

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 82 OF 2003

1. Shri Domingos Manuel Lobo
(deceased through his legal heirs)
his wife the appellant no.2.
2. Smt. Agnes Lobo,
house wife, major,
residing at Moicowaddo,
Pilerne, Bardez Goa.  Deleted
3. Shri Joao Patricio V. D'Souza,
son of Vitorino L.S.M. D'Souza,
major, married, retired/Advocate,
residing at Moicowaddo,
Pilerne, Bardez Goa. Appellants

V e r s u s

1. Shri Felicio Antonio Martinho Lobo,
(deceased through his legal heirs):
1(a) Shri Anthony J. Lobo,
1(b) Smt. Noma Maria Lobo
(deceased through her legal
Reprs.) the respondents
No.2 and No.1(a).
2. Smt. Robertina Piedade Lobo,
(since deceased)
wife of Felicio A.M. Lobo,
major, married, housewife,
All : Residing at Moicowaddo,
Pilerne, Bardez Goa.
3. Shri Nateson Lobo (Since deceased)
major, married,
r/o Papua New Gunea,
P.O. Box No. 6212, Boroco,
N.C.D., New Guinea.

4. Shri Anthony Godfrey Lobo
(since deceased)
major, married,
R/o Dona Paula
Near Hotel Cidade de Goa,
Post Dona Paula.
Through legal heirs
Smt. Pamella Lobo,
W/o deceased respondent no.4,
Shri Anthony Lobo,
r/o Lobo House,
Mumbai – Cavel,
Maharashtra.

... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. M. Furtado, Advocate for the appellants.

Ms. A. Lobo, Advocate for the respondent nos. 1(a) and 2.

Coram:- F. M. REIS, J.

Date:- 18th March, 2016

ORAL JUDGMENT

Heard Mr. S. D. Lotlikar, learned Senior Counsel appearing for the appellants and Ms. A. Lobo, learned counsel appearing for the respondent nos. 1(a) and 2.

2. The above appeal came to be admitted by an order dated

22.01.2004 on the following substantial question of law.

"(1) Whether the plaintiffs had established that the suit property was common, undivided co-ownership property, and as such, defendant nos.1 and 2 had no right to dispose of their share in the undivided property to defendant no.3 ?

As a necessary sequel further :

"Whether the plaintiffs had established that they were entitled to exercise their right of pre-emption to purchase the share of defendant nos.1 and 2 in the suit property ?"

3. Mr. S. D. Lotlikar, learned Senior Counsel appearing for the appellants has pointed out that the provisions of Article 1566 of the Portuguese Civil Code dealing with the preemption stands repealed in view of the extension of the Transfer of Property Act, 1964. The learned Senior Counsel further pointed out that the subject matter of the suit is only a small strip of land adjoining the main road which serves as an access to the appellants to proceed on the main road. The learned Senior Counsel thereafter has taken me through the judgment of the learned Lower Appellate Court to point out that the learned Judge has erroneously come to the conclusion that the respondents are entitled for preemption. The learned Senior Counsel thereafter has taken me through the provisions of Section 41 of the Transfer of Property Act to

point out that in view of the provisions of Section 41 of the Transfer of Property Act, the question of claiming any right of preemption does not arise. The learned Senior Counsel thereafter has taken me through the provisions of Sections 8, 9 and 10 of the Transfer of Property Act and pointed out that once a person has purchased the property there can be no restrictions to further transfer in terms of the said Act.

4. I have considered the submissions of the learned counsel and I have also gone through the records. On the basis of the findings of the fact finding Court, it is not disputed that the appellants have purchased the property without giving a notice to the other co-owners of the property in terms of Article 1566 of the Portuguese Civil Code. It is not disputed that in terms of the provisions of Article 1566 of the Portuguese Civil Code, the respondents are entitled for the right of preemption over the disputed property. In such circumstances, the findings of the fact finding Court need not be interfered in the present Second Appeal.

5. As such, the only aspect to be examined is whether the provisions of Article 1566 of the Portuguese Civil Code stand repealed upon extending the Transfer of Property Act 1964 to the State of Goa.

The then Judicial Commissioner's Court in a Judgment reported in ***AIR 1970 Goa, Daman & Diu 143*** in the case of ***Nandu Noorani vs. Jacinto Humberto Cirilo D' Cruz*** has observed at paras 3, 4 and 5 thus :

“3. The appellant contends that as the Transfer of Property Act, 1882 came into force in this territory from 1-11-1965 the lower court could not sell the property to the respondent herein as per Art. 1566 of Portuguese Civil Code.

4. The point for determination is whether there is any force in the contention of the appellant.

5. The Transfer of Property Act 1882 was extended to this territory by the Goa, Daman and Diu (Laws) No. 2 Regulation 1963. Section 4(1) of that Regulation is as follows:-

“Any law in force in Goa, Daman and Diu or any area thereof corresponding to any Act referred to in Section 3 or any part thereof shall stand repealed as from the coming into force of such Act or part in Goa, Daman and Diu or such area, as the case may be.”

According to that section, if there is any law in force in this territory corresponding to Transfer of Property Act that law would stand repealed. The point in dispute in this case is whether the right of pre-emption claimed by the respondent herein was rightly accepted by the lower court. In the Transfer of Property Act 1882 there is no mention about pre-emption. When it is so, it cannot be said that the law relating to pre-emption existing in this territory has been repealed.

