

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.156 OF 2012

1. Subash Fotu Bhandari (now deceased)
through his legal representative.

1-a. Sudir Bhandari, of full age,

1-b. Shubada (Shraddha) Bhandari,
of full age,

1-c. Sudesh Bhandari, of full age,

1-d. Shubhada Bhandari, of full age,

1-e. Sachin Bhandari, of fall age,

1-f. Shreya Bhandari, of full age,

1.(a) to 1(f) at Samadhan , Gogol,
Margao, Goa .

2. Smt. Sushila Subhash Bhandari,
of full age, at present resident of
Samadhan, Gogol, Margao Goa.

3. Shri Pandurang Fotu Bhandari
[deceased, L.R.'s on record as appellant
nos.4(a) to 4(d)]
and his wife

4. Smt Mridula P. Bhandari,
of full age, both residing presently
at Ashirwad, S.Ines, Panaji, Goa.
(since deceased through L.R's)

4a, Madhavi D. Thaly,

4b. Dattatraya J. Thaly,

Both residing at Awishkar Bunglow,
Near Syndicate Bank, Caranzalem,
Ilhas Goa.

4c. Shweta S. Dessai,

4d. Sanjay M. Dessai,
Both residing c/o Sanjay Patki,
C-12, Block No.189, MIG Colony,
Gandhi Nagar Bandra (E) Mumbai 400
051, Appellant No.s 4(c) and 4 (d)
represented by their constituted Attorney
Madhavi D. Thaly (4 (a))

5. Shri Jayant Fotu Bhandari,
aged about 45 years, and wife,

6. Smt Urmila Jayant Bhandari,
Of full age, both residing at Rua
Bernardo da Costa, Margao, Goa.

7. Smt Manika Janardhan Kamat
(now deceased),
Through her legal representatives

7-a. Kiran J. Kamat and his wife,
7-b. Seema Kamat of full age,
7-c. Shodhan Kamat and his wife,
7-d. Radha S. Kamat, of full age

8. Shri Janardhan Kamat, of full age,
Residing at Pranam Bunglow,
Miramar, Panaji, Goa.
(deceased through his Legal
Representatives)

8 (a).Shri Shodan Janardhan Kamat
(b). Smt. Radha Shodhan Kamat
both major in age residing at Miramar,
Ilhas Goa.

(c) Shri Kiran alias Kiranchandra
Janardhan Kamat

(d) Smt Seema Kiran Kamat
both major in age, residing at "Pranam"
Tonca, Caranzalem, Ilhas Goa.

9. Smt. Shakuntala Pundalik Priolkar,
(deceased), Of full age, and her husband.

10. Shri Pundalik Xamba Priolkar,
(deceased through L.R.'s)
Of full age, both residing
At Sahakar Niwas, Dadar, Mumbai.

10(a) Shakuntala Pundalik Priolkar
(deceased)
(b) Harshad Pundalik Priolkar
(c) Swapna Harshad Priolkar
(d) Subodh Pundalik Priolkar
(e) Swati Subodh Priolkar

11. Smt Anita alias Smt Lalita Ravindra
Verlekar, Of full age, and her husband

12. Ravindra Krishna Verlekar,
Of full age, residing presently at College
Road D'Souza Colony,
Nasik, Maharashtra.

... Appellants

Versus

1. Shri Vassant Data Quenim Robolo,
(since deceased) through his legal
representatives

1. Smt. Mohinibai Keni,
widow, Residing at Sanvorcotto,
Cunolim, Salcete, Goa.
(since deceased through her Legal
Representatives)

2. Shri Khushalchand V . Keni, And his
wife

3. Smt. Rekha K. Keni,
Both residing at A-6, Building 16,
Sparsh Jana Kalyan Nagar, Karoddi

Marve Road, Madal West Near Fire
Brigade , Mumbai 400 095.

4. Shri Vinayanand V. Keni And his wife,

5. Smt. Shaila V. Keni

Both residing at Sanvorcotto, Cuncolim ,
Salcete, Goa.

6. Shri Premchand V. Keni,
residing at Azossim, Tiswadi, Goa
And his wife

7. Smt. Suhas alias Radha Premchand V.
Keni, (now deceased through her L.R.'s)

7a) Chirag Keni, of full age

7b) Roshini Keni, of full age,
C/o Rapid Service, Opp. Mustifund
School, Near Mahalaximi Temple,
Panaji – Goa.

