

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO.17 of 2013**

1. Shri Letellier Shollet Gusmao Paulo
Roncon Pereira, aged 55 years,
and his wife
 2. Smt. Maya Roncon Pereira
aged 50 years, both residing at
H.N.207, Laxotte, Varca, Salcete,
Goa.
- Appellants/
Original Plaintiffs

V e r s u s

1. Smt. Iona Eremita Roncon Pereira,
aged about 53 years, w/o late
Antonio Bilimoria Rocon Pereira
2. Dane Roncon Pereira, aged 21 years,
son of late Antonio Bilimoria Roncon
Pereira
3. Kano Rocon Pereira, aged 18 years,
son of late Antonio Bilimoria
Roncon Pereira
all three presently R/o BF2/3, B
Block, LNL Bldg. Empresa Ema,
Perseraulim, Salcete-Goa
4. Marlayne Pereira Furtado, major
and her husband
5. (Shri Sarto Pereira Furtado, major
both resident of Palmar Grande,
Chinchinim, Salcete, Goa)
- 5(a) Mrs. Maria Carms Shereen Pereira
Furtado
- 5(b) Mr. Adolto Piedade Rajesh Da Costa,
Both Residents of Palmar Grande
Chinchinim, Goa.
6. M/s Akar Creations Pvt. Ltd.

a company registered under the Companies Act 1956 with the Registrar of Companies at Panaji, with head office at Lake Plaza Opp Nehru Stadium, Fatorda, Goa represented by its Managing Director Avinash Sadanand Borkar son of Sadanand Borkar aged 52 years, residing at Borda, Margao, Goa.

.. Respondents/
Original Defendants

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

Mr. M. S. Joshi, Advocate for the respondent nos.4 and 5(a) and 5(b).

Mr. S. D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar, Advocate for the respondent no.6.

CORAM : K. L. WADANE, J.

RESERVED ON : 26th February, 2016

PRONOUNCED ON : 23rd March, 2016

JUDGMENT :

The present appeal is preferred by the original plaintiffs against the order dated 20/10/2012 passed by the Civil Judge, Senior Division, A Court, Margao, by which the application for Temporary Injunction Exh.D-3 is rejected. Hence, the present appeal.

2. Parties are referred to as per their original status.

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

It is the case of the plaintiffs that there was no dispute between the interested parties in the Inventory Proceedings regarding auction, therefore, a formal meeting was held, wherein the plaintiff no.1 and the deceased husband of defendant no.1 and defendant nos.4 and 5 decided that the auction would be amicably held. Accordingly, a formal auction was held. The plaintiff no.1 was declared as successful bidder of Item No.12 while the defendant no.1's deceased husband was the successful bidder in respect of the property under Item No.7.

4. There is no dispute between the parties about the allotment of rest of the properties i.e. item nos.7, 8, 9, 10, 11, 13, 15, 16, 18, 19, 20, 21 and 22. After the auction report was prepared indicating *inter alia* that the plaintiff no.1 was successful bidder in respect of the suit property, the said auction report was signed by all the persons, who were present on the date of auction.

5. On 16/02/1976, the Cabeça de Casal filed an application for allotment of the properties in terms of the auction report and the same was accepted by the Inventory Court on

21/02/1976 and the partition was ordered to be done as per the auction. The map of the partition was prepared and the proceedings were promulgated by the Court on 14/04/1976. It is further contended that the plaintiffs have paid an amount of dues which were availed by his father from the Block Development Office, Margao through the Bank of Baroda.

6. In the month of August, 2016, the plaintiffs came to know about the public notice issued by Advocate Rao informing that his client is interested in purchasing the property, to which the plaintiffs have objected and consequently, Advocate Rao informed the plaintiffs that his client is not intending to purchase the suit property.

7. On perusal of the Inventory record, the plaintiffs came to know that the suit property i.e. Item No. 12 was allotted to the deceased husband of the defendant no.1 by mistake in a final chart of partition. In the auction, the suit property was taken up by the plaintiff no.1. In the month of March, 2007, the plaintiff no.1 located the file, and obtained certified copy of the said Inventory Proceedings on 20/03/2007. On verifying the same, the plaintiffs learnt that there was mistake in final allotment shown in the said inventory proceedings. Therefore,

the plaintiffs filed the suit for declaration and permanent injunction. The plaintiffs have claimed their possession over the suit property.

8. The defendant nos.1 to 3 and 6 have resisted the application for Temporary Injunction and it is their contention that the suit is barred by limitation. According to these defendants, the mistake is not in the final chart, but the said mistake is found in recording of the auction proceedings. The allotment of the property under Item No.12 to the deceased husband of defendant no.1 was by the order of the Inventory Court dated 14/04/1976. Subsequently, the defendant no.6 has purchased the property from the defendant no.1. So, the defendant no.6 became the owner in possession of the eastern most and western most of the suit property and the defendant nos.1 to 3 are owners in possession of the central part of the suit property under Item No.12.

9. I have considered the arguments of Mr. M. B. D'Costa, the learned Senior Counsel appearing for the plaintiffs and Mr. Lotlikar, the learned Senior Counsel appearing for the defendant no.6.

