

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 83 OF 2006

Chandrakant Malgaonkar,
major, married, r/o. H. No. 125/6,
Feira-Alto, Mapusa, Goa.

..... Appellant

V e r s u s

1. Shri Govind Tukaram
Korgaonkar (deceased),
major, married, r/o
Carasco Waddo, Mapusa,
Goa, through his legal
representatives:
 - a) Shri Kamalabai G. Korgaonkar,
major, married, r/o. Carasco
Waddo, Mapusa, Goa.
 - b) Smt. Subhadra T. Korgaonkar,
major, widow of Anant T. Korgaonkar,
sister in law of Govind
Tukaram Korgaonkar.
 - c) Smt. Sughandi A. Korgaonkar,
Daughter of Anant Korgaonkar,
 - d) Smt. Leela A. Korgaonkar,
daughter of Anant Korgaonkar,
 - e) Shri Gurudas T. Korgaonkar,
brother of Govind Tukaram Korgaonkar,
 - f) Smt. Nalge T. Korgaonkar,
daughter o Tukaram Korgaonkar
 - g) Smt. Yesu T. Korgaonkar,
daughter of Tukaram Korgaonkar,
r/o Khorjuemm, Podwal, Goa.
 - h) Shri Ramesh D. Mandrekar,
r/o Chandrawado, Fatorda,
Margao.
 - l) Shri Surya D. Mandrekar,

r/o Indira Nagar, Karraswada,
Bardez, Goa,
sons of Smt. Nalge Korgaonkar,
and Dattaram Korgaonkar.

j. Shoba D. Mandrekar,

k. Shrimati D. Mandrekar.

l. Sunanda D. Mandrekar,

m. Vijaya D. Mandrekar,
daughter of Smt. Nalge T. Korgaonkar,

n. Prabhakar Dattaram Bhaidkar,
r/o. Gaunswada, Mapusa, Bradez, Goa,.
Son in law of Nalge Korgaonkar.

2. Shri P. D. Kamat,
major, married, business & Real Estate
Developer, Infront of Bank of Maharashtra,
Mapusa.

3. Smt. Piedade Ramos e Rocha,
major, widow, r/o
H. No. 394, Bhagar Waddo,
Chodan Madel, Tiswadi,
R. V. Chorao.

4. Shri Estanislao Braganza
alias Estanislao Domingo
Santana Pantalelao
Braganza, majopr of widower,
r/o. Green Hill Apartment,.
Penha de France,
Porvorim, Goa (deceased)
through his legal representatives :

a) Mr. Desmond Stenislao Braganza,
Green Hill Apartment, Ground floor,
H. no. 789(2), V. P. Penha
de Franca, Alto Betim,
Bardez, Goa.

5. The Chief Officer,
Municipal Council
Maousa, Goa.

6. Annapurna Apartment
Housing Co-operative
Society represented by its
President Chairman
Shri Mehbood Virani,
Mapusa, Goa.

..... Respondents

Mr. Nitin Sardesai, Senior Advocate with Mr. G. Panandikar, Advocate for the Appellant.

Mr. J. Mulaonkar, Advocate for the Respondent no.2.

Mr. H. D. Naik, Advocate for the Respondent no. 5.

Mr. Valmiki Menezes, Advocate for the Respondent no. 6.

Coram :- F. M. REIS, J

Date : 21st April, 2017

ORAL JUDGMENT

Heard Mr. Nitin Sardesai, learned Senior Advocate appearing for the Appellant and Mr. Valmiki Menezes, learned Counsel appearing for the Respondent no. 6.

2. The above Appeal came to be admitted by an Order dated 21.11.2006 on the following substantial questions of law :

(a) Whether the findings rendered by the Courts below relying upon the ratio laid down in the Judgment delivered by the Honourable High Court in the matter of Temple of Maruti V/S Balkrishna Suryaji S. Kakodkar & Anr., reported in 1998(2) GLT 67 be said to be legal when the said Judgment was expressly quashed and set

aside by the Honourable Supreme Court in SLP(C) No. 6908/98 subsequently registered as Civil Appeal No. 4053/99 decided on 27/07/1999?