8. Shri Roshanlal V. Keni
And his wife,

9. Smt. Anita R. Keni,
both residing near Carmelite Convent,
Vishant Theatre Road, Malbhat,
Margao Goa .

10. Smt Nisha Pramod Hegde and her
husband,

11. Pramod Hegde,
Both r/o Ahdar, M. G. Road Tilakwadi,
Belgauam, Karnataka State.

12. Smt Suvarna A. Kamat and her husband

13. Shri Arun N. Kamat,
Both residing at 1st Floor, Flat No.1,
Vijay Tara Apartments, Comba,
Margao, Goa.

14. Smt. Shoba K. Sakhardande,
and her husband,

15. Krishna J. Sakhardande,
both residing at Sakhardande,
Dada Vaidya Road, Panaji-Goa.

16. Smt. Sujan Kerkar and her husband,

17. Shri Vithal alias Ulhas Kerkar,
both r/at Mardol, Marcaim Road, Goa.

18. Smt. Yashodban A. Kane and her husband,

19. Shri Avadhuth Kane
both residing at Goa Velha, Goa.

20. Nandini V. Keni,
Major in age, near Janata Co-op. Housing
Society Aquem Alto, Margoa, Goa.

.... Respondents

**Mr M.B. Da Costa, Senior Advocate with Ms. K. Betquecar,
Advocate for the Appellants.**

**Ms Priyanka Kamat with Ms. S. Pinto, Advocates for
Respondent Nos.1 to 6, 7(a), 7(b), 8 to 20.**

CORAM: M. S. SONAK, J.

Reserved on : 25th NOVEMBER 2022

Pronounced on : 28th NOVEMBER 2022

JUDGMENT :

1. Heard learned Counsel for the parties.
2. The appellants are the original plaintiffs, and the respondents are the original defendants in Special Civil Suit No.55/1984/B in the Court of Civil Judge Senior Division at Panaji (trial Court). Therefore, in this Appeal, the parties will be referred to as plaintiffs and defendants for convenience.
3. The plaintiffs relying upon a Gift Deed dated 23.02.1922, instituted the above suit for recovery of possession of the property, which they claimed, was the subject matter of the said Gift Deed from the defendants. The defendants resisted the claim, *inter alia*, by raising a counterclaim that the Gift Deed dated 23.02.1922 was never executed by their predecessor in title. In any case, the same was null and void.
4. The trial Court dismissed the suit by judgment and Decree dated 04.07.2000 but decreed the counterclaim. Aggrieved, the plaintiffs instituted Regular Civil Appeal No.201/2010 before the Adhoc District Judge-2, North Goa at Panaji (first appellate Court). By judgment and Decree dated 02.05.2012, the first

appellate Court dismissed the Appeal. Hence, the present Second Appeal.

5. This Second Appeal was admitted on 10.10.2012 on the following substantial questions of Law:

(i) Whether Gift (23.02.1922) made in favour of the donee with reservation of usufruct do not lapses when donee expires before one of the donors, but the donee expires leaving behind heirs ?

(ii) Whether the Gift Deed (23.02.1922) drawn by the Notary under the Notarial Code, which records that a third party has signed at the request of the donor in accordance with the provision of the Civil Code in the presence of witnesses is valid and there is no need of any Power of Attorney in favour of said third party ?

(iii) Whether a deed drawn by the Notary under the Notarial Code is valid operative and effective and certified copy thereof is proof of Gift without their being legal requirement to call for the book of the Notary ?

6. At the very outset, Mr M.B. Da Costa, learned Senior Advocate for the plaintiffs, clarified that he was not pressing any ground based on Order 22 Rule 9 of CPC and, therefore, no substantial question of Law was even framed on this issue. He,

however, submitted that the two Courts concurrently erred in holding that the Gift Deed dated 23.02.1922 was never executed by Raiu or Radha alias Caxibai or that the same was otherwise null and void or not binding on the legal representatives of Raiu and Radha alias Caxibai.

7. Mr Costa submitted that the two Courts applied or rather purported to apply the provisions of the Indian Registration Act, the Indian Stamp Act, or the Transfer of Property Act for determining the validity of the Gift Deed, which was executed on 23.02.1922. He submits that the execution of this Gift Deed should have been examined on the touchstone of the Law then prevalent. He presents that the Portuguese Civil Code and the Notarial Law then prevalent permitted the drawing out of a Gift Deed by a notary public. He submits that where donors were illiterate or otherwise unable to sign, their authorized representative, even without a formal power of Attorney, could always sign on their behalf. He submits that since the two Courts did not consider all these aspects, this Appeal must be allowed.

8. Mr Costa submits that the two Courts failed to appreciate that the certified copy from the notarial records constitutes sufficient proof of the documents and the contents of such documents. He referred to some provisions of the Portuguese

Civil Code and the Notarial Laws concerning this proposition. Finally, he submits that since all this was not considered, the Appeal deserves to be allowed.

9. Mr Costa submitted that the two Courts have unnecessarily raised doubts about the Gift Deed of 23.02.1922. He pointed out that this Gift Deed was referred to and relied upon in the inventory proceedings of 1923, and even allotments were made based upon this Gift Deed. He pointed out that even in the Gift Deed of 1943, executed by Radha in favour of her daughter Mohanbai, there is a clear reference to this 1922 Gift Deed. He submitted that at least the 1943 Gift Deed was executed by Radha in her daughter Mohanbai's house. Moreover, the Deed records that Vasant, her son-in-law, assisted her. Therefore, there was no question of coercion or any undue influence. Mr Costa submits that even this aspect was not considered adequately by the two Courts.

