

IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO. 51 OF 2015.

1. Ms. Satira Maria da Silva, 65 years old, Spinster r/o House no. 1157, Socorro, Maina, Porvorim, Bardez, Goa.
 2. Mrs. Hilda Rachel Lawrence, 71 years old, married, Housewife and husband;
 3. Mr. Joao Nasario Caridade Lawrence, 85 years old, retired, Both r/o. House No. 168 Ranoi, Aldona, Bardez, Goa.
- Appellants.

Versus

1. Mr. Raul Francisco Da Silva, Major of age, married, retired, and wife;
2. Mrs. Luiza Da Silva, Major of age, housewife, Both r/o House no.1157, Socorro, Maina, Bardez, Goa.
3. Mr. Carlos Thomas, Rocha Da Silva, major of age, retired, Married and wife,
4. Mrs. Eufregina D'Silva, Major of age, housewife, Both r/o 1001, MW 32 Court, Miami, Florida 33125, USA.
5. Sr. Olga Philomena Da Silva Major of age, nun, r/o Holy

Cross Convent, Bastora,
Bardez, Goa.

6. Mrs. Shobavraj Yelagudappa
Halawar, Major of age, C/o
Sadanand Gopinath
Nagvenkar, Behind Mahadev
Temple Chogam Road, on the
way to Chubby Cheeks
School, Pilerne, Bardez, Goa.

6a. Mr. Yelagudappa Halawar,
House No. not known,
Porvorim, Bardez, Goa.
(Deleted)

7. Mrs. Aishya Patel, Major of
age, House No. not known,
Porvorim, Bardez, Goa.

7a. Mr. Abdul A. Patel, House no.
not known, Porvorim, Bardez,
Goa.

8 Ms. Samim M. Pathan,
C/o. K. K. Mohammad, Near
Damien de Goa, Porvorim,
Bardez, Goa.

8a. Mr. Mustafa Rajasab Pathan,
House No. not known,
Dandoli, Karnataka.

9. Mr. Sandeep Arjun Vazarkar,
Major of age, House no.
1032, Zosvaddo, Socorro,
Bardez, Goa.

9a. Mrs. Seema Sandeep
Vazarkar, House no. 1032,
Zosvaddo, Socorro, Bardez,

Goa.

..... Respondents.

Shri J. Vaz, Advocate for the appellants.

Shri S. Desai, Advocate for the respondent no.9 and 9(a).

Shri J. J. Mulgaonkar, Advocate for the respondent nos. 6, 8 and 8(a).

Coram:- NUTAN D. SARDESSAI,J.

Reserved on:-8th July, 2016.

Pronounced on:- 22nd July,2016.

JUDGMENT

Heard learned Counsels appearing for the respective parties.

2. Admit.

3. Shri S. Desai, learned Advocate waives notice on behalf of the respondent nos. 9 and 9a and Shri J. J. Mulgaonkar, learned Advocate for the respondent nos. 6, 8 and 8a.

4. This is an appeal at the instance of the original plaintiffs challenging the order passed by the Ad-hoc Senior Civil Judge, Mapusa by which she had dismissed the application for

injunction. The respondents are the original defendants in the suit filed by the plaintiffs for the reliefs of declaration and injunction particularly against the respondent nos.6 to 9(a) from in any manner dealing with the suit properties including the transfer, alienation etc till further orders. The parties will be referred to as the plaintiffs and the defendants for brevity's sake hereinafter.

5. Shri J. Vaz, learned Advocate for the plaintiffs contended that they learnt of the forged powers of attorney and the sale deeds only on a notice of mutation which was published in the local daily and which was followed thereafter by the police complaint. The defendant nos.1 and 2 who had executed the fraudulent sale deeds based on the forged powers of attorney had executed an undertaking admitting that they had indulged in a case of forgery. They were however, not traceable. The survey records still continued in the name of the appellants' parents and therefore the presumption in terms of Section 105 of the Land Revenue Code arose in their favour. He submitted further that the fact that the powers of attorney were forged was apparent from the signatures of the plaintiffs appearing in the plaint and those on the said forged documents. Even assuming at the

highest that the defendant nos.6 to 9 were in possession of the suit property, the plaintiffs were nonetheless entitled to the relief of preventing them from creating any third party right or interest therein based on the fraudulent deeds in their favour. The learned Trial Court had failed to appreciate its case and therefore warranting a reversal of the order in the appeal.

