

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 81 OF 2009

Mrs. Prabhavati Prabhakar Naik,
resident of House No.38, behind
Fondu Raikar's House, Gogol,
Margao, Salcete Goa.

..... Appellant

V e r s u s

1a) Shailesh P. Panandikar,
1b) Smt. Sucheita S. Panandikar,
Both residents of
Opposite A.B.C. Club,
Abade Faria Road, Margao,
Salcete Goa.

1c) Smt. Nandita Bendale,
1d) Shri Sachin Bendale,
Both residents of Smruti
Bungalow, Plot No.13,
Near M.I.T. College,
Paud, Pune.

2. Mrs. Asha Prakash Panandikar,
resident of Opposite A.B.C. Club,
Abade Faria Road, Margao,
Salcete Goa.

3. Mr. Mohandas Bhiku Bhat,
(since deceased)
through his legal heirs
3a) Damodar M. Bhat,
3b) Anupama D. Bhat,

3c) Rajan M. Bhat,
3d) Ashwini R. Bhat,
3(e) Sachine M. Bhat,
3f) Pooja S. Bhat,
3g) Sudin M. Bhat,
3h) Sasha S. Bhat

4. Mrs. Suman M. Bhat,
w/o Mohandas B. Bhat,
resident of House No.729/P,
Sonu Township, near Football Ground,
Dhavorlim, Margao
Salcete Goa.

5. Mr. Ragunath Babuso Naik,
resident of House No.37,
near New Chowgule College,
Gogol, Margao, Salcete Goa,

6. Mrs. Prema Ragunath Naik,
w/o Ragunath B. Naik,
resident of House No.37,
near Chowgule College,
Gogol, Margao, Salcete Goa.

7.Mr. Prabhakar Pandari Naik,
resident of C/o Rohidas B. Shirodkar,
Talye Wadda, Bethora,
Ponda Goa.

... Respondents

Mr. S. S. Kantak, Senior Advocate with Mr. A. Kamat, Advocate for the appellant.

Mr. C. A. Coutinho, Advocate for the respondent nos. 3 & 4.

Mr. P. Phadte holding for Mr. S. D. Padiyar, Advocate for the respondent nos. 5 & 6.

Coram:- F. M. REIS, J.

Date:- 7th July, 2017

ORAL JUDGMENT

Heard Mr. S. S. Kantak, learned Senior Counsel appearing for the appellant, Mr. C. A. Coutinho, learned counsel appearing for the respondent nos. 3 and 4 and Mr. S. D. Padiyar, learned counsel appearing for the respondent nos. 5 and 6.

2. The above appeal came to be admitted by an order dated 15.09.2011 on the following substantial questions of law.

(i) Whether the Decree in Regular Civil Suit No.171/1981/D is not binding on the appellant as the appellant was not a party to the said suit ?

(ii) Whether the District Judge could have discarded 'EXHIBIT 49" (Sale Deed dated 9.2.1977) which was duly proved in evidence on the ground that there are no pleadings about the contents of the said Sale Deed in the plaint ?

3. Mr. S. S. Kantak, learned Senior Counsel appearing for the appellant has assailed the impugned judgment on the ground that the earlier suit filed by the respondent nos. 3 and 4 was against the husband of the appellant inter alia for demolition of a structure in plot No.6 which was being put up by the husband of the appellant. The learned Senior Counsel further pointed out that the suit has been decreed and the husband of the appellant was directed to demolish such structure. It is further pointed out that when the matter came for execution, as the appellant, who was not a party to the said suit, filed the suit inter alia on the ground that there was a fraud committed by the respondent nos. 3 and 4 in obtaining a collusive decree against the husband of the appellant. It is further pointed out that as the decree passed against the husband of the appellant was not binding on the appellant, the appellant filed a suit inter alia to declare the said decree to be not binding on the appellant and for other reliefs. The learned Senior Counsel further submitted that at that stage the husband of the appellant had an agreement for sale executed by the predecessor of the respondent nos.1 and 2 to purchase the subject plot no.6 which led to the