10. Mr Costa submits that the first appellate Court committed an error apparent on the face of the record in confusing the Gift Deed for a Will and holding that the disposition in the Gift Deed lapses because the donee Fottu died before one of the donors, Radha alias Caxibai. Mr Costa submits that Article 1457 of the Portuguese Civil Code did not apply to the 1922 Gift Deed

simply because one of the donors died within eight days of its drawing out. Mr Costa pointed out that the Gift Deed itself provided that the transfer would become void should the donors beget a male child. From this, he submitted that none of the donors made the Gift Deed in contemplation of their imminent demise in the near future. He proposes that the finding of the appellate Court to the contrary is vitiated by perversity.

11. Mr Costa submitted that there could be various explanations for why Radha alias Caxibai, who was only 18 years old then, did not sign the Gift Deed. He offered that she possibly did not know to read and write at that time but must have learnt to read and write subsequently. He submitted that since Raiu, who was suffering from tuberculosis, was not signing the Deed, Radha, out of respect for her husband or not to embarrass him, may have chosen not to sign the Gift Deed.

12. Mr Costa submitted that a Deed drawn by a Notary under the Notarial Code is valid, operative and effective, and the certified copy thereof is the proof of the Deed without insisting or calling for the book from the Notary. He submits that the document was adequately proven. He presents that the two Courts addressed irrelevant issues based upon the provisions of the Indian Evidence Act or the application of the Rule of

Evidence relating to 30 years old documents. Based on this, Mr Costa submitted that even the third substantial question of Law must be answered in favour of the plaintiffs.

13. For all the above reasons, Mr Costa submitted that the substantial questions of Law must be answered in favour of the plaintiffs, and this Appeal must be allowed.

14. Ms Priyanka Kamat countered the submissions of Mr Costa and submitted that this Appeal must be dismissed because no case is made out to interfere with the concurrent findings of fact recorded by the two Courts. She proposes that both Courts have applied correct legal principles and there is no error in their reasoning.

15. Ms Kamat pointed to the contemporaneous evidence about the donor Raiu signing promissory notes in a firm hand hardly three days before the alleged drawing of the Gift Deed dated 23.02.1922. She pointed out a power of Attorney relied upon by the appellant (though disputed by the respondent) allegedly executed by Radha alias Caxibai in 1923, within hardly a year from the alleged drawing out of the Gift Deed dated 23.02.1922. She pointed to other writings and signatures of Raiu and Radha alias Caxibai to submit that they could write or sign. She offered

that in such circumstances, there was no question of Crisna, in the absence of any power of Attorney, signing on behalf of Raiu and Radha alias Caxibai.

16. Ms Kamat referred to the Notarial Laws to point out that a mere inability to write shall not be a ground for someone to sign on the donor's behalf. She pointed out that the Notarial Laws contemplated affixing of thumb impression in front of witnesses. She submitted that the 1922 Gift Deed had no legal efficacy since all this was never done.

17. Ms Kamat submitted that the evidence on record shows that Fottu Bhandari, the elder brother of Raiu, took undue advantage and exercised undue influence. Knowing that Raiu was sick and dying, the properties were sought to be taken on Gift on the promise of providing usufruct. However, perhaps realizing that Raiu and Radha alias Caxibai would never agree to such a transaction, hardly a week before Raiu died, some document was notarised, which did not even bear signatures or thumb impressions of Raiu and Radha alias Caxibai. Based on such a document, legal representatives of Raiu and Radha alias Caxibai cannot be deprived of their parents' properties. Therefore, she submitted that there are concurrent findings of fact that warrant no interference.

18. Ms Kamat submitted that since the donee expired before the surviving donor, the Gift Deed, which was admittedly a conditional Gift Deed, reserving the usufruct to the donors, lapsed. The legal representatives of the donee who predeceased the donor could never maintain a suit to enforce such a Gift Deed. She submitted that even otherwise, the Gift Deed was conditional, as admitted by the plaintiffs' witness. She offered that the condition subject to which the Gift Deed was done was never fulfilled; therefore, there was no question of the recovery of properties based upon such a Gift Deed.

19. Ms Kamat submitted that the 1922 Gift Deed was never proved in accord with Law. Only a document certified by the notary public was produced. Even the so-called alleged original certified copy was never produced. She submitted that in 1988, no notaries could pose as Notary Ex-officio and purport to issue certified copies. Without valid proof, the Courts could never have relied upon the 1922 Gift Deed.

20. Ms Kamat submitted that the suit was for recovering two specific properties. However, in the evidence, the plaintiffs' witnesses referred to some properties having no correlation with the properties pleaded in the plaint. Therefore, there was no

identification of the suit properties and based on this, two Courts correctly dismissed the suit.

