

IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO. 51 OF 2016.

1. Dr. Jose Floriano Cristovam Pinto,
major and his wife,
2. Mrs. Christabel Maria De Menezes
E Pinto, major,
Both Indian Nationals and residing
at House No.1128, Second Ward,
Gorbatt, Calapur, Goa, both represented
herein through their legally constituted
Power of Attorney Mr. Eddie Tavares,
major, r/o Santa Cruz, Panaji, Goa. ...Appellants.

Versus

1. Dr. Michelle N. Pinto Souza,
(Deceased), through her legal heir
Ms. Jenelle Nicole Mariah De Souza,
minor aged 10 years, represented
herein through her father and legal
guardian Mr. Joel Jesuino Milagres
De Souza the Respondent No.2
hereinbelow
2. Mr. Joel Jesuino Milagres De Souza,
major, married,
both Indian Nationals, residing at
Flat No.212, Landscape Pinto Park
Campal, Panaji, Goa. ...Respondents.

Shri S. D. Lotlikar, Senior Advocate with Ms. R. Kantak, Advocate
for the appellants.

Shri Ashwin N. Ramani, Advocate for the respondents.

Coram:- NUTAN D. SARDESSAI,J.

Reserved on:-20th January, 2017.

Pronounced on:-17th February, 2017.

JUDGMENT

Heard learned Advocate appearing for the respective parties.

2. Admit.

3. Shri A. Ramani, learned Advocate waives notice on behalf of the respondents.

4. This is an appeal at the instance of the appellants/ original defendants no.2 and 3 challenging the order dated 3.6.2016 passed by the Ad-hoc Senior Civil Judge, Panaji by which she had secured the respondents/original plaintiffs by an order of injunction restraining them from alienating, creating any third party rights and/or in any manner interfering with any of the properties left behind by late Shri Alvaro Jose Teofilo Pinto, to the exclusion of the applicants, on the basis of the said Deed of Family Settlement and Relinquishment dated 21.6.2005 and/or the Deed of Succession dated 22.10.2012 till the disposal of the suit. Being aggrieved thereby the original defendants

no.2 and 3 are in appeal and who would be referred to in their original status for brevity's sake hereinafter.

5. Shri S. D. Lotlikar, learned Senior Advocate came to be heard on behalf of the appellants who submitted that the parents had distributed the property owned by them during their lifetime by the Deed of Settlement dated 21.6.2005. The respondents/plaintiffs had disposed off the property allotted to them in the Family Settlement. However there was no disclosure of the Family Settlement in the Inventory Proceedings initiated by them and followed by the suit in 2014 to challenge the Family Settlement. The plaintiffs had otherwise disposed off the property under the Family arrangement to which she otherwise had no right. The trial Court had unduly relied on Article 2042 of the Family Laws and held that the Deed of Family Settlement was invalid when such Article was not applicable to the case at hand. Assuming without admitting that Article 2042 applied to the case, still the plaintiffs could not challenge the Deed of Family Settlement having taken benefits thereunder. He relied in **Kale and others Vs Deputy Director of Consolidation others,[CDJ 1976 SC 263]** and **Narendra Kante Vs Anuradha Kante and others [(2010)2 SCC 77]** to invoke the

doctrine of estoppel. Besides, he adverted to the Deed of Family Settlement and contended that there was a gross delay and laches at the instance of the plaintiffs which was ignored by the learned trial Court who exercised the discretion arbitrarily in the plaintiffs' favour. The impugned order had therefore to be interfered with in appeal and had to be set aside.

6. Shri A. Ramani, learned Advocate for the respondents/plaintiffs at the outset distinguished the judgments relied in **Kale and others** and **Narendra Kante** (supra) and submitted that the Deed of Family Settlement was only in respect of some properties and it did not pertain to all the properties of her parents. Article 2042 of the Family Laws applied to the plaintiffs' case and the Deed of Family Settlement was bad since no renunciation of future legitime could be made. The judgment in **Kale and others** (supra) was distinguishable inasmuch as there was a division of the property to the son and the daughters in equal shares unlike the present case where substantial properties were left by the parents to the defendant/appellant no.1 herein. The judgment in **Narendra Kante** (supra), too was distinguishable. He relied in **Maharwal Khewaji Trust(Regd) Vs Faridkot V. Baldev Dass,[AIR**

2005 SC 104], Pralhad Jaganath Jawale and others Vs. Sitabai Chander Nikam and others[2011(4) Mh. L. J. 137] and Krishena Kumar Vs. Union of India[AIR 1990 SC 1782] to conclude his arguments that the impugned order did not justify any interference in appeal.

