IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.253 of 2004

Shri. Jermen D' Mello,
of full age, married,
Indian national, residing at
Santar Bhat, Divar, Ilhas,
Goa,
Or 'Shelters Enclave', ... Appellant
AS-2, Odlem Bhat, Taleigao,
Ilhas, Goa.

Versus

1. Shri. Eusebio D'Souza,
of full age, residing at Balbot,
Bastora, Bardez, Goa.

Since deceased through his
legal heirs

(a) Mr. Jude D'Souza,
of major age, Married, son of
late Eusebio D'Souza,
Resident of Balbot, Bastora,
Bardez, Goa.

(b) Mrs. Ofilia D'Souza,
of major age, Married,
daughter-in-law of late
Eusebio D'Souza, Resident of
Balbot, Bastors, Bardez, Goa.

(c) Mr. Lynet D'Souza,
of major age, Spinster,
daughter of late Eusebio
D'Souza, Resident of Balbot,
Bastora, Bardez, Goa.

(d) Mr. Melvyn D'Souza,
of major age, Bachelor, son of
late Eusebio D'Souza,
Resident of Balbot, Bastora,
Bardez, Goa.

(e) Ms. Telma D'Souza,

of major age, Daughter of
late Eusebio D'Souza,
Resident of Balbot, Bastora,
Bardez, Goa.

(f) Ms. Doris D'Souza,
of major age, Daughter of
late Eusebio D'Souza,
Resident of Balbot, Bastora,
Bardez, Goa.

(g) Mr.Agnelo D'Souza,
of major age, Married, son-in-law of Eusebio D'Souza,
Resident of Balbot, Bastora,
Bardez, Goa.

2. Sahakar Housing
Cooperative Society Limited,
a Society registered under
Maharashtra Cooperative
Societies Act, 1960, as made
applicable to Goa. under
No.60/15/83/TB, having site
office at the suit property
surveyed under survey
no.87/1 of Village Colvale,
situated Opposite Binani
Fibre Glass Ltd. factory.
Colvale, Bardez, Goa, and
through its present
Chairman.

3. Shri. Lavoo Rama Kambli
son of lata Rama Mahadev
Kambili, of full age, residing
at Koni Waddo, Colvale, Goa.

.... Respondent

Mr. Ryan Menezes, Advocate for the Petitioner.

Mr. P.A. Kholkar, Advocate for the Respondents No.1(a) to 1(d).

Mr. Sudin Usgaonkar, Senior Advocate with Ms. T. Mashelkar, Advocate for the Respondent No.2.

CORAM : - SUNIL P. DESHMUKH &
M.S. JAWALKAR, JJ.

Date : 12th August 2021

ORAL JUDGMENT : (*Per Sunil P. Deshmukh,J.*)

The appellant is the plaintiff in Special Civil Suit No.63/1995 is before the Court, aggrieved by dismissal of the same under judgment and order dated 30.01.2003 delivered by Civil Judge, Senior Division at Mapusa and respondents are defendants in the suit. Hereinafter, parties hereto are being referred to by their status in the suit.

2. The plaintiff's case is that the property bearing Survey No.87/1 admeasuring about 56,875 square metres situated in Village Colvale, Taluka Bardez, belonged to one Teotonio Menezes. The plaintiff claims, he has bequeathed suit property under a Will dated 07.02.1990 made by him. Fraudulently a Power of Attorney had been got executed from Teotonio Menezes, the owner of the property, when he was intoxicated and was under influence of alcohol, by defendant no.1. Said Power of Attorney holder had sold aforesaid property under a registered Sale Deed to defendant no.2 namely;

Sahakar Housing Co-operative Society Limited. The owner Teotonio Menezes died on 08.08.1990 and fraud played by the Power of Attorney holder and the transaction of sale came to light and known to the plaintiff some time in 1992 and, thereafter, in 1994 certain documents were discovered and, as such, with reference to the same, suit had been instituted for declaration of ownership, permanent injunction and cancellation of Power of Attorney dated 10.03.1987 and Sale Deed dated 02.09.1988.