21. For all the above reasons, Ms Kamat submitted that this Appeal may be dismissed.

22. The rival contentions now fall for determination.

23. The plaintiffs are the legal representatives of Fottu Bhandari, and the defendants are the legal representatives of Raiu Bhandari and his wife, Radha alias Caxibai. Raiu Bhandari was the younger brother of Fottu Bhandari. There is evidence that he was suffering from tuberculosis, and his wife Radha was hardly 18 years old when Raiu died on 01.03.1922, within barely eight days from the alleged drawal of the Gift Deed dated 23.02.1922, which is the fulcrum of the plaintiffs' case.

24. The plaintiffs contend that by Gift Deed dated 23.02.1922 drawn up before the notary public, Raiu and Radha gifted their entire properties (disposable quota) to their elder brother/brother-in-law, Fottu Bhandari. However, the alleged donors reserved unto themselves the right of usufruct. The plaintiffs admitted that this Deed was conditional upon Raiu and Radha not begetting a male child even though they already had a two-year-old daughter

Mohanbai. The plaintiffs also admitted that the Gift Deed required Fottu to treat Raiu, Radha and their daughter with affection and care as one of the conditions of the Gift Deed.

25. The plaintiffs accept, and even otherwise, the evidence establishes that the Gift Deed dated 23.02.1922 was never signed or executed by Raiu and Radha. Instead, without being constituted as Attorney, one Crisna Sinai Neurencar signed on their behalf. Furthermore, the Gift Deed of 23.02.1922, assuming that the plaintiffs proved the same before the Trial Court, records that Raiu was unable to sign since his hand was trembling in view of his sickness and Radha alias Caxibai did not know to write.

26. The plaintiffs contend that in terms of the Portuguese Law prevalent in 1922, there was no invariable requirement about donors signing the Gift Deed. Furthermore, they claim that there was also no invariable requirement for execution of a formal power of Attorney authorizing some other person to sign a Gift Deed. The plaintiffs, therefore, contend that where the donors could not sign for want of literacy or were unable to sign due to sickness, infirmity, etc., some other person authorized by them could always sign in front of a notary and two witnesses. Based on

this, Mr Costa contended that there was no infirmity in the Gift Deed dated 23.02.1922.

27. The two Courts below have concurrently disagreed with the plaintiff's contentions on the validity of the Gift Deed that was never signed or executed by the donors. Mr Costa submitted that the two Courts did not adequately consider the provisions of the Portuguese Civil Code and the Notarial Law prevalent in 1922 but based their conclusions on the Law applicable after the Liberation of Goa in 1961. Therefore, he submits that the conclusions reached by the two Courts are erroneous for want of reference to the appropriate laws and legal provisions.

28. Mr Costa referred to Article 1459 of the Portuguese Civil Code, 1867, which reads as follows:

"Article 1459 – External form of gifts of immobile assets – *The Gift of immobile assets, if their value doe not exceed 1,000\$ (one thousand escudos) may be made by private writing with the signature of the donor or of another at his request, if he does not know to write, and two more witnesses who write their name in full; if it exceeds that amount, it can only be done by a public deed. Sole paragraph – These gifts produce effect in relation to third parties only if they are registered."*

29. Mr Costa also referred to Articles 1, 38, 39, 63 and 79 of Decree no.8373 (Notarial Laws). He submitted that this Decree repealed the earlier Notarial Law of 1900, 1919 and 1921. However, he offered that there was not much difference between the legal provisions in the repealed laws and Decree no.8373. He submitted that the drawal of the Gift Deed dated 23.02.1922 was consistent with the Notarial Laws that permitted some other person to sign on behalf of the donors where the donors could not sign for want of literacy or sickness.

30. Neither of the Counsel could produce the Notarial Laws of 1900, 1919 and 1921, which might have been the laws prevalent at the time of the alleged draw of the Gift Deed dated 23.02.1922. Decree no. 8373 (Notarial Laws) entered force only on 20.10.1927, almost five years after the suspected draw of the Gift Deed 23.02.1922. However, even if we proceed based on the submission that there was not much difference between the legal provisions of 1900, 1919 and 1921 laws and Decree no.8373, which entered force on 20.10.1927, the question is whether there was any compliance with the Decree no.8373 or the similar provisions in the earlier laws.

31. Article 1459 of the Portuguese Civil Code relied upon by Mr Costa, inter alia, provides that *the Gift of immobile assets*

(immovable properties) not exceeding 1000 escudos could be made by private writing with the signature of the donor or of another at his request, if he does not know to write, in the presence of two or more witnesses. However, this Article provides that if the value of immobile assets to be gifted exceeds 1000 escudos, then such a gift can be made only by a public Deed.

32. Mr Costa explained that one rupee corresponded to approximately six escudos. The Gift Deed dated 23.02.1922 relied upon by the plaintiffs valued the immobile properties at ₹2500/- and ₹625/-. Thus, the value of the immobile properties purported to have been gifted exceeds 1000 escudos, about which there was no dispute whatsoever. Therefore, such a gift could only be effected by a public deed.

