

Andreza

**IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 115 OF 2004**

1. Mrs. Ranjana Jayant Saudagar,
married to,

2. Mr. Jayant Saudagar,

Both of full age, residing at House
no.7/10, Calangute, Bardez-Goa.

... Appellants

V e r s u s

1. Mr. Anil Manohar Bordekar,
And his wife

2. Mrs. Sujal Anil Bordekar;

3. Mr. Manohar Jayawant Bordekar,

All 1 to 3 residents of House No. 7/10,
Sauntavaddo, Calangute, Bardez-Goa,
currently residing at Bombay.

[Deleted since deceased and tendered
the death certificate.]

4. Mrs. Jyoti Subhash Mardolkar,
Married to,

5. Mr. Subhash Mardolkar,

Both 4 and 5 of full age, residing at
Mardol Taluka, Ponda-Goa.

1 to 5 represented herein by their constituted
Attorney, Mr. Jude Sodder, of full age,
resident of Sauntavaddo, Calangute, Bardez,
Goa.

... Respondents

Mr. Parag Rao, Advocate *for the Appellants.*

Mr. S. D. Lotlikar, Senior Advocate *with Ms. S. Naik, Advocate*
for the Respondents.

CORAM: MANISH PITALE, J

Reserved on: 27th January 2022

Pronounced on: 31st January 2022

JUDGMENT

1. By this Appeal, the original defendants are before this Court challenging Judgment and Order dated 30.06.2004, passed by the Court of First Adhoc Additional District Judge, Panaji, whereby, Regular Civil Appeal No. 46 of 2004, filed by the original Plaintiffs stood allowed.

2. The facts in brief leading to the filing of the present appeal are that the parties are *inter se* related to each other. One Manohar Bordekar i.e. the original Plaintiff no.3, who was Respondent no.3 in the present Appeal and later deleted upon his death, was married to Mandakini Bordekar. They had three children i.e. the Appellant no.1, the Respondent no.1 and Respondent no.4. The Appellant no.2 is the husband of Appellant no. 1 and Respondent no.5 is the husband of Respondent no.4. The said Mandakini Bordekar purchased a property comprising two plots surveyed under nos. 243/5 and 244/22 admeasuring 600 square metres and 50 square metres respectively. Property at survey no. 244/22 was acquired for construction of public road and the present litigation concerns the residential house property in survey no. 243/5. The Appellants claimed that the said Mandakini Bordekar, wife of Manohar Bordekar, i.e. the father of Appellant no.1, executed Will Deed dated 03.03.1981, bequeathing the property in

favour of the Appellants. It was further claimed that a Gift Deed dated 24.11.1982, was also executed by him, in respect of part of the suit property in favour of Appellant no.2. The original Plaintiffs i.e. the Respondents herein disputed execution of the Will Deed as well as the Gift Deed. They also disputed execution of a Sale Deed dated 06.01.1994, purportedly executed by Manohar Bordekar, whereby he had allegedly sold his undivided share in the suit property in favour of the Appellant no.2 i.e. his son-in-law. The aforesaid Sale Deed was alleged to have been executed through a Power of Attorney holder.

3. The Respondents filed a suit for declaration and injunction against the Appellants for declaring Will Deed dated 03.03.1981, Gift Deed dated 24.11.1982 and Sale Deed dated 06.01.1994 as null and void. They also prayed for an injunction restraining the Appellants from transferring or alienating the suit property without the intervention of the Respondents. The Appellants filed their written statement and opposed the reliefs claimed by the Respondents. They stood by the validity of the aforesaid documents. The rival parties led evidence in favour of their respective stands.

4. By Judgment and Order dated 31.01.2004, the Court of Civil Judge, Junior Division at Mapusa, (hereinafter referred to as the *Trial Court*), partly decreed the suit by declaring that the Will Deed dated 03.03.1981 and the Gift Deed dated 24.11.1982, were null and void. The declaration sought by the Respondents with regard to Sale Deed dated 06.01.1994, was rejected.

