

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 65 OF 2016

SMT. MARIA CONCEICAO PEREIRA E
FERNANDES @ CONNIE FERNANDES AND
ANR.

... Appellant

Versus

SMT. FELICIANA ARAUJO E FERNANDES
AND 5 ORS.

... Respondent

Mr. Nigel Da Costa Frias, Advocate for the Appellant.

Coram:- F. M. REIS, J.

Date:- 8th September, 2016

ORAL ORDER

Heard Shri Nigel Da Costa Frias, learned Counsel appearing for the Appellant.

2. The above Appeal challenges the Judgments passed by the Courts below whereby the suit filed by the Appellant as well as the Counter claim filed by the Respondents came to be dismissed.

3. It is the contention of the Appellants that the Appellants have purchased the subject property in the year 1984 pursuant to a registered Deed executed by the original Owner Mr. Manuel Fernandes. It is pointed out that the proceedings for eviction were initiated by said Manuel Fernandes which were ultimately compromised and the original tenant vacated in the year 1984 and,

consequently, after the execution of the Sale Deed, the Appellant inducted the Respondent no. 1 as a tenant of the subject house. Learned Counsel further pointed out that the Respondent no. 1 issued a public notice somewhere in the year 1986 showing his intention to purchase the subject house which was duly replied by the Appellant on the ground that the property belongs to him. It is further submitted that from the year 1984, the Respondents had failed to pay the rent in respect of the subject house and, as such, a notice was issued to pay all the arrears in time. Learned Counsel further pointed out that subsequently when the Appellant learnt that there was an execution of the Sale Deed in favour of the Respondent no. 1 in the year 1986, the suit was filed to declare the said Sale Deed null and void.

4. The Respondents after being served, filed their written statements disputing all the contentions made by the Appellant and, inter alia, pointed out that the Respondents have purchased the property in the year 1986 based on a Sale Deed duly registered before the Sub-Registrar. It is further submitted that the Sale Deed relied upon by the Appellants is a fake, fabricated and vitiated as it was not executed by the said Manuel Fernandes. It is also submitted that the Appellants have no right to the subject property and, consequently, prayed that the suit be dismissed and the Counter Claim filed inter alia to declare that the Sale Deed of the year 1984 in favour of the Appellant be declared null and void be decreed.

5. The learned Trial Judge after recording the evidence and appreciating the material on record, has come to the conclusion that the subject Sale Deed of the year 1984 has not been executed by the said Manuel Fernandes. The learned Judge also took note that though the dispute was settled despite of the alleged execution of the Sale Deed in favour of the Appellant, no steps were taken by the Appellant to be impleaded before the Rent Controller. It is also found that after the matter was settled, the original Respondent started occupying the subject house. The learned Judge consequently dismissed the suit filed by the Appellants as well as the Counter Claim.

6. Being aggrieved by the impugned Judgment, the Appellants filed an Appeal before the Lower Appellate Court. By the impugned Judgment dated 10.07.2015, the Appeal preferred by the Appellants came to be rejected.

7. Mr. Nigel Da Costa Frias, learned Counsel appearing for the Appellants, has vehemently argued that the Sale Deed in favour of the Respondents is a fabricated document and, consequently, the Courts below were not justified to dismiss the suit filed by the Appellants. Learned Counsel further pointed out that the Sale Deed in favour of the Appellants of the year 1984 has been duly executed by the said Manuel Fernandes and, as such, the findings of the

learned Judge that the Sale Deed has not been executed by Manuel Fernandes are erroneous and contrary to the material on record. Learned Counsel further pointed out that the learned Judge was not justified to compare the signatures of the said Manuel Fernandes on different alleged documents to come to the conclusion that the Sale Deed was not executed by the said Manuel Fernandes. It is further submitted that in case the Respondents had a grievance with regard to the signatures, it was incumbent upon the Respondents to submit the document to a handwriting expert for proper verification. Learned Counsel further pointed out that the material on record established that the Courts below have erroneously come to the conclusion that the Sale Deed stands vitiated. Learned Counsel further submits that the learned Judge was not justified to dismiss the suit.