execution of the sale deed dated 14.08.2000. It is further pointed out that the respondent nos. 3 and 4 are relying upon the sale deed executed in the year 1973 of the plot no.6 which according to the learned Senior Counsel has nothing to do with the plot no.6 agreed to be purchased by the husband of the appellant. It is further pointed out that the respondent nos. 3 and 4 have erroneously depicted the plot no.6 in plot no.7 agreed to be purchased by the husband of the appellant. The learned Senior Counsel further pointed out that it is clearly mentioned in the agreement executed in favour of the husband of the appellant that the high tension wire was proceeding across the plot agreed to be purchased by the husband of the appellant. It is further submitted that the subdivision plan on record clearly shows that such high tension wire is located in the plot agreed to be purchased by the husband of the appellant. The learned Senior Counsel has thereafter taken me through the judgment passed by the learned Lower Appellate Court to point out that the learned Judge has erroneously appreciated the material on record to come to the conclusion that the decree against the husband of the appellant was binding on the appellant herein. It

is further pointed out that based on the said agreement, the appellant is occupying the structure in the subject plot and as such grave injustice would occasion to the appellant in case any relief is granted in the above proceedings. The learned Senior Counsel has thereafter minutely taken me through the impugned judgment and pointed out that the learned Lower Appellate Court has erroneously come to the conclusion that the subject plot occupied by the appellant is in a plot purchased by the respondent nos. 3 and 4 way back in the year 1973. The learned Senior Counsel has thereafter taken me through the impugned judgment as well as the pleadings of the parties to point out that the high tension wire was going through plot no.6 and not through the plot no.7 as claimed by the respondents herein. The learned Senior Counsel as such points out that the substantial questions of law be answered accordingly.

4. On the other hand, Mr. C. A. Coutinho, learned counsel appearing for the respondent nos.3 and 4 has supported the impugned judgment. The learned counsel has pointed out that there is no material on record to show that there is any enmity between

the appellant and the respondent no.7 who is her husband. It is further pointed out that the decree passed in favour of the respondent no.7 was challenged in Second Appeal before this Court wherein it has been clearly held that the plot which was purchased by the respondent nos. 3 and 4 was the subject matter of the plot where the husband of the appellant was in the process of putting up the construction. It is further pointed out that any construction put up was after the suit filed against the husband of the appellant and as such the question of claiming any equity based on such exercise would not at all be justified. It is further submitted that there is a plan on record to point out that the appellant is erroneously and mischievously changing the number of the plot to falsely identify the plot purchased by the respondent nos. 3 and 4 being plot no.6 to be the plot no.7 which was allegedly purchased by the appellant herein. The learned counsel further pointed out that the findings of fact arrived at by the Courts below cannot be reappreciated by this Court in Second Appeal and as such according to him the findings therein are binding on the appellant herein. The learned counsel further pointed out that the appellant is not claiming any individual

right to the suit property and in fact claiming her right through the husband and as such the findings in the earlier proceedings would clearly bind the appellant herein. The learned counsel further pointed out that there is no merit in the above appeal which deserves to be rejected accordingly.

5. Before I proceed to examine the rival contentions, it would be appropriate to record that looking into the dispute between the parties opportunities were given to the parties to amicably settle the dispute between them. But however, after a number of opportunities the appellant point out that no settlement could be arrived at and as such I proceed to hear the matter and dispose of on merits.

6. The records reveal that the appellant filed a Regular Civil Suit No.112/2000/C inter alia for a declaration that the decree in Regular Civil Suit No.171/1981 is not binding on the appellant and is a nullity in law. The learned Trial Judge decreed the suit on 21.05.2008 holding that plot no.7 which is agreed to be purchased by the appellant is a distinct and different from the plot no.6. In the

appeal preferred by the respondent nos.3 and 4, the judgment of the learned Trial Judge was set aside and the appeal came to be allowed which led to filing of the above Second Appeal which came to be admitted on the aforesaid substantial questions of law.