33. Though Article 1459 may have permitted the Gift of immobile properties not exceeding 1000 escudos by a private Deed or with the signatures of some person authorized by the donor, where the donor does not know to write, there is no such explicit sanction for gifts of properties valued about 1000 escudos. Furthermore, Mr Costa could not show any provision to either the Portuguese Civil Code or the Notarial Laws that permitted even the execution of a public Deed of Gift of immobile properties valued about 1000 escudos without the

signature of the donor or with the signature of some other person (not a power of Attorney), where the donor did not know or was unable to write.

34. The standard rule is that the Gift Deeds must be signed by the donors or their duly constituted power of attorneys. Such power of attorney must be in writing and cannot be simple oral authorization. Since the plaintiffs sought to rely on some alleged exception in Article 1459 of the Portuguese Civil Code, it was for the plaintiffs to not only prove the existence of such exception but also prove that their case fell strictly within the exceptions. Therefore, the plaintiffs were duty-bound to plead and prove compliances, subject to which exceptions were made or exemptions granted.

35. The two Courts may be, without specific reference to Article 1459 or the Notarial Laws, have recorded concurrent findings of fact that the plaintiffs failed to either plead or prove these crucial aspects. There is no perversity in the record of such a finding of fact; possibly that is why not even any substantial question of Law based on perversity was proposed or formulated at the admission stage of this Second Appeal.

36. Since Mr Costa relied on Decree no.8373 (Notarial Code), reference to Article 77 of this Code cannot be avoided. Accordingly, article 77 is transcribed below for the convenience of reference:

'Article 77 - In the case of public wills and proceedings of approval of the closed wills, the intervention of three witnesses is indispensable; in the case of other authentic and extra official documents, excluding protests or promissory notes, two are sufficient.

1. Where the parties, testators not exempted, are not able to or do not know to write, it shall not be necessary, on this ground alone, for some one to sign on their behalf. In case of illiterate parties who are holders of Identity Cards issued by the Archive of Identification, the thumb impression shall substitute the signature, provided that its affixation is made in the presence of the Notary and the latter declares in the documents that it compares with the one recorded in the book of specimen signature.

2. The witnesses shall sign according to the mode of signatures that they used and can at the same time act as warrantors of identity of the parties, as much in the wills and proceedings of approval, as in the deeds and more instruments. The parties who know to write and can write shall also sign according to the mode of signatures that they used.

3. *The parties who are illiterate or not and even those who are not holders of Identity Cards, shall affix on the documents the thumb impression, should the notaries so require, mentioning this fact expressly in the same documents.*
4. *The following persons shall not be witnesses nor warrantors:*
 1. *The foreign nationals.*
 2. *Those who are not in sound mind.*
 3. *The minors who are not emancipated.*
 4. *The deaf, the thumb and the blind and those who have no knowledge of the Portuguese language.*
 5. *The ascendants, descendants and espouses as also the assistants, copying clerks and typists of the notaries who have intervened in the documents and the notaries to whom the assistants were serving.*
 6. *Those who are directly interested in the act.*
 7. *The ascendants in the acts of the descendants and vice-versa.*
 8. *The father-in-law or mother-in-law in the acts of the son-in-law or daughter-in-law and vice-versa.*
 9. *The husband in the acts of the wife and vice-versa.*
 10. *The husband and the wife jointly."*
5. *The competence of the witnesses shall be verified by any means by the notaries and mention of this shall be made in the authentic and extra official documents.*

37. Article 77(1) provides that merely because the parties may not be able to or do not know to write, some other person cannot be permitted to sign on their behalf. In such a case, the thumb impression shall substitute the signature, provided that its affixation is made in the presence of the Notary and the latter declares in the documents that it compares with the one recorded in the book of specimen signatures. Thus, the procedure for affixation of thumb impression was not something alien to the Notarial Code upon which Mr Costa relies. Admittedly the Gift Deed dated 23.02.1922 does not bear either the signatures of Raiu and Radha or even their thumb impressions.

38. The Gift Deed dated 23.02.1922, assuming that the plaintiffs proved the same in accord with Law, only records that Raiu was unable to sign because his hands were trembling due to sickness and Radha alias Caxibai did not know to write. As noted earlier, Article 77(1) of the Notarial Code provides that only this could not have been the reason enough to require Crisna Sinai Neurencar, who was not even the power of attorney holder of Raiu and Radha, to sign on their behalf. In such a situation, at least the thumb impressions of Raiu and Radha should have been affixed. These impressions are conspicuous by their absence, even assuming that the document is regarded as proven.

39. The defendants have relied upon two promissory notes executed by Raiu on 20.02.1922. These documents are duly proved and marked as Exhibit DW1/A and DW1/B. Both these documents show the signature of Raiu in a firm hand. Moreover, these documents, executed hardly 2 to 3 days before the suspected draw of the Gift Deed dated 23.02.1922, negate the statement in the Deed about Raiu being unable to sign due to his sickness and Radha not knowing to sign. Therefore, Mr Costa's contention about Raiu's state of health on the particular day, i.e. 23.02.1922, cannot be readily accepted without any evidence to back the same.

