

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 156 OF 2016
WITH
CIVIL APPLICATION NO. 212 OF 2016**

Santan Atu Lope & ors.

... Appellants

vs.

Santana Pascoal Correia & ors.

... Respondents

Mr. Anil D'Souza, Advocate for the appellants.

Mr. Vishal Kanade i/by Sanjay S. Gawde, Advocate for respondent no.1.

Ms. Pallavi Dabholkar, Advocate for respondents no.2 to 5.

Mr. S. S. Redekar, Advocate for respondents no.6, 8, 10, 12 & 13.

Coram : Smt. R. P. SondurBaldota, J.

Date : 30th March, 2016.

P.C.

1. This appeal is preferred against the interim order dated 14th April, 2015, by which the trial Court has allowed the application for interim relief and restrained the appellants herein and the respondents no.2 to 24 from selling, dealing with or transferring the suit property or it's part in any way and / or creating any third party interest therein pending the hearing and final disposal of the suit.

2. Respondent no.1 is the original plaintiff. She has filed

suit for partition of the joint property and for possession of her 1/8th share therein. She applied for an interim injunction to restrain the defendants inter alia from creating any third party rights in the suit property. The appellants are original defendants no.13 to 19. Their main plank of the argument before this Court is that the suit filed by respondent no.1 is barred by resjudicata in view of the decision in the earlier suit i.e. Regular Civil Suit No.301 of 1998 filed by respondents no.2 to 5. In that suit respondent no.1 had filed a pursis adopting the written statement filed by defendants no.16 to 18 and 20 therein stating that respondent no.1 and her another married sister had relinquished their rights in the property left by the father. The appellants contend that respondent no.1 can not now permitted to take a different stand and as regards the claim of her right to the suit property.

3. For considering bar of resjudicata the appellants need to produce the pleadings in the earlier suit and the judgment and decree therein. Mr. Kanade, the learned advocate for respondent no.1 points out that the appellants had produced none of these documents before the trial Court. At para 6 of the impugned order the trial Court has observed that “there is nothing on record to show that the suit was disposed of on merits and factum of existence of such any custom as well as any such contention of defendants no.16 to 18 and 20 that they have relinquished their

share in the suit property have been duly proved.” In this circumstance, the order of the trial Court cannot be faulted with. In any case, it will always be open to the appellants to agitate bar of resjudicata at the time of the trial in the suit.

4. The other contention is of bar of limitation. It is submitted that respondent no.1 had constructive notice of transfer of some of the suit properties since the properties have not only been transferred several years back but the developers have carried out constructions of buildings thereon. Respondents have purchased flats in the buildings and also formed co-operative societies. Despite the fact respondent no.1 failed to file suit earlier. According to the pleadings of respondent no.1 the cause of action to file suit arose on 28th October, 2013 when the appellants and other defendants told her for the first time that had no right in the suit properties. In these circumstances, the question of limitation is a mixed question of facts and law in the present case. Hence, I am of the opinion that there is no infirmity in the impugned order. Hence, the appeal from order is dismissed.

5. In view of the dismissal of the appeal from order, Civil Application No. 212 of 2016 does not survive. The same is accordingly disposed off.

[Smt. R. P. SondurBaldota, J.]