

IN THE HIGH COURT OF BOMBAY AT GOA***SECOND APPEAL NO.12 OF 2012***

1. Mrs. Celia Fernandes,
d/o Joaquim Constancio Viegas,
major of age, and her husband

2. John Fernandes, major of age, seaman,
Both r/o H. No. 604-A, Hill Crest, Holy Cross Road,
I.C. Colony, Borivali (W), Mumbai-400 013 ... Appellants

Versus

1. Smt. Felicidade Vaz, Expired

1(a) Mrs. Rosa Moares, major of age,

1(b) Mr. Fransisco Jesuito Tadev Morais,
major of age, both residents of H.No 663,
Dandewaddo, Chinchinim, Salcette Goa 403517.

1(c) Mr. Polly Vaz, major of age, s/o Shri Constancio Vaz

1(d) Mrs. Sharlet Faviola Rodrigues e Vaz,
major of age, both residents of r/o
Rolleaband, Chinchinim, Salcette, Goa.

1(e) Mrs. Darina Da'costa, major of age,
w/o Simon Da'costa

1(f) Mr. Simon Da'costa, major of age,
both residents of H.No 821, new colony
lane 2, Mandopa, Navelim, Salcette, Goa.

2. Shri Constancio Vaz, aged 48 years, service,
son of Antonio Santano C. Vaz,
r/o Tolleaband, Chinchinim, Salcete,Goa.

3. Rosa Joaquim Monteiro, aged 83 years, Tolleband,
Deussua, Chinchinim, Salcete, Goa, (deceased)

4. Shri Ubaldino Jeronimo Viegas,
s/o late Joaquim Constancio Viegas,

aged 58 years, Service, r/o Tolleband,
Deussau, Chinchinim, Salcete, Goa.
(since deceased through Legal representative)
4a. Francisco Kevin Viegas, r/o H. No. 228,
Villa Vailankani, Ela, Old Goa, Goa.

5. Shri Valentino H. Viegas, aged 22 years,
service, son of Ubaldino Jeronimo Viegas,
r/o Chinchinim Tollebando, Salcete, Goa.

... Respondents

Mr. Nitin Sardesai, Senior Advocate with Mr. G. Panandikar,
Advocate for the Appellants.

Mr. A. F. Diniz, Senior Advocate along with Mr. Ryan Menezes and
Mr. Nigel Fernandes, Advocates for the Respdnts No.1(c), 1(d) & 2.

Coram:- M.S. SONAK, J.

Reserved on:- 29th January 2021

Pronounced on:- 01st February 2021

JUDGMENT

This Second Appeal was admitted on 15.03.2012 on the following substantial questions of law:

“1. Whether the said sale transaction entered into by the Respondent nos. 4 and 5 with the Respondent no.2 in respect of their undivided share in a specific property could be held to be valid when the Respondent nos. 4 and 5 were co-owners alongwith the Appellants herein of the property sold along with few other properties which were jointly inherited by them from their ancestors, especially in the absence of any partition/inventory ?”

2. The appellants are the original plaintiffs and the respondents are the original defendants in Special Civil Suit No.9/2006 instituted by the plaintiffs before the Ad-hoc District Judge-1, FTC-I, South Goa at Margao (Trial Court) seeking the following reliefs:

“(a) That by Judgment and Decree of this Hon'ble Court, the Deed of gift dated 14th October 1992 executed by the Defendant no. 1 in favour of the Defendant no. 2 registered under No. 202 at pages 588 to 595 dated 11/3/1993, and the Deed of Sale dated 26th December 1995, registered under No.27 at pages 462 to 498 dated 4/1/1996 be declared as null and void.

(b) That by Judgment and Decree of this Hon'ble Court, the defendant no.2(a) be directed to quit, vacate and hand over the Vacant possession of the said house and of the property;

(c) Cost of the suit be allowed;

(d) Other and further orders be passed as deemed fit and proper.”

3. The Trial Court vide Judgment and Decree dated 30.04.2009 partly decreed the suit and the sale deed dated 26.12.1995 registered under No.27 at pages 462 to 498 dated 04.01.1996 was declared as null and void.

