

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO.8 OF 2020**

- 1 Mrs. Olga D'Souza,
D/o. Querobino Godinho,
58 years of age.
- 2 Mr. Agnelo N. D'Souza,
s/o Jose Mario Eleutiro
D'Souza, 60 years of age,
both Indian Nationals,
Both r/o. H.No.1622, Saipem,
Candolim, Bardez, Goa.
- 3 Mr. John Joseph Francisco
Godinho, S/o. Querobino
Godinho, 60 years of age.
- 4 Mrs. Elizabeth Godinho,
w/o. Joh Joseph Francisco
Godinho, 56 years of age, both
Indian Nationals, Both r/o. C-F-
2, Colmorod Residential
Complex, Navelim, Salcete, Goa.
- 5 Mr. Gabriel Anthony N.
D'Souza, S/o. Querobina
Godinho, 51 years of age
- 6 Mrs. Margaret Joanita Godinho,
w/o. Gabriel Anthony Godinho,
46 years of age, both Indian
Nationals, Both r/o. H.No.452,
Sanglem Vaddo, Majorda,
Salcete, Goa.
- 7 Mr. Stanislaus Luis Godinho,
s/o. Querobina Godinho, 51
years of age.
- 8 Mrs. Jacinto Godinho,
w/o. Stanislaus Luis Godinho,
46 years of age, both Indian
Nationals, Both R/o. House
No.1622, Saipem, Candolim,

Bardez, Goa.

- 9 Sr. Lilia Braganza,
d/o. late Heremet Francisco
Xavier Braganca, 62 years of
age, Indian National,
R/o. Premanjali Convent,
Sisters of Charity, H.No.4-131,
Opp. Welkin Convergence,
Mandal Gandimaisama,
Medchal District, D.
Pochampally 50043, Telengana.

(Appellant No.3,4,5,6,7,8 & 9
are represented by their
attorney the appellant no.1)

....Appellants

Versus

- 1 M/s. Nitin Developers Pvt.
Ltd., A company incorporated
under the Companies Act,
Having its office at La Casa
Grande, 1st floor, St. Marry's
Colony, Miramar, Goa.
- 2 Mr. Nitin Saraf,
S/o. Ashok Kumar Saraf,
43 years of age, Director of
M/s. Nitin Developers Pvt. Ltd.
La Casa Grande, 2nd Floor, St.
Mary's Colony, Miramar, Goa.
- 3 Mrs. Poonam Kusshal Bagadia,
w/o. Kausshal Kanhayalal
Bagadia, 44 years of age,
Director of M/s. Nitin
Developers Pvt. Ltd., La Casa
Grande, 2nd Floor, St. Mary's
Colony, Miramar, Goa.
- 4 Mr. Kausshal Kanhayalal
Bagadia , s/o. Kanhayalal
Bagadia, 47 years of age,
Director of M/s. Nitin

- Developers Pvt. Ltd., La Casa Grande, 2nd Floor, St. Mary's Colony, Miramar, Goa.
- 5 Mr. Ashok Kumar
Shiwbhagwan Saraf, S/o.
Shiwbhagwan Sarf, 54 years of age, Director of M/s. Nitin Developers Pvt. Ltd., La Casa Grande, 2nd Floor, St. Mary's Colony, Miramar, Goa.
 - 6 Ms. Atima Saraf, D/o. Ashok Kumar Saraf, 30 years of age, Director of M/s. Nitin Developers Pvt. Ltd., La Casa Grande, 2nd Floor, St. Mary's Colony, Miramar, Goa.
 - 7 Mr. Jose Lourenco Braganca alias Lawrence Braganca, alias Lowrence Braganca, S/o. Heremete Francisco Xavier Braganca, 65 years of age.
 - 8 Mrs. Lucy de Souza alias Lucy Braganza, w/o. Jose Lourenco Braganca, 58 years of age, both Indian Nationals, R/o. H.No.1269/A, Anna Vaddo, Behind Godwin Hotel, Candolim, Goa.
 - 9 Mrs. Valentine Hazel Branganza alias Valentine Gomes, D/o late Sebastiao Apolinario Braganza, 38 years of age.
 - 10 Mr. Nevis Francisco Gomes, S/o. Luis Augusto Gomes, 42 years of age, both Indian Nationals, R/o. H.No.108/A, Falvaddo, Cansaulim, South Goa, Salcete, Goa.

