

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 38 OF 2007

1. Shri Peter Francis Conceicao,
s/o Alex Conceicao,
r/o Mumbai and employed in
Carona Shoe Company P. Ltd.,
Caves Road, Jogeshwari (E),
Mumbai - 60,
Presently residing at H.No.175,
Caranzalem, Ilhas Goa.
(a) Miss Nisha Agnes Conceicao,
aged 28 years,
(b) Miss Alice Conceicao,
aged 27 years,
(c) Master Raymond Conceicao,
aged 20 years,
All residents of Caranzalem Ilhas Goa.
2. Smt. Philomena Marquinho
Conceicao, wife of Shri Peter Francis Conceicao,
r/o Mumbai, presently residing at
H.No.175, Caranzalem, Ilhas Goa. Appellants

V e r s u s

1. Smt. Candolina Conceicao,
wife of Alex Conceicao,
r/o H.No.175, Caranzalem, Goa.
2. Patriarchate of East Indian
through its Administrator Bishop,
through his Attorney Bismachi Palace,
Altinho, Panaji Goa. Respondents

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Vinita Palyekar,
Advocate for the appellants.

:2:

Mr. S. S. Kantak, Senior Advocate with Mr. P. Talaulikar, Advocate for the respondent no.1.

Mr. V. Korgaonkar, Advocate for the respondent no.2.

Coram:- F. M. REIS, J

Judgment reserved on : 12.08.2016

Judgment pronounced on : 15.10.2016

J U D G M E N T

Heard Mr. Sudin Usgaonkar, learned Senior Counsel appearing for the appellants, Mr. S. S. Kantak, learned Senior Counsel appearing for the respondent no.1 and Mr. V. Korgaonkar, learned counsel appearing for the respondent no.2.

2. The above appeal came to be admitted on the following substantial questions of law by order dated 12.04.2007.

(1) Whether the plaintiff was entitled for a relief of declaration of sale deed as null and void and for transfer of suit plot in the name of the plaintiff without seeking relief for specific performance of contract ?

(2) Whether the suit filed on 13.3.1989 for declaring registered sale deed dated 12.6.1975 to which the plaintiff has been a witness was

ex facie barred by limitation in view of the provisions of Transfer of Property Act, which concerns with notice of transaction relating to immovable property effected by registered instrument ?

(3) Whether the pleadings in the plaint at all make out any case of fraud and misrepresentation as defined under Section 17 of the Contract Act ?

(4) Whether the onus of proof could have been shifted upon the defendant by resort to Section 111 of the Evidence Act, 1872:

I) In the absence of any pleadings to the effect that a question as to good faith of transaction was indeed involved between the parties;

II) In the absence of any plea relating to undue influence as contemplated by Sections 16 and 19(A) of the Contract Act having been pleaded by the Plaintiff;

III) In the absence of any such point having been raised in the memo of appeal.

5. Whether the impugned Decree is in contravention of Section 26 of the Specific Relief Act 1963 in view of the following :

i) No relief for rectification came to be specifically claimed as contemplated by sub-section 4 of Section 26 of the Specific Relief Act ?

ii) There is no prayer for rectification and thereafter for specific performance as contemplated by sub-Section 3 of Section 26 of the Specific Relief Act ?

iii) The plaintiff who was neither contracting party to an instrument cannot seek rectification of the instrument ?

3. Mr. Sudin Usgaonkar, learned counsel appearing for the appellants has assailed the impugned judgments essentially on the ground that the sale deed challenged in the year 1989 was registered on 12.06.1975 which was hopelessly barred by limitation. The learned Senior Counsel further pointed out that it is an admitted position that the sale deed was in custody of the respondent/original plaintiff and as such the question of claiming that she had no knowledge of the contents of the sale deed are totally misconceived. The learned Senior Counsel further pointed out that the fact finding Courts below have erroneously come to the conclusion that the suit was not barred by limitation as according to him when the sale deed itself shows that the original plaintiff had knowledge of the contents thereof and on this ground alone the suit deserves to be dismissed. The learned Senior Counsel further pointed out that admittedly the sale deed was in the name of the appellant no.1 herein and as such the burden was on the respondent/original plaintiff to show that the sale deed stands vitiated. It is further pointed out that the pleadings do not spell out any case of fraud nor any particular therein which could remotely suggest that any