4. The respondents/their predecessors in title, aggrieved by the decree dated 30.04.2009 appealed to the District Court, South Goa at Margao (First Appellate Court) vide Regular Civil Appeal No.500 of 2010 / First Appeal No.138 of 2009. By judgment and decree dated 28.07.2011 the First Appellate Court allowed the appeal and set aside the Trial Court's judgment and decree dated 30.04.2009. Hence the present Second Appeal on the aforesaid substantial question of law.

5. Mr. Nitin Sardesai, the learned Senior Advocate who appears along with Mr. G. Panandikar submitted that from the meaningful

reading of the deed of sale dated 26.12.1995, it was more than apparent that the respondents, as co-owners of the suit property, had disposed of a specific portion of the common property without the same being assigned or allotted to them in any inventory or partition. He pointed out that Article 2177 of the Portuguese Civil Code clearly provided that a co-owner cannot dispose of either the entire property or any specific portion thereof unless and until the share of such co-owner in the property is partitioned, separated in loco, and allotted to him. Mr. Sardesai points out that the recitals in the sale deed dated 26.12.1995 have been ingeniously worded but the habendum clauses make it clear that specific property or a specified portion of the common property has been sold by the co-owners in the teeth of the provisions of Article 2177 of the Code. Mr. Sardesai submits that the sale deed dated 26.12.1995 was quite correctly declared null and void by the Trial Court and the First Appellate Court erred in interfering with the decree made by the Trial Court in this matter.

6. Mr. Sardesai relied on **Jose Antonio Philip Pascoal da Piedade Cirilo dos Milagrese Miranda and another v. Joao Luis Laurente dos Milagres Miranda and others – 1999 (1) Goa L. T. 77 and Shri Claudio Francisco v. Smt. Eulalia Fernandes (deceased) & Anr. - 2005 (2) ALL MR 247** in support of his aforesaid contention.

7. Mr. A. F. Diniz, learned Senior Advocate who appears along

with Mr. Ryan Menezes and Mr. Nigel Fernandes for the Respondents No.1(c), 1(d), and 2 in this appeal defended the impugned judgment and decree made by the First Appellate Court based on the reasoning reflected therein. He pointed out that though he was representing the purchasers in the sale deed dated 26.12.1995, there was complete clarity in the understanding of the purchasers that they have only purchased undivided rights in the suit property and they have not purchased either the entire suit property or any specific portion thereof to attract the bar of Article 2177 of the Portuguese Civil Code.

8. Mr. Diniz pointed out that the sale deed dated 26.12.1995 is quite clear in that the vendors/co-owners have only sold their undivided rights in the suit property to the purchasers and this is not at all a case of sale of the entire suit property or the sale of the entire common property or the sale of any specified portion of the suit property or the entire common property to attract the provisions of Article 2177 of the Portuguese Civil Code.

9. Mr. Diniz submitted that there is no bar under Article 2177 of the Portuguese Civil Code for one of the co-owners to sell his undivided rights in the common property even in favour of a stranger, subject no doubt, to the rights of other co-owners to enforce their preemption rights. He points out that in the present case the appellants never sought to enforce their rights of preemption and therefore, the appellants cannot complain of any infirmity in the sale

deed dated 26.12.1995, which is not in breach of the provisions of Article 2177 of the Portuguese Civil Code.

10. Mr. Diniz pointed out that the First Appellate Court in paragraphs 19 and 21 of the impugned judgment and decree dated 28.07.2011 made it quite clear that the sale deed dated 26.12.1995 pertains only to the sale of undivided rights and therefore, there was no question of breach of Article 2177 of the Portuguese Civil Code. Mr. Diniz distinguished the decisions relied on by Mr. Sardesai and he relied on the decision of the Hon'ble Supreme Court in *Syscon Consultants Private Limited v. Primella Sanitary Production Private Limited and others – 2016 DGLS (SC) 993*.

11. For all the aforesaid reasons Mr. Diniz submitted that the substantial question of law as framed may be answered against the appellants and this appeal be dismissed, if necessary, by clarifying the position that the sale deed dated 26.12.1995 was only in respect of undivided rights of the suit property.