8. I have carefully considered the submissions of the learned Counsel and I have also gone through the records. Both the Courts below after appreciating the evidence on record have come to the conclusion to the legality of the Sale Deed is doubtful. The Courts below after comparing the admitted signatures of Manuel Fernandes with the disputed Sale Deed, have come to the conclusion that the person who has signed such document is not one and the same person. The records also reveal that no attempt was made by the Appellants to assert their alleged ownership rights in respect of the subject house though it was contended by the Appellants that the Respondent no. 1 was inducted by the Appellants as a tenant. The

Courts below having appreciated the evidence on record, have come to the conclusion that the Appellants have failed to establish authenticity and legality in the subject Sale Deed. The Courts below also refused to entertain the Counter Claim as the Courts below found that the Sale Deed in favour of the Respondents also stands vitiated. These concurrent finding of facts cannot be re-appreciated by this Court in a Second Appeal as I find no error committed by the Courts below whilst coming to the conclusion that the Appellants have failed to establish the authenticity and legality of the subject Sale Deed.

9. While deciding the Appeal filed by the Appellants, the Lower Appellate Court has noted that it is an admitted position that the said Manuel Fernandes instituted Eviction Proceedings against the tenant Suresh Borkar in the year 1984. Learned Judge also noted that the Consent Terms recorded are at exhibit 40 dated 05.06.1984 which were signed by the said Manuel Fernandes and his signature has been appended thereto. The learned Judge also found marked differences in the signatures on the Consent Terms at exhibit 40 and the subject Sale Deed at exhibit Pw. 1/A dated 14.02.1984. The learned Judge noted that on the face of it, the signatures do not tally. The learned Judge further found that in the cross examination, Pw. 1 stated that the said Manuel is a cousin and he used to reside in his house and he was providing him food and shelter. He has also stated that ten days after the execution of the Sale Deed dated 14.02.1984, said Manuel

Fernandes left his house and thereafter his whereabouts were not known. The learned Judge noted that in case his whereabouts were not known, the Consent Terms could not have been signed on 05.06.1984 by said Manuel Fernandes personally. The learned Judge also took note of the fact that the Appellants never brought to the notice of the Rent Controller the fact that he had allegedly purchased the subject house. The learned Judge also took note of the fact that there is no evidence to show that the Respondent no. 1 had paid any rent to the Appellant no. 1 at any point of time though he had claimed that he had introduced her as a tenant. It was contended by the Respondent no.1 that she was in possession of the subject house pursuant to an Agreement dated 15.11.1984 at exhibit 61 entered into with Manuel Fernandes. The learned Judge also noted that the mother of Manuel Fernandes expired in the year 1983 as admitted by Pw.1 and that Pw.1 had allegedly entered into an Agreement with Manuel Fernandes in the year 1979 when she was alive. The learned Judge noted that there was no Agreement produced in respect of the subject house. The learned Judge also noted that the said Manuel Fernandes was a drunkard and was not maintaining good health coupled with the fact that the Appellants were looking after him and were serving food and giving him shelter. The learned Judge also noted that even attesting witness of the disputed Sale Deed was not examined by the Appellants. The learned Judge also found that the certified copy of the Power of Attorney has not been placed on record and that the evidence of Dw. 1 and Dw2 is self contradictory. The

learned Judge further noted that Manuel Fernandes was the only person who could throw light on the entire matter in controversy and, as such, he was a proper and necessary party to the suit as well as to the Counter Claim. The learned Judge as such found that the suit is also bad for non-joinder of necessary and proper parties to the suit namely said Shri Manuel Fernandes. The learned Judge further noted that the cause of action arose to the Appellants on 11.03.1986 and the suit was filed on 06.08.1990 which is barred by law of limitation. The learned Judge as such dismissed the Appeal as well as the cross objections and maintained the Judgment and Decree dated 04.06.2004 passed by the learned Trial Judge.

10. On going through the said findings of the Courts below, I find that the Appellate Court upon re-appreciating the evidence on record, has minutely examined the evidence on record and has come to the conclusion that the Sale Deed relied upon by the Appellants stands vitiated. The concurrent findings with that regard are based on legal inferences and materials produced on record. Learned Counsel appearing for the Appellants was only to point out any perversity in such findings. Apart from that, Shri Manuel Fernandes was a necessary party to the suit. Considering the nature of the dispute raised in the suit as such, I find that there are no substantial question of law which arises in the present Appeal for consideration.

11. On perusal of the substantial question if law as proposed by the

Appellants, I find that the learned Judge has not dismissed the suit merely because attesting witness was not examined but found that considering the issues raised in the suit, it was expected of the Appellants to examine atleast one attesting witness to throw light on the disputed execution of the subject Sale Deed.

12. As such, I find no merit in the above Appeal, which stands accordingly rejected.

F. M. REIS, J.

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