11 Mrs. Valencia Braganza
 D'Costa, D/o. late Sebastiao
 Apolinario Braganza, 32 years
 of age, Mr. William Wesly
 D'Costa, s/o. Arzilio D'Costa,
 28 years of age, both Indian
 Nationals, R/o. H.No.197/4,
 Arzfil Cottage, Adao Vaddo,
 Majorda, Salcete, Goa.

....Respondents

Shri J.E. Coelho Pereira, Senior Advocate with Shri V. Pavithran, Advocate
 for the Appellants.

Shri P. Vernekar, Advocate for the Respondents No.1 to 6.

Coram: - DAMA SESHADRI NAIDU, J.

Reserved on : 21st July 2020

Pronounced on : 23rd July 2020

ORAL JUDGMENT:

Heard. Admit. The learned counsel for the respondents no.1 to 6
 waives service.

I. Introduction:

One group of persons purchases a piece of property from another
 group. Yet another group comes forward and claims co-ownership. By then,
 the group that purchased the property started construction and went far
 ahead in that process. The group claiming co-ownership wanted from the
 trial Court an *ad interim* injunction; it was to stop the development on the
 suit property. The trial Court refused it. So this Miscellaneous Appeal.

2. Should this Court interfere with the judicial discretion exercised—
 or refused to be exercised in a particular way—by the trial Court?

II. Facts:

3. All the 11 appellants are the plaintiffs in Special Civil Suit No.62/2019/B before the Senior Civil Judge's Case, Mapusa, Goa. They have sued for declaration and injunction. The respondents are the defendants. Of those respondents, 1 to 6 are the purchasers, and 7 to 12 are the vendors. I use the appellations as were used before the trial Court.

(a) Tracing of Title:

4. Both the plaintiffs and the defendants accept that Dorothy Braganza was the mother and Sebastiao A. Braganza (since died) and Jose Lawrence Braganza are her sons. The widowed mother and her two sons purchased the suit property through a registered sale deed, dt.06.05.1975. Dorothy had four daughters and three sons, though.

5. The sale deed, however, reflects that Dorothy had the right of usufruct during her life-time, her two sons remaining the absolute owners. Thus, after Dorothy's death, claiming to be the absolute owners, the children of Sebastiao and Jose Lawrence along with his wife sold the property to the respondents 1 to 6 March 2018. Before that, in February 2018, the branches of Sebastiao and Jose Lawrence had a gazette notification published, declaring that besides them "there does not exist any other person or persons or heirs" to Dorothy.

6. Though the sale took place in March 2018, the plaintiffs assert that they came to know about this sale in March 2019—a year later. So, one of them, the first plaintiff, issued a legal notice to the defendants 7 to 12 claiming to be a co-owner along with others. True, In the same month, those defendants replied, denying the plaintiffs' claim of co-ownership. In August 2019, the plaintiffs sued.

(b) The Reliefs the Plaintiffs Sought:

To declare

- (a) To declare that the suit sale deed, dt.23.03.2018, is illegal, bad in law, and so on;
- (b) to declare that the suit deed of inheritance of succession, dt.08.02.2018, is illegal, bad in law, and so on;
- (c) to set aside mutation proceedings . . . in Forms I and XIV;
- (d) to restrain defendants 1 to 6 and others from carrying out any construction on or development in the suit property;
- (e) to restrain defendants 1 to 6 and others from in any manner changing the nature of the property;
- (f) to restrain defendants 1 to 6 and others from in any manner creating third party rights over the suit property;
- (g) to restrain defendants 1 to 6 and others from entering into any agreements/instruments for sale of built-up area/shops/flats/apartments in the suit property;
- (h) to direct, by a mandatory injunction, the defendants 1 to 6 and others “to demolish and or remove the construction carried out in the suit property and restore the land beneath the same to its original condition.”

(c) Interlocutory Application:

7. Besides seeking the above reliefs, the plaintiffs applied under Order 39, Rule 1 of the Civil Procedure Code for an *ad interim* injunction. The interim reliefs the plaintiffs sought are these: Pending suit, the defendants 1 to 6 should not (a) carry out any construction, (b) change the nature of the suit property, (c) create third party rights over the suit property, (d) enter into “any agreements/instruments for sale of built-up areas/ shops/ flats/ apartments in the suit property”. Relief (e), the last one, is the mandatory interim direction that the defendants 1 to 6 should “demolish and or remove

the construction carried out in the suit property and restore the land . . . to its original condition.”

