

IN THE HIGH COURT OF BOMBAY AT GOA***SECOND APPEAL NO.88 OF 2017***

Conrad Basil Fernandes,
s/o late Louis Mathew Fernandes,
aged 56 years, presently residing at
64, Clansman Trail,
Mississauga,
Ontario, L4Z 3 M4.

.... Appellant

Versus

1. Mr. William Dias,
s/o Paul Dias,
major in age,
r/o 6, Colaco Building,
Mangor Hill, Vasco Goa.
2. Mr. Allister Castelino,
(deceased, through Lr's)
 - a) Mrs. Leona Castelino,
widow of late Allister Castelino,
major in age,
 - b) Mast. Alison Castelino,
minor, through his mother
as natural guardian,
 - c) Ms. Alisa Castelino,
Minor, through his mother as
natural guardian,
All r/o Row House No.D-3,
Swapna Nagri Co-Operative Housing Society,
Fatorda, Margao Goa.

3. Mr. Ricaldo Castelino,
major in age,
c/o Leona Castelino,
r/o row House No.D-3,
Swapna Nagri Co-operative Housing Society,
Fatorda, Margao Goa. ... Respondents

Mr. J. Abreu Lobo, Advocate for the Appellant.

Mr. Nand Kishore Dubey, Advocate for Respondent No.1.

Coram : N.M. Jamdar, J.

Date : 15 December 2017.

ORAL JUDGMENT :

The appeal arises from the judgments and orders passed by the learned Civil Judge Junior Division, Margao and the learned District Judge, South Goa, Margao. The learned Civil Judge dismissed the suit filed by the Appellant-Plaintiff and the learned District Judge has confirmed the judgment and order passed by the learned Civil Judge by dismissing the appeal filed by the Appellant.

2. The Appellant-Plaintiff had filed a Regular Civil Suit No.338/2011/D for permanent injunction, eviction and other consequential reliefs. According to the Appellant-Plaintiff, he is the owner of the bungalow D-3 situated at Swapna Nagari Co-operative

Housing Society, Margao which the Appellant had purchased on 28 August 1993 and the share certificate stands in his name. According to the Appellant-Plaintiff, he was desirous of selling the bungalow and since he was settled abroad, he was required to appoint a power of attorney to oversee the transaction. According to the Appellant, since Respondent No.1 was introduced to him by a common friend, Bruce Emanuel, he gave a Power of Attorney to Respondent No.1 but the Respondent No.1 acted beyond the power given to him under the Power of Attorney and inducted Respondent No.2 into the bungalow. According to the Appellant-Plaintiff, this was breach of the Power of Attorney. Even the consideration of Rs.19 lakhs stated to have been received was far less than the market price when the better offer of Rs.27 lakhs was available. It was also the case of the Appellant that Respondent No.2 is a foreign national and that there has been no registration of the agreement. The suit was contested by the Respondents by filing their written statement. The learned Civil Judge dismissed the suit by judgment and order dated 30 July 2014. The Appellant thereafter filed a Regular Civil Appeal No.136/2014. The learned District Judge, after narrating the facts framed the issues regarding as to whether Respondent No.2 was a trespasser and held the same in negative. The learned District Judge by the judgment and order dated 24 April 2017, dismissed the appeal.

3. In this Second Appeal, on 15 September 2017, notice was issued to the Respondents by *G. S. Patel J* putting the parties to notice that the effort will be made to dispose of the Second Appeal finally at the stage of admission. Thus it was indicated in the order dated 15 September 2017 that even though the appeal may appear on board for admission and if it is admitted, it will be taken up for disposal forthwith. This notice has been served on both the Respondents, but only Respondent No.1 has chosen to appear.

4. Heard Mr. J. Abreu Lobo, the learned counsel for the Appellant and Mr. Nand Kishore Dubey, the learned counsel for Respondent No.1. **Admit**, on the following substantial questions of law.

(a) Whether the learned District Judge has decided the appeal as per the mandate of Section 96 of the Civil Procedure Code ?

(b) Whether the learned District Judge has considered all aspects of the controversy before disposing of the appeal filed by the Appellant-Plaintiff ?

