

Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 302 OF 2007

1. Shri Pramod N. Naik, son of late Nilkanth Naik, about 50 years old, retired, married, Indian national, residing at Chalbhat, Dhauji Road, Old Goa, Tiswadi, Goa.
2. Shri Gurudas S. Naik, son of late Sagun Naik, major, unmarried, service,
3. Kum. Anandini S. Naik, daughter of late Sagun S. Naik, major, unmarried,

Both Indian Nationals, residing at Virlosa, Penha de Franca, Bardez, Goa.

..... Appellants.

Versus

1. Shri Audhut S. Naik, son of late Shriram Naik, 59 years old, married, business, r/o H. No.D-41,
 - 1a) Shri Kiran Audhut Naik; (son)
 - 1b) Kripa Kiran Naik; (daughter-in-law)
 - 1c) Smt. Kiran Naik (Volvoikar); (daughter)
 - 1d) Shri Samil Volvoikar; (son-in-law)1c and 1 d are represented by their mother Smt. Rasvanti A. Naik, residing at House No.D-41, Chalbhat, Dhausi Road, Old Goa, Tiswadi-Goa.
2. Smt. Rasavanti A. Naik, wife of Audhut S. Naik, 54 years old, r/o H.No.D-41,

Since deceased.
Amendment
carried out as per
order dated
23/08/17 in
MCA/277/2014.

3. Shri Ramakant S. Naik, son of late Shriram Naik,
78 years old, married, r/o H.No.D-41,

(A) Shri Mandar Ramakant Naik (son);
(B) Jagruti Ramakant Naik (daughter),

Both residents of H.No.D-41, Chalbhat, Dhauji
Road, Old Goa, Tiswadi-Goa, both represented
by their mother the Respondent No.4, SMT.
SUKANTI R. NAIK.

4. Smt. Sukanti R. Naik, wife of Ramakant S. Naik,
60 years old, housewife, H. No.D-41,

5. Shri Gopinath @ Chandrakant S. Naik, son of late
Sakharam S. Naik, 90 years old, retired,

5)A) Avinash C. Naik.
5)B) Jaiwant C. Naik.
5)C) Shri Santosh C. Naik.
5)D) Sufala C. Naik (Married).
5)E) Jaywanti C. Naik (Married).
5)F) Nutan C. Naik. (Married)

All represented by Shri Avinash Naik, Resident of
Chalbhat, House no-D/57, Old Goa)

6. Shri Madhusudan B. Naik, son of late Balaram
Naik, 59 years old, married, retired,

(A) Shri Amresh Madhusudan Naik (son).
(B) Mrudula Madhusudan Naik (daughter).

Both residents of House No.567, Malim, Betim,
Bardez-Goa both represented by their mother
the Respondent No.7, SMT. SARITA M.
NAIK.

Since deceased.
Amendment
carried out as per
order dated
29/11/13 in
MCA/643/2014.

Deceased-Deceased.
Amendment carried
out as per order
dated 24/1/13.

Since deceased.
Amendment carried
out as per order
dated 29/11/13 in
MCA/643/2014.

7. Smt. Samita M. Naik, wife of Madhusudan Naik, 51 years old, housewife, } **Amendment carried out as per order dated 23/08/17.**
- Both Indian Nationals, residing at H. No.567, Malim, Betim, Bardez-Goa.
8. Shri Dattadas B. Naik, son of late Balaram Naik, 46 years old, housewife, } **Deceased.**
9. Smt. Bharati D. Naik, wife of Dattadas B. Naik, 42 years old, housewife,
10. Shri Gurudas B. Naik, son of late Balaram Naik, 33 years old, unmarried, service,
11. Shri Madhav B. Naik, son of late Balaram Naik, 34 years old, business,
12. Kum, Anusuya B. Naik, daughter of late Balaram Naik, 42 years old, domestic, } **Deceased. In view of order dt.16/9/10, passed by the ld. Registrar the appeal is abated.**
13. Kum. Mangala B. Naik, daughter of late Balaram Naik, 35 years old, unmarried, domestic,
- All Indian Nationals, residing at H. No.304, Verem, Bardez, Goa.
14. Smt. Megha @ Rekhabai Nilkanth Naik, widow of late Nilkanth Naik, 75 years old, housewife, Indian National, residing at Chalbhat, Dhauji Road, Old Goa, Tiswadi, Goa. } **In view of order dt.16/9/10, passed by the ld. Registrar appeal is dismissed.**
15. Shri Ashok N. Naik, son of late late Nilkanth Naik, 59 years old, married, retired,
16. Smt. Tulsi A. Naik, wife of Shri Ashok Naik, 54 years old, domestic,

