

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.38/2006

WITH

CIVIL APPLICATION NO.66/2006

Shri Ramchandra Narayan Naik,
Curdi, Sanguem, Goa.

... Appellant

versus

1. Shri Anthony Inacio A. D'Costa,
major, service and his wife;

2. Smt. Maria Augusta D'Costa,
major, teacher.

3. Shri Cipriano D'Costa,
23 years old, Service,
Nos 1 to 3 residing at
House No, 19, Ward No.X
Varcondem, Ponda, Goa.

4. Smt. Maria S. Fernandes,

5. Domnic Costa,

6. Smt. Marta Angelica Fernandes,

7. Luis D'Souza, (Since deceased)
through his Lrs.

a. Smt. Marta Angelica Fernandes,
wife of deceased.

b. Mr. Wilson Luis D'Souza,
daughter of deceased.

c. Miss Wilma Luis D'Souza,

daughter of deceased,
All resident of Gunatithnagar,
C-Zone, Block 44, Opposite
Agricultural Campus, Junagadh,
Mati bang, Gujarat.

8. Smt. Maria de Lourdes Fernandes,

9. Shri Anthony Noronha,

10. Smt. Maria Brigida Fernandes,

11. Shri Francisco A. J. de P. Fernandes,

12. Smt. Neves Virginia Fernandes,

13. Shri Alberto G. Borges,

14. Smt. Maria Ajida Ana Rojala Fernandes,

15. Shri John Fernandes,
All residents of House No. 34,
Khadpaband, Ponda, Goa.

16. Dominga Carma Fernandes alias
Sister Marieta, resident of Valpoi,
Convent, Valpoi, Goa. **(DELETED)**

17. Smt. Neves Virginia Fernandes @ Borges,

18. Shri Albert Borges,
both residents of Neura,
Ilhas, Goa.

19. Smt. Maria Leocadia Fernandes e Costa

20. Shri Domnic Costa,
Both residents of Mandopa,
Navelim, Salcete Goa.

21. Shri Sikhander Khan,
Son of Abdul Rehman Khan,
Resident of Goa Medical Employees
Quarters, Bambolim, Ilhas, Goa.
22. Shri Joao C. J. D'Costa,
23. Smt. Maria Dianisia e Costa,
both residents of Ward no. 10
House no. 19, Varcondem,
Ponda, Goa.
24. Smt. Crisanto D'Costa,
25. Smt. Natalia D'Souza e Costa,
both residents of Ward no, 10,
House No. 19, Varcondem, Ponda, Goa.
26. Smt. Luisinha Silveira e Monteiro,
27. Shri Peter Joaquim Monteiro,
both residents of Borda,
Margao, Goa.
28. Smt. Rita Silveira e D'Silva,
29. Shri Jack D'Silva,
both residents of Jackson Tailor,
Opp. Mahmood Studio, Hill Road,
Bandra Mumbai 400 050.
30. Miss Alcina Joaquim Silveira,
C/o Piedade Silveira,
D-48, Hill Road Co-operative Housing Society,
Hill Road, Bandra, Mumbai 400 050.
31. Shri Vicente Joaquim Silveira,
alias Vincy J. Silveira.

32. Smt. Gracy Vincy Silveria,
Both residents of D-48,
Hill Road Co-operative Housing Society,
Hill Road, Bandra, Mumbai 400 050.

33. Shri Santana Philip Silveira, (expired) (deleted)
residing at D-48, Hill Road Co-operative Housing Society,
Hill Road, Bandra, Mumbai 400 050.

