

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 24 OF 2009

1. Mr. Walfrido Olderico Jose
Lactancio S. Da Conceicao Anato
alias Mr. Walfrido Antao
(since deceased through his legal heirs)

1.a. Mr. Lourenco Cewel Joao Camilo
Celso Da conceicao Antao,
Son of late Walfrido Antao

1.b. Mr. Joaquim Celiano Olderico
Illdeberto Da Conceicao Antao
Son of late Walfrido Antao

1.c. Ms. Carla Maria Flora Ricardina
Da Conceicao Antao,
Daughter of late Walfrido Antao
(1.b and 1.c represented by next
friend and natural guardian
their mother, the appellant no.2)

2. Mrs. Maria Celina Fatima Do,
Rosario e Souza, Wife of late
Mr. Walfrido Antao,
major in age, housewife,
All residents of H.No.257,
Arrosim, P.O. Cansaulim, Goa.

... Appellants

Versus

1. Alexio Rodrigues
(since deceased through legal heirs)
1.a. Mr. Sergio Rodrigues
son of late Mr. Alexio Rodrigues
service,

1.b. Mr. Domingos Rodrigues
son of late Mr. Alexio Rodrigues
service,

1.c. Mr. Jose Rodrigues
son of late Mr. Alexio Rodrigues
service,

1.d. Mrs. Fatima Rodrigues
daughter of late Mr. Alexio Rodrigues
Housewife, all residents of H.No.262/F,
Arossim, Bandar,
Cansaulim, Goa.

1.e. Mrs. Sharmila Rodrigues
daughter of late Mr. Alexio Rodrigues
Housewife, resident of H.No.436, Gottar,
Macazana, Salcete-Goa.

2. Mrs. Mariquinha Rodrigues
Wife of late Mr. Alexio Rodrigues
major of age, housewife,
resident of H.No.262/F
Arossim, Bandar, Cansaulim, Goa.

... Respondents.

Mr. R. G. Ramani, Senior Advocate with Mr. P. Kakodkar, Advocate
for the Appellants.

Mr. Arun Bras De Sa, Advocate for the Respondents.

Coram :- BHARATI H. DANGRE, J.
Reserved on: 29.01.2021
Pronounced on: 11.02.2021

JUDGMENT:

1. Heard the learned senior counsel Mr. R. G. Ramani with Mr. P. Kakodkar, for the appellants and Mr. Arun Bras De Sa, learned counsel for the respondents.

2. On 3rd April, 2009, the present appeal came to be admitted by formulating the single substantial question of law to the following effect:

'Whether the first appellate court fell in error in refusing declaration because Francisco Antonio Lucio Pereira and Hermogeneous Sebastiao Pereira were not parties.'

3. The sequence of events leading to the formulating of the said question of law can be briefly narrated as under:

The plaintiffs who are the appellants in the Appeal claim to be owners in possession of the suit property situated at Village Arossim Taluka Mormugao bearing Survey No.72/1 and also owned other properties including part of a property known as Aframento bearing survey no.73/2 admeasuring 76625 sq.mts situated in the same village. The property vide survey no. 72/1 was inclusive of the alleged illegally occupied property of the defendants, by dispossessing the plaintiffs. The plaintiffs sold the total area of

800 sq. mts to one Francisco Antonio Lucio Pereira and Hermogeneus Sebastiao Pereira and an area of 600sq.mts each of the suit property is occupied by one Jacinto Quadros and Pedro Filipe Pereira, 160sq.mts of the area from survey no.72/1 was sold to the brother of defendant no.1 Rosario Santana Pereira. The plaintiffs retained the possession of remaining area, i.e. 1455 sq.mts of the suit property. The defendants and his brother Rosario Santana Pereira alongwith his wife claimed to be mundkar of the property bearing survey no.73/2 having their dwelling house. The plaintiffs were desirous of selling the property from survey no.73/2 to a third person and since the sale was expected to be free of any encumbrance, request was made to the defendants and the family members of Rosario Santan to shift their residence to suit property contained in survey no. 72/1. The plaintiffs agreed to sell 160sq.mts each to the defendants and Rosario Santan for a nominal price of ₹150/- out of which an amount of ₹100/- was to be paid as earnest money on signing of the agreement and the balance to be paid after shifting of mundkarial house from the suit property to survey no.72/1. The agreement for sale to that effect was executed on 01.01.1986.

4. The case of the plaintiff as set out is that the defendant no.1 shifted his house as per the agreement but the defendants in

flagrant violation of the agreement continued to occupy the house no.262. This compelled the plaintiff to sell the property to one Mohammad Saleem Pasha with the existing encumbrance of mundkarial house of defendants. The defendants thereafter are alleged to have surrendered their rights in the house bearing no.262 located in the property to M/s. Carrington Hotel, to whom the purchaser Mohammad Saleem Pasha sold the property. This was in consideration of huge compensation being received by them from M/s. Carrington Hotel.

5. On noticing that the defendants had illegally trespassed into the portion of the suit property and started illegal construction, the plaintiff instituted a suit for declaration that the agreement for sale dated 1.1.1986 is null and void and that the plaintiffs are owners in possession of the suit property except the area occupied by Rosario Santan and the area sold by the plaintiffs.

