

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 25 OF 2013**

1. Leonildes Hijinia Fernandes,
widow of late Jose S. Fernandes,
major, housewife,
since deceased,
represented herein by her legal
representatives
 - 1a. Maria Lourdes Teodora Fernandes,
major,
 - 1b. Julieta Idinha Piedade Fernandes,
major,
 - 1c. Thomas Vilanova Fernandes,
major,
 - 1(c)(i) Miss Jovita Steffi Fernandes,
major of age, unmarried,
resident of House No.4/155-A,
Agarvaddo, Calangute,
Bardez Goa.
 - 1(c)(ii) Mr. Troy Joseph Fernandes,
major of age, unmarried,
resident of House No.4/155-A,
Agarvaddo, Calangute,
Bardez Goa.
 - 1d. Iris Ernestina Fernandes,
major,
 - 1e. Annie Veronica Fernandes,
major,
 - 1f. Santana Luis Aleixo Pereira,
major,
 - 1g. George David Fernandes,
major,
 - 1h. Anthony Fernandes,
major,
 - 1i. Flavia Norman Liberette
Fernandes, major,
 - 1j. Antonio Fernandes,
major,

All resident of House No.4/155-B,
Agarvaddo, Calangute,
Bardez Goa. (Nos. 1a, 1c, 1d & 1e
through POA Appellant No.1j & Nos.
1b, 1g, 1h & 1i through POA
(Ushaniy A.S.e Fernandes)

2. Lourdes Fernandes,
d/o late Benjamin C. Fernandes,
major of age, spinster,
resident of House No.4/155-A,
Agarvaddo, Calangute,
Bardez Goa.

.... Appellants

Versus

1. Ronnie Jeremias Rodrigues,
s/o late Jesus R. Rodrigues,
major, married, businessman,
resident of House No.547,
Xiro, Carmona, Salcete Goa.
2. Fiona Mariam Ferrao E Rodrigues,
w/o Ronnie J. Rodrigues,
major of age, married, housewife,
resident of House No. 547,
Xiro, Carmona, Salcete Goa.
3. Elvina Fernandes,
w/o late Joaquim P. A. Fernandes,
major of age, married,
housewife,
resident of House No.429,
Deginvaddo, Dunya, Tivim,
Bardez Goa.
4. Elva Fernandes,
d/o late Joaquim P. A. Fernandes,
wife of Mr. Zefrino D'Souza,
major of age, married,

Dismissed in
view of order
dated 17.09.14
& order dated
11.11.14 passed
by the ld. Dy.
Registrar

resident of House No.429,
Deginvaddo, Dunya, Tivim,
Bardez Goa.

5. Zefrino D'Souza,
husband of Mrs. Elva Fernandes,
major of age, married, service,
House No.429, Deginvaddo,
Dunya, Tivim, Bardez Goa.
6. Nuno Fernandes,
son of late Joaquim Piedade
Ambrosio Fernandes,
major of age,
married, service,
resident of House No.429,
Deginvaddo, Dunya, Tivim,
Bardez Goa.
7. Elisa Fernandes,
wife of Mr. Nuno D'Souza,
major of age, married,
resident of House No.429,
Deginvaddo, Dunya, Tivim,
Bardez Goa.
8. Epifanio Fernandes,
son of late Joaquim
Piedade Ambrosio Fernandes,
major of age, married,
resident of House No.429,
Deginvaddo, Dunya, Tivim,
Bardez Goa.
9. Luiza Fernandes,
wife of Mr. Epifanio Fernandes,
major of age, married,
resident of House No.429,
Deginvaddo, Dunya, Tivim,
Bardez Goa.