6. Shri S. Desai, learned Advocate for the respondent nos.9 and 9(a) contended that from a bare perusal of the pleadings it was apparent that there were no pleadings of any fraud or allegations against the defendant nos.9 and 9(a) and that the property had been undervalued. These defendants were the bonafide purchasers for consideration and therefore their right had to be protected vis-a-vis the suit properties. There were no allegations against the Notary anywhere in the plaint and therefore the presumption in terms of the acts so done by the Notary were protected in terms of Section 85 of the Indian Evidence Act. There was also a presumption in favour of these defendants inasmuch as the survey records stood in the name of their predecessor-in-title.

7. Shri S. Desai, submitted that moreover the Notary

had identified the executants of the powers of attorney being the plaintiffs and therefore, in the absence of any challenge thereto, the plaintiffs were not entitled to any reliefs or of the nature as claimed in the appeal. There was a presumption attached to the registered sale deed executed in their favour unlike the affidavit/undertaking which was the only document in favour of the plaintiffs purportedly executed by the defendants nos.1 and 2 and which was not worthy of credit. He relied in the landmark judgment in **Wander Ltd Vs Antox India Pvt. Ltd.,[1990 (Supp) SCC 727]** and submitted that no grounds were made out of whatsoever nature for an interference with the impugned order. In any event the plaintiffs were protected qua the suit properties on the principle of lis pendens.

8. Shri J. J. Mulgaonkar learned Advocate for the defendants nos. 6,8 and 8(a) adopted the arguments of Shri S. Desai, learned Advocate for the defendant nos.9 and 9(a) on the aspect of being bonafide purchasers and submitted that the only document which the plaintiffs had in their favour was the affidavit/undertaking purportedly executed before the Notary like the powers of attorney. The plaintiffs had lodged the complaint only in 2010 and the suit was filed more than a year after the

complaint. No action was taken against the perpetrators of the fraud and the plaintiffs were precipitating their remedy against the purchaser for value. The affidavit/undertaking executed by the defendant nos.1 and 2 was a self serving document and there were findings to that effect by the learned Trial Court but who had lost sight of the fact that the defendants were bonafide purchasers who were likely to stand to lose in case the plaintiffs were secured with the relief of injunction. The aspect of delay and laches was also applicable to the case of the plaintiffs who had based the cause of action for filing the suit on the notice published in the local daily. There was no justification or explanation for the delay in filing the suit and which was fatal to their claim.

9. Shri J. Vaz, learned Advocate for the plaintiffs submitted that a substantial amount of time was consumed to procure the documents. He adverted to the pleadings at paragraphs 14 and 15 of the plaint and submitted that there was no question of any delay and laches. The affidavit/declaration of the defendant nos.1 and 2 was prepared after the police complaint and the Trial Court ought to have considered the affidavit accordingly. Hence, the appeal had to be allowed and

the order be varied accordingly.

10. The plaintiffs claimed a right to the suit properties bearing the distinct survey numbers through their late parent/parents. They had received the mutation notice in August, 2010 from the office of the Mamlatdar and were shocked on learning that the suit property no.298/5 had been sold by the defendant nos.1 and 2 to the defendant nos.6 to 8 by three separate Sale Deeds dated 18.5.2010. They had filed objections to the mutation applications since the Sale Deeds were executed without their knowledge and consent. They had learned on inquiries that the defendant nos.1 and 2 had fraudulently executed the Deed of Partition which was duly registered before the Registrar again without the knowledge and consent of the plaintiffs on the basis of the powers of attorney fraudulently obtained from them and thereafter the plaintiffs learnt that the fraudulent powers of attorney was executed before Shri D. S. Petkar at Mapusa.

11. The plaintiffs also carved a case that in November, 2010 they had realised that another property bearing the Survey no.296/3 of Socorro had been sold by the defendant nos.1 and 2

to Raul D'Silva and his wife without their knowledge. They had never executed the powers of attorney in favour of the defendant nos.1 and 2 nor met or contacted Petkar for the execution of the powers of attorney. They had never executed the powers of attorney which were therefore per se null and void and precipitating a complaint to the Police. The plaintiffs also carved a case that the defendant nos.1 and 2 contacted them after the Police complaint and admitted and acknowledged their fraud and swore an affidavit how they had fraudulently executed the powers of attorney by forging their signatures and also executed the Partition Deed based on the fraudulent powers of attorney followed by the execution of the three sale deeds dated 18.5.2010 in favour of the defendant nos. 6 to 8 and another in favour of defendant no.9. The defendant nos.1 and 2 had agreed to undo all the wrongs committed by them including the Partition Deed, Sale Deeds dated 18.5.2010. The defendants had not done anything concrete to set right the illegalities even after the issue of a legal notice which entitled them to the reliefs as prayed for in the appeal.