5. Aggrieved by the said Judgment and Decree, the Respondents filed Appeal before the Court of First Adhoc Additional District Judge,

Panaji, (hereinafter referred to as the *Appellate Court*). It is an admitted position that the Appellants did not challenge the Judgment and Decree passed by the Trial Court. As a consequence, the only area of dispute before the Appellate Court was the validity of the aforesaid Sale Deed dated 06.01.1994.

6. The Appellate Court took into consideration the evidence and material on record and found that the Appellants claimed that the Sale Deed was executed on the strength of a Power of Attorney executed by Manohar Bordekar i.e. original Plaintiff no.3. The said Manohar Bordekar, who also deposed as Pw.2 before the Trial Court, refuted execution of any such Power of Attorney and claimed that the Appellant no.1, i.e. his daughter, had taken his signatures on certain blank papers, which may have been misused for preparing the Power of Attorney. The Appellate Court concluded that, in these circumstances, it was for the Appellants to have produced the Power of Attorney on record in order to substantiate their claim that the Sale Deed was valid. It was also held by the Appellate Court that the Appellants could not prove payment of consideration to the said Manohar Bordekar and this was an additional reason why the Sale Deed deserved to be declared as null and void. On this basis, the Appellate Court found that the Trial Court had erred on this aspect of the matter. Consequently, the Appeal was allowed and the Sale Deed also stood declared as null and void.

7. Aggrieved by the aforesaid Judgment and Order passed by the Appellate Court, the Appellants filed the present Appeal. By order dated 18.08.2005, the Appeal stood admitted on the following substantial question of law:

“Whether the Courts below are justified in setting aside the Deed of Sale for the reasons stated in the impugned Judgments?”

8. Heard the learned Counsel appearing for the rival parties on the aforesaid substantial question of law.

9. Mr. Parag Rao, learned Counsel appearing for the Appellants, contended that the findings rendered by the Appellate Court were based on an erroneous appreciation of the facts and law. It was submitted that on perusal of the pleadings of the parties in the present case and the oral and documentary evidence, it would be evident that the Respondents had miserably failed to demonstrate that there were grounds for declaring the Sale Deed dated 06.01.1994, as null and void. It was contended that in the absence of a challenge to the Power of Attorney on the basis of which the Sale Deed was executed, the Appellate Court could not have rendered adverse findings in respect of the Power of Attorney and consequently in respect of the Sale Deed in question.

10. It was submitted that the Appellate Court read a statement made in cross-examination of Appellant no.1 as an admission that signatures of the said Manohar Bordekar were taken on blank papers. It was submitted that the said statement was read out of context to conclude that it was an admission on the part of Appellant no.1. By inviting attention to the evidence of the said Manohar Bordekar (Pw.2), it was submitted that there were vital admissions given by him, which demonstrated that it was for the Respondents to have placed the Power of Attorney on record or examined the Power of Attorney holder who

had executed the Sale Deed in favour of Appellant no.2. On this basis, it was contended that the findings rendered by the Appellate Court in this regard were perverse and hence the impugned Judgment and Order deserved interference.

11. It was further contended that if the Respondents claimed that the Power of Attorney was executed in a fraudulent manner by the Appellants, it was for the Respondents to have specifically pleaded so and to have led evidence in support of such a claim. Having failed to do so, the Appellate Court ought not to have held in favour of the Respondents in the context of the aforesaid Sale Deed, executed on the strength of the power of attorney. It was further specifically contended that the suit filed by the Respondents for declaration was itself not maintainable, in view of their failure to seek possession of the suit property. It was contended that the bar of Section 34 of the Specific Relief Act, 1963, applied in the present case, particularly when the Appellants in their written statement, as also in the evidence of the Appellant no.1, had specifically proved that the Respondents were completely ousted from the suit property and that the Appellants were in exclusive possession thereof. Attention of this Court was invited on certain admissions in this regard. The learned Counsel appearing for the Appellants placed reliance on the Judgments of the Hon'ble Supreme Court in the case of *Ram Saran & anr. vs. Smt. Ganga Devi*¹, *Afsar Sheikh & anr. vs. Soleman Bibi & Ors.*², *Vinay Krishna vs. Keshav Chandra & anr.*³, *Anathula Sudhakar vs. P. Buchi Reddy*

1 (1973) 2 SCC 60

2 (1976) 2 SCC 142

3 1993 Supp (3) SCC 129

(Dead) by LRs. & Ors.⁴ and Rajni Tandon vs. Dulal Ranjan Ghyosh Dastidar & anr.⁵.