III. The Trial Court’s Verdict:

8. The trial Court converted into issues the three cardinal common law principles that involve in any adjudication for an interim injunction: (i) Have the plaintiffs established a *prima facie* case? (b) does the balance of convenience lie in their favour? and (c) will they suffer irreparable injury if no injunction is granted. Of course, the trial Court, in the last issue, also considered whether money compensates the plaintiffs’ loss if ever established.

(a) Trial Court’s Findings:

9. Through its Order, dt. 20 December 2019, the trial Court has held thus:

(a) Though the plaintiffs have heavily relied on the original sale deed, dt.6.5.1975, they have not produced it. So adverse inference must be drawn against them.

(b) The plaintiffs issued a legal notice in March 2019 but waited till recently to file the suit. By then, the defendants 1 to 6 spent substantial amounts and raised structures. These defendants also seem to be the *bona fide* purchasers. With no *prima facie* title in the plaintiffs’ favour, it is imprudent for the Court to injunct those defendants.

(c) The plaintiffs would not suffer any irreparable injury, for money could always compensate their loss if any. On the contrary, the defendants 1 to 6, as the builders, may suffer enormous loss having already spent money.

10. Heard Shri J.E. Coelho Pereira, the learned Senior Counsel for the petitioners/plaintiffs, and Shri Pankaj Vernekar, the learned counsel for the

respondents/defendants 1 to 6. Despite notice, none appears for the respondents 7 to 12, the vendors.

11. Indeed, both the learned counsel have argued the matter threadbare. Yet I do not wish to multiply the pages by reproducing those arguments. I will, however, refer to them wherever I reckon it appropriate.

IV. Discussion:

Judicial Discretion and Interference:

12. This is a miscellaneous appeal against the trial Court's order refusing *ad interim* injunction. By that refusal, the trial Court has exercised its judicial discretion in a particular way. The plaintiffs, however, complain that the trial Court ought to have exercised its discretion in another way—in their favour. Can this Court interfere? It can. But the question is, should this Court interfere?

13. In *Wander Ltd. v. Antox India (P) Ltd.*, 1990 Supp SCC 727, the Supreme Court has noted, on facts, that the appeal before the Division Bench of High Court was against the Single Judge's exercising discretion in granting an *ad interim* injunction. In such appeals, as the Supreme Court stresses, the appellate court will not interfere with the exercise of discretion by the primary court and substitute its own discretion unless the primary court has exercised the discretion arbitrarily, capriciously, or perversely. It has further noted that if the primary court has ignored the settled principles of law regulating grant or refusal of interlocutory injunctions, it may provide the appellate court with a ground to interfere, but not otherwise. An appeal against exercise of discretion is said to be an appeal on principle.

14. *Wander Ltd.*, is particular in its observation that the appellate court will not reassess the material and conclude differently if the trial court's conclusion was "reasonably possible" based on the available material.

The appellate court would not normally be justified in interfering with the exercise of discretion under appeal solely on the grounds that if it had considered the matter at the trial stage, it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and judicially, according to *Wander Ltd.*, the appellate court's taking a different view may not justify interference with the trial court's exercise of discretion.

15. So let us see whether the impugned order suffers from any decisional deviance pointed out in *Wander Ltd.*

(b) The Document:

16. The *raison d'être* for this litigation is the sale deed, dt.6.5.1975. This sale deed has three purchasers: Dorothy Braganza, Sebastiao A. Braganza (since died) and Jose Lawrence Braganza; that is, the mother and her two sons. Indisputably, Dorothy had four daughters and three sons. The plaintiffs are the children of Dorothy's eldest daughter: late Edociana Braganza Godinho.

(b1) Non-production of the Document:

17. The plaintiffs pleaded about the 1975 sale deed; in fact, they founded their right on that document. But they have not produced it. The defendants attacked the plaintiffs on their failure to produce the documents. And that persuaded the trial Court to conclude that the plaintiffs' non-production may have been deliberate, for its production would have adversely affected their case.

18. In this regard, I may note that the parties were at an interlocutory stage, and the document relates to 1975. Along with their reply to the plaintiffs' notice, the defendants 7 to 12 sent a copy of that sale deed to the plaintiffs. That was a copy of a copy—as the plaintiffs contend. All is said and done, I see no occasion for the trial Court to draw any

adverse inference against the plaintiffs, for the document is otherwise available on record.