(c) Whether the judgment and order passed by the learned District Judge needs to be set aside and the appeal be remanded to the learned District Court ?

In view of the order passed on 15 September 2017, the appeal is taken up for disposal forthwith. Paper book dispensed with.

5. On the questions of law as framed, Mr. Lobo, the learned counsel appearing for the Appellant submitted that the first main ground of challenge apart from other grounds in the first appeal, which fell for consideration of the learned District Judge-First Appellate Court was, what was the effect of the non registration of the documents stated to be executed in favour of Respondent No.2 by Respondent No.1 and whether these documents could be considered as valid documents. Secondly, that the Appellant did not receive any consideration and that the Respondent No.1 acted beyond his authority. The learned counsel for the Appellant relied upon a decision of the learned Single Judge of Kerala High Court in the case of *Kurian Chacko v Varkey Ouseph*¹, and the decision of the Apex Court in *Madhukar and others v Sangram and others*² to emphasize the role of the First Appellate Court. The learned counsel for Respondent No.1 submitted that there is no relief as such that can be effectively granted against the Respondent No.1 and the main relief sought for is against the Respondent No.2. Respondent No.2 as stated above, has not chosen to appear.

6. With the assistance of the learned counsel for the parties, I have gone through the judgment and order passed by the learned District Judge. Paragraphs 1 to 11 of the judgment deal with the

¹ AIR 1969 Kerala 316

² AIR 2001 SC 2171

facts. Thereafter, issues have been framed and paragraphs 13 and 14 refer to the documents on record. The discussion is from paragraphs 16 to 23. In paragraph 16, the learned District Judge refers to the rival contentions and some of the facts. The contention of the Appellant that the agreement is not registered with the Sub-Registrar it being a transaction of an immovable property it is not valid, is noted. The learned District Judge acknowledged that this argument was advanced, however observed that no objection was raised for production of the agreement and the defect can be rectified. The argument of the Appellant that, as on date, for lack of registration, no title vests in Respondent No.2, has gone unanswered.

7. In paragraph 17, the learned District Judge dealt with the arguments based on the Power of Attorney and held that the Power of Attorney does not state that the holder was to take the prior consent of the Principal. The argument of the Appellant that the Respondent No.1 had acted beyond the terms of the power, since no consideration was given to the Appellant, has not been adverted to. The learned District Judge thereafter has referred to the certain decisions and has concluded in paragraph 23 that the learned Civil Judge has correctly appreciated the evidence on record.

8. Though the learned District Judge was confirming the

decision of the learned Civil Judge, still the duty as a First Appellate Court to decide the appeal looking at the entire material on record afresh, did not cease. It is true that the Courts have acknowledged the distinction between the judgment of the Appellate Court confirming the decree, and the judgment reversing the decree, still it is not the law that the requirement of considering the evidence is reduced to a formality when the First Appellate Court confirms the judgment of the Trial Court. The Apex Court in the case of *Madhukar and others* has emphasized the fact that the first appeal on facts is a valuable right given to the litigant and it is the duty of the First Appellate Court to deal with all issues and evidence before recording a finding. In the present case, the two main issues, on the basis of which virtually the entire suit is founded, have been sidestepped by the learned District Judge during the discussion. Since these issues are not addressed either in favour of the Appellant or against the Appellant, it cannot be said that the judgment and order passed by the learned District Judge was in accordance with law and as envisaged under section 96 of the Code of Civil Procedure and Order 41 Rule 31 of the Civil Procedure Code. The questions of law framed thus will have to be answered in favour of the Appellant and it is accordingly answered. The judgment and order passed by the learned District Judge therefore will have to be set aside and the first appeal filed by the Appellant will have to be restored to the file of the

learned District Court.

9. The second appeal is allowed. The judgment and order passed by the learned District Court, South Goa, Margao, in Regular Civil Appeal No.136/2014 dated 24 April 2017 is quashed and set aside and the Regular Civil Appeal No.136/2014 stands restored to the file of the District Court, South Goa, Margao. It is open to the Appellant to make a request to the learned District Judge for early disposal of the first appeal. No costs.

N.M. Jamdar, J.