt. Namisha Nilesh Dalvi,
major of age, married,
occupation housewife,
both resident of 'Maguisrish Krupa'
Sapna Town, Bethora road,
Ponda, Goa.

1(c) Smt. Priya Vithal Kamat,
daughter of late Ramesh Mortoba Dalvi,
major of age, married,
occupation housewife, and her husband;

1(d) Shri Vithal Damodar Kamat,
major of age, married,
occupation service,

Both resident of Green Valley Apartment,
Khadpabandh, Ponda, Goa.

2. Smt. Prabha Ramesh Dalvi,
wife of Ramesh Dalvi,
of major age,
r/o. Olga Mansion, Nirankul Rd.
Ponda, Goa.

3. Ratnakar Mortoba Dalvi (expired),
Legal heirs of appellant No.3,

3(a) Anjani (Bindia) Ratnakar Dalvi,
3(b) Alpana Ratnakar Dalvi,

3(c) Chetan Ratnakar Dalvi,
All residents of Khadapaband, Ponda, Goa.

5. Balcrisna Martoba Dalvi (deceased)
legal heirs of deceased Appellant Nos. 5 & 6.

5(a) Sudin Balcrisna Dalvi, major,
5(b) Jayesh Balkrishna Dalvi, major,
5(c) Roshan Balkrishna Dalvi, major,
All residing at Saraswat Co-operative
Housing Society, Yeshwant Nargar,
Ponda, Goa.

6. Smt. Chandra Balcrisna Dalvi
wife of Balcrisna Dalvi,

7. Kum. Sushma Balcrishna Dalvi, alias
Sushma Sandeep Prialkar, major,
residing at Mahalaxmi Temple,
Panaji, Goa.

8. Smt. Shalini Gurudev Gaitonde,
wife of Gurudev Gaitonde,

9. Gurudev Sinai Gaitonde,
Both residing at Tonca,
Caranzalem, Goa.

..... Appellants.

Versus.

1. M/s. Chowgule and Company Pvt. Ltd.,
A Company incorporated under the
Companies Act, 1956, having its
Head Office at Mormugao, Harbour,

2. Miss Kumudini Martoba Dalvi, also
known as Smt. Lalita Gajanan Sinai Surlacar
residing at Ponda, Goa.

3. Gajanan Shantaram Sinai Surlacar,
(since deceased) through Lrs.

3a) Smt. Archana Vishant Naik Gaunekar,
major,

- 3b) Vishant Naik Gaunekar, major, married,
both residing at H.No.23,
Nagush Bandora, Ponda, Goa.
- 3c) Smt. Gitali Sukant Nargunkar,
major, married, her husband
- 3d) Sukant Govinda Nargunkar, major,
married, both residing at A/B Apartment,
1st Floor, Near Pandava Kapel,
Aquem, Margao, Goa.
- 3e) Omkar Gajanan Surlakar,
major, bachelor, businessman,
residing at Khadapaband, Ponda, Goa. Respondents.

Mr. Sudesh Usgaonkar, and Ms. R. Pereira, Advocates for the appellants.

Shri S.D. Lotlikar, Senior Advocate with Ms. G. Xettigar, Advocate for the respondent No.1.

CORAM :- F.M. REIS, J.

DATE :- 30th SEPTEMBER 2015.

ORAL JUDGMENT :-

Heard Mr. Sudesh Usgaonkar, the learned Counsel appearing for the appellants and Mr. S. D. Lotlikar, the learned Senior Counsel appearing for the respondent No.1. None for the other respondents, though served.

2. The above appeal challenges the judgment and decree dated 12/06/2008 passed in Regular Civil Appeal No.134/2000, whereby the

appeal preferred by the appellants came to be dismissed and the judgment and decree passed by the learned Trial Judge dated 3/06/2000 was upheld.

3. Briefly, the facts of the case are that a Civil Suit came to be filed bearing no.29/1968 in the Court of the learned Civil Judge Senior Division at Bicholim by one Dinanath Dalvi and his wife; Narendra Dalvi and his wife; Ramesh Dalvi, Ratnakar Dalvi, Balkrishna Dalvi, Kumari Sushma B. Dalvi, Smt. Xalini Gaitonde and her husband and Ms. Cumudini Martoba Dalvi against the respondents herein. It was the case of the said plaintiffs that they had one half share in the property known as “Cond” out of which Shri Dinanath Dalvi and his wife were owners of one half share of the property, Shri Narendra Dalvi and his wife owned one fourth share, Shri Ramesh and Ratnakar Dalvi owned one fourth share and remaining one fourth belonged to the other plaintiffs. It was further their case that as far as the other three fields are concerned, Shri Dinanth Dalvi and Shri Narendra Dalvi along with their respective spouses were owners of one fourth share of the said field and the remaining plaintiffs were owners of the one eighth share of the said field. It was further their case that the said fields were separated and disannexed from the entire field and that the plaintiffs therein were in

