

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 100 OF 2016**

MRS. IDALINA FERNANDES @ IDA
FERNANDES.,

.. Appellant

Versus

MR. ANTONIO GOMES AND 24 ORS.

... Respondents

Mr. Valmiki Menezes, Advocate for the appellant.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Vinita Vishram Palyekar, Advocate for the respondent nos. 1 to 4 (a) to (d), 5 to 12, 13(a), 13(b), and 14 to 23.

Coram:- F. M. REIS, J.

Date:- 3rd March, 2017

ORAL ORDER :

Heard Mr. V. Menezes, learned counsel appearing for the appellant and Mr. Sudin Usgaonkar, learned Senior Counsel appearing for the respondents.

2. The challenge in the above appeal is to the order passed by the learned Lower Appellate Court whereby an appeal

filed by the appellant challenging the homologation of the final chart of partition in the Inventory Proceedings initiated upon the death of a common ancestor of the appellant and the respondents came to be dismissed.

3. Mr. V. Menezes, learned counsel appearing for the appellant has pointed out that during the course of the Inventory Proceedings initiated upon the death of the estate leaver, the appellant had raised an objection to the chart of partition inter alia producing a deed of sale dated 05.05.1980 and deed of gift dated 16.08.1976. The learned counsel further pointed out that the objections raised to take into consideration the said gift deed came to be disposed of by this Court inter alia holding that such gift deed was null and void. The learned counsel further pointed out that the appellant thereafter placed on record the sale deed at the time of raising the objections to the chart of partition which was not considered by the learned Trial Judge while preparing the chart of partition. The learned counsel further pointed out that the challenge to such orders before the learned Lower

Appellate Court came to be dismissed and thereafter a Writ Petition was filed before this Court challenging such order. The learned counsel further submitted that as in the meanwhile the final chart of partition was confirmed by the Inventory Court, this Court has disposed of the said Writ Petition inter alia reserving the right of the appellant to challenge such order before the Appellate Court. The learned counsel thereafter has taken me through the impugned judgment passed by the learned Lower Appellate Court to point out that the learned Judge has refused to examine the objections essentially on the ground that the order passed by the Inventory Court during the course of the proceedings had attained finality losing sight of the fact that this Court has reserved the right of the appellant to challenge such order before the Appellate Court. The learned counsel further submits that pursuant to the said sale deed, the grand mother has sold her 1/4th share in a specific property to the appellant which would affect the allotment in the final chart of partition. The learned counsel further pointed out that as the learned Lower Appellate Court has failed to consider the validity of the said sale

deed while examining the appeal preferred by the appellant the impugned chart of partition finalized by the Inventory Court stands vitiated. The learned counsel further pointed out that though it is contended by the respondents that the said sale deed is a nullity in terms of Article 1565 of the Portuguese Civil Code nevertheless, the law itself recognised that the consent can be made good by calling the family council. The learned counsel further submits that as this aspect has not been considered by the learned Lower Appellate Court, the impugned judgment passed by the learned Lower Appellate Court deserves to be quashed and set aside. The learned counsel further pointed out that the appellant ought to have been given an opportunity to lead evidence to establish the consent of all the co-owners in executing such deed of sale. The learned counsel as such submits that the impugned judgment be quashed and set aside.

4. On the other hand, Mr. Sudin Usgaonkar, learned Senior Counsel appearing for the respondents has supported the impugned judgment. The learned Senior Counsel pointed out

that calling the family council would be an exercise in futility as according to him the respondents who represent five of the six heirs of the said grand mother have not given any consent to such sale deed. The learned counsel further pointed out that in view of Article 1565 of the Portuguese Civil Code, the sale deed itself is a nullity as there is a specific bar in conveying an immovable property to the grand children without the consent of the other heirs. The learned Senior Counsel further pointed out that in any event at the time of execution of the said sale deed the grand mother was only a moiety share holder of the estate as her husband had expired and as such she was not entitled to convey any property unless such property was allotted to her in terms of Article 1766 of the Portuguese Civil Code. The learned Senior Counsel as such points out that there is no merit in the above appeal which deserves to be rejected.

