

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 16/2023
WITH
CIVIL APPLICATION NO. 21/2023

MRS LOURDINE ASSUMPCAO
CARVALHO & ORS.

... Appellants.

Versus

MR PRESTON MILACRUZ MANUEL
AGNELO CARVALHO.

...Respondent.

Mr J.J. Mulgaonkar, Advocate for the Appellants.

**Mr C.A. Coutinho, with Mr Ivan Santimano, Advocates for
the Respondent.**

CORAM : M. S. SONAK, J.

Reserved on : 22nd June 2023

Pronounced on 28th June 2023.

ORDER :

- 1.** Heard Mr J.J. Mulgaonkar for the Appellants and Mr C.A. Coutinho with Mr Ivan Santimano for the Respondent.
- 2.** This Second Appeal challenges the Decrees dated 17/4/2017 and 18/4/2022, made by the Trial Court and the First Appellate Court, decreeing Regular Civil Suit No. 47/2014/F.
- 3.** The Appellants are the original Defendants, and the Respondent is the original Plaintiff in Regular Civil Suit No. 47/2014/F, instituted in the Court of Civil Judge, Junior Division, at Margao, seeking the following substantive reliefs:

“a) for a declaration that the Defendants have no right to the suit property, and that the suit property is solely and exclusively owned and possessed by the Plaintiff;

b) for a declaration that the said Deed of Gift dated 29/08/2006, drawn in the Office of the Sub-registrar of Salcete, at Margao at pages 113. to 128 of Book No.1, Volume No.2138, dated 14/09/2006 is null and void, and consequently for a direction to the Sub Registrar to cancel the said Deed of Gift.”

4. Mr Mulgaonkar learned Counsel for the Appellant, urged the following questions, which according to him, are the substantial questions of law, in support of this Appeal :

(I) Whether the two Courts erred in accepting the evidence of Antriciana Antonio Da Silva, who was only the Power of Attorney holder for the Plaintiff given the law laid down in ***Janki Vashdeo Bhojwani vs. IndusInd Bank*** – 2005 (2) SCC 217 and ***Mann Kaur vs. Hartar Singh Sangha*** – 2010 (10) SCC 512?

(II) Whether the suit was barred by limitation because the same was instituted only on 15/2/2014 to question the registered Gift Deed dated 29/8/2006 registered before the Sub-Registrar of Salcete on 14/9/2006, given the law laid down in ***Dilboo vs. Dhanrajji*** – 2000 (7) SCC 702?

(III) Whether the suit for declaration simplicitor, without claiming consequential relief of recovery of possession, was maintainable given the provisions of Section 34 of the Specific Relief Act and the law laid down in ***Arulmugu Chokkanatha Swamy Koil Trust vs. Chandran*** – 2017 (3) SCC 702?

(IV) Whether the statements in the written statement of the Defendant about rights of late Ana Maria Ernestina Figuerido and

Esperanca Rodrigues were express and unambiguous in nature to be considered as admission based on which expressly disputed identity of the suit property bearing Portuguese Land Registration No. 3318 could be matched with present survey No. 231/9 of Village Carmona?

(V) Whether the impugned Judgments are contrary to Section 31 of the Indian Evidence Act, 1872 which states that admissions are not conclusive proof of the matters admitted?

5. Mr Mulgaonkar submitted that Plaintiff did not step into the witness box and the attorney had no personal knowledge about the contents of the plaint. He submitted that the registration of documents operates as a notice. Since the suit was instituted almost eight years after registration of the Gift Deed dated 14/9/2006, the same was barred by limitation. In this regard, he referred to Section 3 of The Transfer of Property Act. He submitted that the Appellants were in possession of the suit property. Therefore, a suit for declaration simpliciter, without the consequential relief of recovery of possession, was not maintainable. He submitted that there was a serious dispute about the identity of the suit property, and there was no evidence to correlate the Portuguese documents with the survey numbers and entries. He submitted that the two Courts failed to consider the import of Section 31 of the Evidence Act, which states that admissions are not conclusive proof and that the same could always be explained. Based upon these submissions, Mr Mulgaonkar urged admission of this Appeal on the above questions of law.

6. Mr Coutinho defended the impugned Judgments and Decrees based upon the detailed reasoning reflected therein. He pointed out that the Appellants had clearly and unequivocally admitted that the suit property, a part of which was a subject matter of the Gift Deed

dated 29/8/2006, was owned by Ana Maria Ernestina Figueiredo (Ana Maria). He submitted that there was no dispute about the Plaintiff being the legal heir of Ana Maria. In 2007, the Defendant No.2 (present Appellant No.2) instituted Inventory Proceedings No.50/2005/A (old), in which the suit property was expressly allotted to the Plaintiff by disbelieving the Appellants' case of heirship from Ana Maria. The gift deed by Defendants No.1 and 2 favouring Defendant No.3 is nothing but a fraud or, in any case, confers no title upon Defendant No.3 because Defendants No.1 and 2 had no title themselves in the suit property. Mr Coutinho submitted that the case was based entirely on documentary evidence and, therefore, the principles in *Janki Vashdeo Bhojwani* (supra) did not apply.

7. Mr Coutinho submitted that the decision in *Dilboo* (supra) did not apply because the Plaintiff was not some transferee who, due to failure of diligent search, had failed to detect the registered instrument. He further submitted that it is the Plaintiff who was throughout in possession of the suit property and, therefore, there was no necessity of seeking any recovery of possession. Mr Coutinho submitted that it is only because the Appellants executed the gift deed fraudulently and tried to effect changes in the revenue records that the suit for declaration was filed, and the relief of declaring the gift deed as null and void were applied for based upon this. Accordingly, he submitted that the decision in *Arulmugu Chokkanatha Swamy Koil Trust* (supra) would not apply. Mr Coutinho submitted that the provisions of Section 34 of The Specific Relief Act would also not apply. Mr Coutinho finally submitted that there were clear admissions which the Appellants never explained.