19. True, Order 7, Rule 14 (1) of CPC requires the plaintiffs to produce in Court the documents they rely on when they present the plaint. And sub-rule (2) allows them to give the details of any document if it is not in their possession. We need not delve deep into that aspect, because the defendants themselves produced a certified copy of this sale deed before the trial Court. In that backdrop, I may note that the trial Court could have *prima facie* ruled on the nature of that document. Both parties do agree that this document is the fulcrum for the case. So, I reckon, the trial Court's observations on the plaintiffs' suppressing a document and so on are misplaced or premature—at least.

20. Besides, the legal proposition on the question of fraud as articulated in *S.P. Chengalvaraya Naidu v. Jagannath*, (1994) 1 SCC 1, relied on by the defendants, does not apply here. I reckon, to assess the alleged suppression and non-production of the document in this case, the time is not ripe; it is premature.

21. True, in *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*, (1995) 5 SCC 545, the Supreme Court has set out the circumstances which may disentitle a suit to an equitable remedy. Under Order 39 of the Code of Civil Procedure, the Court's jurisdiction to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Unmistakable is the judicial assertion in *Gujarat Bottling Co. Ltd.* But the question is, does that proposition apply here? I am afraid, not. We should not make fraud out of a document referred to but not produced by one party, when the

document is very much available on record, albeit produced by another party, for scrutiny. At any rate, an allegation of fraud needs firm proof to carry home that allegation during trial.

(b2) The Nature of the 1975 Sale Deed:

22. The plaintiffs claim that Dorothy was a co-owner and that, on her death, all her other children and their descendants have succeeded to her estate. In this context, Shri Pereria argues that the 1975 sale deed declares at the threshold that it was an absolute sale in favour of all the three purchasers. Absent any reference to individual contribution of consideration, we should presume that all the three purchasers have contributed equally. That accepted, a sale deed could not have limited one of the co-owner's right to a mere life estate—a usufructuary right.

23. On the other hand, Shri Vernekar for the respondents 1 to 6 has argued that the sale deed clearly delineated the respective rights of the mother and her two sons—though they were classed as co-purchasers. According to him, the Portuguese Civil Code does recognise the usufructuary right in the property. Besides, Shri Vernekar has also contended that the sale deed is not a unilateral document; even the purchasers signed it. It signifies, he stresses, that Dorothy did accept her right only usufruct during her life-time.

24. Let us see the recitals in the 1975 Sale Deed: Vendor of one part and “(1) Dorothy Fraganza ..., (2) Mr. Sebastiao A. Fraganza . . . (3) Mr. Lawrence Fraganza . . . (hereinafter referred to as the Purchasers) of the other part.” The deed recites that “the Vendor has agreed with the Purchasers to sell absolutely to the latter the said property, for the price of . . . and Purchasers have agreed to purchase the same”

25. Under the sale covenants, we find the first recital to the effect that “the Vendor, as the beneficial owner, does hereby convey, transfer and

assign, by way of sale, unto and to the use of Purchasers, free from encumbrances, all that property shown and fully described . . . in favour of “the Purchasers Dorothy Frgranza being the life-time usufruct (usufructo vitalieieo) and in favour of the Purchasers Sebastiano Fragranza and Lawrence Fragranza, the suit property without usufruct (...) with all the belongings and contents there with all the rights, title, interest, claim and other appurtenances and privileges along with . . .”

26. In the next paragraph, the recital reads, “and that the Vendor has already delivered to the Purchasers the possession of the said property to peacefully use and enjoy the same as their own property without any hindrance or obstruction, interruption, claim or demand from the Vendor . . .”

27. To put the defendants’ argument in perspective, I may say they treat the sale deed, as their learned counsel puts it, a “composite or compendious” deed. According to them, it is not only a sale deed between the vendor and the purchasers but also a deed of arrangement determining the rights between the purchasers: one purchaser should have a life estate and the other two absolute estate once that life estate extinguishes. For the fact remains, as they stress, the vendor on the one hand and the purchasers on the other, too, have signed the document.

28. On the contrary, the Plaintiffs would have the Court believe that this sale deed of 1975 attracts the statutory mandate as incorporated under Section 11 of the Transfer of Property Act: On a transfer of property, if interest is created absolutely in the transferee’s favour, the transfer deed can contain no direction that the transferee should enjoy the property only in a particular manner. The transferee is “entitled to receive and dispose of such interest as if there were no such direction.”