12. On the other hand, Mr. S. D. Lotlikar, learned Senior Counsel appearing for the Respondents, submitted that the present appeal deserved to be dismissed for the reason that the Appellate Court properly appreciated the pleadings, as well as the oral and documentary evidence on record to render findings in favour of the Respondents. It was submitted that when the said Manohar Bordekar specifically denied execution of Power of Attorney and the fact about his signatures being taken on blank papers by Appellant no.1 was proved by the evidence on record, the entire onus shifted on the Appellants, as the original Defendants, to produce the Power of Attorney on record, in order to substantiate their claim that the Sale Deed was validly executed. It was submitted that the Appellant no.1 in her evidence before the Trial Court had committed flip flop by claiming on the one hand that the said Manohar Bordekar had himself personally executed the Sale Deed and on the other hand also claimed that the Power of Attorney holder had executed the Sale Deed. This rendered the entire claim of the Appellant suspicious and it is for this reason that the Appellate Court held against them. It was further submitted that on the question of payment of consideration, the Appellate Court considered the evidence and material on record to find that the Appellants miserably failed to demonstrate how the alleged consideration amount of Rs.70,000/- was paid to the said Manohar Bordekar. On this basis, it was submitted that the impugned Judgment and Order was justified and did not deserve any interference.

⁴ (2008) 4 SCC 594

⁵ (2009) 14 SCC 782

13. On the question of alleged ouster of the Respondents from the suit property and on that ground the claim that the suit was not maintainable in the absence of a prayer for restoration of possession, it was submitted that the parties were admittedly co-owners of the suit property and, therefore, there was no question of the Appellants succeeding on this count. It was further submitted that there was lack of pleadings and evidence as regards hostile possession of the Appellants. It was also highlighted that there was no counterclaim filed on behalf of the Appellants and there was also no claim of adverse possession raised on their behalf. On this basis, it was submitted that the Judgments relied upon by the learned Counsel for the Appellants were wholly irrelevant in the facts of the present case.

14. Having heard the learned Counsel appearing for the rival parties and upon perusal of the material on record, it is found that the present Appeal is limited to the question of validity of the Sale Deed dated 06.01.1994. It is for this reason that the substantial question of law framed while admitting this Appeal pertains only to the aforesaid Sale Deed.

15. The Respondents in their suit filed before the Trial Court specifically claimed that the Sale Deed dated 06.01.1994, was null and void for the reason that it was based on a purported Power of Attorney, which the original Plaintiff no. 3 i.e. Manohar Bordekar, had never executed. There was specific denial about the very existence of the said Power of Attorney. Even as per the case of the Appellants i.e. the original Defendants, the Power of Attorney was a notarized document. It was also specifically claimed by the said Manohar Bordekar that the Appellant no.1, i.e. his own daughter, had got certain blank papers signed from him on the basis that the Respondent no.1, i.e. the brother

of the Appellant no.1, was seeking to oust her from the suit property. The said Manohar Bordekar claimed that as the father of Appellant no.1, he had signed the blank papers. According to the Respondents, the Appellants misused the said signed blank papers to prepare the said Power of Attorney and since the Sale Deed was executed by such purported Power of Attorney holder, the Sale Deed deserved to be declared as null and void.

16. In the backdrop of such rival claims made by the parties, it becomes clear that the onus was clearly on the Appellants to have either produced the Power of Attorney on record or to have led cogent evidence to prove the existence of the same. There is no dispute about the fact that no such effort was made by the Appellants and that the purported Power of Attorney never came on record. The claim made by the Appellants is further weakened by the evidence led on their behalf by Appellant no.1. A perusal of the same shows that while at one place she has claimed that her own father i.e. the said Manohar Bordekar (original Plaintiff no.3), had personally come and executed the Sale Deed dated 06.01.1994, at another place in her evidence, she has claimed that it was the Power of Attorney holder who had executed the Sale Deed. A perusal of the registered Sale Deed placed on record shows that it was executed by the Power of Attorney holder on the strength of the purported Power of Attorney said to have been executed by the said Manohar Bordekar in his favour.