All Indian Nationals, residing at H. No.82,
Chalbhat, Dhauji Road, Old Goa, Tiswadi, Goa.

17. Shri Sanjeev N. Naik, son of late Nilkanth Naik,
38 years old, business, married,
18. Smt. Varsha S. Naik, wife of Sanjeev Naik, 37
years old,
19. Shri Yeshwant N. Naik, son of late Nilkanth
Naik, 62 years, married, retired,
20. Smt. Shanta Y. Naik, wife of Yeshwant Naik, 57
years old, housewife,

Both Indian Nationals, residing at Yashdeep
Niwas, Dhawali, Ponda, Goa.

21. Shri Prakash D. Narvekar, 52 years old, married,
service,
22. Smt, Pratima P. Narvekar, wife of Prakash
Narvekar, 45 years old, major, housewife,

Both Indian Nationals, residing at H. No.220/1,
Near KTC Depot, Porvorim, Bardez, Goa.

23. Shri Uday N. Naik, son of late Nilkanth Naik, 52
years old, Advocate by profession
24. Smt. Nita U. Naik, wife of Uday Naik, major,
housewife,

**DELETED AS
PER ORDER
DATED
15.03.2007 ON
EXH. 33.**

Both Indian Nationals, residing at H.No. not
known, Chalbhat, Dhauji Road, Old Goa,
Tiswadi, Goa.

25. Shri Shrikrishna N. Tari Narvekar, son of late
Namdev Tari Narvekar, 46 years old, business,

26. Smt. Ratan S. Tari Narvekar, wife of Shrikrishna
Tari Narvekar, 44 years old, housewife,

Both Indian Nationals, residing at St. Estevem,
Tiswadi, Goa.

27. Shri Rajaram N. Naik, son of late Nilkanth Naik,
43 years old, business,

28. Smt. Leena R. Naik, wife of Rajaram Naik, 40
years old,

Both Indian Nationals, residing at H. No.D-46,
Chalbhat, Dhauji Road, Old Goa, Tiswadi, Goa.

29. Shri Vishwanath Chodankar, 45 years old,
married, business,

30. Smt. Vishaka V. Chodankar, wife of Vishwanath
Chodankar, 42 years old, housewife,

Both Indian Nationals, residing at Near Ganesh
Temple, Ganeshpuri, Mapusa, Bardez, Goa.

31. Shri Nilkanth Naik Karekar, 47 years old,
business, married,

32. Smt. Tanuja Nilkanth Naik Karekar, wife of
Nilkanth Naik Karekar, housewife,

33. Shri Naresh Nilkanth Naik, son of late Nilkanth
Naik, 39 years old, married, business,

34. Smt. Sampada Naresh Naik, wife of Naresh
Naik, 35 years old, housewife,

Both Indian Nationals, residing at Gold Tiles
Factory, Dhauji Road, Old Goa, Tiswadi, Goa.

**In view of order
dt.16/9/10, passed
by the Id.
Registrar appeal is
dismissed against
Rep. No.33 and 34.**

35. State of Goa represented by the Chief Secretary,
Government of Goa, Secretariat, Alto Porvorim,
Bardez, Goa.

36. The Joint Mamlatdar-II of Tiswadi, Panaji, Goa. .. Respondents.

Mr. Parikshit Sawant, Advocate for the Appellants.