34. Shri Leopolda F. D'Costa (expire) (deleted),
resident of ward no.10,
House No. 19, Varcondem, Ponda, Goa.

35. Smt. Maria Tamaturga D'Costa,
alias Maria de Carmo e Fernandes,

36. Artenisia Arleta da Costa,

37. Manuel Fernandes,

38. Artemio Fernandes, (expired) (deleted),

39. Filomena Fernandes,

40. Elwin Fernandes,

41. Anthony Fernandes,

42. Crestina Fernandes,
Nos 36 to 43 all residents of
Varcondem near Almeida High School,
Ponda, Goa.

43. Smt. Adelaide D'Costa e Dias,

44. Shri Minguel Dias,
both residents of Porebhat
Verna, Salcete, Goa,

45. Smt. Ana Maria Elvira D'Costa e Lewis,

46. Miss Amita Lewis,

47. Miss Vinita Lewis

Nos 46 to 48 residents of Manisha
Housing Colony, Tisk,
Ponda, Goa.

48. Shri Carlos Henrique D'Costa
both residents of ward no. 10,
House No. 19, Varcondem,
Ponda, Goa.

49. Smt. Cristalino Rodrigues e Costa,
both residents of ward no. 10,
house no. 19, Varcondem,
Ponda, Goa.

50. Smt. Piedade Adelaide (expired) (deleted)
Fernandes e Silveira,
Resident of flat no. D-48,
Hill Road, Bandra, Co-operative Housing Society
Mumbai 400 050.

51. Maria Lourdes Fernandes e Noronha,
resident of Khadpaband, Ponda, Goa.

52. Antonia Anacleto Bella Fernandes, (dropped)
r/o H.No. 34, Khadapabandh,
Ponda, Goa.

... Respondents

Mr. Preetam Talaulikar, Advocate for the Appellant.

Mr. Valmiki Menezes, with Mr. A. Shirodkar, Advocates for the
Respondents.

Coram : M.S. Sonak, J.
Reserved on : 22nd January 2021.
Pronounced on : 27th January, 2021.

ORAL JUDGMENT :-

Heard Mr. Pritam Talaulikar for the Appellants and Mr. Valmiki Menezes with Mr. A. Shirodkar for the Respondents.

2. This Second Appeal was admitted on 22/4/2014, on the following substantial questions of law :

- i. *Whether the Courts below were right in holding that appellant was not bonafide purchaser for value?*
- ii. *Whether the Appellate Court below has misinterpreted Section 41 of Transfer of Property Act, while rendering the findings that the appellant is not bonafide purchaser for value.*

3. The Appellant is original Respondent No.13 and Respondents No.1, 2, and 3 are the original Plaintiffs in Regular Civil Suit No.17/1983/C, instituted in the Court of Civil Judge, Jr. Division, at Ponda. This suit was decreed on 27/4/2001. The Appeal instituted by the present Appellant against the said Judgment and Decree was dismissed by the 1st Ad hoc District Judge, Panaji on 1/10/2005. Hence, the present Second Appeal on the aforesaid substantial questions of law.

4. The suit concerns a property known as “*Siulem Batta*” alias “*Siulem Baga*” situated at Khadpaband, Ponda, Goa (suit property). For the present appeal, it suffices to mention that it was the case of the Plaintiffs that Leopoldo D'Costa (Defendant No.22) who sold one of the plots from out of the suit property vide sale deed dated 27/9/1980 in favour of the Appellant herein, was not the sole owner of the suit property and consequently, the suit plot. It was also the case of the Plaintiffs that the Deed of Partition of the year 1976, based on which the said Leopoldo executed the sale deed dated 27/9/1980 in favour of the Appellant, was also null and void, since, all the co-owners of the suit property were not parties to it. Based on these pleadings, the Plaintiffs sought a declaration that the Deed of Partition, as well as the Sale Deed dated 27/9/1980 were null and void. Similarly, a declaration was sought in respect of two other sale deeds executed in favour of some other parties based on the 1976 Partition Deed.

