

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 3 OF 2007**

Mrs. Arminda Fatima Noronha,
married to Agnelo Francisco D'Sa,
Landlady, r/o Poevaddo,
Betalbatim, Salcete, Goa.

..... Appellant

V e r s u s

1. Mr. Alirio Fatima de Piedade Noronha,
(since deceased) represented by
Amira Fatima De Piedade Noronha
Residing at G-03, Annette Beach Apartments,
Cobrawado, Calangute, Bardez-Goa.
(Amendment carried out as per order
dated 4/12/2014 in MCA no.602/2014).

2. Mr. Menino Coutinho,
(since deceased through Lrs)

A) Master Valinton Coutinho,
Aged 17 years, minor,
R/o House No.99, Anuz Nuvem,
Salcete Goa.

B) Ms. Valincia Coutinho,
Aged 7 years, minor,
R/O House No.99, Anuz Nuvem,
Salcete Goa.

(Amendment carried out as per
order dated 10/9/2009 passed in
MCA no.366/2009 in S.A. No.3/2009).

3) Mrs. Joana Coutinho,
aged 42 years, r/o H. No.99,
Anus Nuvem, Salcete, Goa.

.... Respondents.

Shri A.F. Diniz with Adv. I. Agha and Adv. K. Morajkar for the Appellant.

Shri R. G. Ramani for the Respondent.

CORAM: C. V. BHADANG, J.
Reserved on: 11th July, 2018.
Pronounced on: 11th January, 2019.

JUDGMENT :

The appellant, who is the original plaintiff, is challenging the concurrent findings of the Courts below, dismissing a suit filed by the appellant for declaration and alternatively for preemption.

2. For the sake of convenience the parties are referred to in their original capacity as plaintiff and defendants.

The plaintiff is the brother of original defendant no.1, Almira Fatima De Piedade Noronha (since deceased). Inventory Proceedings bearing no.6/1974 were instituted on the death of the father of the plaintiff and the defendant no.1 which were decided on 24/9/1975 and amongst other properties the defendant no.1 was allotted a property better known as “Bandoloi-Cantem” of village Nuvem, Salcette, Goa, which bears survey no.257/2. The defendant no.1 was ordered to pay a sum of Rs.11,319/- to the plaintiff as owelty money, which amount the defendant no.1 was unable to pay. The plaintiff did not demand the said owelty amount looking to the close

relations between the parties and the sickness of the defendant no.1.

3. According to the plaintiff, as the defendant no.1 could not pay the amount of owelty, the defendant no.1 approached her with a proposal to sell to the plaintiff half of the said property “Bandoloi-Cantem” in case he fails to pay the owelty amount on or before 31/12/1983. The defendant no.1 also represented that in the event he desires to sell the said property, first preference shall be given to the plaintiff, “ whether the owelty amount is paid or not”. Eventually the parties entered into an agreement dated 7/9/1977 (Exhibit PW.1-B). The relevant contents of the agreement may be reproduced thus:

1) The “PROSPECTIVE VENDOR”, agrees to sell one half of the said property “BANDOLOI CANTEM”, described hereinbefore, in the event the “PROSPECTIVE VENDOR”, fails to pay the said amount of Rs.11319/- plus interest at a rate of 6% per annum, to the “PROSPECTIVE PURCHASER”, on or before 31st December, 1983.

2) The 'PROSPECTIVE VENDOR", further agree that in any event, he desires to sell the said property 'BANDOLOI CANTEM', the “PROSPECTIVE PURCAHSER”, shall be given first preference, irrespective whether the said amount is paid or not, in view of the consideration that the prospective purchaser is his sister and for having not demanded immediate

payment of the said amount.

