

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 49 OF 2019

Leticia Lobo Braganza e Lobo
@ Leticia Ameliana Braganza,
Through her Constituted Attorney
Keith Michael Crasto

... Appellant

V e r s u s

1. Joao Sebastiao Zezita Da Purificacao
Pires & 2 Others

... Respondents

Mr. M. B. D'Costa, Senior Advocate with Ms. K. Betquekar,
Advocate for the Applicant.

Mr. Nitin Sardessai, Senior Advocate with Mr. S. P. Desai, Mr. P.
Sawant and Ms. Gautami Kamat, Advocates for the
Respondents.

Coram :- C. V. BHADANG, J.

Reserved for Order on : 20th August, 2019

Order Pronounced on : 21st August, 2019

ORAL ORDER

1. The challenge in this appeal is to the order dated 12.07.2019 passed by the learned Senior Civil Judge at Mapusa in Special Civil Suit No.78/2018. By the impugned Order, the application for temporary injunction filed by the appellant, has been dismissed.

2. The brief facts necessary for the disposal of the appeal may be stated thus :

The appellant has filed the aforesaid suit against the respondents for declaration that the Deed of Sale dated 31.07.2018 and the alleged Power of Attorney executed by the first respondent is null and void and for cancellation of the said Sale Deed. The appellant is also praying for an injunction restraining the respondents/defendants from transferring, mortgaging or creating any third party interest in the suit property and from putting up any construction over the same.

3. The appellant is the estranged wife of the first respondent. They are married under a regime of communion of assets and the marriage is subsisting. It is the material case of the appellant that the aforesaid Sale Deed has been executed by the first respondent, without the consent of the appellant.

4. It appears that the appellant filed an application for temporary injunction in which initially the Trial Court had granted ad-interim relief. According to the respondents, the execution of the Sale Deed and the transfer of a half undivided right in the suit property by virtue of the aforesaid Sale Deed is legal and proper. It was also contended on the basis of certain whatsapp messages and telephonic conversation that

the appellant was aware and had consented for the said transaction.

5. The learned Trial Court by the impugned order has dismissed the application thereby vacating the ad-interim relief which is subject matter of challenge in this appeal.

6. I have heard Mr. D'Costa, the learned Senior Counsel for the appellant and Mr. Sardessai, the learned Senior Counsel for the respondents. Perused record.

7. It is submitted by Shri D' Costa, the learned Senior Counsel for the appellant that the first respondent was not authorised to execute the Sale Deed thereby purportedly transferring half undivided share in the suit property in favour of the respondent no.2. It is submitted that the said transaction is hit by Article 1119 and 1191 of the Portuguese Civil Code (Civil Code, for short). It is submitted that under Article 1119 of the Civil Code, immovable assets whether common or exclusive of either spouse cannot be alienated or charged in any manner, without the consent and/or agreement of both. It is submitted that as per Article 1191 of the Civil Code, it is not lawful for the husband to alienate immovable assets without the written consent of the wife. The learned

Senior Counsel has placed reliance on the decision of this Court in the case of **Shivaji Narayan Gaonkar vs. Mr. Claudio Francisco Remedios (Second Appeal Nos.21 and 24 of 2011, decided on 13.10.2011)** and **Smt. Joana Francisca Errie Bernadette Gomes e Barreto & Ors. vs. Mr. Albano Vespaniziano Jose Vaz & Ors. (Second Appeal No.153 of 2012, decided on 25.09.2014)** in order to submit that the ownership and the possession of the common properties vests in both spouses during the subsistence of the marriage and the first respondent in this case was not legally authorised to transfer even the undivided share without the express consent of the appellant. The learned Senior Counsel submitted that a moiety share cannot be equated to co-ownership. He submitted that the spouse who has been excluded and in whose absence the Sale Deed has been executed, can annul the Sale Deed and there is no question of pre-emption in such cases. The learned Senior Counsel points that although a certificate as required by Section 165-B of the Evidence Act was produced in respect of the whatsapp messages, no such certificate has been produced in respect of the alleged telephonic conversation. It is submitted that in any event the whatsapp messages and the telephonic conversation which have been relied upon do not

show any consent as such by the appellant for execution of the Sale Deed.