He, therefore, submitted that the provisions of Section 31 of the Evidence Act would not apply in this matter.

8. For all the above reasons, Mr Coutinho submitted that this Appeal raises no questions of law, much less substantial questions of law. He submitted that the concurrent Judgments and Decrees suffer from no perversity, so this Second Appeal should be dismissed.

9. The rival contentions now fall for my determination.

10. In this case, the Appellants and the Respondent admitted that the suit property belonged to Ana Maria. There is no dispute whatsoever that the Respondent/Plaintiff was the legal heir of Ana Maria. The Appellants, however, claimed that Ana Maria “*always treated the defendant no.1 as her daughter*”. The Appellants pleaded in their written statement that Ana Maria had expired in 1956. Before her death, when she was bedridden, she was looked after and cared for by defendant No.1. Defendants No.1 and 2 claimed that a portion of the suit property was in their possession since 1958, due to which some title has crystallised in their favour.

11. Considering the Appellants’ defence, the onus naturally shifted upon them to establish their case. This onus, the Appellants have failed to discharge. The Appellants cannot, by resort to the provisions of Section 31 of the Evidence Act, seek to distance themselves from their admission about the suit property being owned by Ana Maria. There was no dispute raised by the Appellants about the Respondent/Plaintiff being the legal heir of Ana Maria. Section 31 of the Evidence Act provides that admissions are not

conclusive proof of the matters admitted. Still, they may operate as estoppels under the provisions contained in the Evidence Act.

12. In the present case, there are clear admissions about the suit property being owned by Ana Maria. There are admissions, or in any case, there is ample evidence about the Respondent/Plaintiff being the legal heir of Ana Maria. The Appellants have not adduced any evidence to either explain or overthrow the effect of their admissions. Section 31 of the Evidence Act states that the admissions are not conclusive proof. However, that does not mean that admissions are no evidence at all. In any case, having admitted that Ana Maria was the owner of the suit property, the Appellants are not permitted to resile from this position. Factually, the Appellants have not even resiled from this position. Therefore, the substantial question of law referring to Section 31 of the Evidence Act does not arise in this Appeal.

13. The record bears out that the original Defendant No.2 had filed inventory proceedings bearing No.50/2005/A (old) on the death of Manuelino Carvalho, husband of the late Ana Maria. Defendant No.2 claimed a portion of the suit property in the said inventory proceedings. The Respondent/Plaintiff even participated in this inventory proceedings and contested Defendant No.2's claim. By Judgment and Order dated 10/1/2013, the Inventory Court overruled Defendant No.2's claim of deemed daughter and allotted the suit property to the Respondent/Plaintiff.

14. The Judgment and Order dated 10/1/2013 were never challenged by any of the Appellants, even though the Judgment and Order was a judicial determination that the Appellants have no

rights to the suit property or any part thereof. Instead, Defendants No.1 and 2, without having any right or title to the suit property, executed the gift deed in favour of Defendant No.3 on 29/8/2006. The two Courts, based upon the documentary evidence on record, have correctly concluded that Defendants No.1 and 2 had no right or title to the suit property or any part thereof. Therefore, the gift deed dated 29/8/2006, notwithstanding its registration, was of no avail. It is trite that a party cannot transfer any title it does not possess. Since Defendants No.1 and 2 had no right, title or interest in the suit property, the Gift Deed dated 29/8/2006, by which they purport to transfer the right, title or interest in a portion of the suit property favouring Defendant No.3, was entirely ineffective and the two Courts correctly declared the same as a nullity.

15. The principle in *Janki Vashdeo Bhojwani* (supra) and *Mann Kaur* (supra) would not apply in this case because the entire focus was on documentary evidence. PW.1 deposed to the self-explanatory documents. Similarly, even the *Dilboo* (supra) principle would not apply given the provisions of Section 3 of the T.P. Act concerned with the expression “*a person is stated to have notice*”. Respondent/Plaintiff was not some transferee who could be deemed to have constructive notice of the registered document affecting his title or concerning any encumbrances.

16. The evidence on record establishes that the possession was always with the Respondent/Plaintiff. The title documents were also with the Respondent/Plaintiff. Moreover, there was allotment made by the Inventory Court vide Judgment and Order dated 10/1/2013, favouring the Respondent/Plaintiff. Given this state of evidence,

there was no necessity to seek any consequential relief of recovery of possession. The suit was maintainable, and the Trial Court correctly decreed the same. The First Appellate Court correctly upheld such a decree.

17. There was no dispute whatsoever about the identity of the suit property. Neither in the written statement nor in the evidence was such a dispute raised. Therefore, the so-called substantial question of law, based upon the dispute about the identity of the suit property, is entirely misconceived. Both parties were clear about the identity of the suit property. The documents on record are also quite clear regarding the identity of the suit property.

18. For all the above reasons, none of the substantial questions of law, as proposed or even otherwise, arise in this Appeal.

19. The Appeal is devoid of any merit and is consequently dismissed. Misc. Applications, if any, are also disposed of.

20. There shall be no order for costs.

M. S. SONAK, J.

SANTOSH S Digitally signed by
SANTOSH S MHAMAL
Date: 2023.07.03
13:28:10 +05'30'