

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 529 OF 2015**

1. Shri Manojkumar Ramakant Naik Gaonkar, 39 years of age, business, son of late Ramakant Naik Gaonkar, resident of H. No.264, Ganapatiwada, Khandola, Marcela, Ponda-Goa.
 2. Mrs. Shital Manojkumar Naik Gaonkar, 32 years of age, wife of Manojkumar Naik Gaonkar, resident of H. No. 264, Ganapatiwada, Khandola, Marcela, Ponda-Goa.
- ... Petitioners

Versus

1. Shri Paresh Ramakant Naik Gaonkar, major of age, son of late Ramakant Naik Gaonkar, residing at H. No. not known, Ganapatiwada, Khandola (Candola), Marcela, Ponda-Goa.
2. Shri Harish Ramakant Gaonkar, major of age, son of late Ramakant Naik Gaonkar, residing at H. No. not known, Ganapatiwada, Khandola (Candola), Marcela, Ponda-Goa.
3. Smt. Laxmi Ramakant Gaonkar, w/o Ramakant Nakul Gaonkar, major of age, housewife, residing at H. No. not known,

Ganapatiwada, Khandola (Candola),
Marcela, Ponda-Goa. Respondents

Shri Ashwin D. Bhole, Advocate for the Petitioners.

Shri Vijay Palekar, Advocate for Respondent Nos. 1
and 2.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 7th OCTOBER, 2016

PRONOUNCED ON:- 10th OCTOBER, 2016

JUDGMENT:

Rule made returnable forthwith. The learned Counsel for the respondent nos. 1 and 2 waives service. None appears for respondent no. 3, though served. Heard finally by consent of the parties.

2. The challenge in this petition is to the judgment and order dated 27.04.2015 passed by the learned District Judge at Panaji in Miscellaneous Civil Appeal No. 5/2015. By the impugned judgment, the learned District Judge has dismissed the appeal, thereby confirming the order of injunction passed by the learned Senior Civil Judge, Ponda on 31.12.2014

in Regular Civil Suit No. 26/2014/A. The petitioners are also challenging an order dated 27.04.2015, by which application (Exhibit-9) filed by the respondents for production of documents has been allowed by the learned District Judge.

3. The brief facts are that the respondent nos. 1 and 2 have filed the aforesaid suit against the petitioners (original defendant nos. 1 and 2) and the respondent no. 3-Laxmi Gaonkar (original defendant no. 3) for declaration, permanent injunction and other consequential reliefs. The parties are hereinafter referred to in their original capacity for the sake of convenience.

4. The plaintiffs are seeking declaration that the sale deed dated 05.03.2013 executed by their mother (respondent no. 3) and the deceased father of the petitioners, in favour of defendant no. 1, is null and void and for cancellation of the same. The

plaintiffs are also seeking injunction restraining the defendants from changing the survey records of the suit plot or effecting any construction or transferring the same in any manner.

5. The plaintiffs filed an application for temporary injunction, which was opposed by the defendants *inter-alia* on the ground that the suit property was sold by the deceased father alongwith their mother (defendant no. 3) in favour of defendant no. 1 and it is in his possession.

6. The learned Trial Court by order dated 31.12.2014 allowed the application restraining the petitioners or anybody on their behalf from changing the survey records of the suit plot or from effecting any construction or transferring, selling or alienating the same in any manner. This was challenged by the petitioners before the learned District Judge in Miscellaneous Civil Appeal No.

5/2015. It appears that during the pendency of the said appeal, the respondent nos. 1 and 2 filed an application under Order 41, Rule 27 of CPC for production of documents. The learned District Judge has allowed the said application, permitting the production of the following documents:

(1) Copy of No Objection certificate issued by V.P. Vetqui-Candola for release of water supply connection to the shed for commercial use under Ref. No. VP/BC/2002-03/784 dated 20.09.2002.

(2) Copy of No Objection certificate under Ref. No. VP/BC/2013-14/1150 issued by Village Panchayat to start the fabrication workshop in premises House No. 264 to Harish R. Gaonkar.

(3) Copy of complaint by Harish Ramakant Gaonkar dated 29.06.2013.

(4) Copy of objection for Mutation filed with Joint Mamlatdar-III dated 05.12.2014.

(5) Copy of objection addressed to Sarpanch V.P. Khandola-Marcela dated 31.01.2014.