The learned advocate for the appellant brought to my notice Section 44 of the Transfer of Property Act, 1882. That section deals with rights of a person who purchased property from a co-owner. That section has nothing to do with pre-emption. Section 5(1) of the Goa, Daman and Diu (Administration) Act, 1962 is as follows:-

“All laws in force immediately before the appointed day in Goa. Daman and Diu or any part thereof shall continue to be in force therein until amended or repealed by a competent legislature or other competent authority.”

Even according to that section the law

relating to pre-emption existing in this territory will continue to be in force till it is repealed by competent Legislature or authority. Up to now the Law relating to pre-emption has not been repealed. For this reason it will have to be held that in spite of the Transfer of Property Act 1882 coming into force from 1-11-1965 in this territory, the lower court was right in selling the property in dispute to the respondent herein when he expressed his desire to purchase it and when it was proved that he was co-owner and he had right to purchase it in exercise of his right of pre-emption. I find no force in this appeal. The appeal is dismissed. Parties will bear their own costs.”

Taking note of the said observations, I find that the provisions of Article 1566 of the Portuguese Civil Code dealing with pre-emption have not been repealed inspite of the Transfer of Property Act 1882 coming into force from 01.11.1965 in the State of Goa. Thus, the contention of Mr. Lotlikar, learned Senior Counsel appearing for the appellants that the provisions of Article 1566 of the Portuguese Civil Code stand repealed in view of the coming into force of the Transfer of Property Act, cannot be accepted.

6. On perusal of the Judgment of the Lower Appellate Court, it has been clearly held that the material on record produced by the appellants and the respondents coupled with the supporting documents, it has been amply established that the suit property was a common undivided ancestral property. It was also found that the respondents-plaintiffs had also established that no notice much less a written notice was issued by the appellants to them before the disposal of their share in the suit property. The learned Lower Appellate Court as such found that there was no merit in the Appeal preferred by the appellants which came to be accordingly dismissed. The finding of fact as such have conclusively established that the property was undivided and that there was no notice of transfer of the shares to the original plaintiffs-respondents herein prior to the execution of the subject Sale Deed and, as such, in terms of Article 1566 of the Portuguese Civil Code, the respondents-plaintiffs were entitled to exercise their right of pre-emption. The learned Single Judge of this Court in a Judgment reported in **1991(2) GLT 304** in the case of ***Smt. Cynthia Shahid Dhar & Ors. vs. Shri Carlos Wilfredo Roque de Sequeira Nazareth & Ors.***, has observed at para 12 thus :

“12. It is necessary to look to certain provisions of the Civil Code and the

Procedure Code in order to appreciate arguments in their application to the facts not in dispute. It is common ground that the substantive right of preemption is found in Article 1566 of the Civil Code. This Article in its turn refers to Article 2309 which provides some details of procedure. When translated this Article reads that co-owners of indivisible or undivided thing cannot sell to strangers their respective share if any co-owner wants to have for the same purchase money :-

“Para 1 : A Co-owner to whom the notice of sale was not given shall have for himself the part sold to strangers provided he applies for within a time of six months from the date when he comes to know about the same by depositing before the delivery is effected the price which in accordance with the conditions of the contract has been paid or due.

Para 2: In case there are more than one co-owner the provisions of paras 4 and 5 of Article 2309 shall be observed. But if the shares are unequal and the biggest co-owner is willing to preempt the respective right shall be adjudicated to him irrespective of

any bidding.”

Para 4 of Article 2309 says being present more than one co-owner to use such right there shall be bidding between them and the highest value so produced shall revert in favour of the vendor. Para 5 says in case of existence of more than one owner with a right to preempt, none of them shall be allowed to enforce in the Court his right without previously notifying others in terms of Article 1511 of the Procedure Code and in case of some other persons so notified come to preempt there shall be bidding between them and the respective right shall be adjudicated to such a person who shall offer the highest price and subsequently deposit within time of three days in favour of the vendor the excess over the primitive price of the contract and pay within 30 days the respective sisa tax.

What therefore transpires from a combined reading of Article 1566 with paras 4 and 5 of Article 2309 is that a co-owner or co-sharer of indivisible or undivided property when sold to a stranger desires to purchase the same bring a suit for preemption within a period of six months

from the date of acquisition of the knowledge of purchase by complying with the terms of payment etc. The first part provides a sort of an embargo on the co-owner unless the co-owners are otherwise not interested in exercising their right of preemption or in other words the sale made to the stranger is subject to the right of preemption by the other co-owners or co-sharers. Paras 4 and 5 of Article 2309 in terms speaks of the procedure that when there are more than one co-owners who are ready and willing to exercise the right of preemption there must be a bidding and the highest bidder would take it which would naturally revert in favour of the stranger-purchaser.

But a small observation is required to be made in relation to Article 1566. In the first place the heading reads 'Right of preemption of co-owners' and it speaks of an eventuality when there has been already a sale in favour of a stranger by a co-owner of undivided rights and shares in the absence of notice to the remaining co-owners or co-shares.....”

Taking note of the said observations, I find that the Courts below were justified to grant the reliefs sought by the respondents-plaintiffs. The substantial questions of law are answered accordingly. The Appeal stands accordingly rejected.

F. M. REIS, J.

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