4. Further according to the plaintiff, she learnt that the defendant no.1 was intending to sell the property to one Ramnant G. Lotlikar and Gajanan Karekar and hence the plaintiff filed a civil suit bearing Regular Civil Suit No. 106/1987/A against the defendant no.1 and the said Lotlikar. The defendant no.1 filed written statement in the suit and inter alia claimed that the said Lotlikar and one other person had exploited his mental condition and got his signatures on the said sale deed, however, no consideration has been paid to the defendant no.1. Gopal Ramakant Lotlikar filed his written statement and claimed that he along with one Gajanan S. Karekar had purchased a part of the suit property having an area of 17864 square metres (which is marked as Plot "B") under a registered sale deed dated 22/1/1987 which has been registered in the office of the Sub Registrar of Salcette on 6/2/1987.

5. It appears that the plaintiff filed Special Civil Suit No.213/1987 against the defendant no.1 and Ramkant Lotlikar and Gajanan Karekar in which Mr. Lotlikar and Mr. Karekar claimed that the remaining portion of the suit property was sold by defendant no.1 to the present respondents no.2 under a registered sale deed dated 11/2/1988.

6. This led the plaintiff to file a third suit being R.C.S. No.374/2000/II (Old) R.C.S No.67/1989, out of which the present Second Appeal arises. Be that as it may, the plaintiff has withdrawn R.C.S No.106/1987 while the second suit bearing Special Civil Suit no.213/1987 was settled by virtue of the consent terms dated 7/4/1999 (Exhibit 97) between the appellant and Shri Lotlikar and Shri Karekar. Under the said consent terms, Shri Lotlikar and Shri Karekar had agreed to pay a sum of Rs.10.00 lakhs to the appellant. Eventually the said suit has been disposed of on the basis of the said consent terms.

7. The present appeal arises out of the third suit, filed by the appellant on 7/4/1989 being R.C.S No.374/2000/II (Old Special Civil Suit No.67/1989) against the respondents for the following reliefs :

(a) That the deed of sale dated 11/2/1988 registered under no.1381 in the Office of Sub-Registrar of Salcete at Margao at pages 78 to 86, of Book no.I, Volume No.55, dated 13/12/1988, as contained in “Annexure-B”, be declared as null and void and non-existent and by order deed to be cancelled.

AND/OR IN ALTERNATIVELY.

(b) That it ordered that the plaintiff has first preference

to purchase the property sold vide said “Annexure-B” and upon deposit of the sale amount in the Court, the plaintiff be declared as purchaser of the same and the sale certificate be issued in plaintiff's favour”.

8. The respondent no.1 did not contest the suit by filing any written statement.

9. The respondent nos.2 and 3 resisted the suit. It was contended that the suit does not disclose any cause of action. The same is barred by limitation as the agreement dated 7/9/1977 had to be enforced within three years from the date of its execution and also claimed, that the agreement dated 7/9/1977 is anti- dated and it was a sham and bogus document. It was denied that the appellant had any first preference to purchase the suit property.

10. On the basis of the rival pleadings the learned trial court framed the following issues :

- i) Whether plaintiff proves that sale deed dated 11/2/1988 was got executed by exercising fraud on defendant no.1?
- ii) Whether plaintiff proves that plaintiff has first right to purchase suit property?
- iii) Whether defendants 2 and 3 prove that agreement

dated 7/9/1977 between plaintiffs and defendant no.1 is a sham, fraudulent and fabricated transaction?

iv) Whether plaintiff proves that suit is filed within limitation?

v) Whether plaintiff proves that any cause of action arose for filing of the suit?

11. The appellant examined herself as PW.1. On behalf of the defendant, nos.2 and 3, the Power of Attorney holder Smt. Luiza Colaco was examined as DW.1.

12. The learned trial court answered issue nos.1, 2 and 3 in the negative and the issue nos.4 and 5 in the affirmative. In short, the learned trial court refused to accept that the suit was barred by limitation or that the suit was bad for non disclosure of cause of action. The learned trial court also refused to accept that the agreement dated 7/9/1997 was a sham, fraudulent and a fabricated document. However, the learned trial court found that the appellant had failed to prove that she had the first right to purchase the suit property and also found that she had failed to prove that the sale deed dated 11/7/1988 was executed on account of fraud practiced on the defendant no.1. In the face of the findings as above, the learned trial court dismissed the suit by a judgment and decree dated 17/12/2004. Feeling aggrieved, the appellant challenged the same before the learned District Judge in R.C.A No.8/2005.