17. On the other hand, in the pleadings of the Respondents and the deposition of the said Manohar Bordekar (Pw.2), it was consistently stated that no such Power of Attorney was executed. It was specifically stated that the Appellant no.1 had got certain blank papers signed from the said Manohar Bordekar, which were misused for preparation of the Power of Attorney. It is in the backdrop of such

pleadings and evidence of the said Manohar Bordekar that the Appellate Court highlighted a question put to the said Manohar Bordekar in cross-examination on behalf of the Appellants. A perusal of the answer given by the said Manohar Bordekar in cross-examination, clearly shows that the Appellants conceded to the fact that signatures of the said Manohar Bordekar were indeed taken on blank papers. In the face of such pleadings and evidence, it becomes clear that it was all the more necessary for the Appellants to have either produced the Power of Attorney on record or to have led cogent oral and documentary evidence to prove the existence of such a Power of Attorney. Thus, the contention raised on behalf of the Appellants that the impugned Judgment and Order passed by the Appellate Court was rendered erroneous, because the Respondents failed to challenge the Power of Attorney, cannot be accepted. The very execution and existence of the Power of Attorney was stoutly denied by the Respondents and, in this context, the Appellate Court was justified in holding that they could not be made to prove the negative.

18. Therefore, the findings rendered by the Appellate Court in the impugned Judgment and Order in respect of the Sale Deed cannot be said to be erroneous or perverse. The appreciation of the pleadings, as also the oral and documentary evidence on record was correctly undertaken by the Appellate Court, leading to cogent findings in favour of the Plaintiffs and against the Appellants. It is for this reason that the learned Counsel for the Appellants is not justified in relying upon the Judgment of the Supreme Court in the case of *Afsar Sheikh & anr. vs. Soleman Bibi & Ors* (supra) on the aspect of the quality of pleadings and evidence necessary to prove fraud.

19. As regards the contentions raised on behalf of the Appellants that the suit was not maintainable in the absence of a prayer for a

decree of possession, suffice it to say, that the same is misplaced in the facts and circumstances of the present case. It is an admitted position that the parties are co-owners of the property. The Appellants themselves claimed that by the Sale Deed dated 06.01.1994, the said Manohar Bordekar had allegedly sold his undivided share in the suit property. The parties admittedly being co-owners of the suit property completely negates the basis of the aforesaid contention raised on behalf of the Appellants. There can be no quarrel with the proposition laid down in the Judgments of the Supreme Court in the case of **Ram Saran & anr. vs. Smt. Ganga Devi** (supra) and **Anathula Sudhakar vs. P. Buchi Reddy (Dead) by LRs. & Ors.** (supra) in the context of Section 34 of the Specific Relief Act, 1963. But, the said position of law cannot be of any assistance to the Appellants in the facts and circumstances of the present case.

20. As regards the aspect of ouster of the Respondents from the suit property, the same was specifically denied on their behalf. Admittedly, there were no pleadings and evidence on behalf of the Appellants regarding hostile possession, to claim adverse possession in the suit property. There was also no counterclaim filed on behalf of the Appellants in the present case. Therefore, the contentions raised on behalf of the Appellants in this regard cannot be accepted.

21. Another aspect of the matter concerning the Sale Deed dated 06.01.1994, is that the Appellate Court in the impugned Judgment and Order, on the basis of the pleadings and evidence on record, found as a fact that the Appellants failed to prove payment of consideration in respect of the Sale Deed. It was found that the evidence of the Appellants in this regard was wholly inconsistent and there was nothing on record to show that the consideration amount of Rs.70,000/- was indeed paid to the said Manohar Bordekar for the

execution of the Sale Deed. The findings rendered in this regard also do not deserve interference.

22. In view of the above, it is found that the impugned Judgment and Order is just and proper. The substantial question of law is answered against the Appellants and in favour of the Respondents.

23. Accordingly, the Appeal is dismissed. There shall be no order as to costs.

MANISH PITALE, J