**Mr. R. G. Ramani, Senior Advocate with Mr Pranay Sinai
Kakodkar, Advocate for the Respondents No. 1 to 11 and 13.**

CORAM: VALMIKI SA MENEZES, J.

DATED: 9th November 2023.

JUDGMENT:

1. This is a First Appeal against the Judgment and Decree dated 13.09.2007 passed by the District Court, North Goa at Panaji in Civil Suit No.8/2005. The appellants herein are defendants 1, 2 and 3 in the Suit as the respondents no. 1 to 18 are the original plaintiffs. These are the contesting parties and shall be referred to in this Appeal by their original nomenclatures i.e. defendants 1, 2 and 3 (appellants herein) as “defendants” and respondents 1 to 18 as “plaintiffs”.

2. The trial Court has decreed the Suit of the plaintiffs declaring a Sale Deed dated 07.05.2003 executed by defendants no.2 and 3 in favour of defendant no.1 to be null and void and in violation of the provisions of Article 2177 of the Portuguese Civil Code.

3. The plaint pleads that properties under Survey No.21/7 admeasuring 9550 sq. metres (“Chawl Bhat”) and under Survey No.20/3 admeasuring 9875 sq. metres of the same name were owned by late Yaduvir Gangaram Naik, Gopinath Sakharam Naik, late Balaram Ranga Naik and Audhut S. Naik. Yaduvir passed away and was succeeded by his two grandchildren defendant no.2 and 3 who were children of his only daughter late Parvati Sagun Naik. On the demise of Balaram, his share in these properties devolved upon plaintiffs no.6 to 13. Audhut, the plaintiff no.1 and his wife Rasawanti and Ramakant Naik (plaintiff 3) are co-owners of these properties.

It was further pleaded in the plaint that a third property surveyed under Survey No.21/3 admeasuring 1250sq.metres known as “Mandovi Chawl Bhat” was owned by all the aforementioned persons and by late Nilkanth Rajaram Naik on whose demise his share was succeeded by plaintiffs no.14 to 18 and defendants nos. 1 and 4 to 19. The plaintiff no.14 is the widow of Nilkanth while plaintiffs no.15 and 17 are his sons and plaintiffs 16 and 18 are respectively their wives. That the names of plaintiffs no.1, 3 and 5 along with the name of Yaduvir and Balaram are shown in the survey records of the first two properties while the names of plaintiffs no.1, 3 and 5 with the name of Yaduvir, Balaram and Nilkanth are shown in the survey records of the third property.

4. It was further the case of the plaintiffs that an earlier suit bearing No. RCS/142/88/C filed by plaintiffs 3, 5 and 10 against Mahananda (wife of late Yaduvir) to injunct the defendant no.1 from constructing in the property under Survey No.21/7 was dismissed and the said decree was confirmed by

this Court. That the 3 suit properties being joint and undivided properties, and no co-owner could have the right to alienate a specific portion of these properties without consent to other co-owners (being contrary to Article 2177 of the Portuguese Civil Code), a Sale Deed dated 07.05.2003 executed by defendant no.2 and 3 to the defendant no.1 was null and void and required to be cancelled by a decree of the Civil Court.

5. A written statement came to be filed by the defendants 1, 2 and 3 wherein they took a preliminary objection that the Suit was barred by Section 11 CPC since the issue involved in RCS 142/1988/C which was dismissed was directly in issue in the present suit; on merits, these defendants admitted the contents of paragraph 1 of the plaint wherein the ownership of the plaintiffs and defendants of 3 properties, as referred above, are pleaded, however, they stated that the names of plaintiffs no.1, 3 and 5 are wrongly entered in the Survey records of these properties. In paragraph 7 of the plaint, these defendants deny that the plaintiffs are the co-owners of the suit property and paragraph 8 stated that late Mahananda had sold his suit properties to the defendant no.1, which act was upheld by the Civil Court in the previous suit.

6. Issues were framed by the trial Court which are reproduced herein:

- 1) Do the plaintiffs prove that Survey No.21/7 and 20/3 of Old Goa Village are joint and undivided properties of plaintiffs no.1 to 13 and defendants no.2 and 3?