(b) Whether the Rectification Deed dated 3/04/1991 entered into between Smt. Rocha and Shri Korgaonkar without joining as Consenting Party or otherwise, the predecessor in title of Shri Korgaonkar, be termed as legal, so as to confer a valid title on Shri Korgaonkar, especially in view of the fact that, Shri Korgaonkar had purchased the concerned property from Shri Braganza and not from Smt. Rocha?

3. Briefly, the facts of the case are that the Appellants purchased a plot from Smt. Rocha by Sale Deed dated 06.05.1983 which was adjacent to the plot purchased by the Respondent no. 1. The Respondent no. 1 had in fact purchased the said plot from Shri Braganza by a Sale Deed dated 04.07.1983 and in fact the said plot was the subject matter of the same property which was purchased by the Vendee-Respondent no. 1 from said Smt. Rocha and purchased by the Vendor by Sale Deed dated 06.02.1981. When the Predecessor in title of the Appellants said Mrs. Rocha sold the plot to Mr. Braganza, she had no title to the plot as it devolved upon her subsequent to the property having been sold to said Mr. Braganza. It is further the contention of the Appellant that somewhere on 03.04.1991. the said Smt. Rocha entered into a Rectification Deed with Shri Korgaonkar in order to rectify the mistake in the Sale Deed dated 04.07.1983 entered into between Shri Braganza and said Korgaonkar, in respect of a property which was sold by Smt.

Rocha to Shri Braganza. As such, the Appellants filed the suit on 06.12.1993 challenging the Rectification Deed and praying for an injunction and other reliefs. It is further contended by the Appellant that by the Deed of Rectification, 159 square metres of the area sold by Smt. Rocha to the Appellant is sought to be transferred to Mr. Korgaonkar. The Respondents filed their written statements, inter alia, contending that the Sale Deed of the Appellant is subsequent to the transfer by the Respondents. After evidence was recorded and the parties were heard, by Judgment dated 27.02.2004, the suit filed by the Appellant came to be dismissed. Being aggrieved by the said Judgment, the Appellant preferred the Appeal before the Lower Appellate Court which came to be disposed of by Judgment dated 11.03.2005 whereby the Appeal preferred by the Appellant came to be dismissed. Being aggrieved by the said Judgment passed by the Court, the Appellant has preferred the above Second Appeal which came to be admitted on the aforesaid substantial question of law.

4. Mr. Nitin Sardesai, learned Senior Advocate appearing for the Appellant, has pointed out that the disputed Deed of Rectification itself is fictitious as, according to him, by such document, an additional area is being included as being part of the subject matter of the Sale Deed dated 06.02.1981 which was executed by Smt. Rocha in favour of Mr. Braganza though Mr. Braganza is not a party to such Deed of Rectification. Learned Senior Advocate further pointed out that by a Sale Deed dated 06.05.1983, the Appellants purchased the plot from Smt. Rocha which was adjacent to the plot purchased by Shri Korgaonkar who ultimately purchased his plot from the said Mr. Braganza on 04.07.1983. Learned Senior

