

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 127 OF 2012

1. Smt. Maria Olga Cardozo,
widow of late Joao Marcelino
Cardozo, age about 72 years,
retired employee, and her son
(Deceased)

2. Mr. Clifford Cardozo,
age 38 years, service,
both resident of House No.175,
near Civil and Criminal Court,
Quepem Goa.

... Appellants
(Original Defendant nos. 3 & 6)

Versus

1. Smt. Maria Cleto Coelho,
daughter of Francisco Cardozo,
75 years of age and her husband

2. Shri Joaquim Sacrafamilia Jesus
Coelho, son of late Sabastiao Jose
Coelho, 85 years of age, both
resident of House No.910/J,
Bella Vista, Bichat, Raia,
Salcete Goa.

(Original Plaintiff nos. 1 & 2)

(Deceased)

(a) Mrs. Fiona Fernandes,
major of age, married,
daughter of late Joaquim Sacrafamilia
Jesus Coelho, and her husband,

(b) Mr. David Fernandes,
major of age,

both resident of House No.910/J,
Bella Vista, Bichat, Raia,
Salcete Goa.

(c) Olicio Coelho,
major of age,
married,
son of late Joaquim Sacrafamilia Jesus Coelho,
and his wife,

(d) Mrs. Louvella Coelho,
major of age,
Santemol Raia,
Salcete Goa.

(e) Mr. Anthony Monserrate,
major of age, married and his wife,

(f) Mrs. Maria Lourdes Monserrate,
major of age,
son of late Joaquim Sarafamilia Jesus Coelho,
Pundalik Nagar,
Behind Maruti SAI Showroom,
Porvorim, Bardez Goa.

3. Smt. Prabina Fernandes e Dias,
wife of Gabriel Dias,
major of age,
housewife and husband

4. Shri Gabriel Dias,
son of Domingos Dias,
major in age, service,
both resident of
House number not known
Sirvoi, Quepem Goa.

Deleted vide order dated
10.01.2013 passed in
CA No. 179/2012

5. Smt. Marilyn Filomena Menezes,
daughter of late Shri Joao Marcelino Cardozo,
major in age,
Housewife and her husband
 6. Shri Luis Menezes,
son of Francisco Menezes,
major in age, businessman,
both r/o H.No.not known,
Santarbhat, Piedade, Diwar,
Tiswadi Goa.
 7. Smt. Maria Denzila Cardozo,
major of age, housewife, resident
of House No.175,
near Civil and Criminal Court,
Quepem Goa.
 8. Smt. Linette Cardozo,
daughter of late Shri Joao Marcelino
Cardozo, major of age,
service and resident of H.No.175,
near Civil and Criminal Court,
Quepem Goa.
 9. Smt.Jane Suneil Coutinho,
daughter of Shri Joao Marcelino
Cardozo, major in age, service,
and her husband
 10. Shri Jerome Coutinho,
son of Joseph Coutinho,
major of age, service,
both residing at House No.175,
near Civil and Criminal Court,
Quepem Goa.
- Deleted vide Order
dt. 10.01.2013 passed
In CA No. 179/2012
- Deleted vide order
dt. 10.01.2013 passed
in CA No. 179/2012

11. Shri Danny D'Souza,
son of late Caitaninho D'Souza,
major in age, service and his wife,

12. Smt. Angela D'Souza,
wife of Danny D'souza,
major in age, service,
bldg., no.33, R.No.11/84,
Subhash Nagar,
Chembur, Mumbai – 71.

13. Smt. Alda D'Souza e Furtado,
daughter of late Caitaninho D'Souza,
major in age, service, bldg. no.33,
R.No.11/84, Subhash Nagar,
Chembur, Mumbai -71.

Deleted vide order
dt. 11.04.2014 passed
in MCA No.279/2014

... Respondents

Mr. V. R. Tamba, Advocate for the appellants.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. V. Palyekar,
Advocate for the respondent nos. 1 to 5.

Coram:- F. M. REIS, J.

Date:- 22nd March, 2017

ORAL JUDGMENT :

Heard Mr. Tamba, learned counsel appearing for the
appellants and Mr. Sudin Usgaonkar, learned Senior Counsel
appearing for the respondent nos. 1 to 5.

2. The above appeal came to be admitted by an order dated 23.10.2012 on the following substantial questions of law.

(i) Whether in a suit for cancellation of a conveyance of property (Sale Deed in the present case), it is incumbent upon the plaintiffs to seek relief of reconveyance of the property unto him as consequential relief, especially when by virtue of the Sale Deed the title and possession of the suit property is already transferred unto a third party; or upon cancellation of the conveyance document, the property is reconveyed back automatically, especially in view of specific requirement of Section 31 of the Specific Relief Act, 1963 ?

(ii) In the event prayer (b) in the suit is construed as one for declaration as under Section 34 of the Specific Relief Act, then, whether upon seeking such declaration of the Sale Deed being invalid, null and void, it was incumbent upon the plaintiffs to seek a relief of recovery of possession in view of the fact that by virtue of the Sale Deed, along with the right, title and interest the possession of the suit property is also transferred unto a third party ?

(iii) Whether the First Appellate Court while confirming the decree of the trial court, committed a gross illegality of decreeing the suit of the plaintiffs to the extent that the plaintiffs are declared to be co-owners in respect to property under Survey No.19/15, when the trial Court having come to a categorical conclusion that the plaintiffs have not led any evidence to establish their right to the extent of 1/3rd share in the said property and survey no.19/15 ?