- 2) Do the plaintiffs prove that the Survey No.21/3 is joint property of the plaintiffs and defendants nos. 1 to 19?
- 3) Do the plaintiffs prove that the Sale Deed dated 07.05.2003 is null and void as the defendant no.1 has been sold by the defendants no.2 and 3 a specific portion of undivided property?
- 4) Do the defendants no.1, 2 and 3 prove that the suit is hit by Section 11 of CPC?

7. The trial Court held that the plaintiffs had proved that they were joint and undivided owners of properties under Survey No.21/7 and 20/3 along with defendants no.2 and 3. The trial Court further held that insofar as property under Survey No.21/3 was concerned, the plaintiffs and defendants 1 to 19 are co-owners of the property. Consequently, since the Deed of Sale dated 07.05.2003 was executed with respect to a specific portion of these 3 properties by defendant no.2 and 3 to defendant no.1, and without the consent of the plaintiffs and other co-owners, the Deed of Sale was held to be null and void, consequently the decree.

On the issue of res judicata, the trial Court held that the suit was not barred by Section 11 CPC.

8. I have heard learned Shri Parikshit Sawant for the appellants and Shri R. G. Ramani, learned Senior Advocate for the Respondents no.1 to 11 and 13. I have perused the record of the trial Court, the pleadings of the parties, evidence led by them and the Deed of Sale dated 07.05.2003.

It is the submission of the learned Counsel for the appellants that the burden lay on the plaintiffs to prove that they were co-owners of the suit property, which burden they have failed to discharge. He submits that the issue No.1A, 1B and 2 fail in Regular Civil Suit 142/88/C in the earlier litigation between Ramakant, Gopinath and Gurudas as plaintiffs and Mahananda and the appellants on the other hand having been decided in favour of the defendants, the present suit was clearly barred by res judicata, and the trial Court has erred in returning a finding to the contrary.

9. The following Points for Determination would arise for my consideration on the basis of the above record of the trial Court;

Point 1- Whether the plaintiffs prove that they are co-owners of the suit properties as claimed in paragraph 1 of the plaint.

Point 2- Whether the Deed of Sale dated 07.05.2003 is null and void and contrary to the provisions of Article 2177 of the Portuguese Civil Code as the same is executed without consent of the plaintiffs and other co-owners and due to the fact that they propose to sell a specific portion of the suit properties.

Point 3- Whether the suit is barred by Section 11 CPC.

10. The plaintiffs have specifically pleaded in paragraph 1 of the plaint that they are co-owners of the 3 suit properties. They have stated that the first two properties are owned by late Yaduvir (who is survived by defendants 2 and 3), Gopinath (plaintiff no.5), late Balaram (who is survived by plaintiffs 6 to 13 and by the plaintiffs 1 to 3). The third property under Survey

No.21/3 is owned by the above plaintiffs, defendant no.2 and 3 and late Nilkanth who is survived by plaintiff no.14 to 18 and defendant 1 and defendants 4 to 19. The deposition of PW1, Audhut Naik states these facts. There are no denials put to PW1 in respect of these specific averments in the affidavit.

11. The pleadings of defendants 1 to 3 also admit this fact in paragraph 3 thereof. However, defendants 1 to 3, in paragraph 7 of the written statement had denied plaintiffs co-ownership of the 3 properties. DW1, Pramod Naik has admitted in his deposition that the sisters and brothers of the plaintiffs have a share in all the 3 properties and has further stated that the suit was bad for non-joinder of necessary parties on that count. He has also stated in his deposition that the sister of plaintiff no.1 has a share in all 3 properties through her father Shriram Naik and further admitted that plaintiffs 6 to 13 are heirs of late Balaram while plaintiff 14 is his (Pramod's) mother and widow of late Nilkanth Naik. This defendant has also admitted in his evidence that plaintiff no.15 to 18 are also successors of his father Nilkanth along with defendants 4 to 19 and himself. This deposition by itself clearly admits that the defendant no.3 (DW1) is the son of Nilkanth and through him is a co-owner of all 3 properties along with the plaintiffs. The admissions themselves are enough to record a finding that the plaintiffs are co-owners of all three suit properties, and notwithstanding the claim of defendant no.3 (PW1 Pramod) that he was the adopted son of Yaduvir, he admits that his

parents and his siblings, some of whom are parties to the suit are co-owners of the suit properties.