Advocate further pointed out that an illegal expedient was resorted to by the Respondents to defeat the rights of the Appellant to the subject property purchased by the said Sale Deed dated 06.05.1983 by purporting to rectify the Sale Deed of the year 1983. Learned Senior Advocate further pointed out that the property which was subject matter of the Sale Deed executed by Mrs. Rocha dated 06.02.1981 was sold by Mr. Braganza in favour of Mr. Korgaonkar by Sale Deed dated 04.07.1983 and, as such, the question of said Mr. Korgaonkar purporting to rectify the Sale Deed of the Predecessor in title is totally misplaced and not sustainable in law. Learned Counsel further pointed out that the Courts below have erroneously relied upon the Judgment of this Court which holds that boundaries prevail on the area though such Judgment is not applicable to the facts of the case as the property which was sold clearly depicted in the Sale Deed. Learned Senior Advocate further pointed out that the application for temporary injunction filed by the Appellant came to be disposed of by an Order essentially on the ground that the Sale Deed of said Rectification in favour of the Respondents was prior to the registration of the Sale Deed in favour of the Appellant herein. Learned Senior Advocate further pointed out that when the suit was filed, the suit plot was vacant and only thereafter during the pendency of the suit, the Respondents Appellants have put up the building in the disputed structure thereby totally blocking the plot belonging to the Appellant from the road which is located beyond the subject plot. Learned Senior Advocate further pointed out that the subject matter of the Sale Deed in favour of the Appellant was essentially for the purpose of an access to go to the road from the property of the Appellant. Learned Senior Advocate as such submits that any construction carried out is subject to the result of the Suit as, admittedly, the

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Respondents did not take leave of the Court to change or alienate the suit property during the pendency of the Suit. Learned Senior Advocate without prejudice to the above contentions has also pointed out that considering the plot purchased by the Appellants, pursuant to the Sale Deed dated 06.05.1983, is presently being occupied by a building an equivalent area which is left open on the other side of the plot of the Respondents can be reserved as an access to go to the property of the Appellant herein. Learned Senior Advocate further submits that the property of the Appellants is landlocked in view of such mischievous exercise carried out by the Respondents unlawfully by executing such Deed. The Appellants have been in enjoyment of the plot which has been purchased by them by the said Sale Deed in 1983 from the original owners. Learned Senior Advocate further pointed out that the Deed of Rectification itself is illegal as based on such Deed of Rectification, additional area cannot be sold which was not the subject matter of the original Sale Deed executed in favour of the Predecessor in Title of the Respondents namely said Braganza. Learned Senior Advocate further pointed out that the substantial question of law be answered in favour of the Appellant.

5. On the other hand, Shri V. Menezes, learned Counsel appearing for the Respondents, has supported the impugned Judgment. Learned Counsel submitted that by the Deed of Rectification, the Sale Deed which was registered in favour of Braganza has been rectified and, as such, as the date of registration of such Sale Deed is prior to the Registration of the Sale Deed in favour of the Appellant, no rights could flow in favour of the Appellant based on such Sale Deed which was executed/registered subsequently. It is further pointed out that as the

subject plot did not belong to the vendors in the Sale Deed dated 06.05.1983, the question of any right flowing in favour of the Appellants based on such Sale Deed is itself unsustainable. It is further pointed out that as the Deed was registered prior in time of the Deed relied upon by the Appellant, no rights of immoveable property can flow in favour of the Appellant based on such Sale Deed. Learned Counsel further pointed out that as the application for temporary injunction was dismissed, the Respondents proceeded to put up a building wherein third party rights have been created as the flats in the building have been sold. Learned Counsel further submitted that though there is a space on the other side of the plot belonging to the Respondents, nevertheless, such space is part of the property of the Respondents which has been reserved as a set back for the building. It is further pointed out that the Appellants have no right of any kind to the subject plot and, as such, the substantial question of law be decided against the Appellant herein.

6. Upon hearing the learned Counsel, the undisputed facts are that the subject matter of the plot purchased by the Appellant from Smt. Rocha by Sale Deed dated 06.05.1983 is part of the same property which is the subject matter of the plot purchased by the Respondent no. 1 from Shri Braganza by Sale Deed dated 04.07.1983. The said Shri Braganza had also purchased the said plot which is the subject matter of the said property from Smt. Rocha by a Sale Deed dated 06.02.1981 which is prior in time to the Sale Deed of the disputed plot by the Appellant in May 1983. The dispute in the present case revolves upon the validity of the Deed of Rectification dated 03.04.1991 whereby Smt. Rocha entered with Shri Korgaonkar, the Respondent no. 1 herein, allegedly to rectify a mistake in the

Sale Deed dated 04.07.1983 entered into between Shri Braganza and said Shri Korgaonkar in respect of the property which was sold by Smt. Rocha to Shri Braganza.