fraud was committed by the appellants. The learned Senior Counsel further pointed out that there is no pleading of undue influence and as such the judgments of the Courts below decreeing the suit filed by the respondent/original plaintiff is totally misplaced. The learned Senior Counsel further submits that the recitals in the sale deed itself point out that the consideration was received by the respondent no.2 from the appellants and as such, the question of claiming that the property purchased for the benefit of the respondent/original plaintiff is unjustifiable. The learned Senior Counsel further pointed out that the relief granted by the Courts below is erroneous as according to him there was no relief sought for rectification of the sale deed. The learned Senior Counsel further pointed out that the total consideration was paid by the original defendant/appellant no.1 and that the claim of the plaintiff/respondent no.1 is totally untenable. The learned Senior Counsel thereafter has minutely taken me through the substantial questions of law to point out that the substantial questions of law are to be answered in favour of the appellants.

4. On the other hand, Mr. S. S. Kantak, learned Senior Counsel appearing for the respondent no.1 submitted that the respondent/original

plaintiff was a widow/mother, who was cheated by her son/appellant no.1 in getting the disputed sale deed executed in his favour when in fact the intention was to execute in favour of the original plaintiff/respondent no.1 herein. The learned Senior Counsel further pointed out that the evidence on record clearly suggest that the first two receipts were paid by the respondent no.1 herein. It is further pointed out that the respondent no.1 and her husband were residing in the subject house as mundkars of the respondent no.2 much before the execution of the subject sale deed. The learned Senior Counsel further pointed out that the respondent no.1 continued to reside in the said house despite of the disputed sale deed which itself suggest that the sale deed was to be executed in favour of the respondent no.1. It is further pointed out that the respondent no.1 had a kiosk and used to derive income and as such the consideration was paid by the respondent no.1 to the respondent no.2. The learned Senior Counsel has thereafter taken me through the judgments passed by the Courts below and pointed out that the fact finding Courts have rightly come to the conclusion that the sale deed is vitiated and passed the impugned judgments. The learned Senior Counsel as such points out that the appeal be rejected.

5. I have considered the submissions of the learned counsel and I have also gone through the records. It is the case of the respondent no.1/plaintiff that there exists a house in the suit plot for more than 30 years which has been inherited by the respondent no.1 and her husband upon the death of her parents -in- law. The suit plot admeasuring an area of 518 square metres which includes a strip of land of nine metres in width all along the road side reserved for road widening. The property where such house is located belongs to the respondent no.2. It is further the case of the respondent no.1 that by an agreement between the respondent no.1 and the respondent no.2 the suit property was agreed to be purchased for a fixed sum of Rs.9500/- in the month of May, 1975. It is further contended that Rs.6000/- was paid and Rs. 3500/- was to be paid at the time of the execution of the sale deed within three months. It is further claimed that the respondent no.1 paid the amount to the respondent no.2 and thereafter a sale deed was executed somewhere in July, 1975. It is further alleged that the appellant no.1 got married to the appellant no.2 in the year 1977 and some time in December, 1988 the original appellant nos.1 and 2 told the respondent no.1 that she has no right to the house as it was purchased by the original appellant no.1. It is further contended that she made an

inquiry with the Sub Registrar and she was shocked to learnt that in the sale deed the appellant no.1 was shown as a 'purchaser' of the suit plot. Hence, the suit was filed for a declaration and other reliefs. The appellants filed their written statement disputing the said claim. It is further pointed out that the sale was finalized only on 12.06.1975 when the appellant no.1 paid the last instalment to the respondent no.2 and that the appellant no.1 had paid the total consideration. It was further stated that the respondent no.1 was a witness to the said sale deed. It is also pointed out that when the sister of the appellant no.1 got married, the respondent no.1 started residing separately in two rooms along with the daughter. As such, it was submitted that the suit be dismissed. The respondent no.2 also filed a written statement inter alia contending that the respondent no.3 has agreed to sell the suit plot to the appellant no.1 and the amount was paid by the respondent no.1 to the respondent no.2 on behalf of the appellant no.1.