8. On the contrary, Mr. Sardessai, the learned Senior Counsel for the respondents, has supported the impugned order. The learned Senior Counsel has placed reliance on Article 2177 of the Civil Code, in order to submit that the transfer of a half undivided share is permissible. The learned Senior Counsel pointed out that the undivided half share of the appellant has not been adversely affected and therefore the consent of the appellant is not necessary. It is submitted that the Trial Court has rightly placed reliance on the whatsapp message and the telephonic conversation to hold that the appellant was all along aware of the transaction. It is submitted that the interim relief can only be in aid of the final relief and the interim relief claimed in this case is not competent and cannot be said to be in the aid of the final relief where the appellant is claiming the cancellation of the Sale Deed. The learned Senior Counsel has placed strong reliance on the decision of the Supreme Court in the case of **Syscon Consultants Private Limited vs. Primella Sanitary Products Private Limited & anr. (2016) 10 SCC 353** and the decision of this Court in the case of **Mr. Jaganath Vinayak Shet Manerkar & anr. vs. Vallabh Saanand**

Bondre (Writ Petition No.502 of 2018 decided on 01.04.2019), in order to submit that transfer of an undivided share is not prohibited. It is submitted that there is, rule against perpetuity and all that the appellant could have claimed was pre-emption. It is pointed out that the suit for pre-emption is already barred by limitation.

9. I have carefully considered the rival circumstances and the submissions made. The suit property consists of survey no. 209/6 situated at Cobrawaddo, Calangute known as 'Bati' admeasuring 19,725 square metres more specifically described in the plaint. Admittedly, the suit property has devolved upon the first respondent through his parents by virtue of a Public Will dated 14.12.1967. It is not in dispute that by virtue of her marriage, the appellant is a moiety sharer in the suit property. It is a matter of record that as per the impugned Sale Deed dated 31.07.2018, the first respondent has transferred his half undivided rights or share in favour of the respondent no.2 for a consideration of Rs.12.65 Crores. Admittedly, there is no express written consent by the appellant for execution of the Sale Deed. The question in such circumstances is whether the appellant has made out a case for grant of temporary injunction as prayed.

10. Article 1119 and 1191 of the Civil Code which fall in subdivision 2 of the Civil Code entitled "marriage as per the custom of the country" read thus :

"Article 1119 of the Civil Code – Alienation of the immovables of the matrimonial estate The immoveable properties, whether common or exclusive of either spouse, shall not be alienated or charged in any manner without the consent and agreement of both. Sole paragraph. In case of dissent or unfounded opposition, the consent of the dissenting spouse may be made good by order of the Court."

Article 1191 of the Civil Code – Powers of the husband over immovables The husband is not permitted, without the consent of his wife, either to alienate immoveable properties or to move the Court in respect of disputes regarding ownership or possession of immoveable properties.

Paragraph 1. Such consent may be made good judicially when the wife refuses to give it without just cause, or when she is unable to give it.

Paragraph 2. However, the alienation of exclusive properties made by the husband in violation of the provisions of this Article may be annulled at the request of the wife or her heirs only in case the husband is found liable to pay her or her heirs and there being no other properties with which the liabilities can be met.

Paragraph 3. In case the said alienations are of common properties, the wife or her heirs or the heirs of the husband with right to the legitimate portion may, in all cases, apply that the same be annulled.”

Prima facie, it can thus be seen that as per Article 1119 of the Civil Code, the immovable properties whether common or exclusive of either spouse cannot be alienated or charged in any manner without the consent and agreement of both. In a given case, such consent can be made good by the order of the Court. Admittedly, there is no such order obtained from any competent Court prior to the execution of the Sale Deed. Article 1191 of the Civil Code declares that the husband is not permitted without the consent of his wife to alienate the immovable properties.

