

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.172 OF 2021**

LEO JOSEPH CRUZ DE
SOUZA AND 3 ORS

..... PETITIONERS

VS

JOHN WILFRED
FERNANDES AND 6 ORS

..... RESPONDENTS

Mr. Shivraj Gaonkar, Advocate for the Petitioners.

Mr. Shivan Desai, Advocate for Respondent no.1 and 2.

CORAM: DAMA SESHADRI NAIDU, J.

Date: 16th March 2021

ORDER:

The first and the third petitioners, as well as the respondents no.5 and 6, are all brothers. The second petitioner is the first petitioner's wife, and the fourth petitioner is the third petitioner's wife. The seventh respondent is the sixth respondent's wife.

2. As to the other respondents, respondent nos.1 and 2 are wife and husband; they are the uncle and aunt of the petitioner nos.1 and 2 and respondent nos. 5 and 6. Respondent nos. 3 and 4 are the purchasers from the respondent nos.1 and 2.

3. There was prior litigation between the uncle (respondent no.1) and the nephews (petitioner nos.1, 3 and respondent nos. 5 and 6). That litigation is said to have ended in an *ex parte* decree, which is pending execution. We are not concerned with that.

4. The petitioners plead even if that *ex parte* decree were to be accepted, respondent no.1 is only one of the co-owners of the property.

They refer to Article 2177 of the Old Civil Portuguese Code, section 17 of the Goa Panchayat Raj Act 1994, and a few provisions of Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 Act of 1969. According to them, under the statutory regime, there could be no alienation by metes and bounds without the other co-owners' consent.

5. But, in the course of time, the petitioner came to know that the first and the second respondents sold a piece of that joint property to the respondent nos.3 and 4, who are said to be the developers. Under those circumstances, the petitioners filed Special Civil Suit No.8/2021/C before the Civil Judge Senior Division, "C" Court, Mapusa. In that suit, the petitioners, as the plaintiffs, have sought relief of declaration and other consequential reliefs.

6. In the suit, the petitioners have also applied under Order 39 Rules 1 and 2 for a temporary injunction: not to create third party interest. Initially, the trial Court granted an *ex parte* order of injunction, but the petitioners failed to comply with the statutory mandate under proviso to Order 39 Rule 3 (1) of CPC. Therefore, the temporary injunction had not come into force.

7. In the meanwhile, the respondents entered an appearance. In that context, the petitioners as the plaintiffs insisted that the trial Court hear the parties on the merits and render an order in the interlocutory application under Order 39, Rules 1 and 2. But the trial Court passed the impugned order, noting that section 52 of the Transfer of Properties Act protects the petitioners. It has also observed that the petitioners have failed to file an affidavit under Order 39 Rule 3 of CPC. Aggrieved, the petitioners have filed this Writ Petition.

8. Heard Shri Shivraj Gaonkar, the learned counsel for the petitioners; Shri Shivan Desai, the learned counsel for the respondent nos.1 and 2.

9. The plaintiffs in the suit secured an *ex parte* ad interim injunction. So the Proviso to Rule 3 of Order 39 CPC required them to put the

defendants on notice. If we examine the statutory scheme, Rule 3 mandates that the trial Court must issue a notice to the respondent before it grants an injunction to the applicant. But if it appears to the Court that the delay would defeat the object of granting the injunction, it may dispense with the need for prior notice to the respondent. Then, to grant an *ex parte* ad interim injunction, the trial Court must record reasons. Once that injunction is granted, the applicant must “deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with (i) a copy of the affidavit filed in support of the application; (ii) a copy of the plaint; and (iii) copies of documents on which the applicant relies. Soon after that, on the day on which such injunction is granted or on the day immediately following that day, the applicant must file an affidavit stating that the copies in the manner stated above have been delivered or sent to the opposite party.

10. Admittedly, the petitioners in this case have not complied with the proviso to Rule 3 of Order 39 CPC. With that, the *ex parte* ad interim injunction order has remained stillborn—has not come into effect. But that does not deprive the petitioners of an opportunity to securing an interim injunction on the merits.

11. According to the learned counsel, the trial Court has not heard the parties on the merits. Therefore, he wants this Court to set aside the impugned order, dated 8/3/2021, and remand the matter for fresh consideration on the merits.

12. On the other hand, the learned counsel for the respondent nos.1 and 2 has submitted that the decree the first respondent secured did declare that they are the absolute owners of the property. Therefore, as pleaded by the petitioners about the co-ownership, the whole mechanism does not come into the picture. At any rate, the learned counsel is willing to have an order from the trial Court on merits in the petitioner's application under Order 39

Rule 1 and 2.

13. Under these circumstances, I dispose of the Writ Petition without advertent to the merits. I hold that the trial Court will hear the parties and pass appropriate orders on the merits in the petitioners' application under Order 39, Rules 1 and 2. To facilitate such a step, I set aside the impugned order, dated 8/3 /2021.

14. It is entirely open for the trial Court, in its wisdom and discretion, to consider the impact of section 52 of the Transfer of Property Act on the issue before it at an interim stage. But whatever decision it arrives at needs to be after hearing the parties.

No order on costs.

DAMA SESHADRI NAIDU, J.

AP/-

MARIA
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