6. The learned Trial Judge after framing the issues and recording the evidence by judgment and decree dated 01.04.2004 dismissed the suit filed by the respondent no.1. The learned Judge while appreciating the evidence on record has found that none of the witnesses

of the respondent no.1 had deposed that the respondent no.2 had agreed to sell the suit plot to the respondent no.1. The learned Judge also noted that it was contended by the appellant no.1 that the respondent no.2 being a caretaker as the appellants were residing in Bombay. The learned Judge further noted that it is admitted fact that the respondent no.1 has put her thumb impression on the disputed sale deed as a witness to such document. The learned Judge as such noted that it was to be presumed that the contents of the sale deed were explained to the respondent no.1. The learned Judge as such further found that the contention that she was not explained about the contents of the document deserve consideration. The learned Judge as such found that the respondent no.1 has failed to establish the ingredients of Section 17 of the Indian Contract Act. The learned Judge further noted that as per Article 58 of the Limitation Act, the suit for declaration should be filed within three years when right to sue first accrues and consequently, found that the suit was barred by limitation. The learned Judge further noted that the respondent no.1 had full knowledge of the transfer and as such dismissed the suit filed by the respondent no.1.

7. Being aggrieved by the said judgment, the respondent no.1

preferred an appeal before the learned Lower Appellate Court. The learned Appellate Judge has framed four points for determination. The learned Judge has come to the conclusion that the disputed sale deed was executed by fraud. It is also noted that this is not disputed that the respondent no.1 is illiterate and that she does not know the formalities for the execution of the sale deed. The learned Judge upon going through the material on record has found that the respondent no.1 had faith in the appellant no.1 and there was no reason for the respondent no.1 not to repose such faith in the appellant no.1 since he was the only educated son in her family. The learned Judge also noted that the confidence of the respondent no.1 in the appellant no.1 has been duly established and as such in terms of Section 111 of the Evidence Act, the onus to prove good faith was on the appellant no.1. The learned Judge also noted that the respondent no.1 had pleaded that the property was agreed to be purchased in May, 1975 for a total consideration of Rs.9500/- and that she had no cash in her hand and therefore, she had proposed to pay Rs.6000/- before the execution of the sale deed and thereafter, a sum of Rs.3500/- within three months from the date of the sale deed. The learned Judge also found that the respondent no.1 has also pleaded that she has paid Rs.500/- as advance and another two

instalments of Rs.500/- and Rs.5000/-. The learned Judge further noted that on the contrary the appellant has not stated what was the nature of the agreement between the appellants and the respondent no.2. The learned Judge further noted that Exhibit PW1/A Colly are the receipts of three instalments for Rs.6000/- which were issued to the respondent no.1. The receipts clearly show that the amount was received from the respondent no.1. The contention of the appellants that the amount was sent to the respondent no.1 has not been established. The learned Judge also noted that the respondent no.1 had denied that the amount was paid by the appellant no.1. The learned Judge as such noted that the appellant no.1 has failed to establish that this sum of Rs.6000/- was sent by the appellant no.1 to the respondent no.1 to be paid to the respondent no.2. The learned Judge further noted that it was admitted that the initial amount of Rs.6000/- was paid by the respondent no.1. The learned Judge further noted that there is nothing on record to show that the respondent no.2 has agreed to sell the plot to the appellant no.1 herein. The learned Judge also noted that even DW4 has admitted that the initial instalments were paid by the respondent no.1 though claimed on behalf of the appellant no.1 herein. The learned Judge however noted that DW4 was not present at the time of the receipt of the amount.