12. Shri J. Vaz, learned Advocate for the plaintiffs invited attention to the signatures appearing on the plaint vis-a-

vis those appearing on the powers of attorney to buttress his plea that the defendant nos.1 and 2 had forged the signatures and entered into the transactions as set out in detail earlier. Yet the trial Court had not appreciated their case and failed to secure the plaintiffs with the relief as claimed in the application. They were entitled to the relief to restrain the defendants from creating any third party right in the suit property. It is matter of the record that nowhere do the pleadings bear out that there were any allegations of fraud or the like attributed to the defendants nos.9 and 9(a) and the defendant no.6 vis-a-vis the execution of the Sale Deeds nor were there any allegations in the plaint that the properties were undervalued by the defendant nos.1 and 2. The two sets of defendants were therefore bonafide purchasers for value.

13. There were also no allegations against the Notary and therefore a presumption attached to the execution of the such documents would stand in favour of the two sets of the defendants. Moreover the Notary had identified the executants on the basis of the Voters Identify Card and recorded so in the powers of attorney. Therefore, in the absence of any allegations against the Notary and the presumption available under Section

85 of the Indian Evidence Act, it would follow that the documents were duly executed and therefore there was no element of any fraud as was the case of the plaintiffs. The learned Trial Court had also rightly considered the presumption as to the powers of attorney in terms of Section 85 of the Evidence Act and held that both the powers of attorney were valid and effective. The learned Trial Court had also clearly recorded that the defendant no.5 had not disputed the execution of the powers of attorney in favour of the defendant nos.1 and 2 apart from observing that the two powers of attorney bore the seal of the said Notary and the endorsement that the executants were identified as per the Voters Identity Card. The learned Trial Court had therefore given a clear finding at para 26 of the impugned order that there was a clear indication that the powers of attorney were executed before the Notary public and authenticated by him.

14. Besides as rightly submitted by Shri S. Desai, learned Advocate appearing for the defendants no.9 and 9(a), the possibility of the plaintiffs getting an affidavit executed through the defendant nos.1 and 2 at a later date could not be ruled out as remote and as they did not tend to loose anything

by the execution of such documents when apparently no action was pursued against them barring a complaint to the Police. The affidavit too executed by the defendant nos.1 and 2 was not worthy of any credit when they had otherwise not contested the suit nor participated in the proceedings to carve out a specific case in defence or in the alternative admitting in Court that they had done the acts of forgery and were liable for the consequences arising therefrom. Besides, the plaintiffs had filed the suit more than a year after the complaint to the Police and apparently no action was pursued against the perpetrators of the fraud.

15. i am also in agreement with the submission of Shri J. J. Mulgaonkar, learned Advocate for the respondent nos. 6, 8 and 8(a) that the affidavit/undertaking executed by the defendant nos.1 and 2 before the Notary was a self serving document and in respect of which the learned Trial Court had rightly given a finding to that effect. The defendants nos. 6 to 9 as the bonafide purchasers were the ones who were likely to lose in case the plaintiffs was secured with the relief of injunction as prayed in the suit. There is also force in his further contention that there was delay and laches in moving the application for

injunction alongwith the suit for declaration and consequential reliefs even assuming that the cause of action was the notice in the mutation proceedings purportedly sent by them. The plaintiffs have also otherwise not explained the delay nor justified the delay in moving the Court.

16. The learned Trial Court for that matter had clearly held that the same presumption in terms of Section 85 of the Evidence Act could not be applied in respect of the affidavit/undertaking executed by the defendant nos.1 and 2 before the Notary and rightly on the premise that it was hard to believe that any person would make self incriminating statements out of his free will in the form of an affidavit cum undertaking moreso when an FIR had been registered against them at the Police Station and the investigation in the crime was in progress. The learned Trial Court had also further observed and rightly so that the possibility of obtaining the self serving document in the nature of an affidavit cum undertaking by the plaintiffs from the defendant nos.1 and 2 in order to prejudice the rights of the defendant nos.6 to 9 in the suit properties could not be ruled out. Even otherwise, all these aspects of fraud and forgery were required to be looked into at the trial and on the

assessment of the material on the merit of the case and not at this prima facie stage.

17. The contention of Shri J. Vaz, learned Advocate for the plaintiffs/appellants to account for the delay in filing the suit being on account of the time consumed to procure the documents cannot be countenanced nor his contention that they were senior citizens and the plaintiff no.1 was suffering from cancer to account for the delay. In any view of the matter, the findings of the trial Court are in consonance with the case pleaded by the parties and on appreciation of the material at large. No interference is called for with the impugned order and in view thereof the appeal is dismissed and the impugned order is confirmed.

NUTAN D. SARDESSAI J.

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