3. The plaintiff has averred that late Teotonio Menezes had addressed correspondence to different departments viz Town and Country Planning, Office of Deputy Collector, Office of Sub-registrar, Mapusa-Goa. He had also come across the notices addressed by Teotonio's advocate as well as those addressed on his behalf and his daughter Indira and, according to the same, it is revealed, disadvantage of old age of Teotonio Menezes had been taken and under influence of alcohol he was induced to sign documents. It is averred that the fraud also would emerge from the statement appearing in the Power of Attorney about Teotonio Menezes being a bachelor inspite of him having married to one Mrs. Olga

Menezes and having daughter Indira. It is further being contended that there was tenancy dispute between father of defendant no.3 and Teotonio Menezes in respect of tenancy and late Teotonio Menezes had approached Civil Court to declare that Rama Kambli was not tenant of this property.

4. The defendants have opposed the claims by the plaintiff. It is pleaded that late Teotonio had a daughter by name Indira. The Will by late Teotonio Menezes does not bequeath suit property to the plaintiff. It is denied that the Power of Attorney had been brought about by playing fraud. It is also denied that the plaintiff came to know about the sale of the suit property only in 1992. It is contended that the plaintiff was all along aware of the sale of the suit property. It was denied that the letters were written by Teotonio Menezes and Indira. It is contended that as a matter of fact the transaction with defendant no.2 by defendant no.1 has been ratified and confirmed under an agreement dated 28-07-1990. It is contended that the suit property was not a part of the estate of Teotonio at the time of his death as he had already sold the property. Teotonio and even daughter Indira had endorsed and ratified the sale clearly

referring to that all the letters making allegations to different authorities were withdrawn. Even name of Rama Kambli had been added to confirming documents since his name had appeared in survey records.

5. Defendant no.2 had particularly referred to that after the purchase of suit property they had developed and parcelled out the same into several plots. Work had also commenced over the property. Defendant no.2 is a co-operative society registered under the Co-operative Societies Act consisting of about 100 members and about 90 members have been allotted plots. The property was purchased for consideration under a registered Deed as required by law and, as such, defendant no.2 is absolute and exclusive owner of the property and no restraint can be put on its activities. Defendant no.1 also purports to refer to that there had been a Will dated 10.03.1987 which is on the very same day on which the Power of Attorney had been executed in favour of defendant no.1 by late Teotonio Menezes.

6. Based on rival contentions the trial Court had framed issues as to whether plaintiff proves, defendant no.1 had obtained power of attorney dated 10.03.1987

fraudulently from late Teotonio Menezes; sale deed dated 02.09.1988 is null and void, inoperative and not binding on late Teotonio Menezes and also to plaintiff; he is entitled for permanent injunction; in alternative is he entitled to refund with interest; Whether defendants prove that suit is barred by limitation; suit is barred for non-joinder of necessary parties; the will of Teotonio is in excess of his disposable quota; no cause of action arose to file the present suit.

7. The trial Court has rendered findings on all the issues against the plaintiff.

8. The points which arise for consideration under present First Appeal are :-

(a) Whether the plaintiff/ appellant proves that Power of Attorney dated 10.3.1987 had been brought fraudulently by defendant no.1?

(b) Whether the sale deed dated 2.9.1988 in favour of defendant no.1 executed by defendant no.1(respondent nos. 1 and 2) respectively is null and not binding on plaintiff?

(c) Whether suit by the plaintiff barred by law of limitation?

(d) Whether plaintiff is entitled to injunction and as to whether the plaintiff establishes cause of action?

9. Learned counsel appearing for plaintiff/appellant Mr. Ryan Menezes, contends that trial Court had utterly failed to appreciate relevant aspects involved in the matter giving indication of Power of attorney and Sale deed had been a result of grave fraud played on owner of the suit property Teotonio Menezes. He submits that it has vividly come on record that late Teotonio Menezes disputed defendant no.3's (Rama) tenancy right over suit property of and had been litigating the same. During its pendency power of attorney and sale deed are shown to have been executed. There are subsequent events which clearly point out that Power of attorney and subsequent sale deed are not transaction in normal course and have been brought about and forced upon late Teotonio Menezes. He submits that after purported sale deed dated 2.9.1988 in favour of defendant no.2 by defendant no.1, late Teotonio Menezes had lodged complaints with various authorities viz. Deputy Collector, Department of Town and Country Planning, Registrar of Mapusa Goa, etc. It is not disputed that late Teotonio Menezes had

