

Meena

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 130 OF 2011

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| 1 | Smt. Verodiana John Pinto,
wife of John Pinto
age 55 years, major of age,
Indian Nationals. | | |
| 2 | Mr. John Pinto
major of age 57 years,
Indian National
both residents of 187/4,
Venny Villa, Behind Pinto Garage,
Ella Old Goa Tiswadi, Goa. | ... | Appellants |
| | versus | | |
| 1 | Mrs. Ninette Maria Fernandes
wife of Mr. Marshal Alex Fernandes
major of age, service,
resident of D-101, Gokul Plaza,
Thakur Complex, Kandivali (East)
Mumbai -4 00101 | ... | Respondent |

Shri V.A. Lawande, Advocate for the appellants.

Shri A.F. Diniz, Advocate for the respondent.

CORAM : NUTAN D. SARDESSAI, J.

DATED : 15th March 2018.

ORAL JUDGMENT:

1. Heard Shri V. A. Lawande, learned Advocate for the appellants and Shri A. F. Diniz, learned Advocate for the respondent on the substantial questions of law formulated for

determination vide the order dated 05/10/2011.

2. Shri Lawande, the learned Advocate for the appellants contended that the appellant No.2 was not a party to the Sale Deed entered into by the appellant No.1 with the respondent but only a witness. He had not consented to sell the property and therefore in the absence of any consent at his instance and by invoking Article 1119 of the Family Laws, the appellant no.1 could not have entered into the said agreement with the respondent to part with the property. He invited attention to the judgment passed by the Trial Court dated 31/03/2009 and the findings rendered therein and besides adverted to the grounds taken in the appeal memo. A reference was also made by him to the application under Order XLI Rule 27 CPC alongwith the valuation report to buttress his plea that the valuation of the property was in excess of that claimed in the plaint and which aspect was not considered by the learned Trial Court. There were no pleadings at the instance of the plaintiff and also in the affidavit that the appellant No.2 agreed to sell the property in question. He placed reliance in **M/s. Damodar Builders v/s. Agnelo Fernandes** [1999(2) Goa L.T. 9] which considered Article 1119 primarily to the effect that in respect of immovable property one of the spouses was not entitled to alienate or charge without the consent

or agreement of the other spouse and the proviso thereto which provided for in case of dissent or unfounded opposition of one of the spouses, the aggrieved spouse can approach the court for necessary redressal in the matter. Reliance was also placed in **Smt. Joana Fransica Errie and others v/s. Albano Vespaniziano Jose Vaz** (Second Appeal No.153 of 2012) where the learned Single Judge had considered the judgment in **M/s. Damodar Builders** (supra), and observed that the proviso to Article 1119 of the Family Laws did not say that such consent could be inferred from the circumstances or can be presumed. He also placed reliance in **Shri Udhav Singh v/s. Madhav Rao Scindia** [(1977)1 SCC 511] which was an election petition and not applicable to the facts of the present case and hence the departure.

3. Reliance was also placed in **Bhagwati Prasad v/s. Chandramaul** [AIR 1966 SC 735] and Ram Sarup Gupta(Dead) by Lrs v/s. Bishun Narain Ingter College and other [AIR 1987 SC 1242] in the matter of pleadings to canvas a plea that in the absence of pleadings about the consent of the appellant No.2, no reliance could be placed on a stray admission of the appellant No.2. The substantial question as formulated vide the order dated 05/10/2011 and additional questions proposed in the appeal

memo therefore arose for determination.

4. Shri A.F. Diniz, learned Advocate for the respondent contended at the outset that both the Courts below found consent on facts on appreciation of the evidence and therefore no substantial question of law as proposed at 7(b) arose. It was his contention that the appellant No.2 i.e. the husband of the appellant no.1 was the constituted attorney and who had full knowledge of the transaction of the Agreement of Sale. The suit for specific performance was based on the Agreement of Sale and pleadings as filed particularly in the written statement clearly revealed that there was a clear assertion on their behalf that the appellant No.2 agreed to sell the property to the plaintiff and furthermore at paragraph No.16 that there was a specific assertion that both the appellants had pleaded that the respondent had to pay an amount of ₹2,42,500/- which was something still to be done by her and in case she was willing to pay to them, they were willing to execute the Sale Deed in the respondent's favour. The consent of the appellant No.2 to the entire transaction was apparent from the tenor of the written statement filed in defence to which the appellant No.2 was a signatory apart from knowing its contents being true to his knowledge and asserting that they were still willing to execute the

sale deed in favour of the respondent provided she was ready to pay the consideration to them.

