

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NOS. 104 OF 2009 AND 01 OF 2010

SECOND APPEAL NO, 104 OF 2009

1. Shri Rajendra Babonim Naik,
(deceased)
 - (a) Chaya alias Rekha Naik
Daughter of late Rajendra Naik,
Age 52 years,
 - (b) Vinod Medhasham Naik
Son in law of late Rajendra Naik
60 years of age,

Both residents of Ashok Apartments
3C, F2, Near ICICI Bank,
Bebquegal, Curchorem, Goa,.
 - (c) Baburao Rajendra Naik,
Son of late Rajendra Naik,
Age 50 years
 - (d) Sneha Baburao Naik
wife of Baburao Naik,
Age 46 years,

Both residing at Char Rasta,
Nagorcem, Cancaona, Goa.
 - (e) Diksha Manoj Naik
Daughter of late Rajendra Naik,
Age 43 years
 - (f) Manoj Ramdas Naik,
Son in law of late Rajendra Naik,
Age 46 years,

Both residents of Jairam Complex,
1st Floor, Neugi Nagar,
Mala, Panaji, Goa.
2. Smt. Resmabai Rajendra Naik,
major of age.

Residing at H. No. Char Rasta,

Nagorcem, Canacona, Goa.

..... Appellants/
Original Plaintiffs

V e r s u s

1. Smt. Asha Bico Naik,
(since deceased, through her LRs)
 - (a) Ajay Bandekar,
Major of age,
Occupation service,
Residing near Sai Baba Temple,
Kamat Bldg., First Floor,
New Vadem,
Vasco da Gama, Goa.
2. Kum Anita Bico Naik
alias Anita Ajay Bandekar

Both residing at House no. 45,
Char Rasta Nagorcem,
Canacona, Goa.
Presently residing Near Sai
Baba Temple, Kamat Bldg.,
First Floor. New Vadem,
Vasco da Gama, Goa.
3. Dr. Shaba Gauncar,
major of age,
residing at H. No. , Chauri,
Canacona, Goa.
4. Shri Apaji Desai, (Deleted)
- 4(a) Smt. Nalini Apaji Desai,
widow of late Apaji Fakir Desai,
Age 67 years
- 4(b) Shri Anandrao Apaji Desai,
son of late Apaji Fakir Desai,
Age 43 years,

Both residents of H No. 163,
Near KTC Bus Stand
Chauri, Canacona, Goa.
5. Shri Surendra Rane,
major of age,
residing at Flat No. 15,

Palmar Residency, Fatorda, Goa.

6. Smt. Sushila Naguesh Pai,
major of age,
residing near Shri Mallicarjuna High School,
Char Rasta, Canacona, Goa.

..... Respondents
Original Defendants.

Mr. Sudesh Usgaonkar and Ms. Marie Rossette Pereira, Advocates for the
Appellants.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. V. Braganza, Advocate for the
Respondents.

AND

SECOND APPEAL NO. 01 OF 2010

1. Smt. Asha Bico Naik,
(since deceased, through her LRs)
- (a) Kum Anita Bico Naik
alias Anita Ajay Bandekar
Both residing at House no. 45,
Char Rasta Nagorcem,
Canacona, Goa.
- (b) Ajay Bandekar,
Major of age,
Occupation service,
Residing near Sai Baba Temple,
Kamat Bldg., First Floor,
New Vadem,
Vasco da Gama, Goa.

..... Appellants
Original Defendant nos. 1 & 2.

V e r s u s

1. Shri Rajendra Babonim Naik, }
alias Rajendra Naik, major of age, }
Indian National and his wife. }
2. Smt. Resmabai Rajendra Naik, }
Major of age, Indian National, }
Both residing at Char Rasta, }

... Original Plaintiffs

Nagorcem, Canacona, Goa.