40. Similarly, the plaintiffs have relied upon inventory proceedings allegedly instituted by Radha alias Caxibai in 1923 upon the death of her husband Raiu on 01.03.1922. It is the plaintiffs' case that Radha alias Caxibai constituted Fottu Bhandari as her power of Attorney. This document is also produced on record by the plaintiffs and marked in evidence. The defendants dispute this document as a forgery. They claim that Fottu, Raiu's elder brother, took advantage of the situation and got the properties allotted in his favour by relying upon the fraudulent Gift Deed dated 23.02.1922 through this inventory proceedings.

41. However, since the plaintiffs rely upon this power of Attorney dated 31.05.1922 as bearing the signature of Radha alias Caxibai, the two Courts were justified in concluding that even Radha alias Caxibai knew to sign and was not illiterate, as stated in the Gift Deed dated 23.02.1922. Therefore, this finding recorded by the two Courts is certainly not perverse.

42. There are documents from 1943 and 1975 referring to the writings of Radha alias Caxibai. However, Mr Costa is correct in suggesting that these documents may not greatly assist the defendants' case because it is possible that after 30 to 40 years, Radha alias Caxibai may have learnt to write. At the same time, Mr Costa's contention that Radha alias Caxibai may not have signed the Gift Deed on 23.02.1922 so as to respect or not to embarrass her husband Raiu, who was unable to sign due to sickness or that she was only 18 years old and therefore had not learnt to sign, cannot be accepted in the absence of any pleadings or evidence whatsoever to this effect. Moreover, no suggestions were made to the defendant's witnesses on these lines. Besides, the defendants' witnesses deposed to Radha alias Caxibai having studied up to the fourth standard, and this deposition was not seriously challenged.

43. Thus, for all the above reasons, the finding concurrently recorded by the two Courts on the issue of non-execution of the Gift Deed dated 23.02.1922 and even the legal effects arising out of such non-execution by the donors warrant no interference. These are concurrent findings of fact that suffer from no perversity whatsoever. Moreover, these findings are backed by the evidence on record and even applicable laws.

44. The circumstance that the Gift Deed was referred to in the inventory proceedings of 1923, of which a certified copy was issued in 1936, can be of no great assistance to the plaintiffs. The inventory proceedings were initiated mainly by Fottu based on an alleged power of Attorney by Radha alias Caxibai. The plaintiffs, on the one hand, contend that Radha could not read or write and, on the other hand, rely upon a power of Attorney allegedly executed by her hardly within three months from the Gift Deed dated 23.02.1922.

45. Thus, the plaintiffs claim that Radha could not read, write, or sign when it suits the plaintiff's interests. But when it does not, they contend that Radha could read, write and sign. This is approbation and reprobation in the same breath. Besides, these inventory proceedings are based entirely on the so-called Gift Deed dated 23.02.1922, which the two Courts have concurrently

found was never executed by the donors Raiu and Radha alias Caxibai. Therefore, any purported allotment in such inventory proceedings can produce no legal effects as concurrently held by the two Courts below.

46. Based only upon the reference to this Gift Deed in the 1943 Gift Deed by which Radha gifted her properties to her daughter Mohanbai, the concurrent findings of fact recorded by the two Courts cannot be interfered with. To a certain extent, such reference supports Mr Costa's contentions. However, the evidence on record has to be assessed and evaluated in its entirety. The circumstances in which Radha alias Caxibai was placed after the demise of her husband Raiu when she was hardly 18 years old cannot be lost sight of. Evidence shows that Raiu was suffering from T.B. and was in the process of winding up. The circumstance that Radha alias Caxibai and the couple's two-year-old daughter were entirely at the mercy of her husband Raiu's elder brother Fottu also cannot be lost sight of.

47. Therefore, based upon the statement or the reference in the 1943 Gift Deed, the considerable evidence to the contrary cannot be ignored. In any case, no substantial question of Law was also formulated on this aspect precisely because this would be a matter

of appreciation or reappreciation of the evidence on record that is generally beyond the limited scope of a second Appeal.

48. The two Courts have held that the Gift Deed dated 23.02.1922 was not even proved by the plaintiffs in accordance with Law. Mr Costa, however, relies upon provisions of the Portuguese Civil Code and the Notarial Code to contend that even a certified copy of an extract from the Notarial record amounts to proof of the documents and their contents.

49. Though no explicit provisions were shown in support of the above statement, even if the above statement is accepted as correct, there is no clarity whether, indeed certified copy of the extract from the notarial records was produced in this matter. On record, marked as 'X' for identification (page 226 of the original records), is a xerox copy of a document notarized by the Notary Atmarama X.P. Palondicar on 26.07.1988. This Notary has put an endorsement that *'this copy is certified to be a true xerox copy of the original document, which I have initialled and returned'*. If this Notary Atmaram Palondicar was shown some original document, which he has initialled and returned, there is no explanation why this original document was not produced on record. Further, even the Notary Atmaram Palondicar was not examined by the plaintiffs.