12. The admission of co-ownership of the suit properties is further supported by the entries found in the survey records of these 3 properties bearing Survey No.21/7 and 20/3 the names of late Yaduvir, plaintiff no.5 Gopinath, late Balaram, plaintiff no.3 Ramakant and plaintiff no.1 Audhut are seen as entries in the occupants column. In addition to these names the name of Nilkanth, father of the defendant no.3 is also seen in the occupant's column of Survey No.21/3. The statement in evidence of PW1 that the property had been bought by Ranga Naik who was their grandfather has not been denied. So also DW1 Pramod, in his cross-examination has stated that he did not know whether the name of Gangaram's father was Ranga Naik, who was the grandfather of late Yaduvir and plaintiffs no.1, 3 and 5. He also stated in his cross-examination that he did not know whether the suit properties initially belonged to Ranga Naik. The presumptions in favour of the entries under the Land Revenue Code, that the possession of these properties would be with the occupants shown therein has not been rebutted by the defendants by leading any evidence to the contrary.

13. Further, if one peruses the judgment passed in Regular Civil Suit 142/88/C which is in respect of the house situated in land under Survey No.21/7, and to which Mahananda and Pramod were party defendants, there is a specific finding in paragraph 10 thereof that the property under Survey No.21/7 is a joint and common property of which the defendants in that suit

are also co-owners. Thus it can be safely held that the plaintiffs are co-owners of the 3 suit properties. The trial Court has considered the evidence of PW1 and of DW1 in great detail on the question of ownership of the suit properties and has correctly arrived at a conclusion that the plaintiffs are co-owners of the suit properties. No fault can be found with this finding as the same is based upon evidence on record. I hold point No.1 in favour of the plaintiffs.

14. Article 2177 of the Portuguese Civil Code casts an embargo on a co-owner disposing of any specific portion of a common property without the same being allotted or assigned to that co-owner. The provision bars any form of transfer by co-owner of a specific and separated part or portion of a common property. For ready reference the translated provisions of Article 2177 are quoted below:-

“Article 2177 – Disposal of specific portion of a common property: A co-owner may not, however dispose of any specific part of the common property, unless the same is allotted to him in partition; and the transfer of the right which he has to the share which belongs to him may be restricted in terms of law.”

15. *In Robert Felicio Coutinho v/s. Maria Botelho*¹, this Court has considered the provisions of Article 2177 as would be applicable to a transfer of a specific part of an undivided property by gift and

¹ 2002 (1) Goa LT 109

has held that such gift of specific portion of the undivided estate would be a nullity. It held that this provision of the Portuguese Civil Code prohibits the alienation of a property by a co-owner in part or as a whole unless the share of such co-owner is allotted, partitioned and separated at loco, and it is only such separated share that can be transferred by the allottee. This judgment follows a similar view taken by this Court in *Jose Miranda v/s. Joao Miranda* ².

16. In the present case, the Deed of Sale dated 07.05.2003 which is under challenge was executed by defendants no.2 and 3 as children of Sagun Naik and heirs of Yaduvir Gangaram Naik and Mahananda, in favour of the defendant no.1, purported to sell specific and separated parcels of land from out of the suit properties. By this Deed of Sale the specific portion of each of the suit properties is described in Schedule I, II and III of the Deed being 7900 sq. metres, 7640 sq. metres and 1000 sq. metres respectively out of 9875 sq. metres, 9550 sq. metres and 1250 sq. metres of lands under Survey No.20/3, 21/7 and 21/3. The description of specific parcels is depicted on a plan annexed to the Deed of Sale.