7. Shri S. D. Lotlikar, learned Senior Advocate for the defendants/ appellants contended in reply that there was no plea in the pleadings on the distribution of the assets being unequal or inequitable or the Deed of Family Settlement being brought about by fraud. It was also not a case that the allotment was shockingly disproportionate. Besides, the plaintiffs had taken only a technical objection in the plaint challenging the Family Settlement. The judgments in **Kale and others** and **Narendra Kante** (supra), reiterated the principles of the Family Settlement which were relevant to the case at hand and therefore this was a fit case to reverse the impugned order.

8. **Kale and others** (supra), was an appeal by Special Leave against the judgment of the Allahabad High Court by which the appeal against the decision of a learned Single Judge of the High Court rejecting the appellants' Writ Petition was

challenged after the application for granting a Certificate for Leave to appeal was made by the appellants before the High Court which too was dismissed. In the brief facts, Lachman the last propitiator was the tenant and the tenure holder of the property in dispute leaving behind three daughters and the appellant No.1 Kale being the son of one of the daughters. Under the U.P. Tenancy Act, 1939 which applied to the parties only the unmarried daughters inherited the property. In the first round of the dispute which arose soon after the death of Lachman, the Panchayat Adalat of the village was asked to decide the dispute between Prem Pal, nephew of Lachman and the appellant Kale regarding the inheritance to the property left by Lachman. The two daughters Har Pyari and Ram Pyari were the parties to the dispute and the Panchayat Adalat after making local enquiries held that Har Pyari had lost her right in the estate being married and Ram Pyari was an heir so long as she was not married and after her marriage the legal heir to the property of Lachman would be the appellant-Kale. U.P. Zamindari Abolition and Land Reforms Act, 1950 was made applicable to the tenure holders in 1952 which was further amended in 1954 by which amongst the list of the heirs enumerated under the statute, "unmarried daughter" was substituted by "daughter" only.

9. In **Kale and others** (supra), the appellant/Kale filed a petition before the Naib Tahsildar, Hasanpur, for expunging the names of the respondents no.4 and 5 from the disputed Khatas because both the daughters having married ceased to have any interest in the property and therefore prayed that he was the sole heir to the estate and his name alone should be mutated in respect of the property of Lachman which found favour with the Naib Tahsildar to expunge the names of the respondents no.4 and 5. Har Pyari and Ram Pyari filed the application before the Naib Tahsildar for setting aside this order which was passed behind their back and without their knowledge. While the application was pending, the Revenue Court was informed that the talks of compromise were going on between the parties which ultimately culminated in the compromise or the family arrangement under which the appellant Kale was allotted the Khatas Nos.5 and 90 whereas the respondent nos.4 and 5 were allotted the Khatas Nos.53 & 204 between them.

10. In **Kale and others** (supra), the petition was filed before the Revenue Court informing that the compromise had been arrived at and pursuant to that the names of the parties

may be mutated in respect of the Khatas which had been allotted to them and the mutation was carried out accordingly. The parties remained in possession of the properties allotted to them, paid the land revenue to the Government and derived the benefits thereunder which position continued till 1964 when the proceedings for the revision of the records were started in the village under the U.P. Consolidation of Holding Act, 1953. The names of the respondents no.4 and 5 were entered in the relevant form as the persons claiming co-tenure holders to the extent of 2/3rd share and the appellant-Kale was entered in the said form as having 1/3rd share in all the Khatas and in view of the changes in these entries which were contrary to the mutation made in the family arrangement, Kale filed his objections for changing the entries. No objections were filed by the respondents no.4 and 5.

11. In **Kale and others** (supra), the Assistant Consolidation Officer found the dispute complicated and referred the matter to the Consolidation Officer who framed a number of issues and after considering the suit removed the name of the appellant-Kale from the Khatas Nos.5 and 90 and substituted the name of the Appellant Musamat Rampyari and those of the

respondents no.4 and 5. For the first time the respondents no.4 and 5 raised the dispute before the Consolidation Officer denying that the appellant-Kale was the grandson of Lachman and after taking evidence found that the objection raised by them was absolutely groundless and the appellant-Kale was the grandson of Lachman. Their Lordships of the Apex Court in the backdrop of the litigation and the succeeding litigations between the family members and on a consideration of the respective contentions put forward by the parties, deemed it appropriate to discuss in general the effect and the value of the family arrangements entered into between the parties with a view to resolve the disputes once and for all and in that context observed that the object of the arrangement is to protect the family from a long drawn litigation or perpetual strife which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family.

