IN THE HIGH COURT OF BOMBVAY AT GOA

APPEAL FROM ORDER NO.47 OF 2018

Mr. P.P. Kuriakose …. Appellant

V/s

Smt. Shubhalaxmi v. Gaitonde & Ors. …. Respondents

Shri R.G. Ramani, Advocate for the Appellant.
Shri Sudin M.S. Usgaonkar, Senior Advocate with Ms. T. Kamat Ghanekar, Advocate for the Respondents No.2 to 7.

Coram: DAMA SESHADRI NAIDU, J.

DATE: 21st January 2020

ORAL ORDER:

Facts:

The appellant seems to have entered into an agreement of sale with the respondents concerning the share of the respondents in the inherited property. To enforce that agreement of sale, he filed Special Civil Suit No.6/2017/A before the Civil Judge, Senior Division, Ponda. It was against the respondents.

2. The appellant sought relief of specific performance and perpetual injunction. In that suit, the appellant has filed an interlocutory application under Order 39 Rule 1 of CPC, seeking an *ad interim* injunction. He wanted the Court to restrain these respondents from creating third party interest over the property. The trial Court, through its order, dated 23.07.2018, dismissed that application. Aggrieved, the

appellant has filed this appeal against order.

Submissions:

Appellant:

3. Shri R.G. Ramani, the learned counsel for the appellant, agrees the appellant has been protected under Section 52 of the Transfer of Property Act. But, according to him, in view of the peculiarities of this case, the appellants should have the additional protection of an injunction under Order 39 Rule 1 of CPC. To support his contention, he has argued that the Court can travel beyond the legislative mandate under Section 52 of the Transfer of Property Act and provide an ad interim protection.

4. Shri Ramani has, in this regard, relied on the judgment of this Court in *Prakash Gobindram Ahuja v. Ganesh Pandharinath Dhonde*[1]. He has also taken me through the impugned order to contend that Section 17 of Goa, Succession, Special Notaries and Inventory Proceedings Act, 2012, does not in any way bar the transaction including conveyance of the share in the jointly inherited property. So he has urged the Court to set aside the impugned order and provide the interim protection as prayed for.

Respondents:

5. On the other hand, Shri Sudin Usgaonkar, the learned Senior Counsel for the respondents, has submitted that the impugned order is unassailable. According to him, it brooks no contradiction that no person

1 (2016) 6 Bom CR 262

or company, even by gift, convey a share in the inherited, joint property unless it has been demarcated and divided from the rest through inventory proceedings. To support his contention, Shri Usgaonkar has drawn my attention to Article 2177 of the Civil Code, which seems to have been impliedly repealed, and under Section 17 of the New Act, that is the Goa, Succession, Special Notaries and Inventory Proceedings Act, 2012. To support his contention, Shri Usgaonkar has relied on *Jose Antonio Philip Pascoal da Piedade v. Joao Luis Laurente dos Milagres Miranda.*[2]

6. In this context, Shri Usgaonkar stresses that based on the above judgment, this Court later on has reiterated the same concept of indivisible nature of the inherited property. Appreciably, the learned Senior Counsel has also brought to my notice the Supreme Court's judgment in *Syscon Consultants Private Limited v. Primella Sanitary Products Private Ltd.*[3], which renders a contrary opinion. Trying to explain that judgment away, Shri Usgaonkar has contended that the Supreme Court in that judgment has ruled that a joint owner can sell his share in terms of Section 44 of the Transfer of Property At. According to Shri Usgaonkar, the new Act is a code in itself, and the rights of the parties should be determined based on that new Act alone. Thus, he has urged the Court not to interfere with the impugned order, especially, using its supervisory power under Article 227 of the Constitution of India.

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2 1999 (1) Goa L.T. 77

3 (2016) 10 SCC 353

Discussion:

7. Indeed, the facts are not in dispute. The respondents have agreed to convey their share in the inherited property. The agreement also requires the respondents to institute inventory proceedings, get the property divided, and then effect the conveyance. At any rate, in the course of time, the respondents have reneged on their promise. So the appellant wanted to enforce his right in the agreement. For that, he sued the respondents for specific performance. In the Civil Suit, though he has sought many reliefs, we confine ourselves to the interim injunction. That interim injunction concerns third party interest. In fact, the relief the appellant sought reads as under:

> (c) For a decree of permanent injunction restraining the defendants, jointly or any one or more of them severally, their attorneys, servants and agents from in any manner selling, agreeing to sell/selling mortgaging, leasing to any third party or creating any third party right, title and/or interest in the share of the defendants or any part thereof in the suit property bearing new survey nos.216/0. 217/0, 218/0, 219/0, 230/0 and 231/0 of village Betoda, taluka Ponda, Goa.
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> (d) *Pending the hearing* and final disposal of the suit the defendants, jointly or any one or more of them severally, their attorneys, servants and agents be restrained *from in any manner selling, agreeing to sell/selling mortgaging, leasing to any third party, or creating any third party right, title and/or interest in the share of the defendants or any part thereof in the suit property* bearing new survey nos.216/0. 217/0, 218/0, 219/0, 230/0 and 231/0 of village Betoda, taluka Ponda, Goa.
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> (italics supplied)

8. The trial Court, in its order dated 23.07.2018, has relied on Section 17 of the new Act, besides Section 3 of the Transfer of Property Act. Thus relying, it has held that the very agreement is void. So it has

ruled that the true owners should not be restrained from enjoying their property in any manner.

