

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 59 OF 2016

1. Shri Bhagawant Sadanand Kamat,
major of age,
residing at "SADANAND",
B.B. Borkar road,
Opposite Bardez Bazar,
Alto-Porvorim Goa.
 2. Mrs. Medha Bhagawant Kamat,
wife of Shri Bhagawant Sadanand Kamat,
Major of age,
residing at "SADANAND"
B.B. Borkar road,
Opposite Bardez Bazar,
Alto Porvorim Goa.
 3. Smt. Sheelabai alias } Expired on 7.1.2013
Vijay Sadanand Kamat, }
wife of late Shri Sadanand Hari Kamat,
Major of age,
residing at "SADANAND",
B.B. Borkar road,
Opposite Bardez Bazar,
Alto Porvorim Goa.
- Appellants

Versus

1. Mr. Uday Narayan Kamat,
M/s Kamsons Regency,
1st Floor, B. B. Borkar road,
Alto Porvorim Goa.
2. Mrs. Vandan Uday Kamat,
wife of Mr. Uday Narayan Kamat,

M/s Kamsons Regency,
1st Floor, B. B. Borkar Road,
Alto Porvorim Goa.

3. M/s Sea Scan Marine Services
Private Limited,
A Company duly incorporated under
the Indian Companies Act, 1956,
and having its registered office
at Airport road,
Chicalim, Vasco Goa.
 4. Shri Vinayak Gurudas Sinai Moyo,
Son of late Shri Gurudas Krishna Sinai Moyo,
of full age,
resident of 2nd Floor,
Almeida Complex,
Shantinagar Road,
Near Kalpana Cold Drink Centre,
Ponda Goa.
 5. Smt. Anuja Vinayak Sinai Moyo,
wife of Shri Vinayak Gurudas Sinai Moyo,
son of late Shri Gurudas Krishna Sinai Moyo,
of full age, resident of 2nd Floor,
Almeida Complex,
Shantinagar road,
Near Kalpana Cold Drink Centre,
Ponda Goa.
- ... Respondents

Mr. J. P. Mulgaonkar, Advocate for the appellants.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Vinita Vishram
Palyekar, Advocate for the respondent nos. 1 & 2.

Coram:- F. M. REIS, J.

Date:- 3rd February, 2017

ORAL JUDGMENT

Heard Mr. J. P. Mulgaonkar, learned counsel appearing for the appellants and Mr. Sudin Usgaonkar, learned Senior Counsel appearing for the respondent nos. 1 and 2.

2. Admit. Heard forthwith with the consent of the learned counsel.

3. Ms. V. Palyekar, learned counsel appearing for the respondent nos. 1 and 2 waives service.

4. The challenge in the above appeal is to the judgment and order passed by the learned Civil Judge Senior Division, Bicholim, whereby the plaint filed by the appellants came to be rejected under Order VII Rule 11 of the Civil Procedure Code.

5. Mr. Mulgaonkar, learned counsel appearing for the appellants has pointed out that the suit filed by the appellants is essentially on the ground that the Deed of Partition executed way back in the year 1891 is a nullity in law as according to him the legal representatives of Janaki and her husband Vaman were not parties to such document. The learned counsel further pointed out that the ancestors of the appellants are Padmavati and her husband Mukund and that Padmavati had pre-deceased the parents Janaki and Vaman. It is further pointed out that at the time of the execution of the said Deed of Partition as the said Janaki and Vaman had already expired, the rights in the property had devolved upon the ancestors of the appellants who were not parties to such document. The learned counsel further pointed out that the learned Judge has proceeded to reject the plaint essentially on the basis of the defence raised by the defendants which is not permissible while examining an application under Order VII Rule 11 of the Civil Procedure Code. The learned counsel thereafter has taken me through the observations of the learned Judge to point out that such observations are in fact on