7. On examining the contention of Mr. S. S. Kantak, learned Senior Counsel appearing for the appellant, basically the dispute revolved upon as to whether the sale deed executed in favour of the respondent nos. 3 and 4 way back in the year 1973 with regard to plot no.6 is in fact the subject matter of the agreement based on which the appellant and her husband respondent no.7 herein have put up their claim. In this connection, it would be appropriate to note that the husband of the appellant Prabhakar Pandari Naik, who is the respondent no.7 herein, had filed a Second Appeal before this Court bearing Second Appeal No.31/2000 which came to be disposed of by an order dated 30.06.2000. This Court in the said order has observed that the learned Trial Court while disposing of the suit filed by the respondent nos. 3 and 4 on the basis of the evidence on record had

come to the conclusion that the plot where the construction has come up belongs to the respondent nos. 3 and 4 herein. This Court has further noted that the learned Trial Court after considering the evidence on record has given a finding that there is no dispute regarding the boundaries of plot nos.6 and 7 as both the parties have admitted the same. This Court further noted that the learned Trial Judge had proceeded to hold that the suit construction is coming up in plot bearing no.6. That the suit construction in the present suit and the suit construction which was the subject matter of the earlier suit filed against the husband of the appellant is the same is not in dispute. In such circumstances, the contention of Mr. S. S. Kantak, learned Senior Counsel appearing for the appellant that the respondent nos. 3 and 4 have failed to identify plot no.6 purchased by them as being plot no.7 allegedly agreed to be purchased by the husband of the appellant cannot be accepted. The husband of the appellant had relied upon the same agreement to contend that the construction which was being put up by him was in plot no.7 and not in plot no.6 which was belonged to the respondent nos. 3 and 4 herein. This contention of the respondent

no.7 in the earlier proceedings has been rejected by both the fact finding Courts below and confirmed by this Court in Second appeal. In such circumstances, I find that the identity of the property was not at all in dispute and as such it cannot be said that the respondents have failed to establish their claim that the subject plot where the appellant was putting up the construction was belonging to the respondent nos. 3 and 4 which came to be purchased by the sale deed dated 21.03.1973.

8. The only contention which remains to be examined is whether the decree passed against the respondent no.7 who is the husband of the appellant is binding on the appellant herein. It is an admitted position that the appellant as well as the respondent no.7 put up their claim to the subject plot merely on the basis of an agreement for sale. At the time of the filing of the suit, there was no right to the immovable property which had accrued in favour of the appellant or the respondent no.7. The claim of the appellant is that as she has married to the respondent no.7, she is governed by the regime of communion of assets and as such she is half moiety

sharer in the immovable property purchased by the respondent no.7 herein. As such, there was no property which has entered the communion as no transfer document was executed in favour of the respondent no.7 to claim such rights in terms of Article 1108 of the Portuguese Civil Code. The fact remains that at the time of the filing of the suit no such sale deed was executed nor any steps taken by the appellant to get the sale deed executed and consequently, no right to the immovable property was created in favour of the respondent no.7. In fact, at that stage, the respondent no.7 was facing a decision whereby the property claimed was already conveyed in favour of the respondent nos. 3 and 4 and not to the respondent no.7. In such circumstances, the basic claim of the appellant to put up a claim over the subject property was not available to sustain the relief claimed in the suit.

9. Even otherwise in terms of Article 1117 of the Portuguese Civil Code though the ownership and possession of the common property vest in both the spouses, the administration of the properties of the couple belongs to the husband. Even Article 1189

of the Portuguese Civil Code provides that the management of all the properties of the conjugal society belongs to the husband and it belongs to the wife only in case of absence or impediment of the former. In such circumstances, the respondent nos. 3 and 4 filed the suit for demolition against the respondent no.7 and the decree passed therein became final when the Second Appeal before this Court came to be dismissed. Considering the findings therein that the respondent no.7 has no right to the suit plot no.6 and had trespassed to start a construction, the question of the appellant contending that the communion between her and the respondent no.7 would also include the subject property is without any substance.