12. In **Kale and others** (supra), their Lordships considered that the attempt was to strive to build up an egalitarian society and trying for the complete reconstruction of the society to maintain it and uphold the unity and homogeneity of the family which ultimately results in the unification of the

society and therefore of the entire country being the prime need of the hour. A Family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few was undoubtedly a milestone in the administration of social justice and in that context the term "family" had to be understood in a wider sense so as to include within its fold not only the close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successions so that future disputes are sealed for ever and the family instead of fighting claims interse and wasting time, money and energy on such fruitless and futile litigation was able to devote its attention to more constructive work in the larger interest of the country. The Courts have therefore leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the Courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel was pressed into service and applied to shut out the plea of the person who being a party to the family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself

enjoyed some material benefits. Considering the backdrop of the facts in which these observations were made by Their Lordships, there is no basis in the contention of Shri A. Ramani that this judgment is distinguishable and inapplicable to the facts of the present case.

13. **Narendra Kante** (supra), had filed a suit for declaration, permanent and mandatory injunction in respect of the suit property situated at Gwalior on the ground that it was the ancestral property of his father Bapu who had died intestate. The application for ad-interim injunction filed in the suit was rejected by the trial Court on the ground that a partition had been effected between the legal heirs of Bapu and also a family settlement had been effected between the heirs of Bapu whereby his widow and son Surendra Kante, acquired 50% share in the house No.95/21 whose legal heirs were the respondents no.1 and 2 and their names were recorded in the Municipal Records. The appellant was one of the sons of Bapu through his first wife Putli Bai while his son through his second wife Jai Singh Rao claimed a share in his estate on his death when a family settlement was arrived at by which the property of Bapu was divided amongst the heirs by a family arrangement dated

8.2.1967 by metes and bounds and pursuant thereto Jai Singh Rao was allowed to retain the possession of the plot from 25/528 and on his death his wife and children were allowed to live in the said premises.

14. In **Narendra Kante** (supra), a suit was filed against the widow of Bapu and son Jai Singh Rao by Surendra Kante for possession alleging the misuse of the concession and partly decreed on 14.9.1993. In the First Appeal filed by the legal heirs of Jai Singh Rao, it was sought to be asserted that no partition had been at all effected in respect of the properties of late Bapu and the alleged documents of the partition could not acted upon since the same had not been registered and therefore was not admissible in evidence. The High Court accepted the contention that the partition had been effected between the heirs of Bapu and that it was not open to the defendants as well as to the predecessor-in-title of Jai Singh Rao to wriggle out of the said agreement which had been admitted by the defendants and the First Appeal filed by Shri Surendra Kante was allowed and the other appeal filed by the predecessor-in-interest of Jai Singh Rao was dismissed who questioned the judgment and the decree in a Letters Patent

Appeal which was also dismissed by a Division Bench of the High Court holding that the Partition Deed dated 8.2.1967 was a Memorandum pertaining to the previous oral partition. In that backdrop it was contended by both the learned Senior Counsel that all the co-sharers had not consented to the Deed of Family Settlement and therefore could not be relied upon. In that context, Their Lordships of the Apex Court held that the argument would have had force had it not been for the fact that acting upon the said Settlement the appellant had also executed the Sale Deeds in respect of the suit property. Having done so it would not be open to the appellant now to contend that the Deed of Family Settlement was invalid.

15. There was no particular dispute of the fact that there was the Deed of Family settlement dated 21.6.2005 pursuant to which the parents of the appellant no.1 and the original plaintiffs no.1 had allotted the properties to them during their lifetime. It was also not particularly in dispute that the original plaintiffs no.1 had disposed off the property allotted in the Family Settlement and appropriated the amount to themselves. It was sought to be canvassed on behalf of the respondents that they were parties to the Deed of Sale which is

neither here nor there when admittedly the sale proceeds were appropriated by the plaintiffs no.1. It was also not in dispute that the Inventory Proceedings were initiated by the plaintiffs on the death of her parents but in which there was no disclosure whatsoever of the Family Settlement of 2005 and it is only in 2014 that the plaintiffs chose to question the validity of the Family Settlement dated 21.6.2005 and the Deed of Succession dated 22.10.2012 on the premise that they were under legal advice that the Deed of Family Settlement was invalid in law and that Article 2042 of the Family Laws applied to their case pursuant to which there could not be any renunciation of the Family legitime.