5. As of now, there is no dispute that the 1976 Partition Deed had not involved all the co-owners of the suit property and, therefore, the same was null and void. So also there is no dispute that Leopoldo was not the sole owner of the suit plot and consequently, had no authority to execute the Sale Deed dated 27/9/1980 in favour of the Appellant. The only issue raised by the Appellant in this Second Appeal is that the Appellant is the transferee from the ostensible

owner Leopoldo and since such a transfer was for consideration in good faith and after the Appellant had taken reasonable care to ascertain that the transferor had the power to make the transfer, the Appellant is entitled to the protection of Section 41 of the Transfer of Property Act, 1882 (TP Act). This is the import of the two substantial questions of law formulated in this Second Appeal.

6. Mr. Talaulikar, the learned Counsel for the Appellant submitted that there was nothing on record for the Appellant to suspect about the 1976 Partition Deed. In terms thereof, said Leopoldo sold the suit plot to the Appellant by Sale Deed dated 27/9/1980 which indeed had been allotted to Leopoldo. Further, a copy of the Deed of Partition was handed over by the said Leopoldo to the Appellant at some time before execution of the Sale Deed dated 27/9/1980 and that too in presence of the Plaintiffs who were the children of Leopoldo. Based on this material, Mr. Talaulikar submitted that the Appellant is a transferee from the ostensible owner and consequently, entitled to the protection of Section 41 of the TP Act. He submits that the findings recorded by the two Courts to the contrary, suffer from perversity and this gives rise to the two substantial questions of law as formulated above.

7. Mr. Talaulikar, in the alternate and without prejudice, submits that the Appellant paid consideration of ₹ 18,000/- on or

about 27/9/1980. The original Plaintiffs are children of said Leopoldo who had succeeded to the estate of Leopoldo. Therefore the original Plaintiffs be directed to refund this amount of ₹ 18,000/-, which was paid almost 40 years ago, together with interest. Mr. Talaulikar submits that the Plaintiffs had applied for equitable reliefs and are bound to do equity if they seek equity.

8. Mr. Menezes, the learned Counsel for the original Plaintiffs submits that there are concurrent findings of fact that Leopoldo was neither ostensible owner nor that the Appellant had taken any reasonable care to ascertain that Leopoldo had the power to transfer. He submits that the concurrent findings of fact are based on the evidence on record and, therefore, there is no perversity. He points out that the 1976 Partition Deed was itself null and void and based thereon, Leopoldo had no exclusive title to the suit property or the suit plot and, therefore, could not have executed the said Sale Deed dated 27/9/1980 to the exclusion of several other co-owners, including the original plaintiffs. He, therefore, submits that this Second Appeal is required to be dismissed with costs.

9. Mr. Menezes submits that the alternate plea on behalf of the Appellant is misconceived and unjustified. He points out that Leopoldo never shared the purchase price of ₹ 18,000/- with any of the children. The said Leopoldo has already expired and apart from

the original Plaintiffs, several other co-owners have the right, title, and interest in the suit property and, therefore, there is no question of requiring the only original Plaintiffs to refund any amount when the benefit is to accrue to the entire estate. He points out that there is no scope for entertaining such a plea at this stage, particularly because there was no counter-claim filed by the Appellant in this regard.

10. The rival contentions now fall for my determination.

11. The Appellant, who is the original Defendant No.13, has filed a very sketchy written statement. In the written statement, there were no pleadings to the effect that Leopoldo was the ostensible owner and that the Appellant had taken reasonable care to ascertain that Leopoldo had the power to make the transfer or that the Appellant had acted bona fide. The Appellant preferred "*to adopt*" the written statement of Defendant No.8-Sikandar Khan. Even the written statement of said Sikandar Khan was verified by the attorney. Now, if the plea based on Section 41 of the TP Act is to be taken, then, the same has to be backed by pleadings and not mere adoption of pleadings of some other defendants. To make out a case under Section 41 of the TP Act, the defendant has to plead reasonable care to ascertain that the transferor had the power to make the transfer. Therefore, such pleadings have to be essentially personal to the party who is making the claim. Ordinarily, such a plea cannot be taken by

the mere adoption of the pleadings of some other party.