7. On perusal of the Judgment of the learned Trial Judge dated 27.02.2004, the learned Judge has framed four issues and three additional issues. Whilst discussing the evidence on issue no. 1, the learned Judge noted that there is no dispute that plot B was purchased by the Appellant on 20.03.1992 and therefore before 20.03.1992, the Appellant cannot have any claim of whatsoever nature to the plot purchased by the Respondent no. 1 by Deed of Sale dated 21.06.1983 ~~09.04.1984~~ and corrected by Deed of Rectification dated 28.10.1991. The learned Judge further found that the Appellant had no locus to challenge the Deed of Rectification as the Appellant had no interest of any nature to the land admeasuring 308 square metres which is claimed by the Appellant in view of the Sale Deed of ~~Succession~~ dated 20.03.1992. The learned Judge further noted that there is no dispute when the land was purchased by the Respondent no. 1 by Deed of Sale Deed dated 04.07.1983 ~~09.04.1984~~ and thereafter it was rectified by the said Deed of Rectification dated 28.10.1991 before the plot (B) was purchased by the Appellant by the said Sale Deed. The learned Judge further noted that the point for consideration is whether the suit plot (B) in the form of a strip of land along the northern side was purchased by the Appellant by virtue of Deed of Sale dated 20.03.1992 ~~28.10.1991~~ and whether the said property is purchased by Respondent no. 1 by 04.07.1983 ~~09.04.1984~~ which was subsequently rectified. The learned Judge further found that the records clearly show that in the Sale Deed of the

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Plaintiff and that of the Defendants, the northern side has a common boundary of Fr. Irino Lobo which plot admittedly falls outside the plot bearing old cadastral no.2252 and Chalta no. 74 of P.T. Sheet no. 133. The learned Judge further noted that what was purchased by the Appellants by Deed of Sale dated 06.05.1983 and the Defendants by Deed of Sale dated 06.02.1981 and 04.07.1983 respectively covering the entire width of the property of the old cadastral no.2252 of Chalta no. 74 and 74-A and that there is no strip of land existing on the northern side of the said plot of the Plaintiffs/Defendants. The learned Judge as such found that it is manifestly clear that the plot purchased by the Respondent no.4 from the Respondent no.3 and thereafter rectified by Deed of Rectification covering the entire width and is bounded on the northern and southern side by neighbouring owners and thereafter the Deed of Rectification only corrected the area accordingly. The learned Judge as such found that the Deed of Rectification had rectified also the Sale Deed and, as such, no prejudice would accrue to the Appellants based on Sale Deed executed by said Smt. Rocha in favour of the Appellant in respect of the suit portion of the property. The Suit was accordingly dismissed.

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8. The Lower Appellate Court while examining the Appeal preferred by the Appellants, has framed three points for determination. Whilst examining the first point of determination, the learned Judge noted that the parties have a dispute over a portion of the land in the suit plot admeasuring an area of 159 square metres and is a strip of land running along the northern boundary of the suit plot. The Lower Appellate Court noted that the Respondent no. 3 had sold a portion of the property called "Ararichem Batta" before she acquired absolute ownership of such