16. The Deed of Family Settlement dated 21.6.2005 to which a reference was made by Shri S. D. Lotlikar, learned Senior Counsel and Shri A. Ramani, learned Advocate for the appellants/respondents respectively reveal that their parents as the settlers and owners of the distinct properties and on account of their ill-health and to avoid any disputes or differences between their children and respective spouses and to save their children and their respective spouses from prospective ruinous future litigation and to preserve the honour and dignity of the

Family Deed had allotted their properties unto their children. They had besides allotted to the appellant no.1 all the ownership right, title and interest in the remaining properties not mentioned in the Deed being the only son to which the respondents and the other sisters had given free consent.

17. Article 2042 reads thus:-

“No one shall, not even by ante-nuptial contract, renounce the right of the succession of a living person, or alienate or charge the rights, which eventually might have to the inheritance of that person.”

A bare reading of this Article would show that it does not at all come into play in so far as the Deed of Family Settlement is concerned executed by their late parents during their lifetime contrary to the contention of Shri A. Ramani learned Advocate for the respondents. Even assuming at the highest that Article 2042 applied to the case of the plaintiffs, they could still not be heard to raise a challenge to the Deed of Family Settlement having taken the benefits thereunder and even disposed off the property and appropriated the amount to

which the plaintiff no.1 was otherwise not entitled to but for the Deed of Family Settlement. Besides the plaintiffs had sought to challenge the validity of the Deed of Family Settlement of 2005 for the first time in a suit instituted in 2014 and therefore the learned trial Court erred in securing the plaintiffs with the order of injunction when the proceedings were hit by gross delay and laches. The learned trial Court had considered the judgment in **Kale and others and Narendra Kante** (supra) but had failed to understand the import thereof in the factual matrix.

18. Besides unlike the contention of Shri A. Ramani, learned Advocate for the respondents, it was nowhere the case of the plaintiffs that the distribution of the property was inequitable or that the allotment was shockingly disproportionate even on a cursory examination of the pleadings in the plaint. It was otherwise not the case of the plaintiffs that the Deed of Family Settlement was brought about by fraud, undue influence, coercion, etc and therefore it was not at all available to the plaintiffs to raise an issue that the Deed of Family Settlement was invalid.

19. In **Maharwal Khewaji Trust** (supra), it was held

that unless and until a case of irreparable loss or damage is made out by a party to the suit, the Court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and further may lead to a multiplicity of proceedings while dealing with the plaintiffs appeal who filed a suit for the possession of the suit scheduled property alongwith an application under Order XXXIX Rules 1 and 2 of the CPC seeking to injunct the respondent from alienating the suit property and putting up any construction thereon. The trial Court had granted an order of temporary injunction as prayed for while the District Court in the appeal filed by the respondent held while allowing the appeal that the alienation made, if any, will be subject to the law of lis pendens and constructions, if any, put up by the respondent would have to be removed at his risk and costs in the event of the suit being decreed. This order of the District Court was challenged in Revision before the High Court which dismissed the Revision on the basis of the oral Undertaking given by the learned Counsel for the respondent that he had no intention of alienating any part of the property and that any construction raised therein would be at his own risk and costs

without claiming any compensation ultimately giving rise to the Appeal before the Apex Court.

20. In **Maharwal Khewaji Trust** (supra), the learned Senior Counsel appearing on its behalf contended that during the pendency of the litigation the Court protect the status quo existing on the date of the suit and it is only in an exceptional circumstances where irreparable damage is feared, the Courts permit a change of status quo. No such case was made out by the respondent and the trial Court was justified in protecting the status quo as on the date of the suit. The Hon'ble Apex Court found favour with the contention of the learned Senior Counsel for the appellant and held that in the facts and circumstances of the case that the Lower Appellate Court and the High Court too were not justified in permitting the respondent to change the nature of the property by putting up construction as also by permitting the alienation of the property, whatever may be the condition on which the same had been done. Besides in the event the appellants' claim was found baseless, ultimately, it was also always open to the respondent therein to claim the damages or in an appropriate case the Court could itself award damages for the loss suffered and while

setting aside the order of the lower appellate Court and the High Court, restored the order of the trial Court and allowed the appeal.

21. **Pralhad Jawale** (supra), reiterated the well settled principles governing the grant of temporary injunction namely the existence of a prima facie case, irreparable loss and the balance of convenience and that the Court cannot exercise the power of granting temporary injunction mechanically unless the existence of these three ingredients are established while dealing with the Appeal from Order taking exception to the judgment and order passed by the learned trial Judge by which the appellant/plaintiff's application for temporary injunction had been rejected.