exclusive possession and enjoyment of their properties. The suit was filed to claim damages caused to the said fields during the rainy season. The respondent no.1, who was the defendant in the said suit contested on the ground that the plaintiffs had no right to the whole of the property and cannot claim damages for the entire fields. The learned Trial Judge by a judgment dated 1/10/1984 partly decreed the suit in favour of the plaintiffs therein, inter alia, restraining the respondent no.1 from allowing any mineral rejects into the stream or the fields of the plaintiffs. Thereafter, on 30/10/1984, by a Deed of Sale executed between the said Dinanath Dalvi and his wife and Narendra Dalvi and his wife, the respondent no.1 purchased their right and interest in the suit property. The said Sale Deed was duly registered before the Sub-Registrar of Bicholim. The respondent filed Regular Civil Appeal No.211/1984 in the Court of the learned Additional District Judge, Panaji against the remaining plaintiffs i.e. the present appellants. The appellants also filed cross-objections as a relief for damages was not awarded. The appeal was allowed by the Appellate Court and the cross-objections were rejected holding that the relief for mandatory injunction had become infructuous as the appellants therein had become co-owners. The Second Appeal No.14/1993 was preferred before this Court which came to be dismissed by judgment dated 17/03/1999.

Thereafter, the respondent no.1 filed Special Civil Suit No.20/1988 to partition the suit property by metes and bounds according to the shares of the respondents and the appellants, so that they may enjoy their share separately. The appellants contested the said suit on the ground that the suit property was already divided by metes and bounds and the same was being enjoyed separately for the last 50 years. The learned Trial Judge by judgment dated 3/06/2000 decreed the suit holding that the defendants/appellants herein are entitled to one eighth part of the suit property and the respondent no.1 is entitled to seven eighth part of the suit property. Being aggrieved by the said judgment, the appellants preferred an appeal before the learned Appellate Court which came to be dismissed by judgment dated 15/07/2000. Being aggrieved by the said judgment, the appellants have preferred the above Second Appeal, which came to be admitted by an order dated 17th June, 2009 on the following substantial questions of law :

- (a) When the High Court in the Second Appeal held that once the decree does not itself survive the Appellants therein were not entitled to invite a finding on a point regarding the claim of partition of the property whether the Courts below were right in holding that Appellants cannot urge that the suit property was partitioned in the present suit because the same is barred by the principle of res judicata?

(b) Whether the present suit instituted by the Respondent was not maintainable for not joining all the co-owners as parties to the suit, in the light of the finding recorded by the High Court in the Second Appeal arising out of the previous suit in the year 1968?

4. Mr. Sudesh Usgaonkar, the learned Counsel appearing for the appellants has vehemently argued that the earlier suit filed by the vendors of the respondent no.1 herein and other co-owners was for compensation and injunction against the respondents herein. The learned Counsel further pointed out that in the said suit the respondents had filed a counter claim, inter alia, contending that the property was partitioned for the purpose of enjoyment. The learned Counsel further pointed out that the said suit filed by the said plaintiffs and the appellants herein came to be dismissed essentially on the ground that the property was in co-ownership between the appellants and the vendors of the respondent no.1. The learned Counsel further pointed out that the said counter claim also came to be rejected by the Courts below. The learned Counsel has thereafter taken me through the judgment of this Court in the said Second Appeal to point out that the suit was essentially dismissed on the ground of non-joinder of necessary parties and, as such, the question as to whether the property was partitioned or not was not finally decided. The learned Counsel has thereafter pointed out that

the respondents based on the Sale Deed whereby the subject share in the property was purchased by the respondent no.1 filed the suit for partition. It is further submitted that the defence of the appellants herein was inter alia that the property was already partitioned and the question of filing the suit for partition would not arise. The learned Counsel further pointed out that the appellants had also raised a contention that the suit was bad for non-joinder of necessary parties. The learned Counsel further pointed out that even assuming the share of the respondents is accepted to be one eighth share in the property, the suit is bad for non-joinder of other co-owners of the disputed property. The learned Counsel has thereafter taken me through the judgment passed by the Court below to point out that the learned Judge was not justified to pass the decree to partition the property by erroneously coming to the conclusion that the property was not already partitioned. The learned Counsel further pointed out that this Court whilst disposing of the Second Appeal had not examined the said aspect. The learned Counsel further pointed out that the findings of the learned Judge on that count are untenable. The learned Counsel has extensively taken me through the judgments of the Courts below to point out that they have not examined as to whether the suit is bad for non-joinder of necessary parties and, as such, there is grave error committed by the Courts below

in decreeing the suit. The learned Counsel further pointed out that though the share of the appellants is one eighth in the property described at paras 3(a), 3(b) and 3(c), nevertheless, the appellants do have one fourth share in the property described at para 3(d) of the plaint. The learned Counsel further submitted that as the respondents have not established that they were co-owners of the remaining share of seven eighth of the property described at paras 3(a), 3(b) & 3(c) and three fourth in respect of the property described at para 3(d), the Courts below were not justified to pass the impugned judgment. The learned Counsel has further pointed out that even in the survey records the properties are recorded in specific names of the appellants and some of the respondents and as such this itself indicates that the property was already partitioned. The learned Counsel further pointed out that as per the reply to the better particulars the share of the respondents cannot be said to be seven eighth of the property and, consequently, the Courts below were not justified to pass the impugned judgment.