9. To appreciate the controversy, we may examine the statutory provisions under the then Civil Code in Goa as well as the new Act. Shri Usgaonkar has submitted that both the provisions, that is Article 2177 of the Old Act and Section 17 of the New Act, are in para materia. It is profitable for us to extract both the provisions, which read thus:

> Article 2177: It is not lawful to a co-owner, however, *to dispose a specific part of the property held in indivision, without the same being allotted to him in the partition;* and a transfer of the right, which he has to the share belonging to him, may be restricted in accordance with the law.

Section 17 of the Goa, Succession, Special Notaries and Inventory Proceedings Act, 2012:

> 17. *Consequences of transfer of specific assets of inheritance*—
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> (1) A co-heir is not entitled to dispose of *any specific asset of the inheritance or part of such an asset* to a stranger *until and unless the said asset or part thereof is allotted to him in the partition.* Any such transfer, if made, shall be inoperative and void.
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> (2) Where, however, a co-heir *transfers his undivided right to the inheritance to a stranger, the transfer shall be subject to the right of pre-emption.*

10. Under Article 2177, the old provision, a co-owner could not dispose of "a specific part" of the property held in indivision until it was allotted to him in the partition. But the transfer of his right to the share stood restricted "in accordance with the law." In Section 17 of the Goa, Succession, Special Notaries and Inventory Proceedings Act, 2012, this restriction has been made explicit. It provides for the "consequences of

transfer of specific assets of inheritance." A co-heir cannot dispose of "any specific asset of the inheritance or part of such asset" to a stranger "until and unless the asset or part thereof" is allotted to him in the partition. It declares that "any such transfer shall be inoperative and void." But subsection (2) provides for an exception. It allows the co-heir to "transfer his undivided right to the inheritance to a stranger." That transfer, however, must be subject to the other co-heirs' right of pre-emption.

11. As the old provision already stands interpreted, let us refer to the judicial pronouncements the respondents have relied on. In *Jose Antonio Philip*, the facts disclose that the donor gifted "three specific properties" while those three properties continued to be part of the estate left behind by the common ancestor. In that context, the Court interpreted Article 2177 Article 2177 of the Portuguese Civil Code and held that on the day the gift deed was executed, the donor could not have owned those three properties exclusively by herself.

12. In *Syscon Consultants*, the facts are convoluted; we need not set them out. Suffice if we note that the appellant argued that Article 2177 of the Portuguese Civil Code, 1867, absolutely bars transfer of any portion of a joint property. In answer, the Supreme Court has held that "Article 2177 does not prohibit alienation of undivided interest, which is in tune with the principle underlying Section 44 of the Transfer of Property Act,

1882."

13. According to Shri Usgaonkar, the Supreme Court ought not to have decided the issue—that is, whether a person having a share in an inherited property could alienate it without any inventory proceedings—based on Section 44 of the Transfer of Property Act. He stresses that Article 2177 differs from Section 44 of the Transfer of Property Act. I reckon it is not within my province to question the precedential position as emanates from the Supreme Court; Article 141 of the Constitution of India bars it.

14. That apart, *Syscon Consultants* has examined has examined both Article 2177 and Section 44 of the TP Act; it has likened former with the latter. Contrary to the respondents' contention, *Syscon Consultants* has not decided the issue solely relying on Section 44 of the TP Act.

15. At any rate, it is well settled proposition of law that the right to alienate property is an essential component of the right to property. And that right cannot be denied by implication. To my mind, neither Article 2177 of the old Act or Section 17 of the new Act contains any such prohibition in express terms—not even by implication.

16. After surveying almost the entire case law available on the doctrine of *lis pendens*, the Division Bench in *Prakash Gobindram Ahuja*, a judgment of immense industry and erudition, has set out how Section 52 of the TP Act differs from Order 39, Rules 1 & 2 of CPC. *Prakash*

Gobindram Ahuja holds that Section 52, crystalising the principle of *lis pendens*, neither restrains the party from alienating the property, nor renders "the sale *ipso facto* or *ipso jure* illegal or void." That is, it does not make the sale ineffective, much less void *ab initio*. It only makes the alienation subservient to the court's decision. As against it, the object of Order XXXIX Rules 1 and 2 CPC is to totally restrain a party, pending the litigation, from creating any third-party interests in the suit property. It is to ensure that the suit property remains in the same condition as it had been when the suit was filed. Thus, the object of Order XXXIX Rule 1 and 2 CPC, under which an order of injunction is passed, totally differs from that of Section 52 of the TP Act.

17. Here, the respondents have not sold the property; on the contrary, they have only agreed to sell the property. And they agreed to sell their interest in the property, rather than the property by any physical demarcation. Short of sale or delivery of property as a matter of part performance under a contract, the owner cannot be denied through a blanket order his right to enjoy the property. Instead, the owner can—and sometimes ought to—be restrained from creating third party interest or indulging in acts that alter the physical features of the property drastically or diminish its value.

18. Under these circumstances, I hold that the respondents may enjoy their property, and that enjoyment is subject to the outcome of this

Writ Petition. If at all they create any third-party right over the property, that will not affect the appellant's right in any manner. Neither the respondents nor the putative subsequent purchasers can claim equity. I may further note that the respondents shall desist from acts that adversely affect or diminish the value of the property.

With these observations, I dispose of the appeal against order.

DAMA SESHADRI NAIDU, J.

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