50. Mr Costa, however, referred to the notarized xerox copy and pointed out that this has been certified by the Notary ex-Officio (O Notario ex-Officio), who has put a note in Portuguese language and certified that this is the copy (xerox true copy) of the writings in the Notarial books. Now, this writing in Portuguese is dated 28.05.1988. Mr Costa also submitted that the Notario ex-Officio made this certification on 26.05.1988 after verifying the Notarial books.

51. Almost 27 years after liberation, it is doubtful whether any notary public can claim the status of Notary ex-officio and purport to hold custody of old Notarial books and issue certificates based thereon. Mr Costa explained that this is possible and permissible. He also explained that this Notary ex-Officio, who signed on 26.05.1988, is a successor to the Notary before whom the 1922 Gift Deed was drawn out. However, there is no evidence on this crucial aspect, assuming this was legally possible. Moreover, Mr Costa referred to no legal provisions under which this was possible or permissible, nor did the plaintiffs produce any material on record to show that this Notary ex-Officio was indeed the successor to the Notary before whom the Gift Deed dated 23.02.1922 was allegedly drawn out and lawfully had the custody of Notarial books.

52. In the above state of evidence, the two Courts were not unjustified in holding that there was no proof about the document dated 23.02.1922 or that such document, which was the fulcrum of the plaintiff's case, was never proved in accord with the Law whether prevalent before 1961 or even after.

53. However, in the paper book on pages 251 and 252 is a document in the Portuguese language issued by Civil Registrar cum Sub-registrar (leave reserved) O Notario ex-Officio, a typed copy of Gift Deed dated 23.02.1922. The learned Counsel did not point out this document, but I found the same while reviewing the records. To rely on this, Ms Asha Suresh Kamat should have been examined. Only she could have thrown some light on the source and custody of the original document if any. Admittedly, Asha Kamat was never examined in this matter. There is no translation of this document placed on record. This is a typed document, and there is no evidence about the source from which Asha Kamat prepared and issued this document, if at all.

54. Ms Kamat referred to the Notarial Code that was relied upon by Mr Costa to point out that judicial examinations of Notarial books were contemplated. She submitted that the plaintiffs made no efforts to summon those with the official

custody of the Notarial books in the context of the doubtful Gift Deed dated 23.02.1922. Further, she raised certain submissions in the context of Articles 63, 70, 74, 75, 89 and 93 of Decree no.8373 (Notarial Laws). Finally, she pointed out some discrepancies and procedural non-compliances. However, even without going into these issues, the plaintiff's case fails on the substantive issues discussed earlier.

55. Ms Kamat, however, referred to Article 77 of Decree no.8373, which was crucial and was already discussed earlier. Similarly, Ms Kamat also pointed out that Article 2426, relied upon by Mr Costa in support of the probative value of authentic extra-official documents, must be considered along with Articles 2493 and 2495 of the Portuguese Civil Code and other Articles in Section V, which deals with defects which may undo the probative value of the documents. In particular, she referred to Article 2495, dealing with the nullity of extra official documents. She emphasized that the absence of signatures of the parties would render such documents null and void. She submitted that, in such case, such documents would lose their probative value. Article 2495 of the Portuguese Civil Code indeed provides that extra official documents are rendered null and void on account of the absence of signatures of the parties or of the persons who are

signing at the request of the parties when they do not know to sign or are unable to sign.

56. As noted earlier, the evidence on record does not establish that Raiu and Radha alias Caxibai were unable to sign or did not know to sign. Admittedly, Crisna Neurencar, alleged to have signed on their behalf, was not their power of Attorney. Moreover, there is no explanation why Raiu's and Radha's thumb impression was not affixed, even though the Notarial Code contemplates such affixation in certain circumstances. Therefore, in the absence of signatures of Raiu and Radha alias Caxibai on a crucial document that purports to gift away their entire properties (disposable quota), the two Courts were justified in the view that they have adopted. Such a view is neither contrary to the evidence on record nor the laws then applicable.

57. Ms Kamat is also justified in defending the findings of the Trial Court and the appellate Court on the issue of identification of the suit properties. In the plaint, the plaintiffs referred to and sought for recovery of possession of two specific immobile properties known as "Queinem of Azossim" described (i) and (ii) in paragraph 5(b) of the plaint. This is evident from pages 104 to 108 of the paper book. However, the plaintiffs' only witness Subhash Bhandari (PW1), in his deposition, spoke about the

property Manchechem Bhat at Pernem and some other properties like Kerim, Bakar, Manchechem Band, Gharbhat and residential houses at Cumbarjua. He stated that all these properties are "suit properties".

58. Thus, the plaintiffs' witness deposed about one set of properties when the plaint referred to and sought possession of another set of properties. There is complete variation between the pleadings and proof. Considering that the plaintiffs had applied for the recovery of specific properties, they should have been clear about the properties they sought possession, should any decree be made in their favour. This is an additional ground not quite unjustifiably taken into account by the two Courts for denying any relief to the plaintiffs.