The learned Judge noted that the claim of DW4 that the amount was paid on behalf of the appellant no.1 was in view of the fact that the last instalment was paid by the appellant no.1. It is further noted that the respondent no.1 had deposed that the appellant no.1 had told her at the time of execution of the sale deed in the office of the Sub Registrar that all the formalities as regards the sale deed in respect of the suit plot are complete and she has to just put her thumb impression on the paper for the registration. The learned Judge also noted that the plan attached to the sale deed shows an endorsement that the plan of the plot belonging to the respondent no.2 intended to be purchased by Candolina Conceicao who is the respondent no.1 herein. The learned Judge as such found that the sale deed had intended to be executed in favour of the respondent no.1 herein and not in favour of the appellant no.1. The learned Judge also noted that it was pleaded by the respondent no.1 that she was carrying out repairs of the house but however the licence has not been produced on record. The learned Judge also noted that it was admitted that the house tax was paid by the respondent no.1 and that it was recorded in the name of the respondent no.1. The learned Judge also noted that the licence for repairs of the house even after purchase was obtained in the name of the respondent no.1 and she was paying the

house tax in her own name. The appellant no.1 disputed that the original sale deed was with him. But however, the receipts of the first instalments were always in her custody. It is also noted that at the time of paying the final instalment of Rs.3500/- the respondent no.1 accompanied the appellant no.1 and the receipt is issued and written in English and as such, the last receipts were executed in the name of the appellant no.1 herein. The learned Judge as such noted that the appellant no.1 has failed to establish good faith. The learned Judge also noted that it is not disputed that the respondent no.1 was a mundkar of the said house and even after execution of the sale deed she continued to occupy the house. The learned Judge as such noted that the circumstance disclosed that the appellant no.1 had not acted in good faith. The learned Judge upon appreciation of evidence on record found that the respondent no.1 has proved that the appellant no.1 was in a position of active confidence of the respondent no.1 and that the appellants have failed to prove that the sale deed in favour of the appellant no.1 was executed in good faith. The learned Judge further found that the respondent no.1 has proved that the sale deed was executed by fraud and that in November, 1988 when there was physical assault she thereafter learnt about the execution of the disputed sale

deed in the name of the appellant no.1. The learned Judge as such noted that the case of the respondent no.1 that she learnt about the registration of the sale deed in the name of the appellant no.1 only in 1988 has been sufficiently proved. The learned Judge as such noted that the respondent no.1 succeeded in proving that the disputed sale deed was to be executed in favour of the respondent no.1 but the appellant no.1 got the sale deed executed only in his favour by exercising fraud and consequently, allowed the appeal and granted the relief in favour of the respondent no.1. The learned Judge further noted that it is admitted position that the respondent no.1 is presently occupying two rooms and rest of the house is in possession of the appellants. The learned Judge as such decreed the suit in terms of the prayer clauses (a), (b) and (d) and further restrained the appellants by a permanent injunction from dispossessing the respondent no.1 of the property and directed the appellants to hand over the possession of the suit house to the respondent no.1.

8. The aforesaid findings of the fact finding Court are that the disputed sale deed dated 12.06.1975 stands vitiated by fraud. The findings of the learned Judge that the appellants had failed to establish

good faith cannot be faulted. The appellant no.1 was educated whereas the respondent no.1/original plaintiff was illiterate and did not know to read and write though being the mother of the appellant no.1. On the basis of the material on record, the learned Lower Appellate Court has rightly found that there was enough material to come to the conclusion that the respondent no.1 repose confidence on the appellant no.1. In fact, on perusal of the judgment of the learned Lower Appellate Court, the learned Judge has decided in the affirmative the first point for determination to the effect that the appellant no.1 got the sale deed executed in his favour by exercising fraud. The learned Judge also noted that it is admitted that the house belonged to the respondent no.1 and her husband and they were occupying as mundkars therein. The learned Judge further found that the witness of the appellants has admitted that at the time of the execution of the sale deed, he was residing at Mumbai and he used to come to Goa once or twice in a year and stay with his parents and that it was finally decided by his parents to purchase the property in his name. The learned Judge further found that it can be safely inferred that the respondent no.1 had faith in the appellant no.1. The learned Judge further noted that in terms of Section 111 of the Evidence Act which provides that where there is a question