12. The rival contentions now fall for determination.

13. The entire matter, according to me, turns on the interpretation of the recitals and other clauses of the sale deed dated 26.12.1995. This is because there is no serious dispute about the legal position which emanates from the provisions of Article 2177 of the Portuguese Civil Code.

14. In paragraph 57 of *Syscon Consultants Private Limited (supra)* the Hon'ble Supreme Court has taken cognizance of the circumstance that there are different translated versions of Article 2177 of the Portuguese Civil Code but the Hon'ble Supreme Court has referred to the following translation:-

“It is not lawful to a co-owner, however, to dispose a specific part of the thing held indivisibly, without the same being allotted to him in partition; and a transfer of the right, which he has to the share belonging to him, may be restricted in accordance with the law.”

15. In *Jose Antonio (supra)* the learned Single Judge of this Court has held that Article 2177 of the said Code provides that a co-owner cannot dispose of specifically any portion of the common property without the same being assigned or allotted in a partition to him. Thus it prohibits the alienation of a property in the form of a gift by any person unless the said property exclusively belongs to the donor. In other words, a gift can be of a property or any share in a property that exclusively belongs to the donor. In case of a property which is owned by a person along with some other person or persons, it would be a case of co-ownership of the property and in such a case, considering the provisions contained in Article 2177 of the Portuguese Civil Code, the co-owner would not be entitled to dispose of either the entire property or any specific portion of such property unless and until the share of such a co-owner in the property is allotted, partitioned and separated in loco.

16. In the case before the learned Single Judge, one of the co-owners had not only gifted her entire disposable share of one half (*quota disponivel*) with reservation of lifetime usufruct in her favour but also gifted three specific properties namely '*Deulacodil Molla*', '*Madari or Patem*' and '*Mixto Madari*' totally admeasuring 40,000 sq.mtrs. or thereabouts. Based on the provisions of Article 2177 of the Code, the learned Single Judge of this Court held that the transfer of the disposable quota of the donor cannot be said to relate to any specific property or specified portion and therefore, such transfer was not hit by the provisions of Article 2177 of the Code. However, the transfer of three specified properties was hit by the provisions of Article 2177 of the Code and therefore, the gift deed to the extent it purported to transfer these specified properties, was null and void.

17. In *Claudio Francisco (supra)*, the defendants inherited the property left behind by his father Gregory, which had not been subject to any partition. Despite that, the defendants sold the said property in favour of a third party. In these circumstances, following the law laid down in *Jose Antonio (supra)*, the decree of the Trial Court setting aside such sale was upheld by this Court.

18. In *Syscon Consultants Private Limited (Supra)* the Hon'ble Supreme Court, in the context of the provisions of Article 2177 of the Portuguese Civil Code made the following observations at para 57:-

“57. The vehement contention, advanced by learned Senior

Counsel Shri Dhruv Mehta, based on Article 2177 of the Portuguese Civil Code, 1867 that there was an absolute bar for transfer of any portion of the estate or a specific item of the estate, need not detain us both on account of factual matrix and on law. As we have already noted hereinabove, Defendants 1-8 had already given up on their right in the suit property by not taking steps to avoid the distress sale at the instance of the Bank. Though, there are different translated versions of the provision, we may extract Article 2177 as provided by Defendants 7 and 8 in their Appeal:

It is not lawful to a co-owner, however, to dispose a specific part of the thing held indivisibly, without the same being allotted to him in partition; and a transfer of the right, which he has to the share belonging to him, may be restricted in accordance with the law.”

19. Now it is true, as contended by Mr. Sardesai that the emphasis in *Syscon Consultants Private Limited (Supra)* was really upon the conduct of the parties in a suit seeking discretionary reliefs of specific performance. It is basically in that context that the Hon'ble Supreme Court held that the provisions of Article 2177 of the Portuguese Civil Code will not come in the way of decreeing such a suit for specific performance in the peculiar facts of the case because Article 2177 does not prohibit alienation of undivided interest and further, such a provision is in tune with the Principle underlying Section 44 of the Transfer of Property Act, 1882.

20. Therefore, as noted earlier, the crucial issue is whether the sale deed dated 26.12.1995 transfers any specified property or any specified

portion of the co-ownership property or whether the sale deed merely transfers undivided rights in the co-ownership property.