59. Based on the above discussion, the substantial questions at (ii) and (iii) set out in paragraph 5 of judgement and order are liable to be answered against the appellants. This is sufficient to dismiss this Second Appeal without answering the substantial question (i) in paragraph 5 of this judgement and order. Even if the question (i) is answered in favour of the appellant, the conclusion will not change, and the Appeal could not be allowed.

60. Further, since the two Courts have held that since there was no valid execution of the Gift Deed dated 23.02.1922, there is no question of deciding whether the Gift lapsed because at least one of the donors who were to enjoy the usufruct of the gifted properties survived the donee. In other words, because the donee expired before one of the donors, who was to enjoy the usufruct of the gifted properties, the gift lapsed.

61. The appellate Court apparently relied on Article 1457 of the Portuguese Civil Code to hold without prejudice that the Gift lapsed. Article 1457 of the Portuguese Civil Code reads as follows:

"Article 1457 – Gifts' Mortis Causa' – The gifts, which are to produce their effects upon the death of the donor, have the nature of disposition of the last wishes, and shall be subject to the rules laid down under the title on Wills.

Sole paragraph – The provision of this Article does not include the gifts for marriage even though they have to produce their effects after the death of the donor."

62. Ms Kamat pointed out that Article 1457 has to be read in conjunction with Article 1759, which provides for lapsing of testamentary provisions. She pointed out that in Article 1759, the

testamentary dispositions lapse, and have no effect, in relation to the heirs or the legatees, if they die before the testator.

63. Upon conjoint construction of Articles 1457 and 1759 of the Portuguese Civil Code, it is apparent that Article 1457 will apply only to Gifts which are to produce their effect upon the donor's death where such Gifts are in the nature of the disposition of the last wishes of the donor. Therefore, at least the title of Article 1457 refers to "*Gifts' Mortis Causa*". Further, even the plaintiffs understood the Deed to give Fottu the right to possess the suit properties only after the demise of Raiu and Radha.

64. Thus, at least *prima facie*, if the donor makes Gifts in contemplation of death or as expressing his last wishes in contemplation of death, then such Gifts will have to be construed in the context of the rules applicable to testamentary disposition, that is, Wills. Such Gifts will have to be construed in the light of the provisions of Article 1759 and other provisions of the Code concerning testamentary dispositions.

65. Article 1759 indeed provides that testamentary disposition shall lapse and have no effect in relation to the heirs or legatees if such heir or legatees die before the testator. In this case, one of the

donors, Raiu, died on 01.03.1922, within hardly eight days from the alleged draw of the Gift Deed dated 23.02.1922. On the other hand, the donee Fottu Bhandari died on 07.12.1974 and was survived by Radha alias Caxibai, wife of Raiu and the second donor in the Deed allegedly drawn on 23.02.1922. Thus, it can be said that the donee died before one of the donors, Radha alias Caxibai.

66. The Gift Deed did contemplate that the donors would enjoy the usufruct of the gifted properties during their lifetime. Based on this understanding, neither Fottu Bhandari nor the plaintiffs, his legal representatives, sought possession of any of the allegedly gifted properties during the lifetime of Raiu or Radha. The suit was instituted only on 11.04.1984, after the demise of Radha alias Caxibai on 09.09.1980.

67. However, the first appellate Court did not advert whether the alleged Gift Deed was executed in contemplation of the donors' imminent death. The alleged Gift Deed contains a clause that would become void if the donors beget a male child. To a certain extent, this statement might militate against any contemplation of imminent death. But it is not easy to hypothesize on such matters because only the couple would be acquainted with such intimacies. At the same time, there is

evidence that Raiu was sick and suffering from tuberculosis. Moreover, he appeared to be winding up his affairs. There is also no dispute that Raiu died on 01.03.1922, hardly within eight days from the Gift Deed's alleged draw dated 23.02.1922.

68. Therefore, this was a matter of appreciating the evidence on all these aspects. Merely because another view was possible, the second appellate Court would not interfere with the finding of fact based upon which the Law came to be applied. Generally, the first appellate Court is the final Court on factual issues unless some case of perversity is made out. If the finding of fact is left undisturbed, then there may be no error in the Law applied by the first appellate Court. The evidence on record and the Law applicable does not warrant disturbing a position prevailing from 1922 concerning the suit properties which the Plaintiffs have not even bothered to identify.

69. In any case, as noted earlier, any finding on this substantial question of Law will make no difference because there is no legal evidence about the execution or drawal of the Gift Deed dated 23.02.1922, which is a factor which goes to the root. Therefore, even the question number (i) referred to in paragraph 5 of this judgement and order is disposed of accordingly

70. For all the above reasons, the substantial questions of Law are answered in the above terms. Based on the answers, this Appeal fails and is liable to be dismissed. Accordingly, this Appeal is hereby dismissed. However, there shall be no order for costs.

M. S. SONAK, J.

NITI K
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