executed a Will in favour of plaintiff on 7.2.1990 being a god child who had been looking after him. Learned Counsel submits that late Teotonio Menezes in said Will bequeathed the property in taluka of Ilhas and taluka of Bardez. Will is a registered document. Learned counsel further submits that trial Court had been in error to consider that suit is barred by limitation. He submits that signature as a witness on purported agreement dated 28.7.1990 is of no avail to defendants. He submits that plaintiff's signature only appears as a witness and plaintiff was not supposed to know contents of the document. As there had been visit of an official investigating the complaints made by late Teotonio Menezes in respect of transactions of defendants no.1 and 2, it could be sensed that there has been foul play in bringing about power of attorney and sale deed. He submits that relevant documents could come to light and were found, when house had been under maintenance in 1994 and the fraud became more pronounced, Power of attorney instrument depicts and lends credence to the same since there is reference to late Teotonio Menezes as a bachelor when infact he had been married and had a wife and a daughter. It, thus, could be seen that cause in 1994 got revealed and intensified and the suit was filed in 1995 and as such, there is erroneous appreciation on the ground of limitation. He further purports to refer to that daughter of late Teotonio Menezes has also been litigating transactions in respect of the suit property. He further contends that since it is not coming on record that consideration for the transaction of sale has been paid to late Teotonio Menezes in the alternate appellant would be entitled to the amount under the transaction with interest. He submits that there is sufficient record showing fraud having been played. In the circumstances, the suit ought to have been decreed. He contends that trial Court has not properly appreciated evidence in respect of issues in the matter and urges this Court to allow the First Appeal decreeing the suit.

10. On the other hand, the learned Senior Counsel Mr. Sudin Usgaonkar appearing for respondent no. 2 and Mr. Kholkar, learned counsel appearing for legal heirs of respondent no.1 submit that there is absolutely no substance in the appeal. None of the issues framed had been decided in favour of appellant-plaintiff. The decision of the trial Court is based on evidence on

record and findings rendered in relation thereto are impeccable and no fault can be found with the same. Learned Senior Counsel Mr. Usgaonkar particularly contends that fraud has been alleged contending that Power of attorney had been got executed from late Teotonio Menezes when he was under the influence of alcohol. There is absolutely no evidence on record, not even iota. He submits that there are no particular details as to, as and when and how he was intoxicated who had brought about intoxication and simply saying that Teotonio Menezes was intoxicated is not sufficient. There is no evidence placed on record, including not even of plaintiff nor of other witnesses. He refers to cases of **P. Saraswathi V. Lakshmi reported in AIR 1978 Madras 361** as well as the case of **Lynette Fernandes Vs. Gertie Mathias, Since deceased by legal representative 2018(1) SCC 271.**

11. Learned Senior Counsel for respondents further contends that sale deed is a registered document of 1988 is not disputed. The trial Court has taken into account that sale deed is a registered document and as such plaintiff had a notice pursuant to the provision under the Transfer of Property Act 1992 particularly

Section 3 thereof and when plaintiff in fact had knowledge of the sale deed all along right from 1988 and even in 1990 has signed document of agreement endorsing and acknowledging the sale deed. The suit of 1995 is not within limitation. Learned Counsel for respondents-defendants submit that the late Teotonio Menezes had no disposal interest left in suit property while he had executed Will in favour of present plaintiff, and the same did not form part of the property of late Teotonio Menezes when Will was executed. The Counsel on behalf of defendants no.1 and 2 contend that save and except general reference to the property of Mr. Menezes and the will does not make specific reference to the suit property. It is contended that despite late Teotonio Menezes having daughter she was not initially arrayed as defendant and even after impleading her, she was not served. It has been further contented that Will of late Teotonio Menezes is in excess of his disposal quota, going by contention of the plaintiff that Teotonio had a wife and a daughter. Learned Counsel for defendants therefore earnestly request not to indulge into the submissions on behalf of the plaintiff and urge this Court to dismiss the appeal.