3. Mr. Tamba, learned counsel appearing for the appellants has pointed out that the Courts below have erroneously decreed the suit filed by the respondents overlooking the fact that the suit itself was not maintainable as according to him the suit was for declaration simpliciter without seeking any consequential relief and restoration of possession. The learned counsel further points out that though there is an averment in the plaint that the plaintiffs/respondent nos. 1 and 2 continued in joint possession of the subject property, this fact has been disputed by the appellants in

the written statement wherein it has been clearly contended that pursuant to the subject sale deed the development activity was carried out by the respondent nos. 3 and 4. The learned counsel further pointed out that as the suit itself was not maintainable and as there is no prayer for recovery of possession, both the Courts below were not justified to pass the impugned judgment. The learned counsel in support of his submissions has relied upon a judgment of the Division Bench of this Court reported in **2009(2) Bom. C.R. 665** in the case of ***Guna K. Gauns and another vs. Antonio J. Braganza and others***. The learned counsel further pointed out that the Courts below while disposing of the suit have relied upon the provisions of Article 2177 of the Portuguese Civil Code overlooking the fact that in such proceedings, the plaintiffs had sought for restoration of possession. The learned counsel thereafter has taken me through the impugned judgments passed by the Courts below to point out that this aspect has been clearly overlooked by the Courts below which call for interference of this Court in the present Second Appeal. The learned counsel without prejudice however submits that in any event, the appellants are prepared to

partition the property in metes and bounds between the three co-owners.

4. Mr. Sudin Usgaonkar, learned Senior Counsel appearing for the respondent nos. 1 to 5 points out that both the Courts below by appreciating the evidence on record have concurrently found that the subject sale deed is null and void as the consent of all the co-owners was not obtained by the appellants. The learned Senior Counsel further pointed out that the alleged development was carried out by the respondent nos. 3 and 4 who have not raised any challenge to the decree passed by the learned Trial Court either before the Appellate Court or before this Court. The learned Senior Counsel further pointed out that as such these arguments are not available to the appellants who are admittedly co-owners of the subject property along with the respondent nos. 1 and 2. The learned Senior Counsel further pointed out that the learned Lower Appellate Court has come to the conclusion that the contention of the respondent nos. 3 and 4 that they were in possession of the subject property has not been established by any evidence on

record. The learned Senior Counsel has also brought to my notice that the learned Lower Appellate Court has found that the property is as it was existence before the subject sale deed and as such the contention of Mr. Tamba, learned counsel appearing for the appellants that the suit itself is not maintainable cannot be accepted.

5. I have considered the submissions of the learned counsel and I have also gone through the records. No doubt, Section 34 of the Specific Relief Act, provides that grant of declaration is discretion and such discretion would not be exercised when a further relief has not been claimed by the plaintiffs, nevertheless, in the present case, on going through the findings rendered by the fact finding Court below, both the Courts have concurrently come to the conclusion that the claim of the appellants that development has been carried out by the respondent nos. 3 and 4 has not been established. Both the Courts below as such found that the subject property is as it was in existence before the subject sale deed and as such the property was in co-ownership and joint possession of all the co-owners. Apart from that, it is an admitted position that the

appellants have not claimed that they are in exclusive possession of the subject property or that they have shown any act of possession which would unsettle the finding of the Courts below on possession. The respondent nos. 3 and 4 admittedly have not raised a challenge to the findings arrived at by the Courts below wherein it has been held that the respondent nos. 3 and 4 have failed to establish their alleged claim of possession of the subject property. As such, in view of the concurrent findings of fact on possession, which is a finding of fact this Court cannot interfere in this Second Appeal under Section 100 of the Civil Procedure Code unless there is perversity in such findings. In the present case, as there is no perversity shown or established by the appellants, the question of interfering in such findings would not at all arise. It is not the case of the appellants that such findings rendered by the Courts below are on the basis of any misreading of evidence or that any crucial document has been overlooked while rendering such findings. In such circumstances, I find that the appellants are not justified to raise the contention that further relief of restoration of possession had to be sought by the respondent nos. 1 and 2. Apart

from that, the plaintiffs/respondent nos. 1 and 2 have sought a consequential relief of permanent injunction which has been granted by the Courts below. In such circumstances, it cannot be said that the respondent nos. 1 and 2 have not sought for a further relief as provided in Section 34 of the specific Relief Act. In such circumstances, I find that the contention of Mr. Tamba, learned counsel appearing for the appellants that the suit itself was not maintainable cannot be accepted. The judgment of the Division Bench of this Court in the case of ***Guna K. Gauns*** (supra) is not applicable to the facts of the present case. The fact therein clearly discloses that the possession of the subject property was with the purchaser which is not the situation in the present case. Hence, the said judgment cannot supports the contention of Mr. Tamba, learned counsel appearing for the appellants in the facts of the present appeal. The substantial questions of law are answered accordingly.

6. As far as the contention of Mr. Tamba, learned counsel appearing for the appellants that the property may be divided by

metes and bounds in terms of the admitted shares of the partition, I find that the question of considering this aspect in the present appeal would not be justified. The parties if so advised are at liberty to file appropriate proceedings to get the property partitioned by metes and bounds in accordance with law.

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

F. M. REIS, J.

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