a plot by a Sale Deed dated 06.02.1981 at exhibit P.w.1/C. Thereafter, the Defendant no. 4 sold the plot to the Respondent no. 1. After Respondent no. 4 sold the plot to the Respondent no.1, the Respondent no. 3 executed the suit Deed of Rectification. By this Deed of Rectification, the learned Judge noted that the Respondent no. 3 has tried to rectify the Sale Deed by which the Respondent nos. 1 and 4 purchased the plot. The learned Judge thereafter noted that the Appellants purchased the suit plot (b) after the Respondent no. 4 purchased his plot. The Appellant purchased the plot by the said Sale Deed dated 06.05.1983. The learned Lower Appellate Court came to the conclusion that the plot purchased by the Respondent no. 4 was including the said strip and, as such, the question of conveying any such strip in favour of the Appellant is not at all justified. The learned Judge further found that there was no land on the northern side left for the Respondent no. 3 to be sold to the Appellants. The learned Judge as such confirmed the Judgment passed by the learned Trial Judge and dismissed the Appeal preferred by the Appellants. The learned Judge also examined whether the Appellants had a right of easement by necessity and came to the conclusion that the Appellants had no such right of easement in their favour.

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9. The dispute between the parties essentially revolves upon the effects of the Deed of Rectification executed on 03.04.1991 with the Sale Deed dated 20.03.1992 ~~06.05.1983~~ whereby a plot was sold by the Respondent no. 3 in favour of the Appellants. The recital therein disclose that a narrow strip on the northern part of the said property is being sold which has been used as an access to a portion of the property purchased earlier by the Appellants and that the same was agreed to

be sold to the Appellants by the Respondent no. 3. Accordingly, the schedule of the said Sale Deed specifies that the narrow strip of land forming part of the larger property and admeasuring an area of 308 square metres is being conveyed which is bounded towards the north by the property bearing old cadastral survey no.2251 and now surveyed under P. T. Sheet no. 133, chalta no. 68; towards the south by the remaining portion of the entire property sold to the Respondent no. 1; towards the west by the public road and towards East by the remaining portion of the entire property under P. T. Sheet no. 133 of chalta no. 74. The dispute that arises is to examine whether this strip of land was already conveyed by the Respondent no. 3 in favour of the Respondent no. 4. On perusal of the Sale Deed of Pw. 1 dated 06.02.1981 ~~06.04.1981~~, the recitals clearly provide that a plot admeasuring 700 only square metres which is a part and parcel of the larger property is being sold for a price of Rs.14,000/-. Thus, what can be seen from the said Sale Deed is that the Respondent no. 3 sold an area of 700 square metres in favour of the Respondent no. 4. The subject matter of the said plot admeasuring 700 square metres was in fact conveyed in favour of the Respondent no. 1 by the Respondent no. 4 by Sale Deed dated 04.07.1983. This clearly shows that what was purchased by the Respondent no. 1 was only an area of 700 square metres which was purchased by the Respondent no.4 from the Respondent no. 3 pursuant to the said Sale Deed executed in the year 1981. The disputed Deed of Rectification executed on 03.04.1991 was executed between the Respondent no. 1 and the Respondent no. 3. Admittedly, the Respondent no. 4 is not a party to such Deed of Rectification. There was no conveyance of any additional area by the Respondent no. 4 in favour of the Respondent no. 1 as claimed by the Respondent no. 1.

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10. On perusal of the said disputed Deed of Rectification, the area of the plot itself has been changed, the boundaries on the western side are also being changed and it clearly shows that an additional area is being conveyed in favour of the Respondent no. 1. In case the area was more than that sold by the Respondent no.3 to the Respondent no. 4, such additional area would be to the benefit of the Respondent no. 4 and not to the Respondent no. 1. The Respondent no. 1 has clearly purchased only an area of 700 square metres which was conveyed in favour of Respondent no. 4 by Respondent no. 3. A Deed of Rectification can only correct typographical or inadvertent errors and by means of a Deed of Rectification, it is not possible to convey an additional area in favour of the purchasers. This would require a Sale Deed to be executed and not a Deed of Rectification. Increasing an area and changing the boundaries by means of a Deed of Rectification is an illegal expedient especially when the Respondent no. 1 who claims to be a beneficiary of the additional area had not purchased such additional area from the Respondent no. 4. There is no explanation to the inordinate delay in executing a subject Deed of Rectification by the Respondent no. 3 who had already conveyed by a registered Sale Deed the strip of land on the northern side in favour of the Appellants herein when the Sale Deed was executed in favour of the Respondent no. 1 as the Deed of Sale of the subject strip was duly executed before the Civil Registrar in favour of the Appellants. The Courts below as such were not justified to come to the conclusion that the Respondent no. 3 was not entitled to execute the Sale Deed in favour of the Appellants of the disputes strip. Admittedly, there is no registered Sale Deed of the additional strip executed in favour of the

