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IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO.70 OF 2008
WITH
MISCELLANEOUS CIVIL APPLN. NO.543 OF 2021 (F)
IN
SECOND APPEAL NO.70 OF 2008

1. Escolastica Braganza,
Wife of Ismail Braganza,
Major in age,
r/o H. No. 416, Sanglevaddo,
Majorda, Salcete Goa.

2. Smt. Antoneta Braganza,
d/o Ismail Braganza,
Major in age,
r/o H.No. 416, Sanglevaddo,
Majorda Salcete Goa

... Appellants/
Applicants.

Versus

Smt. Helena Braganza (since deceased)
Through legal heirs,

1(a) Mr. Roque Constancio Braganza,
1(b) Mrs. Effie Rita Braganza,
1(c) Mr. Geraldo Irineu Braganza,
1(d) Mrs. Rancy Braganza,
1(e) Mr. Simao Braganza,
1(f) Mrs. Rosilin Braganza,
1(g) Ms. Ana Francisca Braganza
All major of age, All Indian nationals &
All residents of H. no. 415,
Adao vaddo, Majorda,
Salcete, Goa.

1(h) Mrs. Levorina Braganza,
1(i) Lira Braganza,

2. Franklin Braganza,

3. Eliza Braganza,

4. Mrs. Aureliana Braganza (since deceased)

Through legal heirs,
4(a) Adrian Gomes,
4(b) Lucita Gomes,

5. Antonio Braganza,

6. Maria Braganza,

7. Abita Braganza,
All r/o Adrian Villa, Lourdes Colony,
Orlem, Malad West,
Mumbai, Maharashtra.

... Respondents.

Mr. Joaquim Godinho with Mr. Manoj Jalmi, Advocates *for the Appellants/Applicants*.

Mr. Vivek Rodrigues, Advocate *for Respondents No.1(a) to 1(g)*.

Coram: M.S. SONAK, J.

Date: 8th October 2021.

ORAL JUDGMENT:

1. Heard Mr. Godinho for the Appellants/Applicants and Mr. Vivek Rodrigues for Respondents No.1(a) to 1(g). The rest of the Respondents are served but do not appear in this second appeal.

2. The learned Counsel for the parties hand-in consent terms dated 07.10.2021 which are taken on record and marked as “X” for identification. However, this appeal cannot be disposed of based entirely on the consent terms, because, there are other Respondents who have neither appeared nor have joined in the filing of these consent terms. The import of the consent terms is, however, proposed to be taken into consideration, without intending to prejudice or harm the rights and interests of the remaining Respondents. The learned Counsel for the parties state that such of the parties who have signed the consent terms, either themselves or through their Advocate, however, agree to be bound by the same.

3. This second appeal was admitted on 05.02.2009 on the following substantial questions of law:-

“(i) Whether the Courts below fell in error, in not granting an injunction restraining the defendant from making the construction, particularly when they held the plaintiffs/appellants as the co-owners ?

(ii) Whether the Courts below fell in error in applying the provisions of Order 7 Rule 3 when the suit was not for removal of the encroachment as such ?”

4. The Appellant herein was the original plaintiff in Regular Civil Suit No.236/2001/II seeking a declaration, injunction, and consequential reliefs against the Respondent Defendants or their predecessors in title concerning the co-ownership of the suit property described as “ADDO”

or “TAMBITEM”, admeasuring 2850 square meters, surveyed under No.50/30, Village Majorda, Salcete, Goa. Plaintiff had also sought an injunction to restrain the Respondent Defendants from undertaking any construction activity in the suit property.

5. During the pendency of the suit, however, Respondent No.1 and her legal heirs completed the construction of the house and claimed exclusive possession and ownership to half the portion of the land, relying on partition deed dated 27.05.1977, between the original defendant and one Ms. Lodovina Braganza. The Respondent Defendants, however, admitted in their written statement that the Appellant was and is a co-owner of the suit property, but stated that there is already a partition in place and the Appellant should, therefore, be satisfied with the remaining portion.

6. The Trial Court dismissed the suit but accepted the case of the Appellant Plaintiff that the suit property was jointly owned by the Appellant and Respondent Defendants. The Trial Court also held that the partition deed dated 27.05.1977 will not bind the Appellant, as the Appellant was not a party to the same.