The learned District Judge framed the following points for determination;

- i) Whether the sale deed dated 11/2/1988 has got executed by defendant no.2 by exercising fraud and taking advantage of mental and alcoholic state of the defendant no.1 and that it contains falsehood and is without consideration?
- ii) Whether the plaintiff has first right to purchase the suit property?

The learned District Judge answered both the points in the negative and dismissed the appeal by a Judgment and Decree dated 25/9/2006. That is how the appellant is before this Court.

13. It may be mentioned that the respondent nos. 1 and 2 died during the pendency of this appeal and their legal heirs have been brought on record. Incidentally the legal representative Ms. Almira Fatima who has been brought on record, as a legal representative of respondent no.1, happens to be a sister of the appellant and the respondent no.1.

14. I have heard Shri Diniz, the learned counsel for the appellant and Shri Ramani, the learned counsel for the respondents no.2 and 3. With the assistance of the learned counsel for the parties, I have gone through the record and the impugned judgment of the learned trial court, as well as the

first appellate court.

15. At the outset it may be mentioned that Shri Diniz, the learned counsel for the appellant did not press for the ground of the sale deed being invalid on account of the alleged mental condition of the defendant no.1. The claim is now essentially based on the right of 'first preference', on the basis of the agreement dated 7/9/1977 (Exhibit PW.1-B). It is submitted that Courts below were not justified in relying on the principle of preemption, in as much as the case was essentially based on the right of first preference arising out of a contract. It is submitted that preemption is distinct from a right of first preference created by a contract and Courts mistook the case of the appellant to be based on preemption (which may arise under law between co -owners). It is submitted that the case of the appellant is essentially based on the first preference arising out of a contract. It is submitted that the trial court after answering issue nos.3 to 5 in favour of the appellant, erred in dismissing the suit by erroneously importing the concept of preemption which was not called into aid by the appellant. It is submitted that the first appellate court fell into the same error and articulated one more reason while dismissing the appeal. It is submitted that the first appellate court was in error in holding that Clause 2 of the agreement (Exhibit PW.1-B) has become redundant, inasmuch as Clause no.2 does not create a right of first preference to

purchase a portion of the suit property. It is submitted that Clause nos.1 and 2 of the agreement are disjunctive and the fact that the appellant has compromised R.C.S No.213/1987 with Mr. Lotlikar and Mr. Karekar would not have any bearing on the operation of Clause 2 of the agreement.

16. On the contrary it is submitted by Shri Ramani, the learned counsel for the respondent nos.2 and 3 that Clause 2 of the agreement (Exhibit PW.1-B) is void for want of consideration under section 25 (1) of the Contract Act. The learned counsel in all fairness submitted that Clause 1 of the agreement may be relateable to section 25 (2) of the Contract Act. However, once the half portion of the suit property (admeasuring 17864 sq.mtrs, excluding the land acquired for laying of a road) was sold to Mr. Lotlikar and Mr. Karekar and the plaintiff having settled the dispute with Mr. Lotlikar and Mr. Karekar and having accepted Rs.10 lakhs towards consideration of plot "B" would not now be entitled to seek specific performance of Clause 2 of the agreement. The learned counsel, however, did not dispute that this ground was not raised either before the trial court or before the first appellate court. He, however, submitted that this being a pure question of law, which is based on the facts which are established on record, can be allowed to be raised for the first time in second appeal.

17. It is submitted that the respondents have purchased the suit property under the registered sale deed dated 11/2/1988 for a valuable consideration and the appellant would not now be entitled to the specific performance of the agreement dated 7/9/1977 (Exhibit PW.1-B). It is submitted that the relief of specific performance is discretionary in nature and the appellant is not entitled for the discretionary relief. It is submitted that in any event the case set up by the appellant was in the nature of a preemptive right which she is not entitled to enforce in the facts and circumstances of the present case.