10. Emma Fernandes,
daughter of late Joaquim
Piedade Ambrosio Fernandes,
major of age, married,
resident of House No.429,
Deginvaddo, Dunya, Tivim,
Bardez Goa.
 11. Stephen Menezes,
husband of Emma Fernandes,
major of age, married,
resident of House No.429,
Deginvaddo, Dunya, Tivim,
Bardez Goa.
 12. Mr. Emery Fernandes,
son of late Joaquim Piedade
Ambrosio Fernandes,
major, bachelor,
resident of House No.429,
Deginvaddo,
Dunya, Tivim, Bardez Goa.
 13. Rosario Vireburga Fernandes,
son of late Benjamin Fernandes,
major of age, married, service,
resident of House No.429,
Deginvaddo, Dunya, Tivim.
Bardez Goa.
 14. Silvia De Souza e Fernandes,
wife of Rosario V. Fernandes,
major of age, bachelor,
resident of House No.429,
Deginvaddo, Dunya, Tivim,
Bardez Goa.
- Dismissed as per
order dt. 17.09.14 &
order dt. 11.11.14
passed by ld. Dy.
Registrar.
- Dismissed as per
order dt. 17.09.14
& order dt. 11.11.14
passed by ld. Dy.
Registrar.
- Respondents

Mr. Ryan Da Piedade Menezes, Advocate for the appellant.

Mr. C. A. Coutinho, Advocate for the respondent nos. 1 & 2.

Coram:- F. M. REIS, J.

Date:- 2nd April, 2016

ORAL JUDGMENT

Heard Mr. R. Menezes, learned counsel appearing for the appellant and Mr. C. A. Coutinho, learned counsel appearing for the respondent nos. 1 and 2.

2. The above appeal challenges the judgment dated 13.07.2012 passed by the learned Lower Appellate Court whereby the appeal preferred by the respondents came to be allowed and consequently, the suit filed by the appellant came to be dismissed.

3. Mr. R. Menezes, learned counsel appearing for the appellant has pointed out that the appellant filed the suit against the respondents inter-alia on the ground that the other co-owners i.e. the respondent nos. 3 to 14 had sold a specific share in the property in favour of the respondent nos.1 and 2 pursuant to two sale deeds dated 31.01.1994 and 31.03.1998 and as such the sale deeds are null and

void in terms of Article 2177 of the Portuguese Civil Code. The learned counsel further points out that on the basis of such sale deeds, a specific portion of the property which was in co-ownership between the appellant and the respondent nos. 3 to 14 was sought to be sold without the consent of the appellant and consequently, such sale deeds are null and void. The learned counsel thereafter has taken me through the judgment of the Trial Judge to point out that the learned Judge upon appreciating the evidence on record has come to the conclusion that the sale deeds are null and void and consequently, decreed the suit filed by the appellant. The learned counsel further submits that the learned Lower Appellate Court has interfered with the said findings of the Trial Judge on the ground that what was conveyed in favour of the respondent nos. 1 and 2 was an undivided specific shares in the subject property and not any specific area therein. The learned counsel further submits that the learned Lower Appellate Court had misconstrued the said sale deeds to come to the conclusion that only undivided rights were sold in favour of the respondent nos. 1 and 2. The learned counsel as such submits that the said findings of the learned Lower Appellate Court deserve to be quashed and set aside.

4. Mr. Menezes, learned counsel further submits that besides the said relief sought by the appellant, it was contended by the appellant that the respondents without any right, unauthorisedly and illegally erected a structure in the subject property which is surveyed under No.270/11 of Carmona Village. The learned counsel further points out that in any event, even assuming the undivided shares in the property were conveyed in favour of the respondent nos. 1 and 2, such construction put up by the respondent nos. 1 and 2 is illegal and unauthorised and as such the learned Lower Appellate Court was not justified to refuse the relief to the appellant. The learned counsel further points out that in any event the structure put up by the respondent nos. 1 and 2 is without any permission from the statutory authorities and as such the question of protecting such structure would not arise at all. The learned counsel further points out that as the respondent nos. 1 and 2 has not obtained any permission from the statutory authorities to put up such structure, the learned Lower Appellate Court was not justified to refuse the relief of mandatory injunction sought by the appellant. The learned counsel thereafter has taken me through the judgment passed by the learned Lower Appellate Court to point out that this aspect is not at all dealt with by

the learned Lower Appellate Court while passing the impugned judgment and consequently, there are substantial questions of law which arise in the present appeal for consideration.