22. The learned Single Judge considered the judgment in **Maharwal Khewaji Trust** (supra) where the District Court had interfered with the injunction order passed by the trial Court in the appellant/plaintiff favour and held that the alienation made during the pendency of the suit will be subject to the law of lis pendens and the construction carried out would be at the risk of the defendant and same would have to be removed in case the

suit was decreed. This order was challenged in the Revision which was dismissed by the High Court based on the Undertaking given by the learned Advocate for the respondent therein.

23. A learned Single Judge considered a subsequent decision of the Hon'ble Apex Court in **N. Srinivas Vs. M/s Kattukaran Machine Tools Ltd., [2009(6) Mh. L. J.(SC) 331]** which quoted with approval what was held by it in **Maharwal Khewaji Trust** (supra), that normally during the pendency of a substantive suit where the rights to the immovable properties are in dispute, the status quo cannot be allowed to be altered which included the creation of third party interests. Besides it reiterated what was held in **Maharwal Khewaji Trust** (supra), that a defendant is required to make out a case that irreparable loss or damage would be caused to him during the pendency of the suit if he was not allowed to alter the status quo.

24. In **Krishena Kumar** (supra), the Hon'ble Apex Court considered the doctrine of precedent i.e. being bound by a previous decision was limited to the decision itself and as to

what was necessarily involved in it. It does not mean that the Court was bound by the various reasons given in support of it, especially when they contain propositions wider than the case itself required. In other words, the enunciation of the reason or principle upon which a question before a Court has been decided alone is a precedent. The ratio decidendi is the underlying principle, namely the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which give rise to the decision. This principle has been duly considered while appreciating the judgment in **Kale and other and Narendra Kante** (supra) apart from that in **Maharwal Khewaji Trust and Pralhad Jawale** (supra).

25. At the cost of repetition the contention of Shri A. Ramani, learned Advocate for the respondents that Article 2042 was applicable to the case and the Deed of Family Settlement was bad cannot be applied to the case at large when the parents of the appellants and the respondents during their lifetime had distributed the property pursuant of the Deed of Family Settlement dated 21.6.2005. The position would have been otherwise had there been a settlement of the property on the

demise of any one of the parents which is not the case here. Moreover even assuming for a moment that Article 2042 applies, the respondent could still not challenge the same having taken the benefits thereunder. There was also no particular rebuttal at the instance of the respondents that the Inventory Proceedings initiated by them was without the disclosure of the Deed of Family Settlement. The plaintiffs were therefore guilty of suppression of the material facts from the Court and on that premise too, the learned trial Court could not have secured the respondents with the equitable order of injunction against the appellants herein.

26. Besides it was completely lost on the trial Court that there was substantial delay and laches on the part of the respondents to approach the Court in seeking the repudiation of the Deed of Family Settlement of 2005 in a suit of 2014 and on that premise too could not have secured the plaintiffs with the relief of injunction. It was also lost on the trial Court that between the Deed of Family Settlement in 2005 till the institution of the suit in 2014, the appellants could well have disposed off other properties and in that context of apathy and inaction of the plaintiffs did not entitle them to the relief of

injunction. By one stroke of the pen the learned trial Court considered the Deed of Succession of 22.10.2012 and lost its sanctity as the Deed of Settlement was not valid without considering the fact that the parties had to go to trial based on their case and the documents and the validity or otherwise of the Deed of Settlement had to be proved on merits. The impugned order therefore cannot be sustained on any legal premise and hence, i pass the following:-

ORDER

The appeal is allowed and the impugned order dated 3.6.2016 securing the plaintiffs with an order of injunction is quashed and set aside.

The Appeal stands disposed off accordingly with no order as to costs.

NUTAN D. SARDESSAI J.

vn*

27. At this stage Shri A. Ramani, learned Advocate for the respondents prayed for the stay of the order passed by this Court since he was earlier secured with the order of injunction

pursuant to the order passed by the Trial Court dated 3.6.2016 assailed in this appeal. Shri A. R. Kantak, learned Counsel vehemently opposed the grant of stay.

28. It is matter of record that the respondent was secured by an order of temporary injunction restraining the appellant herein from alienating, creating any third party rights and/or in any manner or acting on the basis of the said Deed of Family Settlement and Relinquishment and/or Deed of Succession till the disposal of the suit.

29. Since the order has been set aside in appeal and in the interests of justice, the operation of the order passed by this Court is stayed for a period of four weeks.

NUTAN D. SARDESSAI J.

vn*