5. I have considered the submissions of the learned counsel and I have also gone through the records. Article 1565 of the Portuguese Civil Code reads thus :

“Article 1565- Sale to children or grand children - Parents or grand parents shall not be entitled to sell or mortgage to children or grand children if the other children or grand children do not consent to the sale or mortgage.”

6. The said provision is also incorporated in the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 (Goa Act 23 of 2016) wherein Section 84 reads thus :

“Section 84 : Restrictions on transfer by parents, or grandparents.— Parents or grandparents shall have no right to sell or mortgage their assets to their children or grand children unless the remaining children or grand children and their spouses give their consent thereto in writing.”

7. On going through the said provisions, it clearly provide that the grand parents or parents cannot convey rights to immovable property to the children or grand children without the consent of the other children/grandchildren. Admittedly, in the present case, the disputed sale deed does not disclose that

such sale deed was executed with the consent of all other children or grand children. Apart from that, the contention of Mr. Menezes, learned counsel appearing for the appellant that such consent can be made good after the sale deed is executed in the Inventory Proceedings cannot be accepted in view of the said specific provisions. This consent, if any, has to be obtained before the execution of such sale deed.

8. This Court in the judgment dated 09.12.2011 passed in Second Appeal No. 3 of 2006 in the case of ***Shri Norberto Paulo Sebastiao Fernandes & Ors V/s Shri Gabriel Sebastiao Idalino Fernandes & Ors*** has observed at paras 14 and 16 thus :

“14. Thus, it is to be noted that Article 1565 of the Portuguese Civil Code, is a protection of the legitimate share of the descendants and there is no need to wait for the death of the father or grand father vendor to apply for the annulment of the sale, because it is not necessary to prove, concretely, the effects on the legitime. In view of the above as the legitime would

be affected, such transactions are null and void in view of the provisions of Article 1565 of the Portuguese Civil Code when executed without the consent of the other children.

16. What emerges from the judgments of this Court as well as the commentaries by Dr. Cunha Gonsalves as referred to above is that the provisions of Article 1565 of the Portuguese Civil Code is to protect the legitime (legitimate share) which has to devolve upon the descendants. Law declare such sale transaction as null and void as the nullity has only the aim of impeding the efficaciousness of such transaction. In the present case, law recognizes that in cases in which the parents transferred the property in favour of children, such transactions are null and void unless they are executed with the consent of other children. In the present case, undisputedly no such consent was obtained and consequently the Lower Appellate Court was justified to come to the conclusion that the sale deed executed

by the appellant no.3 is null and void and has no legal effect. The substantial questions of law famed by this Court are answered accordingly.”

9. Taking note of the said observations, I find that the appellant is not entitled to claim any right on the basis of the subject sale deed in view of the said provisions of Article 1565 of the Portuguese Civil Code.

10. Apart from that, Article 1766 of the Portuguese Civil Code reads thus :

“Article 1766- Prohibition of disposition of the assets of spouses – Those married as per the custom of the country shall not, under penalty of nullity, dispose of certain and specific assets of the marital estate, except if the said assets have been allotted to them in partition, or are not included in the communion, or if the disposition has been made by one of the spouses in favour of the other, or if the other spouse has given consent

by authentic form.”

11. Admittedly, in the present case, at the time when the disputed sale deed was executed, the property referred to therein was not allotted to the surviving spouse. In such circumstances, such sale deed itself is a nullity in terms of Article 1766 of the Portuguese Civil Code and consequently, the question of examining the objections of the appellant on this ground would not at all be justified.

12. In view of the above, I find that there is no infirmity committed by the learned Judge while passing the impugned judgment. There are no substantial questions of law arise in the present appeal for consideration in the facts and circumstances of the case as stated herein above. The appeal stands accordingly rejected.

F. M. REIS, J.

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