Respondent no. 4 or Respondent no. 1 by the Respondent no. 3 and, as such, the registered document in favour of the Appellants in respect of the subject strip would prevail over the claim put forward by the Respondent no. 1 based on the Deed of Rectification.

11. Apart from that, the records clearly reveal that the strip of land was purchased by the Appellants essentially as an access to the plots purchased by them pursuant to Sale Deed executed in the year 1983 as there was no access to go to the main road from the western side. In such circumstances, the only aspect to be considered in the facts of the case is what relief can be granted in the present circumstances.

12. The records reveal that the application for temporary injunction was dismissed by the learned Trial Court. The suit proceeded and in fact the Respondents changed the nature of the property and created third party rights during the pendency of the Suit which are hit by the provisions of Section 52 of the Transfer of Property Act. There was no permission sought by the Respondents to deal with the subject property during the pendency of the Suit and, as such, no equities are available to the Respondents on such count. Apart from that, the plot of the Appellants purchases by the said Sale Deed dated 06.05.1983, was absolutely necessary for the Appellants as otherwise the plots on the eastern side belonging to the Appellants would have no value.

13. In such circumstances, this Court called upon Mr. Valmiki Menezes,

learned Counsel appearing for the Respondents, to point out whether a strip of land could be reserved as an access to the plot of the Appellants on the southern side of the plot purchased by the Respondents herein. The parties even proceeded to draw a plan after visiting the site and Mr. Sardessai, learned Senior Advocate appearing for the Appellants has pointed out that in case a right is reserved of access towards the southern side as a mean of access to go to the plot of the Appellants, the Appellants would not seek any demolition of the construction put up in the property which was the subject matter of the Sale Deed in favour of the Appellants herein.

14. Accordingly, a report was prepared by a Surveyor Mr. Prazeres Gonsalves, shows that there is a strip of land running from the East to West on the southern side of the existing building which can lead to the property of the Appellants herein. No doubt, there are some surjahs protruding on the set back area which are at a height of 1.94 metres which otherwise can easily permit a vehicle of lesser height to proceed towards the property belonging to the Appellants. Mr. Sardessai, learned Senior Advocate, pointed out that considering the relief sought in the Suit, the Appellants may be given a right of user of access over the said set back area located on the southern side of the existing building so as to allow an unobstructed user of such access after demolishing the corresponding compound wall as erected by the Respondent no. 1 on the eastern side in line with such set back area.

15. In order to do complete justice between the parties and after hearing

both the learned Counsel, I find that in lieu of the reliefs sought by the Appellants in the Suit, the Appellants should be given a right of user of access over the set back area located on the southern side of the existing building as shown in the plan marked 'X' for identification duly accepted by both the learned Counsel. The substantial question of law is answered accordingly.

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

ORDER

(i) The impugned Judgment passed by the Lower Appellate Court dated 11.03.2005. and the Judgment passed by the learned Trial Judge dated 27.02.2004 are quashed and set aside.

(ii) The Suit filed by the Appellants stands partly Decreed and, as such, the Respondents are directed to provide a right of unobstructed access to the Appellants in the areas as shown in the plan marked 'X' for identification for further development of the property belonging to the Appellants located on the eastern side of the plot belonging to the Respondent no. 1 herein in the light of the observations made herein above.

(iii) The Appeal stands disposed of accordingly with no orders as to cost.

(iv) Decree to be drawn accordingly.

F .M. REIS, J.

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