18. I have carefully considered the rival circumstances and the submissions made.

19. The present second appeal was admitted on 12/4/2007 on the following substantial questions of law:

(i) Whether the Courts below were justified in holding that in view of the settlement of the Special Civil Suit No.213 of 1987/A between the appellant and the said Mr. Lotlikar and Mr. Karekar, in terms of the consent terms, (Exhibit 97), providing that the said suit shall be settled on payment of sum of Rs.10,00,000/- by the said Shri Lotlikar and Shri Karekar, entire claim of the appellant for first preference to purchase the suit land on the basis of the said agreement dated 7/9/1977 had been

extinguished?

(ii) Whether the Courts below were justified in coming to the conclusion that the right of first preference to purchase the suit land as a matter of first preference in terms of the said agreement dated 7/9/1977 amounted to a right of preemption?

(iii) Whether the impugned Judgment and Decree are arbitrary, perverse and illegal?

20. During the course of the hearing of the appeal the following additional substantial question of law has been framed:

i) Whether the Appellate Court misconstrued Clause 2 of the Agreement at Exhibit PW1/B whilst holding that the clause did not give an option to the Appellant to purchase a portion of the entire property, once the other portion was sold?.

21. I have heard the learned counsel for the parties on the said additional questions of law also.

22. It is undisputed that the entire suit property bearing survey no. 257/2 was allotted to the share of the respondent no.1/defendant no.1 in the Inventory Proceedings and the respondent no.1 was liable to pay an amount

of Rs.11,319/- towards owelty to the appellant/plaintiff which he was unable to pay. The agreement (Exhibit PW.1-B) can be said to be in two parts. Under Clause no.1 of the agreement, the respondent no.1 (prospective vendor) had agreed to sell one half of the said property "Bondoloi Cantem" to the appellant (the prospective purchaser), if the respondent no.1 fails to pay the amount of owelty, along with interest @ 6% p.a. on or before 31/12/1983. Under Clause 2, the respondent no.1 had agreed that in the event he desires to sale the said property " Bondoloi Cantem", the appellant shall be given first preference "irrespective, whether the owelty amount is paid or not" and this is in view of the consideration that the appellant was his sister and further on account of the fact that the appellant had not demanded the immediate payment of the owelty amount.

23. Indisputably, a portion of the property was acquired by the State for the purpose of laying a road and as a result thereof the property was divided into two portions. Indisputably the plot "B" admeasuring 17864 sq.mtrs. was sold by the defendant no.1 to Mr. Lotlikar and Karekar under a sale deed dated 22/1/1987 which was registered on 6/2/1987 and a suit in respect thereof being R.C.S No.213/1987 has been settled by the parties on the basis of consent terms, under which the appellant has received an amount of Rs.10.00 lakhs towards plot "B". It is further a matter of record that the

respondent nos.2 and 3 have purportedly purchased the remaining portion of the property under a registered sale deed dated 11/2/1988 which is challenged in this appeal. The appellant is also seeking a declaration that the sale deed be declared as null and void and for cancellation of the same and/or in the alternative to hold that the appellant has the first preference to purchase the suit property upon deposit of the sale amount in Court and the appellant be declared a purchaser and a sale certificate be issued in her favour. The question is whether the Courts below were justified in refusing to grant such a relief? I find that the answer has to be in the affirmative.

24. The learned counsel for the appellant is right in contending that Clause 1 and 2 of the agreement are disjunctive and independent of each other. The suit filed by the appellant would not be relateable to Clause 1 of the agreement, by which the respondent no.1 had agreed to sell one half of the suit property to the appellant, if he fails to pay the owelty amount along with interest as agreed, on or before 31/12/1983. This is because in that event the appellant would have been required to file a suit for specific performance of the agreement as contained in Clause 1 of the agreement. The suit filed by the appellant was essentially for a declaration and alternatively for “preemption”. The material contention on behalf of the appellant is that the courts below have misdirected themselves by proceeding