12. From the pleadings of the parties and evidence on record, it would emerge that basis of claim of the plaintiff for declaration of ownership, injunction and setting aside sale deed and power of attorney is claim of fraud having been played on Teotonio Menezes in execution of power of attorney. According to plaintiff documents were executed while late Teotonio Menezes was old and was under influence of alcohol and intoxicated. It is contended on behalf of the plaintiff that instrument of Power of Attorney refers to late Teotonio Menezes as a bachelor is an indicator of fraud having being played.

13. Perusal of evidence by plaintiff shows that beyond statement about the Power of Attorney had been brought about by playing fraud on late Teotonio Menezes, there is nothing on record that neither him nor any of his witnesses had deposed as to how alleged fraud had been played. No details appear in pleading nor there is anything in evidence as to how the fraud as alleged had been brought about. The evidence of Jermen D'Mello-plaintiff/appellant shows that he was not present when power of attorney in favour of defendant no.1 was executed by late Teotonio Menezes nor anything about

the same had even been told by late Teotonio Menezes to the plaintiff much less about the fraud having been played on him by defendant no.1 in bringing about power of attorney. It is not in dispute that power of attorney had been executed before the notary public. Production of said power of attorney by defendant no.2 during the evidence had not been objected to. There is no evidence on record worth credence about fraud as alleged. This gives rise to presumption under Section 85. Said presumption has not been rebutted. Not a single piece of evidence has been placed forth in respect of late Teotonio Menezes being under influence of alcohol and intoxicated when execution and authentication of power of attorney had taken place. Much less, there is evidence about intoxication of late Teotonio Menezes had been creation of defendant no.1.

14. In this respect, it may not be out of place to refer to the decision pressed into service and relied on, on behalf of defendant no.2 in the case of ***Lynette Fernandes V/s. Gertie Mathias since deceased by legal representatives (2018) 1 SCC 271***, where in paragraph 13 it has been observed, thus :

> “13.... Moreover, the particulars of fraud are

> neither pleaded nor proved by the party alleging fraud before the District Court. The party alleging fraud must set forth full particulars of fraud and the case can be decided only on the particulars laid out. There can be no departure from them. General allegations are insufficient. Merely because the appellant has made bald allegations in the revocation application that the will executed by the deceased is void because the same has been brought out by Mrs. Mathias and the same is constituted by fraud and undue influence, it will not absolve her from providing specifically the particulars of fraud and undue influence. Mere bald pleading will not help her in the absence of proof."

15. As such there is no substance in the allegation/contention on behalf of the appellant/plaintiff that defendant no.1 had obtained power of attorney dated 10.3.1987 fraudulently from the late Teotonio Menezes.

16. The registration of document of sale deed is not in dispute which had taken place on 02.09.1988. It appears that the problem had arisen and further actions in terms - had taken placed in the form of an agreement dated 20th of July 1990 among Teotonio Menezes, his daughter Ms. Indira Menezes and defendant no.2- Sahakar Housing Co-operative Society Ltd. The existence and execution of said agreement is not

disputed by the plaintiff. Under the agreement, late Teotonio Menezes had accepted that the suit property had been sold under registered Sale Deed dated 02.09.1988 for a consideration of ₹5,50,000/- clarifying that inadvertently it had been referred to Teotonio Menezes as a bachelor, as a matter of fact, he had a wife by name Olga Menezes and a daughter Indira Martha and further that the wife's share after her death devolved on Indira Martha and whilst Indira Martha was not a party to the Sale Deed, she wished to give consent to the transaction and, as such, document has been executed. The document also shows that present plaintiff had signed the same as a witness. Even Rama and/or his heirs had been signatory to the sale deed of 02-09-1988.