- | | | | |
|-----|--|----------------------------|--------------------------------------|
| 3. | Dr. Shaba Gauncar, major of age,
Indian National, residing at Chauri,
Canacona, Goa. | }
}
} | |
| 4. | Shri Apaji Dessai,
Indian National, residing at
House No. 163,
Near KTC Bus Stand,
Chauri, Canacona, Goa.
(Since deceased) through LRs. | }
}
}
}
}
} | |
| (a) | Smt. Nalini Apaji Desai,
widow of late Apaji Fakir Desai,
67 years of age, married, | }
}
} | |
| (b) | Shri Anandrao Apaji Desai,
son of late Apaji Fakir Desai,
43 years of age, | }
}
} | ... Original Defendant
nos 3 to 6 |
| | Residents of House No. 163,
Near KTC Bus Stand
Canacona, Goa. 403702. | }
}
} | |
| 5. | Shri Surendra Rane,
major of age,
residing at Flat No. 15,
Palmar Residency,
Fatorda, Goa. | }
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}
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} | |
| 6. | Smt. Sushila Naguesh Pai,
major of age, Indian National,
Residing near Shri Mallicarjuna High School,
Char Rasta, Canacona, Goa. | }
}
}
} | Respondents |

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. V. Braganza, Advocate for the Appellants.

Mr. Sudesh Usgaonkar and Ms. Marie Rosette Pereira, Advocates for the Respondents.

Coram :- F. M. REIS, J

Date : 19th August 2015.

ORAL JUDGMENT

Heard Shri Sudesh Usgaonkar, learned Counsel appearing for the Original Plaintiffs and Appellants in Second Appeal no. 104 of 2009 and Respondents in Second Appeal no. 01 of 2010 and Shri J. E. Coelho Pereira, learned Senior Advocate appearing for the Original Defendant nos. 1 and 2-Appellants in Second Appeal no. 01 of 2010 and Respondents in Second Appeal no. 104 of 2009.

2. Both the above Appeals were taken up together as they challenge the same Judgment and Decree passed by the Lower Appellate Court.

3. Second Appeal no. 104 of 2009 was admitted by an Order dated 16.07.2010 on the following substantial questions of law :

(1) Whether the Appellate court was right in holding that the Respondent nos. 1 and 2 have ownership to the extended portion of the dwelling house and are not liable to be affected therefrom though it came to the conclusion that the Respondent nos. 1 and 2 have not attained ownership rights to the suit property ?

(2) Whether the finding of the Appellate Court to the effect that a sum of Rs.7,000/- was paid by the husband of Respondent no. 1 to the Appellants herein, is on the basis of no legal evidence on record ?

4. Second Appeal no. 1 of 2010 was admitted by an Order dated 02.05.2012 on the following substantial question of law :

(1) As to whether the learned First Appellant though rightly framed points for determination in the touchstone of Order 41 Rule 31 of C.P.C. did address the same on consideration of the documentary and oral evidence on record and in the context of the pleadings the issues vis a vis the judgment on consideration of the evidence adduced by the parties, whilst deciding point (1) and (2) as framed by him ?

(2) As to whether the Learned First Appellate Court was right in holding that the issue as to whether the Second Agreement of Sale is forged, was an academic exercise and of no exercise ?

5. Shri Sudesh Usgaonkar, learned Counsel appearing for the Original Plaintiffs, has pointed out that the learned Trial Judge has decreed the suit filed by the Plaintiffs for restoration of possession of the subject premises. It is further submitted that the Lower Appellate Court whilst examining the Appeal preferred by the Defendant nos. 1 and 2, has partly allowed the Appeal thereby protecting the possession of the Defendant nos. 1 and 2 of part of the premises which was stated to be in possession of the said Defendants. As far as the remaining portion of the house is concerned, the learned Lower Appellate Court confirmed the relief granted by the Trial Judge and being aggrieved by the said Judgment, the Plaintiffs preferred an Appeal which came to be admitted on the above mentioned

substantial questions of law.