7. The Appellant thereupon appealed to the District Court, Margao, vide Regular Civil Appeal No.63/2007, which was, however, dismissed by the First Appellate Court vide Judgment and Decree dated 28.01.2008. The findings of co-ownership of the suit property and that the partition

deed dated 27.05.1977 would not bind the Appellant Plaintiff were, however, upheld by the First Appellate Court, as well. The record indicates that these crucial findings in favor of the Appellant Plaintiff were not even appealed against, by the Respondent Defendants.

8. Since the Appellant Plaintiff did not secure the reliefs as claimed in the plaint despite the aforesaid beneficial findings, this second appeal came to be lodged and was admitted on the aforesaid substantial questions of law.

9. At the stage of the final hearing, the Court felt that since there was no dispute about co-ownership, the rights of the Appellant Plaintiff, and further since the partition deed was also not to bind the Appellant Plaintiff, the matter could perhaps be sorted out, if necessary, by impleading the other co-owners as parties to these proceedings. Accordingly, leave was granted to amend the memo of appeal to implead the other co-owners as Respondents No. 1(h), 1(i), 2, 3, 4(a), 4(b), 5, 6, and 7. These Respondents were duly served, but have chosen not to appear despite service.

10. The Appellant (original Plaintiff) and Respondents No.1(a) to 1(g) i.e. the legal representatives of the original Defendants have, as pointed out above, filed consent terms. Therefore, the disputes between them could have been held as resolved based on such consent terms. However, this Court is anxious to ensure that these terms do not, in the slightest,

prejudice the rights and interests of the other co-owners of the suit property.

11. Accordingly, this Court feels that it would be appropriate if one of the parties institutes an inventory proceeding before the competent Court concerning the suit property and other co-owned properties, if any, where all the parties, including the Appellant and Respondent No.1(a) get their legitimate share in terms of their legitimate entitlements. In the consent terms, Respondent No.1(a) has agreed and undertaken to file such inventory proceedings within a period of a maximum of four months from today. Mr. Rodrigues, the learned Counsel for Respondent No.1, on instructions, reiterates this undertaking. Accordingly, consistent with such undertaking, Respondent No.1(a) shall file inventory proceedings before the competent Court concerning the suit property and other co-owned properties, if any. Mr. Rodrigues states that to such inventory proceedings, all the co-owners including the Appellant herein will naturally be impleaded as parties.

12. The inventory proceedings will have to be disposed of in accord with law and on their own merits after giving a fair opportunity to all the parties i.e. to all the co-owners. The inventory proceedings will have to be decided without being influenced by the orders dismissing the Appellant's suit. However, the Inventory Court will have to proceed on the basis that the Appellant is indeed the co-owner of the suit property,

and further, that the earlier partition deed is not binding on the Appellant herein.

13. Mr. Godinho, the learned Counsel for the Appellant, based on instructions, as also on what is recorded in the consent terms, has stated that the Appellants, at this stage, will not insist upon demolition of the construction which is already complete and even this issue can abide by the orders which will be made by the Inventory Court in the proceedings to be initiated by Respondent No.1(a). Mr. Rodrigues, the learned Counsel for Respondents No.1(a) to 1(g), again based on instructions and what is set out in the consent terms, has stated that until the inventory proceedings are decided, neither any further construction will be carried out by them in the suit property, nor any third party rights will be created by them in the suit property.

14. The undertakings given by the parties are accepted as undertakings to this Court. In case there is any disobedience of the undertakings, the parties are at liberty to take out appropriate proceedings to enforce the same and if necessary, to even seek recall of this order and insist upon demolition of the construction made during the pendency of the suit. This Court is quite sure that such an occasion will not arise, but the liberty is granted should the same arise, and particularly if there is a delay in instituting inventory proceedings.

15. The other co-owners who are impleaded as parties in this appeal will be at liberty to raise all permissible contentions to safeguard their alleged rights and entitlements to the suit property. It is once again made clear that nothing in this order is intended to prejudice their rights and interests, if any, to the suit property or other co-owned properties, if any.

16. The substantial questions of law are answered in the aforesaid terms. This appeal and miscellaneous civil application are disposed of in the aforesaid terms.

M.S. SONAK, J.