11. This Court in the case of **Shivaji Narayan Gaonkar** (supra), after considering the provisions of Article 1119, 1191 along with Article 1117 and 1121 of the Civil Code has, inter alia, held that the ownership and possession of the common properties vests in both spouses during the subsistence of the marriage. This Court has found that the legislature has imposed a 'sterner regime' vide Article 1119 and 1191 of the Civil Code which makes the consent and common agreement mandatory, for the alienation of immovable properties.

12. Mr. Sardessai, the learned Senior Counsel for the appellant submitted that the observations and the findings of this Court in the case of **Shivaji Narayan Gaonkar** (supra) in para 9 of the judgment are orbiter as this Court had found that no such substantial question of law was arising for determination in the second appeal. Thus, in the submission of the learned Senior Counsel, the observation by this Court has no binding effect. Prima facie, I am not inclined to accept the said contention. Para 7 of the said judgment shows that the only contention raised on behalf of the appellant, was that the deceased Joao who was the husband of the respondent no.3 in that case having admittedly executed the impugned Sale Deed, the same needs to be restricted to half share of said Joao in the said property. This Court in para 9 found that no such contention was raised before the Courts below and in such circumstances found that no substantial question of law arises in that regard. In other words, what this Court found was that such a contention cannot be allowed to be raised for the first time in a second appeal. Nonetheless, this Court considered the said contention on its own merits and has held that a moiety share cannot be equated to a co-ownership and the law has imposed a 'sterner regime' in Article 1191 of the Civil Code in the matter of one spouse alienating the immovable properties without the consent and common

agreement of the other. This Court in the case of **Shivaji Narayan Gaonkar** (supra), has also distinguished the judgment of the Division Bench of this Court in the case of **Primella Sanitary Products Pvt. Ltd., vs. Gurudas Vishwanath Sinai Gaitonde & Ors 2010 (6) Bom. C.R. 554** (supra). That was a case which arose essentially under Article 2177 of the Civil Code which is part of Title-III entitled "sole property and common property."

13. Article 2177 reads thus :

"Article 2177 – Disposal of specified portion of a common asset - A co-partner may not however dispose of any specific part of the common asset or thing, unless the same is assigned to him in partition; and the extinguishment of the right to the portion which is to belong to him may be delimited in terms of the law."

Prima facie, it can thus be seen that it refers to a case of a co-partner or a co-sharer while the case of a common property of the spouses is specifically governed by Article 1119 of the Civil Code.

14. The judgment of this Court in the case of **Jaganath Manerkar** (supra) is also distinguishable on facts, inasmuch as it did not arise out of any common property of the spouses as such which may be governed by Article 1119 and 1191 of the Civil Code. Prima facie, it also does not appear that there is any express or even implied consent which can be made out on the basis of the whatsapp messages or the transcription of the telephonic conversation, between the attorney of the appellant and the respondent no.3. The judgment in the case of **Syscon Consultants Private Limited** (supra) is clearly distinguishable on facts as it does not involve the common property of the spouses of a marriage governed by the regime of communion of assets.

15. The appellant in this case has sought temporary injunction on two counts, firstly, restraining the respondents from transferring, mortgaging or creating third party interest in the suit property and, secondly, from putting up any construction over the same. Inasmuch as the respondent no.2 has purportedly purchased an undivided half share, by the impugned Sale Deed, it is difficult to see as to how the respondents can possibly construct or be permitted to put up any construction on a specific portion. The learned Senior Counsel for the respondents, in all fairness, submitted that the

respondents are not intending to make any construction on the suit property.

16. Considering the fact that, prima facie, the execution of the Sale Deed is in breach of Article 1119 and 1191 of the Civil Code, in my considered view, the appellants are entitled to the injunction as prayed for.

17. In the result, the following order is passed :

ORDER

- (i) The appeal is allowed.
- (ii) The impugned order dated 12.07.2019 is hereby set aside.
- (iii) The application, exhibit D-35, filed by the petitioners is hereby allowed.
- (iv) The respondents or anybody on their behalf are hereby restrained from transferring/mortgaging or creating third party interest in the suit property and from putting up any construction in the suit property during the pendency of the suit.
- (v) It is made clear that the observations made herein are of a prima facie nature and the Trial Court shall not be influenced by the same at the trial of the suit.

- (vi) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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