5. Shri Diniz, the learned Advocate for the respondent invited attention to the judgment passed by the Trial Court which had clearly held against the appellants on the issues Nos.5 and 6 where there was a burden cast on them to prove that the appellant No.1 had alone agreed to sell the suit property to the respondent and that she had paid the balance consideration. The appellant No.2 had filed an affidavit for self and also as the constituted attorney of the appellant No.1 and besides in his affidavit there was a clear assertion that the agreement was executed by his wife as a vendor and he had signed as witness apart from claiming that the respondent had met them, requested them to sell the property and the discussion in respect of the sale were between him and the husband of the respondent. There was also an assertion by him that he was aware of the contents of the Agreement for Sale before its execution and had consented to the agreement though clarified by voluntary statement and later admitting that the plaintiff had paid him the total consideration of ₹1,25,000/- and also paid ₹9,000/- towards the execution of the sale deed. He also invited attention to the judgment of the First Appellate Court which also held on the consent of the appellant

No.2 and therefore it was incumbent upon the appellant No.2 to plead want of consent in the Written Statement in defence if at all, to support his plea of his case being covered under Article 1119 of the Family laws.

6. Shri Diniz, learned Advocate for the respondent invited attention to the prescribed Form 48 and 13 of the Appendix A to the Civil Procedure Code spelling out the nature of pleadings in a suit for specific performance and the nature of defence adopted in such cases apart from Order VIII Rule 2 C.P.C. to contend that it was incumbent on the appellant no.2 to plead how the agreement of sale was illegal by specific pleadings. He also invited attention to Section 9 of the Specific Relief Act which required the persons against whom the relief was claimed to plead by way of defence under any ground which is available to him under any law relating to contracts. In the face of the concurrent findings of facts on the consent by both the Courts below, no question as proposed for determination arose and therefore in the absence of any substantial question of law, the appeal did not survive and was liable to be dismissed.

7. Shri V. Lawande, the learned Advocate for the appellant adverted to Order VI Rule 6 CPC, once again reiterated the case that specific pleadings were taken in the Written Statement in

defence apart from the production of documents by the respondent and wrapped up his arguments to contend that the question as formulated had arisen for determination, that no consent could be inferred from the evidence in the absence of any pleadings and therefore additional substantial question of law also arose for determination and which this Court could formulate by exercising its power by invoking the proviso to Section 100(5) CPC.

8. I have considered the judgment relied upon by Shri Lawande, the learned Advocate for the appellant, considered the pleadings to which attention was invited by both the learned Counsels, the judgment of the Trial court, the affidavit as also the evidence on record and the findings of facts recorded both by the Trial Court and the First Appellate Court concurrent on the point of fact that there was consent at the instance of the appellant No.2 to the Agreement of Sale. Having considered the requirements of the law of pleadings contained in Order VIII as also that in Order VI Rule 6 CPC apart from the prescribed format for the constitution of the suit for specific performance and the Written Statement in defence, it was incumbent on the appellant No.2 to specifically plead that he had not consented to such Agreement for Sale executed by the appellant No.1 with the respondent, that he

was not in the know of the agreement and otherwise to seek the benefit of the requirements of Article 1119 of the Family Laws. From the appraisal of the material on record to which attention was invited by the learned Counsels, i find myself in agreement with the contentions of Mr. Diniz, the learned Advocate for the respondent that there were concurrent findings recorded by the Courts below qua the consent of the appellant no.2 and that it was not a singular or stray incident of admission extracted from the appellant No.2 about his concurrence to the said agreement. Without repetition, the material produced on record amply demonstrate that the appellant No.2 representing his interest and also that the appellant No.1 as a constituted attorney had full knowledge of the Agreement of Sale entered into by her with the respondent.

9. Since both the Courts have found on an appreciation of the evidence that there was consent at the instance of appellant No.2 for the Agreement of Sale, the invocation of Article 1119 of the Family Laws would not arise nor would it be available to the appellants to canvas a substantial question of law and no such substantial questions of law arise for determination.

10. In view thereof, the appeal does not survive and is dismissed with no order as to costs.

NUTAN D. SARDESSAI, J.