on the footing that the claim was for preemption as may be applicable in law or some statutory provision. It is submitted that the claim was essentially for a right of preferential purchase on the basis of a contract. It would, therefore be necessary to see whether such a right can be enforced on the basis of Clause (2) of the agreement. In this context the substantial question of law at serial no.1 and the additional substantial question of law framed can be taken together. It is trite that when a right of preferential purchase is claimed on the basis of a contract, the contract has to be strictly construed to find out whether any such right is spelt out of the terms agreed by the parties. As noticed earlier, the first part related to an agreement between the respondent no.1 and the appellant whereunder the respondent no.1 had agreed to sell half of the suit property in favour of the appellant in the event he fails to pay the amount of owelty along with interest as agreed by a specified date. Under the second part, which is relevant for the purpose, the respondent no.1, irrespective of the fact whether the owelty is paid or not, had agreed to give first preference to the appellant in the event the respondent no.1 intends to sell the property. The consideration for giving such first preference is that the appellant is the sister of the first respondent and she had not demanded immediate payment of the owelty amount. In any event, such a consideration of the appellant being closely related to the respondent no.1 and she having been magnanimous enough, not to have demanded immediate payment of the

owelty amount cannot be said to be a valuable consideration which can validate any such contract. The learned counsel for the respondent in my considered view is right that the said agreement would be without consideration and would be void as it is not registered. Having regard to the fact that all the relevant facts are already on record, a pure question of law can be allowed to be raised even at this stage. That apart, a careful perusal of Clause 2 of the agreement would show that the right of first preference was in respect of the entire suit property. Admittedly, a portion of the suit property was acquired by the government for laying a road which had the effect of dividing the property in two parts. It has come on record that Plot no.B was admeasuring 17,864 sq.mtrs and the other part was a little over 18,000 sq.mtrs. Be that as it may, it is a matter of record that the respondent nos.2 and 3 had purchased the plot 'B' in respect of which civil suit no.213/1987 was filed by the appellant which was subsequently settled as per the consent terms dated 7/4/1999 (Exhibit 19) between the appellant, Shri Lotlikar and Shri Karekar. It is further undisputed that under the said consent terms, the appellant had received Rs.10.00 lakhs from Mr. Lotlikar and Mr. Karekar. Thus Clause no.2 of the agreement, cannot now be enforced in its letter and spirit, as approximately half of the suit property has already been purchased by the respondent nos.2 and 3 and that dispute has been settled by the first appellant by accepting the amount of Rs.10.00 lakhs. In my considered view,

the view taken by the first appellate court that the said clause did not give an option to purchase the portion of the other property, once the other portion was sold, is a plausible view. It is well settled that unless and until the finding of fact recorded by the Courts below is perverse, the same does not amount to any substantial question of law as such. In the absence of the finding being perverse and it being a plausible view, it is essentially a finding of fact which does not partake of the nature of a substantial question of law. It needs to be stressed that a right of 'preferential purchase', which is claimed under a contract as in the present case (which would be akin to a right of preemption governed by customary law or statutory provisions) is a weak right and where such a right of preferential purchase (which is sometimes called a right of first refusal) is claimed on the basis of a contract, the contract should be valid, binding and enforceable in law and further should be clear and has to be strictly construed. If the aforesaid test is applied, the ultimate finding recorded by the Courts below of refusing to decree the suit in my considered view does not require interference. In such circumstances, the substantial question of law at serial no.(i) is answered in the affirmative and the additional substantial question of law framed, is answered in the negative.

25. In so far as the substantial question of law at serial no.(ii) is concerned, it is true that the courts have considered the issue on the basis of a right of

preemption. As noticed earlier, a preemption may be under a customary law or a statutory provision. The right of first preferential purchase which is claimed on the basis of the contract as in the present case, would be akin to a preemption in law. Even assuming that strictly speaking, the two rights cannot be equated, no different conclusion can arise in the matter. This is because even after examining the claim of the appellant on the basis of a right of preferential purchase on the basis of a contract, the appellant in my view is not entitled to a decree as prayed. Thus the ultimate conclusion, about dismissal of the suit, in my considered view, does not need interference.

26. The appeal is without any merit and it is accordingly dismissed with no order as to costs. Decree be drawn accordingly.

C. V. BHADANG, J.

Ap/