10. On going through the judgment passed by the learned Lower Appellate Court, I find that while determining the first point for determination, the learned Judge has rightly come to the conclusion that the subject construction of the structure is in the plot purchased by the respondent nos. 3 and 4 by sale deed dated 21.03.1973. In fact, this aspect was concluded in the earlier litigation filed by the respondent nos. 3 and 4 against the

respondent no.7 who is the husband of the appellant herein. The learned Judge also found that the appellant has failed to prove that the decree passed in Regular Civil Suit No.171/81/D filed by the respondent nos. 3 and 4 has been obtained by playing a fraud upon them. The learned Judge further found that the respondent no.7, his agents and servants have been restrained from interfering or trespassing or carrying out any construction activity in plot no.6 belonging to the said respondent nos. 3 and 4. The learned Judge as such found that the decree therein also binding on the appellant herein. The learned Judge after appreciating the material on record found that the plan at Exhibit 32 was not produced in Regular Civil Suit No.171/81/D nor the same was shown to PW3 and, therefore, the existence of such plan as forming part of the Exhibit 32 cannot be accepted. The learned Judge as such found that the learned Trial Judge erroneously came to the conclusion that plot no.7 is distinct plot from plot no.6 sold to the respondent nos. 3 and 4 which cannot be accepted. It is also to be noted that even the respondent no.7 did not raise any objection that the appellant was a necessary party to the suit and considering that the allegations of the fraud

contended by the appellant has been rejected, I find that the suit filed by the appellant is an abuse of process of Court only to defeat the decree in favour of the respondent nos. 3 and 4 which has attained finality after the Second Appeal filed by the respondent no.7 came to be rejected by this Court.

11. As such, considering that the suit filed by the respondent nos. 3 and 4 was only for permanent injunction and direction to demolish the structure being put up by the respondent no.7 and the reliefs granted by the Trial Court were confirmed even in the Second Appeal the findings therein are also binding on the appellant herein. Consequently, the contention of the learned Senior Counsel appearing for the appellant that the findings in the earlier suit are not binding on the appellant herein cannot be accepted. The learned Appellate Court has upon appreciating the evidence on record come to the conclusion that the construction put up by the appellant is located in plot no.6 belonging to the respondent nos. 3 and 4. These findings of fact arrived at by the learned Lower Appellate Court corroborates the earlier findings rendered in the

earlier suit filed by the respondent nos. 3 and 4 and would clearly show that such findings arrived at by the learned Lower Appellate Court are in accordance with law. There is no perversity in the said findings nor such findings can be said to be by misreading of any piece of evidence or discarding clinching documents in favour of the appellant herein. In such circumstances, I find that the contention of the learned Senior Counsel appearing for the appellant that plot no.6 which belongs to the respondent nos. 3 and 4 is not the subject matter of the location where the structure was being put up by the appellant cannot be accepted. The contention of the learned Senior Counsel appearing for the appellant about the execution of the sale deed in the year 2000 does not in any way affect the decree which was already in operation and in any event the principle of lis pendens as provided in Section 52 of the Transfer of Property Act would apply. The findings of fact arrived at by the learned Lower Appellate Court does not call for any interference. In the present Second Appeal, the sale deed based on which the respondent nos. 3 and 4 have put up their claim is of the year 1973 which the Appellate Court has found is the plot where the

respondent no.7 was putting up his construction, the subsequent sale deed dated 09.02.1977 at Exhibit 49 cannot defeat the claim of the respondent nos. 3 and 4 to the suit plot as the sale deed in favour of the respondent nos. 3 and 4 was duly executed and registered before the Sub Registrar in accordance with law. Hence, the sale deed at Exhibit 49 cannot defeat the claim of the respondent nos. 3 and 4 over the subject plot. The substantial questions of law are answered accordingly.

12. In view of the above, I find no merits in the above appeal which stands accordingly rejected.

F. M. REIS, J.

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