

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 93 OF 2015**

1. Shri Michael Gracian Fernandes,
s/o Beneditto Fernandes,
aged 52 years, service, married,
 2. Shri Lawrence Piedade Fernandes,
s/o Beneditto Fernandes,
aged 40 years, married, service,
both r/o Taripanto, Sanguem,
of Sanguem Taluka. Earlier
represented by his Power of
Attorney, Smt. Francisca Fernandes,
r/o H.No. 28/B, Taripanto, Sanguem,
The appellant no.2 now represented
by his Power of Attorney,
the appellant no.1
- ... Appellants

V e r s u s

1. Shri Minguelinho D'Costa,
aged 65 years, married,
businessman and his wife,
2. Smt. Scolastica D'Costa
aged 60 years, housewife,
Both r/o Opposite Forest Colony,
Sanguem Goa.
3. Shri Vinayak Angle,
aged 63 years, married,
businessman and his wife,
4. Smt. Vinayak Angle,
aged 55 years, housewife,
Both r/o H.No.843/3,
Aquem, Margao Goa.

5. Shri Alleluia Diniz,
Aged 75 years,
Businessman and his wife,
 6. Smt. Conny Diniz,
aged 70 years, housewife,
Both r/o Avedem, Quepem Goa.
 7. Shri Joao Fernandes,
s/o Jose Fernandes,
aged 77 years, retired and his wife,
 8. Smt. Rosa Maria Fernandes,
aged 68 years, housewife,
Both r/o H.No.29, Taripanto,
Sanguem Goa.
- Respondents

Mr. R. G. Ramani, Advocate for the appellants.

Mr. D. Pangam, Advocate for the respondent nos. 1, 2, 5 and 6.

Coram:- F. M. REIS, J.

Date:- 24th June, 2016

ORAL JUDGMENT

Heard Mr. R. G. Ramani, learned counsel appearing for the appellants and Mr. D. Pangam, learned counsel appearing for the respondent nos. 1, 2, 5 and 6.

2. Admit on the following substantial question of law:

Whether the judgment passed by the learned Lower Appellate Court dated 07.04.2015 stands

vitiated as the operative part of the judgment is not in consonance with the findings therein ?

3. Mr. Pangam, learned counsel waives service on behalf of the respondent nos. 1, 2, 5 and 6.

4. Upon hearing Mr. Ramani, learned counsel appearing for the appellants and Mr. Pangam, learned counsel appearing for the respondent nos. 1, 2, 5 and 6, a short point which came for consideration is whether the judgment passed by the learned Lower Appellate Court dismissing the appeal preferred by the appellants stands vitiated as though the findings in the judgment are in favour of the appellants the operative part dismisses the appeal preferred by the appellants. Mr. Ramani, learned counsel appearing for the appellants has taken me through the findings rendered by the learned Appellate Court while examining point no.1 for determination to point out that the learned Judge after scrutiny of the evidence on record has come to the conclusion that the respondents had failed to establish their case that the earlier judgment and decree was obtained by misrepresentation. The learned counsel has thereafter taken me through the findings while discussing point no.2 wherein the learned

Lower Appellate Court has come to the conclusion that the findings of the learned Trial Judge that the earlier judgment and decree passed in the earlier suit was not obtained by fraud came to be upheld. The learned counsel as such submits that the consequence thereof would be the appeal preferred by the appellants ought to have been allowed and the judgment and decree passed by the learned Trial Judge be quashed and set aside.

5. Mr. Pangam, learned counsel appearing for the respondent nos. 1, 2, 5 and 6 points out that the learned Lower Appellate Court has rightly dismissed the appeal preferred by the appellants.

6. I have considered the submissions of the learned counsel and I have also gone through the records. On perusal of the judgment passed by the learned Appellate Court while discussing point no.1, the learned Judge has come to the conclusion at para 39 that the plaintiffs/respondents have thus failed to prove that the judgment and decree challenged in the suit is vitiated by misrepresentation or fraud. Even on perusal of the discussion on point no.2, the learned Judge

has confirmed the findings of the learned Trial Judge that the subject decree was not vitiated by fraud. In such circumstances, Mr. Ramani, learned counsel appearing for the appellants is justified to contend that in such circumstances, the appeal ought to have been allowed. Nevertheless, in the peculiar facts and circumstances of the case and in the interest of justice, I find that it would be appropriate to quash and set aside the judgment dated 07.04.2015 passed by the learned Lower Appellate Court and direct the learned Lower Appellate Court to decide the appeal preferred by the appellants afresh after hearing the parties in accordance with law. The substantial question of law is answered accordingly.

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

O R D E R

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and decree passed by the learned Lower Appellate Court dated 07.04.2015 is quashed and set aside.
- (iii) Regular Civil Appeal No. 86/2014/I is

restored to the file of the learned Lower Appellate Court.

(iv) The learned Lower Appellate Court is directed to decide the appeal afresh after hearing the parties in accordance with law.

(v) All contentions of both the parties on merits are left open.

(vi) The parties are directed to appear before the learned Appellate Court on 19.09.2016 at 10.00 a.m.

(vii) The appeal stands disposed of accordingly.

F. M. REIS, J.

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