the basis of the defence of the defendants and as such the whole exercise carried out by the learned Judge rejecting the plaint is misconceived and deserves to be quashed and set aside. The learned counsel further submits that at the most it can be said that the suit is not maintainable but by no stretch of imagination at this stage it is open to the learned Judge to take a view that the appellants have no right to the subject property. The learned counsel thereafter has taken me through the impugned judgment as well as the pleadings in the plaint to point out that the source of title document is in favour of the appellants and as such according to him the relief sought by the appellants to the effect that the appellants are owners in possession of the subject property as they are entitled to 1/6th of the property is justified. The learned counsel further submits that consequently, as the appellants had an undivided right to the subject property, the sale deed executed in the year 2005 itself is a nullity and as such the learned Judge was not justified to pass the impugned judgment.

6. On the other hand, Mr. Sudin Usgaonkar, learned

Senior Counsel appearing for the respondent nos. 1 and 2 has supported the impugned judgment. The learned Senior Counsel pointed out that reading the plaint, there is no cause of action disclosed which would require any further examination of the suit. The learned Senior Counsel further pointed out that the source of the claim of the appellants is essentially to seek an alleged nullity of the Deed of Partition executed in the year 1891 which itself is misconceived as according to him thereafter there were three generations of the appellants who have never claimed any right to any of the property which was the subject matter of the Deed of Partition. The learned Senior Counsel further pointed out that the learned Judge has rightly found that the claim of the appellants is on the basis of a partition which took place in the year 1891 and as such the plaint did not disclose a cause of action. The learned Senior Counsel further submitted that there is nothing pleaded in the plaint as to how the property devolved upon the appellants irrespective of the Deed of Partition executed in the year 1891. The learned Senior Counsel further submitted that there are no particulars in the plaint as to the manner in

which the subject property was ever enjoyed by the appellants or any of the ancestors since the year 1891.

7. I have considered the submissions of the learned counsel and I have also gone through the records and on the basis thereof the following point for determination arises in the present appeal for consideration.

POINT FOR DETERMINATION

Whether the learned Judge was justified to reject the plaint on the ground that it does not disclose the cause of action ?

8. On perusal of the pleadings in the plaint, the source of the claim of the appellants is apparently on the basis of the Deed of Partition executed in the year 1891. There are no particulars in the plaint how the right to the property devolved upon the ancestors of the appellants and ultimately on the appellants themselves. There is no pleading to the effect that there were partition proceedings upon the death of any of the ancestor of the appellants and as such unless and until such proceedings are

initiated, the question of claiming that an undivided right in the property crystallized in favour of the appellants would not arise at all. There is nothing on record to show any right to the extent of 1/6th of the suit property was determined in favour of the appellants or any of the ancestor of the appellants based on any Inventory Proceedings. As such, unless and until such rights are crystallized or determined in appropriate Inventory Proceedings, the question of claiming any undivided 1/6th right in a specific property would not arise at all. In such circumstances, I find that on bare reading of the plaint, it does not disclose a cause of action and as such the learned Judge was justified to reject the plaint under Order VII Rule 11 of the Civil Procedure Code.

9. Mr. Mulgaonkar, learned counsel appearing for the appellants however points out that the appellants can amend the plaint to rectify any defect therein. It would be grossly belated on the part of the appellants to now file an application for amendment as in any event, the appellants can if so advised file a fresh plaint under Order VII Rule 13 of the Civil Procedure

Code. Before parting with the above, it would be appropriate to note that the order passed under Order VII Rule 11 of the Civil Procedure Code is deemed to be a decree in terms of Section 2 of the Civil Procedure Code but however, the learned Judge was not justified to draw a decree upon passing an order under Order VII Rule 11 of the Civil Procedure Code. The decree as such drawn by the learned Judge stands quashed and set aside. The point for determination is answered accordingly.

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

ORDER

- (i) The order rejecting the plaint under Order VII Rule 11 of the Civil Procedure Code stands confirmed.
- (ii) The decree drawn by the learned Judge dated 06.04.2016 is quashed and set aside.
- (iii) The appeal stands disposed of accordingly.

F. M. REIS, J.

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