7. The learned District Judge has dismissed the appeal, which brings the petitioners to this Court.

8. I have heard Shri Bhobe, the learned Counsel for the petitioners and Shri Palekar, the learned Counsel for the respondent nos. 1 and 2. None appears for respondent no. 3.

9. It is submitted by the learned Counsel for the petitioners that no case was made out to entertain the application (Exhibit-9) under Order 41, Rule 27 of CPC. It is submitted that the Appellate Court erred in making out a case for respondent nos. 1 and 2, while allowing the said application. It is contended that although, the application (Exhibit-9) is dated 04.02.2015, the

same is filed on 24.03.2015 after the petitioners had concluded their arguments on 12.03.2015. It is contended that the Appellate Court ought to have granted opportunity to the petitioners to deal with the effect of the documents. Insofar as the merits are concerned, it is contended that the respondent nos. 1 and 2 had not set up any case for breach of Article-1565 of the Portuguese Civil Code (PCC, for short) in the case and there are no pleadings to attract the said provision. It is submitted that thus, the Courts below could not have relied on Article-1565 of PCC, in granting reliefs to respondent nos. 1 and 2. It is submitted that Article-1565 of PCC does not apply to self acquired property. It is submitted that the suit property being self acquired property of the deceased, the transfer of the same by way of sale deed, could not have attracted the provisions of Article-1565 of PCC.

10. On the contrary, the learned Counsel for the respondent nos. 1 and 2 has supported the impugned order. It is submitted that the learned District Judge had heard the parties on application (Exhibit-9) on 22.04.2015 and a further hearing on the effect of the documents is neither contemplated nor envisaged nor required. It is submitted that the respondents/plaintiffs have made out a case in the plaint that the sale deed is null and void as the same was fraudulently got executed and registered from Ramakant Gaonkar and respondent no. 3 herein. It is submitted that the Courts below were not precluded from taking note of the statutory provisions such as Article-1565 of PCC and the impugned orders do not call for any interference.

11. I have carefully considered the circumstances and the submissions made.

12. On behalf of the petitioners, there are four contentions raised (i) that the documents could not have been allowed under Order 41, Rule 27 of CPC (ii) that after they were formally permitted to be placed on record, the Appellate Court should have heard the parties on the effect of the documents (iii) in the plaint, the challenge to the sale deed is only on account of alleged fraud and not under Article-1565 of the PCC and thus, the Courts below could not have placed reliance on the said Article and even otherwise Article-1565 of the PCC, would not apply to self acquired property and (iv) fraud is not *prima facie* established.

13. I have carefully gone through the impugned order permitting production of documents and I do not find that any exception can be taken to the same. The learned District Judge has noticed three circumstances under which, such production can be permitted and has acted on the third category,

namely, where the Court requires any documents to be produced in order to enable the Court to decide the appeal or for any other substantive cause. I am not inclined to interfere with the exercise of discretion by the learned Appellate Court. The contention that the petitioners were not heard on the effect of the documents to my mind, is also not acceptable. It is apparent that while considering the question whether the documents can be allowed to be placed on record, the Court is bound to look into the relevancy of the same. For the present purpose, when the Appellate Court has found that the production of documents is necessary to enable it to decide the appeal, that is on account of the third category, it cannot be said that the Appellate Court was further required to hear the parties on the effect of the documents. It is true that in the plaint, the only case made out is about fraud, however, in a given case, this would not preclude the Court from taking note of a statutory provision

in the nature of Article-1565 of the PCC. Thus, on the basis of the case made out in the plaint itself, the Court found that Article-1565 of the PCC is attracted. I do not see any reason to hold that *prima facie* the Courts below, were not justified in placing reliance on the same.

14. It is necessary to mention that the matter is still at the interim stage. Insofar as the issue of inapplicability of Article-1565 of the PCC in respect of self acquired property is concerned, nothing has been brought to my notice to limit the application of the Article, to the property other than, self acquired property. The Article reads thus:

"Article 1565 - Sale to children or grand children - Parents or grand parents shall not be entitled to sell or mortgage to children or grand children if the other children or grand children do not consent to the sale or mortgage."

15. Thus *prima facie*, we can't read the said Article with a limitation that it only applies to the property other than self acquired property. On careful consideration of the circumstances and the impugned order passed, I do not see any reason to interfere with the same in the exercise of the supervisory jurisdiction under Article-227 of the Constitution of India.

The petition is without any merit and is accordingly dismissed, with no order as to costs.

Needless to mention that the Trial Court shall not be influenced by any of the observations made herein, at the trial of the suit.

C. V. BHADANG, J.

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