29. Indeed, the 1975 sale deed does require judicial scrutiny. But that is a matter for trial. So is the impact of Articles 2197, 2207, and 2241, if applicable, of the Portuguese Civil Code.

30. Indeed, the defendants 1 to 6 have relied on this Court's judgment in *Fransisco de Rosario Ferraro v. Panduranga Sivaram*, 1998 (1) Goa LT 138. In that, through testamentary disposition, one person got the "property as usufruct during her life-time." That right of usufruct undisputed, this Court has referred to Portuguese Civil Code 1867 and held that a person holding usufruct could only create rights in favour of third parties during her life-time and not beyond that. Here, the devolution is through a sale deed, and there are three purchasers, one enjoying the usufruct and the other two absolute ownership—of course, once the usufruct ends. So this document requires deeper legal analysis, and the Civil Code's recognition of a species of right does not mean that this document only reflects that right.

(c) Have the Plaintiffs approached the Court belatedly?

31. Delay defeats equity. And no one can dispute injunction is an equitable remedy. Here, does the plaintiffs' conduct suffer from delay or laches?

32. If we consider the case's chronology, the defendants 7 to 12 had the 'Succession Notification' published in the Official Gazette of Government of Goa in February 2018. If we may have a word about this succession notification, legally it is person-specific, not property-specific. But the Notification reads as if the defendants 7 to 12 alone were Dorothy's heirs and successors. Is it an anomaly that affects the merits of the matter? Granted, it is a matter for trial, but not for our conjecture. The defendants 7 to 12 sold the property in March 2018. That was through a registered instrument. The plaintiffs notified their claim over the property

to the defendants 7 to 12 in March 2019—a year later. Of course, the defendants 7 to 12 swiftly replied in the same month. As seen from the record, the defendants 1 to 6, as the purchasers, obtained all the civil permissions in April, May, or thereabouts of 2019. They must have started the construction, say, from June or July 2019. The plaintiffs filed the suit in August 2019.

33. In the interlocutory application, the trial Court rendered its Order on 20 December 2019. In that Order, it has noted that the purchasers have had their construction already at an advanced stage. From the photograph the defendants 1 to 6 placed before the Court, I notice that the construction is massive, and the fabric of the building is substantially completed.

34. According to the defendants 1 to 6, the plaintiffs waited over a year to respond. Though the Gazette Notification was in February 2018 and the sale deed in March of the same year, the plaintiffs issued the legal notice to the defendants 7 to 12 only a year later. As the Gazette Notification and the sale deed provided constructive notice to the plaintiffs, they responded rather late. So delay or latches.

35. I agree that there is an element of delay, but that does not amount to latches—bordering on the abandonment of rights. In about two months after the commencement of the construction, the plaintiffs filed the suit.

(d) Are the Defendants *bona fide* purchasers?

(e) Would the money be an adequate remedy for the injury the plaintiffs may suffer if they were successful in the suit?

36. In a purchase allegedly from only a few of many co-owners, the concept of *bona fide* purchasers does not arise; on the converse, what applies is, perhaps, *caveat emptor*: buyer beware. As to monetary compensation for the likely legal injury the plaintiffs suffer, I reckon it depends on facts and circumstances. It is premature to rule on it; let the trial determine it.

V. Conclusion:

37. I hold that the trial Court has exercised its judicial discretion, and I see no legal infirmity in that exercise of discretion any shortcomings as pointed by *Wander Ltd.* So I am disinclined to interfere with the impugned Order, dt.20.12.2019, passed by the Court of the Senior Civil Judge, 'B' Court, at Mapusa, Goa, in Special Civil Suit No.62/2019/B.

38. That said, I also hold that the plaintiffs were denied an *ad interim* injunction based on equitable considerations—not on merits, though. Therefore, it is eminently a fit case that attracts the doctrine of *lis pendens* as statutorily recognised under Section 52 of the Transfer of Property Act. That means all the developments over the suit property shall be subject to the outcome of the suit. I may stress the obvious and further hold that whatever observations either the trial Court made in the impugned order or I made in this disposition, they are *prima face* and do not affect the case of either party to the suit.

VI Result:

39. Subject to the observations made above, I dismiss the Appeal From Order No.8 of 2020, as warranting no interference.

No order on costs.

DAMA SESHADRI NAIDU, J.

NH