6. Mr. J. E. Coelho Pereira, learned Senior Advocate appearing for the Original Defendant nos. 1 and 2 has elaborately pointed out that the said Defendant had in fact paid the total consideration as specified in the Agreement executed on 05.04.1968 as well as the Agreement for extension dated 14.10.1968. It is further pointed out that in terms of the said Agreement, the Defendant nos. 1 and 2 were in possession of the subject house. It is further pointed out that the total consideration has already been paid and, as such, according to him, the learned Trial Judge was not justified to grant the relief granted in favour of the Plaintiffs. It is further pointed out that the Lower Appellate Court whilst examining the Appeal preferred by the Defendant nos. 1 and 2 has not at all scrutinised the material on record nor dealt with the legal submissions advanced by the Defendant nos. 1 and 2. In support of their contention that the total consideration was paid and that the Defendant nos. 1 and 2 were in possession of the subject property in part performance of the Agreement, learned Senior Advocate submits that the Lower Appellate Court has without considering the oral evidence nor the documentary evidence on record, erroneously came to the conclusion that the Defendant nos. 1 and 2 were only entitled for part of the premises which were stated to be in possession of the said Defendants. It is further submitted that the Defendant nos. 1 and 2 met all the ingredients to take a plea of part performance in terms of Section 53 A of the Transfer of Property Act and, consequently, the findings of the Lower Appellate court in that regard are without any substance. Learned Senior Advocate further submits that the Lower Appellate Court has failed

to comply with the predicates expected of a Court of First Appeal whilst deciding the Appeal preferred by the Defendant nos. 1 and 2. It is further pointed out that as the material requirements in terms of Order 41 Rule 31 of the Civil Procedure Code have not been complied with and as the evidence has not been scrutinized whilst dealing with the rival contentions advanced before the Lower Appellate court, the Judgment passed by the Lower Appellate Court stands vitiated and deserves to be quashed and set aside. Learned Counsel further pointed out that there is enough material to point out that the Defendant nos. 1 and 2 have paid the total consideration. It is further pointed out that the Lower Appellate Court has erroneously restricted a part and protected the possession of only part of the house and, according to him, the whole house as well as the property is in possession of the Defendant nos. 1 and 2 in part performance of the Agreement. It is further pointed out that the cross Appeal has also erroneously discarded the second Agreement executed on 14.10.1968 which was admittedly executed before the then Notary whereby a presumption would be drawn in favour of the Defendant nos. 1 and 2. Learned Senior Advocate has elaborately taken me through the findings of the Lower Appellate Court as well as the learned Trial Judge to point out that the Plaintiffs were not entitled for any reliefs and, consequently, the impugned Judgment passed by the Courts below deserves to be quashed and set aside.

7. On the other hand, Shri Sudesh Usgaonkar, learned Counsel appearing for the Original Plaintiffs, has pointed out that though it cannot be disputed that the Lower Appellate Court has failed to comply with the predicates under Order 41 Rule 31 of the Civil Procedure Code by inappropriately framing the

points for determination and scrutinising the material on record, nevertheless the findings arrived at by the learned Trial Judge, that the Defendant nos. 1 and 2 have failed to comply with the predicates under Section 58 of the Transfer of Property Act, cannot be faulted. Learned Counsel further pointed out that there are no pleadings or any materials adduced on record to substantiate their claim of part performance or that the Defendant nos. 1 and 2 were ready and willing to perform their part of the contract. Learned Counsel further pointed out that the Plaintiffs had in fact served a legal notice on the Defendant nos. 1 and 2 which came to be refused by such Defendants. It is further submitted that the said notice clearly stated that in case of failure of executing the Sale Deed in terms of the Agreement, the Plaintiffs would take legal action in accordance with law. It is further pointed out that the Defendant nos. 1 and 2 are not entitled to claim any part performance as, according to him, the Defendants have failed to show readiness and willingness to perform their part performance. Learned Counsel further pointed out that the second Agreement dated 14.10.1968 has been obtained by fraud and, as such, the learned Trial Judge was justified to discard such Agreement. It is further submitted that considering the facts and circumstances of the case as the Defendant nos. 1 and 2 are not entitled to continue in possession of the subject house, the learned Trial Judge was justified to Decree the suit. Learned Counsel as such pointed out that the Appeal preferred by the Plaintiffs be allowed and, consequently, the Decree passed by the learned Trial Judge be upheld. Learned Counsel as such submits that the Appeal preferred by the Plaintiffs be allowed and the Appeal preferred by the Defendant nos. 1 and 2 be rejected.