10. During the course of argument, Mr. D'Costa, the learned Senior Counsel has argued that the plaintiffs being highest bidder of Item No.12 became the owner of the property and the partition has to be effected in terms of the auction report. The clerk of the Court has committed a mistake in writing the auction report and has inadvertently, instead of allotting Item No.12 to the plaintiffs, allotted it to the husband of the defendant no.1. Subsequently, the husband of the defendant no.1 died. His widow i.e. the defendant no.1 sold the property to the defendant no.6. So, according to Mr. D'Costa, the learned Senior Counsel, the mistake was committed by the clerk of the Court for which no blame could be given to the plaintiff no.1. Mr. D'Costa further argued that the defendant no.6 has not issued public notice before purchasing the suit property. Therefore, Mr. M. B. D'Costa, the learned Senior Counsel has prayed to allow the appeal.

11. As against this, Mr. Lotlikar, the learned Senior Counsel has argued that the defendant no.6 is a purchaser vide Sale Deed dated 09/10/2006 and the plaintiffs came to know about the mistake committed by the clerk of the Court after about 27 years before filing of the suit and, therefore, the suit suffers from delay and laches. The plaintiffs have not made out a

prima facie case nor the balance of convenience is in their favour. Mr. Lotlikar further argued that the learned Trial Court has considered all the aspects and the discretion exercised by the Trial Court cannot be disturbed or set aside unless the impugned order is shown to be perverse. Therefore, the appeal is liable to be rejected.

12. Considering the rival contentions and arguments of both sides, it reveals that the controversy between the parties is in reference to the allotment of the property at Item No.12 and according to the plaintiffs, the plaintiff no.1 was a successful bidder for the Item No.12. Accordingly, it was recorded in the auction report/ chart. As against this, it is the case of the defendant nos.1 to 3 and 6 that there was mistake committed in recording the auction report itself. Therefore, the defendant nos.1 to 3 became owner of the suit property i.e. Item No.12 by virtue of the order passed by the Inventory Court and on the basis of the Sale-Deed, the defendant no.6 is owner in possession of the suit property.

13. I have perused the record, from which it is seen that the suit property under Item No.12 was allotted to the deceased husband of defendant no.1 by the order of Inventory Court. It is

the case of the plaintiffs that the plaintiffs came to know this only in August, 2006 when a public notice was issued in the newspaper. Such contention of the plaintiffs is not acceptable because no person can sleep over his right for about 27 to 30 years on the background that the final chart of the partition was signed by all the parties. Explanation offered by the plaintiffs, that they relied upon the auction chart and were under the impression that the final chart of partition must be based upon the auction report. Such an explanation of the plaintiffs is not acceptable because the final chart of partition before Inventory Court was signed by all the interested parties. Therefore, now one cannot turn around and say that such final chart of partition was signed blindly.

14. It is the contention of the defendant no.6 that he has purchased the suit property for a consideration and he was unaware about the so called mistake committed by the clerk of the Court because the defendant no.6 was not party to the said Inventory Proceedings and the defendant no.6 had purchased the property based upon final chart of partition and the order passed thereunder by the Inventory Court in the year 1976. Therefore, it appears that there is nothing on record to show even prima facie that such a mistake was within the knowledge of the

defendant no.6. If the plaintiff no.1 had exercised the reasonable diligence, he would have objected to the chart of partition before the same was finalised by the Inventory Court by order dated 14/04/1976. The plaintiff no.1 was served with the notice of final order confirming partition. If at all the plaintiff no.1 was diligent, then, he would have preferred an appeal or the revision as per the provisions of Article 1427 of Portuguese Civil Code. The plaintiffs had also not moved to the concerned Inventory Court for rectification of the mistake.

15. The factum of possession, while deciding the application for Temporary Injunction, is an important aspect to be taken into consideration. The plaintiffs failed to establish their possession over the suit property as on the date of the suit. To establish the possession, the plaintiffs have relied upon the bank receipt and the affidavits of two persons. I think the affidavits of said two persons appear to be oath against oath and on the basis of bank receipt, the possession of a particular property cannot be determined, unless it is shown that the suit property was mortgaged with the bank and the plaintiffs have repaid the amount incurred by mortgaging the Item No.12. So, considering the entire record, I do not think that the plaintiffs are the owner in possession of the suit property. The learned

Trial Court has considered all the aspects and has rightly rejected the application for Temporary Injunction.

16. Mr. Lotlikar, the learned Senior Counsel for the defendant no.6, has therefore, rightly relied upon the observations in the case of **Mohd. Mehtab Khan and others Vs. Khushnuma Ibrahim Khan and others**, reported in (2013)9 SCC 221, which are reproduced as under :

“Where the learned Trial Court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the Appellate Court could not have interfered with the exercise of discretion by the trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the trial Judge do not indicate that the view taken is not a possible view. The Appellate Court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While it is not said that the Appellate Court was wrong in its conclusions what is sought to be emphasised is that as long as the

view of the trial Court was a possible view the Appellate Court should not have interfered with the same."

17. Mr. Lotlikar further relied upon the observations in the case of ***Wander Ltd. and another Vs. Antox India P. Ltd.***, reported in 1990(Supp) SCC 727, which are reproduced as under:

"The Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

18. The observations of the above cited authorities are

perfectly applicable to the present case. In the present case, the plaintiffs have failed to point out that the order of the learned Trial Court is perverse and contrary to the settled law.

19. In view of the above, there is no substance in the appeal. Therefore, the appeal is liable to be dismissed and accordingly, it is dismissed, with no order as to costs.

K. L. WADANE, J

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