IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 78 OF 2017

SMT. SHEELA LVY CLEOFA RODRIGUES,
REP. BY HER ATTORNEY, SHRI. MIGUEL
ANTONIO JOSE PEREIRA AND ANR., ... Appellants
Versus
SMT. GERALDINA GOMES E FERRAO AND
31 ORS., ... Respondents

Mr. Almeida Coutinho Cleofato Garrett, Advocate for the appellants.

Coram:- F. M. REIS, J.

Date:- 13th July, 2017

P.C.:

Heard Mr. C.A. Coutinho, learned Counsel appearing for the appellants.

2. The challenge in the above appeal is to the Judgments passed by the Courts below, whereby in a suit filed by the appellants to declare the sale deed executed by the respondents No.1 and 2 in favour of the respondents No.13 to 17 as null and void, as well as for preemption, came to the dismissed.

3. Mr. C. A. Coutinho, learned Counsel appearing for the appellants has submitted that the subject sale deed dated 1st October, 1997 is a nullity, as the respondents No.1 and 2, who had an undivided share in the property, had sold a specific

portion of the property in favour of the respondents No.13 to 17. The learned Counsel further submits that both the Courts below have confirmed that such a sale deed is a nullity and declared accordingly. The learned Counsel further points out that besides the said relief, the appellants had also claimed a right of preemption over the share of the respondents No.1 and 2 which came to be dismissed by both the Courts below. The learned Counsel further submits that as the other co-owners have consented to the exercise of the right of preemption of the rights of the appellants, the Courts below were not justified to refuse such a relief. It is further submitted that in such circumstances, in terms of Article 1566 of the Portuguese Civil Code, the appellants are entitled for a right of preemption over the share of the respondents No.1 and 2.

4. I have carefully considered the submissions of the learned Counsel and I have also gone through the records. Both the Courts below have concurrently found that the subject sale deed is a nullity and a declaration to that effect has been granted. In such circumstances, the question of claiming that the appellants are entitled for a right of preemption, on the basis of such sale deed, would not at all be justified. Admittedly, the respondents No.1 and 2 have not sold their shares on the basis of such sale deed and, as such, the question of invoking the provisions of Article 1566 of the Portuguese Civil Code would

not at all be justified.

5. Article 1566 of the Code reads thus :

"Article 1566 : It is not lawful to the co-owners of a property under indivision or undivided to sell to the strangers their respective share, when the other co-owner desires to have it for the same price.

Clause No.l : The co-owner to whom no notice of sale is given, can have for himself the part sold to the stranger, provided he claims within a period of six months from the date on which he has the knowledge of sale, depositing, before before the effective handing over, the price which, according to the conditions of the contract, might have been paid or accrued.

Clause No.2 : There being more than one co-owner, the provisions of para 4 and 5 of Article 2039 shall be observed; but, if the shares are unequal and the co-owner of bigger share is willing to preempt, the said right shall be allotted to him without any auction.

Clause No.3 : The right of preference, in any case, is not prejudiced by cancellation of said contract, which might have been made extra judicially or by consent, or judicial transaction.

Clause No.4 : The period which is referred to in para 1 of this Article is applicable to all the other cases of preference.

6. First part of the said provision clearly stipulates that the subject matter of the sale deed has to be a share in the property. This is not the case in the present proceedings and consequently, I find that there is no infirmity in the Judgments passed by the Courts below which would call for interference of this Court under Section 100 of the Code of Civil Procedure. The appeal stands, accordingly, rejected.

F. M. REIS, J.

ssm.