IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 24 OF 2016

1. Gregory de Souza,
   77 years of age, married,
   son of Daniel Maria D'Souza,
   r/o 6th Macdonald Place,
   Scarsoale, New York 10583.

2. Elizabeth B. de Souza,
   68 years of age,
   wife of Gregory De Souza,
   r/o 6th Macdonald Place,
   Scarsoale, New York 10583. ….. Appellants

V e r s u s

1. Mr. Anthony Gaudience De Souza,
   (Since deceased through legal representatives
   Respondent nos. 1(a) and no.6)
   1a. Ms. Jenifer Rose De souza
   major of age,
   Resident of 2319, Julie lane,
   South San Francisco, California
   94080, U.S.A.

2. Miss. Alexandra L. de Souza,
   (Since deceased through legal representatives
   Respondent Nos. 3 to 7)

3. Michael Arachangel de Souza,
   major of age, married,
   son of Daniel Mario de Souza,
   r/o No.70, Oakfield Road,
   Carterton Oxfordshire
   Ox 183 QW England.

4. Joseph Bonaventure de Souza,
   major of age,
   son of Daniel Maria D'Souza,
   r/o 99, Palmerstome Road,
   Wimbledon, SW-19, London.

5. Marcelia Fabia de Souza,
   major of age,
   w/o Joseph Bonaventure de Souza,
   r/o 99, Palmerstome Road,
   Wimbledon, SW-19, London.

6. Ixida Felicidade de Souza,
   major of age,
   wife of Anthony G. D'Souza,
   r/o 2319, Julie lane,
   South San Francisco, California
   94080, U.S.A.

7. Carmen de Souza,
   major of age,
   wife of Michael de Souza,
   r/o No. 70, Oakfield Road,
   Carterton Oxfordshire,
   Ox 183 QW England. ….. Respondents

Mr. A. D. Bhobe, Advocate for the appellants.

Mr. V. Menezes, Advocate for the respondents.

Coram:- F. M. REIS, J.

Date : 21st October, 2016

ORAL JUDGMENT

Heard Mr. A. D. Bhobe, learned counsel appearing for the appellants and Mr. V. Menezes, learned counsel appearing for the respondents.

2. The above appeal challenges the judgments passed by the Courts below whereby the suit filed by the respondents came to be decreed and the challenges to such decree by the appellants came to be dismissed by the Lower Appellate Court.

3. Briefly, it is the case of the appellants that the respondent nos. 1, 2 and 3/original plaintiffs filed a suit for declaration and permanent injunction against the appellants/original defendant nos. 1 and 2 and the respondent nos. 4 to 7/original defendant nos. 3 to 6 being Special Civil Suit No. 101/2007 on the ground that the appellant no.1 and the respondent no.4 are children of Daniel Mario D'Souza and Louisa D'Souza, who expired on 09.01.1985 and 06.05.1990. It is their case that their parents had filed a suit bearing No. 144/1981 against one Joaquim Francis D'Souza and others for partitioning the property bearing survey Nos.77/4 and 78/9 of village