17. The very basis of seeking declaration against sale deed dated 2.9.1988 is allegation of fraudulent power of attorney, does not survive. The plaintiff purports to refer to correspondence made by late Teotonio Menezes to the authorities written document. The agreement executed among the parties specifically goes a long way to establish the fact of acceptance of transaction by late Teotonio Menezes and sharer of the property. It is not even the case of the plaintiff that the agreement is

brought about by fraud and is not binding on him nor anything was placed on record by the plaintiff about the same. The correspondence which has been referred to gives indication that late Teotonio Menezes had a complaint about payment of consideration. Grievance of Teotonio Menezes had been met with and agreement has been signed by late Teotonio Menezes and his daughter. In the same it has been specifically agreed to that, late Teotonio Menezes and his daughter shall withdraw all the letters/applications given to various authorities complaining against sale of property under deed dated 2.9.1988. It has been specifically agreed that it will be deemed, after lapse of stipulated period, there is ratification of transaction dated 2.9.1988. This document has been entered into and executed specifically in respect of the suit property. To this document, plaintiff has been a signatory as a witness. There is sufficient evidence in respect of signature of plaintiff who had signed the agreement referred to above and even the trial Court has compared the signature additionally and had observed that there is absolutely no doubt that this signature at Exh. 51 at point B and signature at point A on plaint at page 16 and handwriting at point B are by one and the same person namely the plaintiff. The discrepancies occurring in the document, in respect of status of late Teotonio Menezes being bachelor, have been removed by him during his lifetime by entering into agreement in respect of suit property with defendant no.2 and his daughter Indira Martha. It discernibly emerges that plaintiff does not dispute execution of document claiming that it is fraudulent. He claims ignorance of its contents, that it has been executed in respect of suit property. The sale deed is a registered document. The plaintiff is supposed to have a notice as referred to by the trial Court. Apart from aforesaid, plaintiff is a signatory to the document of July, 1990 amongst owner and the purchaser in respect of the suit property. In the face of this claim the plaintiff about having sensed fraud initially in 1992 gets dissipated and extinguished as observed by the trial Court. Ignorance claimed by plaintiff loses on having any efficacy.

18. It emerges that there is strong preponderance showing plaintiff having knowledge about the existence of sale deed and the power of attorney. Thus, it would be clear that suit for declaration about sale deed being null

and void is barred by law of limitation taking into account Parts 3 and 4 of the Limitation Act.

19. The next question that would be required to be considered is about injunction claimed by the plaintiff. Fallacy in the claim of plaintiff on this count has been ripped widely open in the evidence.

20. Plaintiff's own deposition shows that suit property is situated about 30 kms away from his residence, and he had not visited the suit property before 1994. He had visited the area to find out exact location of suit property only in 1996. Forms I and XIV in respect of suit property do not show name of the plaintiff at all whereas the form produced on behalf of defendant no.2 shows defendant no.2 to be occupant of the suit property. The plaintiff has thus utterly failed to establish his case being in possession nor the plaintiff had procured any document showing his title to the suit property. Basis of the claim to the suit property is Will which has been executed subsequent to the sale of 1988. In the absence of establishment of possession and title to the property, plaintiff's claim for injunction is not tenable at all. In these circumstances, plaintiff can

hardly be able to stake claim of alternate relief for payment of consideration of amount with interest.

21. It also would have to be considered that late Teotonio Menezes had no disposable interest in suit property having accepted the same during his life time when the Will has been executed. Having regard to the aforesaid plaintiff had no right to the suit property.

22. Apart from aforesaid, there is no evidence on record in respect of visit of official giving plaintiff cause of action. Plaintiff's own saying shows, he was in possession of the documents all along before 1994. Contention of discovery is rendered weak and is not firmly substantiated particularly when plaintiff had sensed foul play in 1992 and had been witness to agreement of July, 1990. In the face of document of agreement of July, 1990 where plaintiff is signatory with alleged discovery of documents in 1994, it hardly can be said that cause of action accrues. Apart from aforesaid plaintiff had failed to serve daughter of late Teotonio Menezes gives a quite long indication that he was averse to her presence and interest.

23. For all aforesaid reasons, it is difficult for us to give

indulgence in the plaintiff's claims in the first appeal. We are in agreement with the findings of trial Court on the relevant issues. The first appeal by plaintiff fails and is dismissed with costs.

M.S. JAWALKAR, J. **SUNIL P. DESHMUKH, J.**

NH/Vn*

NITI K HALDANKAR Digitally signed by NITI K HALDANKAR Date: 2021.08.31 09:58:08 +05'30'