21. Now, if the recitals or the other clauses of the sale deed are perused it is possible to say that the same are to some extent ambiguous or confusing. However, mere ambiguity or confusion in the phraseology employed by the parties is not sufficient to declare such sale deed as null and void or as in breach of the provisions of Article 2177 of the Portuguese Civil Code. The sale deed will have to be read and construed in its entirety and even the intention of the parties to the sale deed will have to be ascertained.

22. Now insofar as the intention of the parties is concerned, the same has been made clear time and again that this sale deed is neither concerned with the entire co-ownership property nor with any specified portion of the co-ownership property. Rather, the parties to the sale deed assert and reassert that the sale deed is only concerned with the transfer of undivided rights possessed by the vendors, and based on such sale deed, the purchasers do not even claim any exclusive right or title to the suit property as described by the appellants. Mr. Diniz, the learned Senior Advocate appearing for some of the purchasers also made it clear that the purchasers, in terms of the sale deed dated 26.12.1995 could claim and are claiming only undivided rights and not either entire rights to the common property or even rights to any specified portion of the common property. The First

Appellate Court has also made it very clear that the sale deed dated 26.12.1995 only transfers undivided rights in the suit property which means that the sale deed does not specify or describe the portion of part of the property sold from the joint property. Based on such interpretation, which was advanced by none other parties to the sale deed dated 26.12.1995 that the First Appellate Court concluded that the sale deed was not hit by the provisions of Article 2177 of the Portuguese Civil Code. This aspect is reiterated by the First Appellate Court in paragraph 21 of the impugned judgment and decree dated 28.07.2011.

23. Thus, insofar as the intention of the parties to the sale deed dated 26.12.1995 is concerned, it is apparent that the parties are quite clear that the sale deed dated 26.12.1995 does not transfer to them either the entire common property or even any specified portion of the common properties. All that they have acquired by the sale deed dated 26.12.1995 is the undivided rights to the said property, which undivided rights, admittedly, the vendors in the said sale deed possessed before the sale deed dated 26.12.1995. The parties to the sale deed will therefore be bound by this understanding, failing which the sale deed dated 26.12.1995 might itself be vulnerable, considering the provisions of Article 2177 of the Portuguese Civil Code.

24. Though, the recitals or some of the clauses of the sale deed dated 26.12.1995 appear to be a little ambiguous, upon reading or

construction of the sale deed in its entirety, it does transpire that the vendors have only sold and transferred their undivided rights in the suit property in favour of the purchasers. Therefore, this is not a case of transfer of common property either in its entirety or a case of transfer of a specified portion of the common property by some of the co-owners in favour of some strangers. Therefore, based upon the sale deed dated 26.12.1995 the purchasers will not be in a position to claim any rights over and above the rights which their vendors possessed as co-owners. This also means that the rights which the appellants have as co-owners are intact or not affected by the execution of the sale deed dated 26.12.1995.

25. Mr. Sardesai did contend that the purchasers are strangers and therefore the appellants will now have to co-own the suit properties with such strangers. Article 2177 of the Portuguese Civil Code does not prohibit the transfer of undivided rights in the common property, even in favour of strangers. This is no doubt subject to the rights of preemption which certain other articles of the Code give to the co-owners. In this case, the appellants did not seek to enforce their rights of preemption. The plea in the suit instituted by them was not to seek enforcement of their rights of preemption. Therefore, there is no point in complaining about the appellants having to enjoy the common property together with some strangers.

26. Now that the factual, as well as the legal position, is clarified, the

appellants, will undoubtedly have all their rights as co-owners secure and intact. This will include the right to seek partition, etc. Based on the sale deed dated 26.12.1995, there will be no question of the purchasers claiming any specific rights in any specific co-ownership property. The purchasers have merely stepped into the shoes of the vendors and will now have the same co-ownership rights which the vendors had before the execution of the sale deed dated 26.12.1995.

27. With the aforesaid clarifications, there is no necessity to set aside the impugned judgment and decree made by the First Appellate Court in this matter. The substantial question of law is also answered accordingly.

28. The appeal is disposed of in the aforesaid terms without there being any order for costs.

M. S. SONAK, J.