17. Apart from the fact that specific parcels out of the joint properties have been transferred under the Sale Deed, the Deed itself contains

² 1999 (1) Goa LT 77

recitals that Yaduvir and Mahananda were joint owners in possession of the 3 properties thereby meaning that the properties were in co-ownership with other persons. There is no recital as to when the 3 specific portions sold by the Deed came to be allotted and late Yaduvir and Mahananda came to be in exclusive ownership and possession of these parcels. DW1 Pramod has admitted the various shares of the co-owners and at page 3 of the deposition he admits that no partition of the suit properties has taken place between the co-owners by any document. From this evidence it can be safely deduced that the suit properties have never been partitioned among the co-owners and no specific share of each co-owner has been determined or been specifically allotted either by any partition proceedings or by any Deed. That being the evidence before me, the Deed of Sale dated 07.05.2003 has been executed contrary to and in contravention of the specific provisions prohibiting such sale of transfer in Article 2177 of the Civil Code. The Sale Deed is therefore not valid being contrary to Article 2177 and requires to be declared as null and void.

18. The trial Court has dealt with this issue by specifically applying the law on the subject as contained in Article 2177 and arrived at a correct finding that the Deed of Sale, which transfers specific part of the suit property is contrary to law. The finding is hereby upheld and accordingly, the point for determination No.2 is held in favour of the

plaintiffs. The Sale Deed dated 07.05.2003 has been rightly held to be a nullity and contrary to Article 2177.

19. Regular Civil Suit 142/88/C was filed by Ramakant, Gopinath and Gurudas against Mahananda and her children for relief of mandatory injunction to demolish an illegal construction in a portion of the suit house, which was subject matter of the suit; a decree of permanent injunction to restrain the defendants from any further illegal construction was also sought.

Pramod (defendant no.1 in the present suit) was later added as defendant no.3 in that suit and a relief of declaration was sought against him that his possession with respect to the suit house was illegal, and his eviction was sought thereon.

20. The subject matter of the suit was not the property under Survey No.21/7 but a house structure standing thereon. In that suit, the Court held that the plaintiffs had failed to prove that the defendants have raised an illegal construction in the suit house or that the suit house belongs exclusively to the plaintiffs. After joinder of Pramod as a defendant, it was held in that suit on the 3 additional issues framed therein that Pramod had proved he was the adopted son of Yaduvir and Mahananda and he had further proved that he had purchased Mahananda's share in the suit house and was in possession of the suit house with Mahananda's

consent. On the basis of these findings that Court dismissed the suit, which decree was confirmed by this Court.

21. Examining the judgment in the above suit which is at Exhibit 57 of the evidence, it is clear that the present suit properties were not subject matter of that suit but it was only a house in possession of the defendant Pramod which was in issue. In that suit, there is a specific finding that land under Survey No.21/7 was a joint and common property between the parties to that suit but the suit house standing thereon was in possession of the defendant Pramod. In the light of these facts, no relief of mandatory injunction was granted to the plaintiffs. Clearly therefore the issues raised in the Regular Suit had absolutely no connection with the question of title to the 3 suit properties before this Court and there is no issue which was decided in that suit which could be said to be substantially an issue between the parties in the present suit. The present suit would therefore clearly not be hit by the bar under Section 11 CPC.

The trial Court has examined this question under issue no.4 and has correctly concluded that the issue in the earlier suit was limited to an illegal construction and not to the issue as to whether the 3 suit properties were under co-ownership or as to the legality of the Deed of Sale dated 07.05.2003. The finding on the issue of whether this Suit is barred by the principles of res judicata have been correctly appreciated by the trial Court and no infirmity can be

found on its finding on this issue. Accordingly, point No.3 is determined in favour of the plaintiffs.

22. On the basis of the conclusions arrived at on the points of determination framed above, the Appeal stands rejected. The judgment and decree dated 13.09.2007 passed by the District Court North Goa Panaji in Civil Suit No.8/2005 is hereby confirmed. No costs. Registry may draw up a decree in these terms.

VALMIKI MENEZES, J.

MARIA SUZANA REBELLO Digitally signed by MARIA SUZANA REBELLO
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