as to the good faith of the transaction between the parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. On the basis of the material on record, the learned Judge has rightly found that the deceased defendant no.1/appellant no.1 was in a position of active confidence of the parents including the respondent no.1 herein and the burden was on him to establish the good faith. The learned Judge on the basis of the oral evidence and documentary evidence has rightly come to the conclusion that the good faith has not been established. The learned Judge also noted that the permission which was obtained for repair of the subject house from the statutory authority was in the name of the respondent no.1. All these facts taken together would lead to the conclusion that the appellants had never acted upon the said sale deed nor had exercised therein the alleged exclusive right over the house in question. In fact, the respondent no.1 continued to reside in the house along with other children and records reveal that part of the house was occupied by the respondent no.1 and some portions by her son, the deceased defendant no.1/appellant no.1.

9. In such circumstances, the fact finding Court below has rightly come to the conclusion that the respondent no.1 was also a party to the sale deed and in fact had contributed the substantial amount of consideration. Apart from that, it is not disputed that the respondent no.1 and her husband were mundkars of the subject house and such mundkarial right cannot be defeated on the basis of the sale deed in question. In such circumstances, I shall now proceed to examine the legal effect of the findings of the Courts below about the payment of consideration. The receipts of consideration which were in the custody of the respondent no.1 clearly suggest that out of the consideration of Rs.9500/-, Rs. 6000/- was admittedly paid by the respondent no.1. The fact that the respondent no.1 had a kiosk and carrying out independent business which would earn income has not been disputed. In such circumstances, as the said amount was in fact paid by the respondent no.1 and as the deceased defendant no.1/appellant no.1 has failed to produce any evidence that he had contributed to pay such a sum of Rs.6000/-, I find that the fact that the respondent no.1 had paid such amount cannot be disputed. Apart from that, the respondent no.1 continued to be in possession of the house in question despite of the sale deed in question. The appellant no.1 has failed to show as to in what

circumstance the sale deed was executed only in his favour during her lifetime when admittedly, she has other children. The records however reveal that after the execution of the sale deed in question, the balance amount of Rs.3500/- was paid by the appellant no.1 and in fact the receipts stand in his name. The records also reveal that when he went to make such payment, the respondent no.1 also accompanied him to the office of the respondent no.2. In such circumstances, the fact that the deceased defendant no.1/appellant no.1 had paid the said amount of Rs.3500/- cannot be disputed. The net effect of the finding of the fact finding Court is that a sum of Rs.6000/- was paid by the respondent no.1 and remaining amount of Rs.3500/- which makes total consideration was paid by the deceased defendant no.1/appellant no.1.

10. Section 45 of the Transfer of Property Act reads thus :

“45. Joint transfer for consideration.-

Where immoveable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary,

respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.”

11. This Section deals with the question as to what quantum of interest each one of several transferees would get in the property

transferred based on the consideration paid. The principle of equity underlying this Section would not clearly apply if the parties themselves have specified what interest or share each of the transferees should have in the property transferred. Section accordingly declares that the rules enunciated are to apply only where there is no contract to the contrary. Admittedly, in the present case, there is no contract as to the manner in which the transferee would have a share in the property in question based on the subject sale deed. In such circumstances, the share in the property transferred would be in terms of the said provisions to the extent of the consideration contributed by the respective parties. In such circumstances, I find that the respondent no.1 was also a co-purchaser of the subject property and had to be added as a co-transferee along with the deceased defendant no.1/appellant no.1 being joint purchasers of the property. As pointed out herein above, the deceased defendant no.1/appellant no.1 had contributed a sum of Rs.3500/- whereas the respondent no.1 had contributed a sum of Rs.6000/- to make up the consideration amount in question. In such circumstances, I find that the relief sought by the respondent no.1 deserves to be moulded in the interest of justice and the respondent no.1 has to be declared to be the owner of the subject property along with the

deceased defendant no.1/appellant no.1 nevertheless, the share of the appellant no.1 would be $\frac{1}{3}^{\text{rd}}$ and the remaining $\frac{2}{3}^{\text{rd}}$ undivided right in favour of the respondent no.1 herein. To that extent, the impugned judgment passed by the learned Lower Appellate Court has to be modified and rectified.