12. That apart, the provisions of Section 41 of the TP Act might have applied with greater vigor if the alleged ostensible owner Leopoldo had questioned the sale deed dated 27/9/1998 on the ground that he did not have the power to make the transfer. In the present case, it is the other co-owners who have applied to declare the sale deed dated 27/9/1980 as null and void on the ground that Leopoldo did not have exclusive right to execute such a sale deed to the exclusion of other co-owners.

13. Further, as was held in *Gurubaksh Singh vs. Nikka Singh and anr.* - AIR 1963 SC 1917, Section 41 is an exception to the general rule that a person cannot confer a better title than that he has. Being an exception, the onus is on the transferee to show that the transferor was the ostensible owner of the property and further the transferee had the power to make the transfer and has acted in good faith.

14. In the present case, apart from the fact that the pleadings of the Appellant in his written statement or for that matter, adoptive written statements were quite sketchy, the Appellant has failed to prove the pleadings and discharge of onus which the law, had squarely placed upon him. The two Courts have recorded concurrent

findings of fact after discussing the evidence led on behalf of the Plaintiffs, as well as the Appellant. The Appellant has failed to make out a case that there was any perversity in the concurrent findings of fact recorded by the two Courts, to give rise to the substantial questions of law.

15. Although the second Appellate Court is not expected to reappreciate or reevaluate the evidence on record, even if such an exercise is undertaken, it is apparent that the evidence on record does not establish the ingredients of Section 41 of the TP Act. The Appellant took the specific plea that the Deed of Partition was handed over to him before the execution of the sale deed and Advocate F. Soares verified this document and advised the Appellant to purchase the suit plot. However, there is no clarity as to the precise or even approximate date on which such a transaction took place. Advocate Soares was never examined and, therefore, it is difficult to accept that the said Advocate advised the Appellant to purchase the suit plot by clearing the title of Leopoldo. No title investigation report has been produced on record.

16. The Appellant admitted in the course of his evidence that he was aware that Leopoldo's wife had expired when the Sale Deed dated 27/9/1980 was executed. The Appellant has also admitted that he was aware that Leopoldo had children. The Appellant, in the

course of his evidence, admitted that he did not make any inquiries about the number of children and whether they had any rights in the suit plot, which was purported to be sold to him by the said Leopoldo.

17. The Appellant did try to say that the Plaintiffs No.1 and 3 and one more son of Leopoldo was present at the time when the Partition Deed of 1976 was handed over to him by Leopoldo and when the Appellant paid consideration to said Leopoldo (vendor). However, even this part of the evidence has been quite correctly rejected by the two Courts, because, the Appellant, at a later point in time, admitted that he did not even know the Plaintiffs personally or by their names. The Appellant claimed that this fact was told to him by one Yeshwant Shet. Neither the Appellant disclosed as to when said Yeshwant had told him about this fact, nor said Yeshwant Shet has been examined in support of this aspect. Findings of fact, concurrently recorded by the two courts, are backed by evidence on record and, therefore, the same cannot be styled as perverse, to give rise to the substantial questions of law in this matter. In any case, the substantial questions of law cannot be answered in favour of the Appellant since the concurrent findings of fact recorded in this matter by the two Courts are backed by evidence on record and cannot be styled as perverse findings of fact.

18. In *Hardev Singh vs. Gurmail Singh (Dead) by LRs.* - 2007

(2) SCC 404, the Hon'ble Supreme Court has explained that the ingredients of Section 41 of the TP Act are as follows :

- (i) The transferor is the ostensible owner;
- (ii) The transferor is the ostensible owner by consent, express or implied or the real owner;
- (iii) The transfer is for consideration;
- (iv) The transferee has acted in good faith, taking reasonable care to ascertain that the transferor had the power to transfer.