Candolim which came to be decreed on the basis of the compromise terms on 20.09.1990. It is further their case that since respondent nos. 1 to 7 and the appellants were abroad, for the purpose of executing the decree, the respondent nos. 1 to 7 executed a power of attorney in favour of the appellant no.1 so as to enable the appellant no.1 to carry out the execution of the decree in the said suit as well as to secure the transfer of the estate in favour of all the heirs of the said deceased parents. It is further their case that based on such power of attorney, the appellant no.1 filed Inventory Proceedings No.98/95 in the Court of the learned Civil Judge Senior Division, Mapusa in which he disclosed only the immovable property and did not disclose the movable assets including the deposits in the banks etc. It is further their case that when the respondent nos. 1, 2 and 3 tried to inquire with the appellant no.1 regarding the steps taken by him in the Inventory Proceedings, he gave an impression that it is not yet finalized and that around November, 1996, at the request of the appellant no.1, the respondent nos. 1 to 7 sent a Wakalatnama as the power of attorney held by the appellant no.1 could not be utilized for the purpose of the Inventory Proceedings. It is further their case that the respondent nos. 2 and 3 visited Goa on the last occasion in the year 1982 and that they were informed that over the years, the proceedings for the transfer of property had not been concluded. It is further contended that on 07.05.2007 the appellant no.1 furnished an explanation to the respondent no.1 and as such the respondent nos.1, 2 and 3 were not satisfied by such explanation. Thereafter, it is contended that the respondent no.1 came down to Goa on 08.09.2007 and had inspection of the Inventory Proceedings and during the said inspection, they learnt that the appellant no.1 without notice to the respondent nos. 1, 2 and 3 held an auction in the Inventory Proceedings and fraudulently transferred all the properties to himself as they were not given any notice of auction proceedings. Consequently, the suit was filed for declaration, injunction and other reliefs. On being served, the appellants filed written statement disputing the said claim and contended that the suit itself is barred by limitation as it was filed to challenge the decree passed in 1998. The appellants also denied that the appellant no.1 had requested the respondent nos. 1 to 7 to execute the power of attorney in favour of the appellant no.1 and contended that the respondent nos. 1 to 7 had voluntarily executed such power of attorney in his favour. It is further their case that the proceedings which have been initiated were in accordance with law and there was no fraud committed as alleged. It was also contended that the respondents were represented by an Advocate who had filed Wakalatnama and disputed the claim put forward by the respondents. After issues were framed and the evidence was recorded, the learned Trial Judge by judgment dated 14.05.2012 decreed the suit filed by the respondents. Being aggrieved by the said judgment, the appellants preferred an appeal before the Appellate Court which came to be dismissed by judgment dated 08.10.2015. Being aggrieved by the said judgment, the appellants have preferred the present Second Appeal.

4. Mr. Bhobe, learned counsel appearing for the appellants has vehemently argued that both the Courts below have erroneously come to the conclusion that the suit was within the period of limitation. The learned counsel further pointed out that the alleged fraud has not been established and as such according to him the judgments passed by the Courts below stand vitiated. The learned counsel further pointed out that the Inventory Proceedings were duly proceeded in accordance with law and finally the judgment was passed in the year 1998 and the suit was filed in the year 2007 which

is hopelessly barred by limitation. The learned counsel further pointed out that once the respondent nos. 1 to 7 were represented by an Advocate all acts done in such proceedings are deemed to have been intimated to them and as such, the Courts below were not justified to pass the impugned judgments. The learned counsel further pointed out that there are substantial questions of law as to whether the suit is barred by law of limitation and whether the suit is maintainable in law.

5. On the other hand, Mr. V. Menezes, learned counsel appearing for the respondents has submitted that the whole exercise conducted by the appellant no.1 was to defraud the respondent nos. 1 to 7 of their legitimate right in the subject property. The Advocate was appearing for the appellants and the respondents which itself shows that the fraud was committed by the appellants. It is further submitted that admittedly the respondents were not served with a notice of the date of auction and as such the proceedings for auction stands vitiated. The learned counsel further pointed out that the appellant no.1 has used an illegal process to deprive the respondent nos. 1, 2 and 3 of their legitimate right to all the properties agreed to

be left in common between the co-heirs of the deceased parents. The learned counsel further pointed out that the appellants have taken advantage of the absence of the respondents to initiate fictitious proceedings with malafides motive.

6. I have considered the submissions of the learned counsel and I have also gone through the records. While disposing of the suit filed by the respondent nos. 1, 2 and 3, the learned Trial Judge in the judgment dated 14.05.2012 has found that the auction proceedings in the Inventory Proceedings were held on 22.01.1998 and consequently the chart of partition therein were declared as null and void as being contrary to law and without notice to the concerned respondents. The learned Judge has noted that the mandatory notice of auction had to be given to the interested parties in the said proceedings which included the respondent nos. 1, 2 and 3 as they were not treated ex-parte in terms of Article 1372 of the Portuguese Civil Procedure Code by relying upon the judgment of this Court in ***Appeal From Order No. 23 of 2006 dated 12.07.2006 in the matter of Ms. Helen Carvalho V/s Ms. Maria Thereza De Cunha and others***. The learned Judge as such found that as no notice was given to the concerned