5. On the other hand, Mr. C. A. Coutinho, learned counsel appearing for the respondent nos. 1 and 2 has submitted that on plain reading of the two sale deeds, it clearly reveal that what was conveyed in favour of the respondent nos. 1 and 2 were undivided shares in the subject property. The learned counsel further points out that as such the contention of Mr. Menezes, learned counsel appearing for the appellant relying upon Article 2177 of the Portuguese Civil Code to contend that a specific area of the property was conveyed in favour of the respondent nos. 1 and 2 has no substance. The learned counsel further points out that there is no bar for the co-owners to sell their undivided rights in the property and as such the learned Lower Appellate Court has rightly come to the conclusion that the appellant was not entitled for the relief that the sale deeds were null and void. The learned counsel further submits that the sale deeds itself disclose that the structure was already put up by the respondent nos. 1 and 2 with the consent of the co-owners much before the execution of the sale deeds. The learned counsel has

taken me through the recitals to that effect to contend that the averments therein further disclose that such structure was put up after obtaining the permission from the statutory authorities. The learned counsel further points out that in any event, there was no specific challenge by the appellant to contend that any permission has not been obtained by the respondent nos. 1 and 2 to put up such structure and as such the learned Lower Appellate Court was justified to allow the appeal preferred by the respondents and dismiss the suit filed by the appellant. The learned counsel as such points out that in terms the effect of the findings of the learned Judge is that the respondent nos. 1 and 2 have only stepped into the shoes of the other co-owners who have sold their rights in the subject property.

6. I have considered the submissions of the learned counsel and I have also gone through the records. On plain reading of the said sale deeds dated 31.01.1994 and 31.03.1998, it clearly shows an undivided 1/5th and 2/5th shares respectively of the subject property are conveyed in favour of the respondent nos. 1 and 2. As such, the contention of Mr. Menezes, learned counsel appearing for the appellant that a specific portion of the property was conveyed in favour of the respondent nos. 1 and 2 and that the transaction is hit by

the provisions of Article 2177 of the Portuguese Civil Code cannot be accepted. There is nothing to suggest in the sale deeds to support the contention of Mr. Menezes, that a specific portion of the property was conveyed in terms of the said sale deeds. Hence, the first contention of Mr. Menezes to that effect deserves no consideration.

7. As far as the next contention of Mr. Menezes is concerned, on going through para 10 of the plaint, the only averment therein is that the subject structure is unauthorised and illegal. At para 9 of the plaint, it is pleaded by the appellant that the respondents have no right at all to the property. There is no specific foundation in the pleadings to point out on what basis the appellant contend that such structure was illegal. On the other hand, the sale deeds record that the structure which was existing and put up by the respondent nos. 1 and 2 was with the consent of the local panchayat. In any event, in case any activities are carried out by the respondent nos. 1 and 2 without the permission from the statutory authorities, the appellant can always raise such contention before the statutory authorities which the authorities shall examine on its own merits in accordance with law. But however, considering that there is no foundation in the pleadings, the question of examining such

contention of the appellant in the present appeal would not be justified.

8. Mr. C. A. Coutinho, learned counsel appearing for the respondent nos. 1 and 2 upon instructions states that the respondent nos. 1 and 2 shall not claim any equity based on the subject structure existing in the suit property at the time of partition of the property by metes and bounds in accordance with their respective shares. In view of the above, I find that there is no case made out by the appellant for any interference in the impugned judgment. Accepting the said statement of Mr. C. A. Coutinho, learned counsel appearing for the respondent nos. 1 and 2, I find that there is no substantial question of law which arises in the present appeal for consideration as the prejudice if any to the appellants at the time of partition of the property are safeguarded.

9. Subject to the above, the appeal stands rejected.

F. M. REIS, J.

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