19. In the present case, apart from establishing that the transfer is for consideration, the Appellant has also failed to establish other ingredients of Section 41 of the TP Act. It is possible that the Appellant was made to believe that the transferor had a good title to transfer the suit plot vide Sale Deed dated 27/9/1980. However, the good faith in such matters is required to be ascertained not merely by good intentions or the absence of bad intentions on the part of the transferee, but based upon the evidence that the transferee had taken reasonable care to ascertain that the transferor indeed had the power to transfer the property. The pleadings, as well as the evidence on record, do not establish that the Appellant had taken reasonable care to ascertain that Leopoldo had the power to transfer the suit plot vide Sale Deed dated 27/9/1980.

20. There is also no evidence that Leopoldo had consent, whether express or implied from several co-owners to act as the ostensible owner of the suit property, which included the suit plot, and to transfer the same without involving the remaining co-owners. Thus, the ingredients of Section 41 of the TP Act have not been satisfied in the present case and the onus which was on the Appellant has not been discharged by the Appellant.

21. As regards the alternate plea, there was no necessity on the part of the Appellant to have filed a counter-claim. This is because, even though the original Plaintiffs have succeeded in establishing that the Sale Deed dated 27/9/1980 was void, the original Plaintiffs who are the children of Leopoldo and have succeeded to the estate of Leopoldo consequent upon his demise, cannot seek to retain the benefit received by said Leopoldo based upon the Sale Deed dated 27/9/1980.

22. Mr. Menezes did attempt to contend that the amount of ₹ 18,000/- paid by the Appellant to Leopoldo, was never shared by the said Leopoldo with the Plaintiffs. Even if this is so, there can be no dispute that the original Plaintiffs have succeeded to the estate of Leopoldo, no doubt, along with several other co-owners. The suit plot admeasures 517 sq. meters and is located in the town of Ponda.

Mr. Menezes pointed out that the Appellant has done no construction on the suit plot and in fact, it is the case of the original Plaintiffs that it is they, along with other co-owners who have the possession of the suit plot. There can be no dispute that the price of the suit plot, at this point, would run into several lakhs of rupees.

23. In such circumstances, equitable consideration would require that the original Plaintiffs refund to the Appellant the amount of ₹ 18,000/-, together with simple interest at the rate of ten percent per annum from 27/9/1980 till the date such refund is effected to the Appellant herein. No doubt, as pointed out by Mr. Menezes, such refund will operate as a charge on the estate qua the other co-owners of the suit property and the suit plot. This means that as and when the suit property and the suit plot, are the subject matter of any partition proceedings, the original Plaintiffs will be entitled to credit for the amount which they are now directed to refund to the Appellant because such refund is not only on behalf of the original Plaintiffs themselves, but such refund is on behalf of all the co-owners of the suit property, which includes the suit plot. The impugned decrees will stand modified to this limited extent only.

24. The Second Appeal is, therefore, partly allowed. The impugned Judgments and Orders, to the extent they relate to the deed of partition, gift deeds, and the sale deeds referred to in the operative

portion of the Judgment and Order dated 27/4/2001 made by the learned Civil Judge, Jr. Division, at Ponda is not interfered with. However, the original Plaintiffs are directed to pay to the Appellant herein the amount of ₹ 18,000/-, together with simple interest at the rate of ten percent thereon from 27/9/1980, till the date of effective payment. Further, it is clarified that such payments will be on behalf of all the co-owners of the suit property, which includes the suit plot and, therefore, if the suit property or the suit plot is, at any stage, the subject matter of any partition proceedings, then, the original Plaintiffs will be entitled to the credit of the amount so paid to the Appellant herein. Further, the original Plaintiffs will also be entitled to take out appropriate proceedings for the recovery of a portion of this amount from other co-owners of the suit property, which includes the suit plot, even if there is no proposal to partition the suit property, which includes the suit plot therein, in future. The Decree to be modified accordingly.

25. In the facts and circumstances of the present case, there shall be no order as to costs.

26. The Civil Application does not survive in view of the disposal of the appeal and the same is disposed of accordingly.

M.S. Sonak, J.