8. I have considered the submissions of the learned Counsel and also gone through the records. Without going into the merits of the rival contentions, I will examine whether the Lower Appellate Court has complied with the predicates expected of the First Appellate Court whilst deciding the Appeal preferred by the Defendant nos. 1 and 2. On bare reading of the Judgment passed by the Lower Appellate Court, I find that the learned Judge has merely re-produced the portions of the evidence and documents without scrutinising every piece of material on record and considering the legal effects of the contents and the evidence adduced by the respective parties. Whilst exercising jurisdiction of First Appeal, it is expected of the Lower Appellate Court to scrutinise every piece of material adduced by the parties and independently draw conclusions on the basis of the rival contentions. On perusal of the Judgment of the Lower Appellate Court, there is no scrutiny of the material on record nor any cogent reasons to examine the correctness of the findings of the learned Trial Judge. The requirements to claim part performance under Section 53-A of the Transfer of Property Act, are well settled and, consequently, to consider as to whether the Defendant nos. 1 and 2 can oppose the suit filed by the original Plaintiffs on the basis of part performance, it is incumbent of the Lower Appellate Court to first examine whether on the basis of the material on record, the original Defendant nos. 1 and 2 have in fact satisfied the requirements of claiming part performance under Section 53-A of the Transfer and Property Act. Having failed to do so, would itself vitiate the Judgment passed by the Lower Appellate Court. In the present case, on bare perusal of the Judgment of the Lower Appellate court, I find that there is no scrutiny of the evidence nor any discussion of the documents produced nor the evidence adduced by the parties

whilst deciding the Appeal filed by the defendant nos. 1 and 2. As the Lower Appellate Court has failed to consider the rival stand of the parties, I find that the impugned Judgment passed by the Lower Appellate Court cannot be sustained and deserves to be quashed and set aside. Considering the view I propose to take in the above Appeal, it is not necessary to consider the rival contentions with regard to the claim of the Defendant nos. 1 and 2 that they are in possession of part performance in terms of Section 53-A of the Transfer and Property Act nor the contention of Mr. Sudesh Usgaonkar, learned Counsel appearing for the Original Plaintiffs that the mandatory requirements as provided in Section 53-A of the Transfer and Property Act have not at all be satisfied by the original Defendant nos. 1 and 2. In such circumstances, I find that the impugned Judgment and Decree dated 05.05.2009 passed by the Lower Appellate court deserves to be quashed and set aside.

10. Mr. Sudesh Usgaonkar, learned Counsel appearing for the Original Plaintiffs points out that he desires to produce additional documents at the Appellate stage. The Plaintiffs, if so advised, are at liberty to file such application.

11. Mr. J. E. Coelho Pereira, learned Senior Advocate appearing for the Original Defendant nos. 1 and 2, pointed out that he desires to amend the pleadings.

12. Considering the view I have taken whilst disposing of the above Appeal, the parties are at liberty to file such application before the Lower Appellate

Court which shall be examined by the Lower Appellate Court on its own merit in accordance with law.

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

ORDER

(i) The impugned Judgment and Decree dated 05.05.2009 passed by the Lower Appellate Court deserves to be quashed and set aside.

(ii) Regular Civil Appeal No. 69 of 2005 is restored to the file of the Lower Appellate Court.

(iii) The Lower Appellate court is accordingly directed to hear the parties afresh in the light of the observations made herein above in accordance with law as expeditiously as possible in any manner within two months from the receipt of the Order.

(iv) Both the Appeals stand disposed of according with no orders as to costs.

(v) The parties are directed to appear before the Lower Appellate Court on 04.10.2016 at 10.00 a.m.

F .M. REIS, J.

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