respondents, the auction proceedings itself were vitiated. The learned Judge has also noted that the Advocate was not authorised to accept the notice of auction and in fact, the concerned Advocate was examined as PW2 who had stated that at the time of auction, the appellant no.1 had told him that the other interested parties and the appellant no.1 had agreed that the suit properties should be taken in auction in the name of the appellant no.1. This clearly shows that the instructions which were given to the concerned Advocate were at the instance of the appellant no.1 to get the properties allotted to him to the exclusion of the respondent nos. 1, 2 and 3 and other plaintiffs. The learned Judge also found that the very fact that no objections were raised by the concerned Advocate would also show that the appellant no.1 had wrongly given instructions on behalf of the respondent nos. 1, 2 and 3 to suit his design to get the properties illegally allotted to him. The learned Judge as such held that the proceedings and the auction proceedings stand vitiated. The learned Judge also decided the issue no.2 in the affirmative.

7. With regard to the claim of the appellants that the suit was barred by limitation, the learned Judge noted that the

plaintiffs/respondent nos. 1, 2 and 3 had established the facts which occurred in September, 2007 and therefore, the suit is well within limitation. The learned Judge further found that there is no material on record to indicate that the respondent nos. 1, 2 and 3 were aware of the disposal of the Inventory Proceedings in the year 1998 and as such, it cannot be held that the limitation commenced on the date of the disposal of the Inventory Proceedings. While discussing the point no.1 after reappreciating the evidence on record the learned Lower Appellate Court has found that the proceedings were null and void and upheld the findings of the learned Trial Judge on that count. While examining the second point of determination, the learned Judge has noted that the suit is within the period prescribed as it was filed within three years from the date of knowledge of the fraud committed by the appellant no.1 and the irregularities in the Inventory Proceedings.

8. From the findings of the fact finding Court, it clearly reveals that the Advocate who had filed the Wakalatnama on behalf of the respondent nos. 1, 2 and 3 was in fact following the instructions of the appellant no.1 that in view of an arrangement between the

appellants and the other co-heirs to the estate of the parents including the respondent nos. 1, 2 and 3, it was understood that the properties would be allotted in favour of the appellant no.1. But in fact no such arrangement has been established or pleaded by the appellant no.1 nor the respondent nos. 1, 2 and 3 have accepted any such arrangement as claimed by the appellant no.1. In such circumstances, in terms of Articles 1030 and 1031 of the Portuguese Civil Code, when simulation is committed by the party on the basis of false averments to commit an act only to defraud another party, such acts can be rescinded at the instance of the party who has been defrauded. The simulation is an act committed by a party declaring a statement which is not true. In the present case, PW2 himself has stated that the appellant no.1 had given him to understand that there was an arrangement to get the properties allotted to the appellant no.1 which was a false statement and as such, the proceedings disposed of on the basis of such false and incorrect allegations would itself vitiate such proceedings.

9. Apart from that, the Courts below have rightly come to the conclusion that the respondent nos. 1, 2 and 3/plaintiffs were not

notified of the auction proceedings and consequently, the auction proceedings itself stands vitiated along with the subsequent steps in the Inventory Proceedings based on an auction which was a nullity.

10. With regard to the contention of Mr. Bhobe, learned counsel appearing for the appellants that the suit itself is barred by limitation, both the Courts below have concurrently found that prior to the suit filed in the year 2007, the plaintiffs/respondent nos. 1, 2 and 3 were not aware about the irregularities and the fraudulent acts committed by the appellant no.1 in the Inventory Proceedings. These concurrent findings of fact based on the appreciation of evidence on record cannot be reappreciated by this Court. The plaintiffs/respondent nos. 1, 2 and 3 had the knowledge about all the relevant facts only in the year 2007 that the Inventory Proceedings were initiated and as such as no evidence has been produced by the appellants to the contrary, I find that the findings of fact on that count are justified. The contention of Mr. Bhobe, learned counsel appearing for the appellants that the suit is barred by limitation as such deserves to be rejected.

11. In view of the above, I find that there is no substantial question of law which arises in the present appeal for consideration. The appeal stands accordingly rejected.

F. M. REIS, J.

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