The defendants contested the claim and also set up a counter-claim alleging that there are violations of the terms of agreement, as necessary provision for plan and NOC for construction of house in survey no.72/1 was not obtained, which constrained them to stop the construction. The breach was alleged as the appellants failed to transfer the suit plot in the name of defendants and it was pleaded that the agreement for sale is still

existing and valid. By counter-claim, a declaration was sought for executing necessary sale deed and a permanent injunction was also prayed for restricting the plaintiffs from interfering with the property and dispossessing them.

6. By judgment and order passed by the trial court on 04.03.2008, the suit of the plaintiff came to be allowed and the counter claim dismissed, by holding that the respondents had violated the terms and conditions of the agreement, rendering it to be null and void.

7. The respondents preferred an appeal in the Court of District Judge, South Goa, Margao challenging the judgment and decree. The Appellate Court confirmed the findings in favour of the plaintiffs as recorded by the trial court but held that the plaintiffs/appellants could not have been declared as absolute owners in possession of part of suit property admeasuring 1455 sq.mts since in the Record of Rights pertaining to the suit property, the name of appellant no.1 Walfrido Antao has been entered alongwith the names of Francisco Antonio Lucio Pereira and Hermogen Sebastiao Pereira and the said persons were not parties to the suit and no declaration could be made about the rights of the appellant in their absence.

The plaintiff/appellant has assailed the said judgment and it is in this backdrop the aforesaid substantial question of law has been formulated since it arises therein.

8. The question involved in the peculiar facts is whether on the ground of non-joinder of necessary parties and in absence of plea to that effect taken in defence and no issue framed thereupon, the Appellate Court was justified in doing so.

The 2 plaintiffs who instituted the civil suit seeking a declaration are the husband and wife and the claim staked by them is that the plaintiff no.1 is seized and possessed of or otherwise and sufficiently entitled to the landed property described in the plaint. The reliance was placed on Deed of Declaration of Succession dated 15.11.1985 by which the plaintiff and his sister became owners of all the properties bequeathed by brother of plaintiff no.1 including the suit property. The sister Maria Celsina Antao renounced and relinquished her rights in favour of plaintiff no.1 by Relinquishment Deed. Subsequent thereto by Deed of Succession dated 15.03.1990 plaintiff no.1 became entitled to all the properties of one Ricardina Antao who had bequeathed the said property to one Celsa Graciano da Conceicao Antao by will. The plaintiff allege that he had sold 800 sq.mts. land to one Francisco Antonio Pereira and Hermogen Pereira who are the heirs of Elvira Vaz and Dermitlida Gomes and

600 sq. mts. is in occupation of 2 other persons whereas 160sq.mts was sold to the brother of defendant. He claim to be in possession of area of 1455 sq.mts. The declaration in the plaint qua the property in his possession was clearly spelt out and in the prayer clause the relief was also clearly sought for a declaration as owners in possession of suit property except the area sold to Francisco Antonio Pereira and Hermogen Pereira and the area occupied by Pedro Filipe Pereira and Jacinto Quadreas. The area in respect of which declaration was sought was approximately 1455 sq.mts. In light of the clear declaration in the plaint and restricting the limit of the land in respect of which the declaration was sought, the impugned judgment of the appellate court, partly setting aside the declaration is not sustainable, the reasoning being Exhibit 63 which is Records of Rights of the suit property the name of the plaintiff no.1 is entered in the occupant's column alongwith the other persons and unless and until they are parties, no declaration can be given. During the trial the plaintiff has established his title and therefore a declaration is issued in his favour by the Civil Court and decree is passed to that effect. The declaration is limited to area of 1455 sq.mts as claimed by the plaintiff to be the owner and in possession of the suit property. The appellate court has failed to take into consideration that the co-owner is also competent to maintain the suit protecting the interest in the property on behalf of other

owners. In any case, in light of Order I Rule 9 of Code of Civil Procedure, no suit shall be defeated by reason of misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. This provision is applicable with the exception in case of non-joinder of the necessary party. The issue as regards the claim of the plaintiffs to seek a declaration in respect of area admeasuring 1455 sq.mts was never contested by the defendants and therefore no issue has been framed to that effect. The suit was instituted by the plaintiff seeking a declaration that the agreement of sale dated 01.01.1986 is null and void and the claim was against the defendants who were alleged to have illegally started construction in utter violation of the said agreement. The appellate court has simply misdirected itself and partly modified the said decree granted in favour of the plaintiff in utter ignorance of the settled principle of law that the Records of Rights do not confer any title nor extinguish the title. The co-owners Francisco Antonio Pereira and Hermogen Pereira are the purchasers from the plaintiffs and their interest is not in any way being influenced by the plaintiff and the said declaration sought by him vide the judgment and decree dated 04.03.2008.

9. In light of the aforesaid facts and the legal position

governing the facts holding that the first appellate court has clearly erred in refusing the declaration in favour of the plaintiffs as the co-owners of a portion of the property owned by the plaintiffs were not made parties. Answering the question of law in the affirmative, the appeal is allowed, by setting aside the judgment of appellate court dated 11.06.2008 to the extent of refusing a declaration in favour of the plaintiff that they are owners in possession of suit property, which is an area of 1455 sq.mts. The judgment and decree passed by trial court on 04.03.2008 is confirmed. Decree be drawn accordingly.

BHARATI H. DANGRE, J.

msr.