5. On the other hand, Mr. S.D. Lotlikar, the learned Senior Counsel appearing for the respondent no.1 has supported the impugned judgment. The learned Senior Counsel has pointed out that as far as the shares of the appellants are concerned, one eighth share in each of the

properties has been ordered to be partitioned in favour of the appellants herein. The learned Senior Counsel, as such, pointed out that the alleged grievances raised by the appellants are totally misconceived. The learned Senior Counsel further pointed out that as per the two Sale Deeds executed in favour of the respondent, two of the original co-owners of the property, namely the descendants of the Dinanath and Narendra had sold their share in favour of the respondent. The learned Senior Counsel further submitted that one of the original co-owners of the disputed property was one Martoba Dalvi whose descendants are the appellants herein. The learned Senior Counsel further submitted that the said Martoba was entitled to one eighth share in the property and, as such, the appellants have no grievance as far as their share in the property is concerned. The learned Senior Counsel has thereafter taken me through the impugned judgment passed by the Courts below and pointed out that the substantial question of law are to be answered in favour of the respondents.

6. I have considered the submissions of the learned Counsel and I have also gone through the records with their assistance. On perusal of the proceedings in the other suit, I find that the findings therein clearly disclose that the property was held to be in common co-ownership and

was undivided. In such circumstances, the contention of Mr. Sudesh Usgaonakr, the learned Counsel appearing for the appellants that such finding can be reopened in the subsequent suit, as this Court in the Second Appeal had not verified the correctness of such aspect, cannot be accepted. These findings have attained finality between the parties thereto including the appellants and, as such, the appellants are not entitled to challenge such findings in the present suit. In fact, on perusal of the defence raised in the said suit, I find that such stand was already taken by the appellants which came to be rejected. In fact, the suit filed by the appellants and the other then co-owners was dismissed essentially on the ground that the property being in common ownership of the co-owners had to be partitioned. It is not open to the appellants to now contend that the property was not undivided. It cannot be disputed, as such, that the earlier suit filed by the appellants and the other co-owners came to be essentially dismissed on the ground that the property was in common ownership. The findings therein also disclosed that all the co-owners were not made parties to the suit and the suit itself was found to be defective. The records also reveal that during the pendency of the earlier suit before the appellate Court, the respondent no.1 purchased the shares of two of the co-owners namely Dinanath and Narendra and, as such, the Court took the view that as the respondent had become co-

owners of the property the question of granting any injunction against the respondent no.1 as claimed by the appellants and the other co-owners of the property would not arise at all. In such circumstances, the findings arrived at in the earlier suit to the effect that the property is in co-ownership cannot be reopened as rightly held by the Courts below in the impugned judgment. Hence, the findings of the learned Judge on that count cannot be faulted and, as such, the first substantial questions of law has to be answered against the appellants.

7. With regard to the second substantial question of law, Mr. Sudesh Usgaonkar, the learned Counsel appearing for the appellants has pointed out that there is no conclusive evidence on record to show that the respondents are owners of seven eighth share in the disputed property. But however, it is not disputed that the share of the appellants is one eighth in the disputed property. With regard to the contention of Mr. Usgaonkar, the learned Counsel appearing for the appellants that all the co-owners have not been made parties, it is not disputed that the share of the appellants is one eighth and the appellants have no right or interest with regard to the remaining shares in the disputed properties concerned and, as such, it is not possible to accept the contention of Mr. Usgaonkar, the learned Counsel appearing for the appellants that the

other co-owners are not made parties, when admittedly the appellants have no right to any other share in the disputed property and the names and identity of the remaining alleged co-owners have not been disclosed nor established nor the existence thereof have not been established by the appellants herein. As such the said contention cannot be accepted.

8. But however, as far as the contention of Mr. Usgaonkar, the learned Counsel appearing for the appellants with regard to the property described at para 3(d) of the plaint is concerned, I find that what is the subject matter of the partition is only one half of the property i.e. “Cond” and, there is no substantial question of law framed on that count whilst admitting the above appeal. Hence, it is not possible to examine such contention raised by the learned Counsel appearing for the appellants.

9. In view of the above, I find that there is no merit in the above appeal which is hereby dismissed. Needless to say, the partition may be effected, if possible, by taking into consideration the occupation of the appellants and the respondents in the suit property provided such occupation fits within their respective shares.

10. Subject to the above, the appeal stands rejected.

F.M. REIS, J.

ssm/NH