12. For the aforesaid reasons, I find that the declaration granted by the learned Lower Appellate Court is to be modified and the name of the respondent no.1 is to be added as a co-purchaser to the sale deed in question having right to the extent referred to herein above. Taking note of the conclusion drawn in the above judgment, the question of seeking any specific performance by the deceased defendant no.1/appellant no.1 would not arise. The learned Lower Appellate Court on the basis of the evidence on record has come to the conclusion that the respondent no.1 learnt about the sale deed only in December, 1988 and as such, the suit filed on 15.03.1989 is within the time prescribed. While coming to such conclusion, the learned Judge has examined the evidence on record and upon appreciating such evidence has come to the conclusion that the fact that the original plaintiff/respondent no.1 learnt about the sale deed only in 1988 has been duly proved and as such the suit was not

barred by limitation. There is no material on record which would suggest that the original plaintiff/respondent no.1 had knowledge about the fact that the sale deed in question was executed in favour of the original deceased defendant no.1/appellant no.1 on any date prior to December, 1988. Though it was contended by the appellants that the sale deed was in possession of the plaintiff/respondent no.1 nevertheless, this aspect was seriously disputed by the respondent no.1. The receipts only were with the respondent no.1 and in fact, there is no material on record that the deceased appellant no.1 has ever acted upon the sale deed in question. The learned Lower Appellate Court has also noted that the name of the respondent no.1 was figuring before the Statutory Authorities and even the house tax was being paid in the name of the respondent no.1. There were also permissions in her name besides the fact that she was residing in the said house. The house was also constructed by the respondent no.1 and her husband. In such circumstances, the findings of the learned Judge that the suit filed by the original plaintiff/respondent no.1 is within the time prescribed cannot be faulted. The cause of action for filing a suit to cancel an instrument arises when the facts which entitled the plaintiff to have an instrument cancelled or set aside first become known to him. The fact finding

Court has categorically found that such knowledge of original plaintiff no.1/respondent no.1 was only in December, 1988 and consequently, the suit filed in 1989 is within the period of limitation. As already pointed out herein above, the fact finding Court upon appreciating the evidence has come to the conclusion that the deceased appellant no.1 had committed fraud on the plaintiff/respondent no.1 herein. The question of seeking rectification would not arise as it is the case of the plaintiff/respondent no.1 that the subject sale deed was fraudulently executed only in the name of the deceased appellant no.1 herein. In such circumstances and for the aforesaid reasons, the substantial questions of law framed by this Court are answered against the appellants.

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

O R D E R

(i) The impugned judgment and decree dated 27.02.2007 passed by the learned Lower Appellate Court stands modified in the following terms.

(ii) The name of the respondent no.1 is to be included in the sale deed dated 12.06.1975 to the effect that the respondent no.1 is a joint owner of the disputed

property along with the deceased appellant no.1 whereby the share of the respondent no.1 is to the extent of $\frac{2}{3}$ rd and the share of the deceased appellant no.1 is to the extent of $\frac{1}{3}$ rd.

(iii) Both the parties shall continue to be in occupation of the respective portions being occupied by them presently until the property is divided between the appellant no.1 and the respondent no.1 in the aforesaid shares by metes and bounds.

(iv) Both the parties shall not create any third party right or change the nature of the property without their mutual consent.

(v) The appeal stands disposed of accordingly with no order as to costs.

F. M. REIS, J

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