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IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.42 OF 2023

1. Smt Eugenia Fernandes, about 74 years of age, r/o 280, Laxete, Varca, Salcete-Goa.
 2. Shri Inacio Francisco Fernandes, (since deceased), through legal heirs:
 - 2(a) Smt. Effie Germina Fernandes, and her husband
 - 2(b) Shri Domaciano Arcenio Rebello, both of major age, r/o Odnem Bhat, Quepem-Goa, and appellant no.2(b) serving at abroad and represented herein by his attorney being appellant no.2(a)
 - 2(c) Smt Genifa Fernandes, and her husband,
 - 2(d) Shri Antonio Vincent Micky Leitao, both of major age, r/o Laxete, Varca Goa and presently at abroad and represented herein by their attorney Shri Joaquim Fernandes, of major age, r/o Sonarbhat, Quepem-Goa.
 - 2(e) Smt. Donatilda Fernandes, and her husband
 - 2(f) Shri Pedro Rosario Fernandes, both of major age, r/o H.No.280, Laxete, Varca, Salcete-Goa and appellant no.2(f) is presently working abroad and represented herein by his attorney being appellant no.2(e).
- .. Petitioners

Versus

1. Smt Maria Santana Fernandes, of major age and r/o. H.No.311/A, Reprovado, Varca Taluka, Salcete-Goa and her husband,
2. Shri Sebastiao D'Souza, (since deceased) through legal heirs:
 - 2(a) Smt Colette Carmelina D'Souza,

- 2(b) Shri Rony Luis Cardozo,
2(c) Shri Shirley D'Souza,
2(d) Shri Denzil D'Souza,
all major in age, r/o H. No.311/A, Reprovado,
Varca, Salcete-Goa.
3. Smt. Maria Anunciacao Alina Camila alias
Mena De Souza Fernandes, housewife, of
major age, r/o H.No.294, Uddo, Laxete,
Varca, Salcete-Goa. ...Respondents

Mr Vinayak Gurudas Pai, Advocate for the Appellants.

**Mr Cleofato A. Coutinho, Advocate with Mr Ivan Santimano,
Advocate for Respondents No.1, 2(a) and 2(c).**

CORAM: M. S. SONAK, J.

DATED: 12th JANUARY 2024

ORAL ORDER:

1. Heard Mr V. G. P. Duple for the appellant, Mr Cleofato Coutinho for respondents No.1, 2 (a) and 2(c).
2. This Second Appeal is directed against concurrent Judgments and Decrees dated 12.03.2010 and 07.02.2018 made by the Trial Court and the Appeal Court decreeing Regular Civil Suit No.202/2001/I.
3. The appellants are the original defendants, and the respondents are the original plaintiffs in Regular Civil Suit No.202/2001/I.
4. The record bears out that plaintiff no.1's mother expired on 02.05.1977. After that, their father, Antonio, without concurrence or consent from the plaintiffs, who had inherited rights

in the suit property consequent upon the death of their mother, sold the suit property vide Sale Deed dated 02.01.1983 to the defendants.

5. After that, the plaintiffs instituted Regular Civil Suit No.74/1984 seeking, inter alia, cancellation of the Sale Deed dated 02.01.1983. This suit was decreed on 29.03.1985, and the Sale Deed dated 02.01.1983 was declared as null and void.

6. Thereupon, the defendants, in February 1997, filed an application seeking a declaration that they were tenants in respect of the suit property. This application was filed by appellant no.1, Eugenia, against her own daughter, Donatilda Fernandes. Mr Dukle points out that in the meantime, the plaintiff's father, Antonio, had married defendant no.4/respondent no.4 herein. Accordingly, even the second wife of Antonio was impleaded as a party in the application seeking a declaration in respect of the tenancy in respect of the suit property. Further, Mr Dukle admitted and even otherwise, the records bear out that the plaintiff, who was the daughter of Antonio and Maria (Antonio's first wife), was not impleaded as a party before the Tenancy Court.

7. The Tenancy Court, by order dated 04.07.1997 and by a purchase order dated 10.08.1999, allowed the claim of tenancy and order purchase. At least the order of purchase refers only to Eugenia's daughter's name.

8. The plaintiffs, thereupon, instituted the present suit, i.e. Regular Civil Suit No.202/2002/I, seeking a declaration that the orders dated 04.07.1997 and purchase order dated 10.08.1999, were

nullities, being products of a gross fraud practised upon the Authorities.

9. The Trial Court, by Decree dated 12.03.2010, held that the orders from the Trial Court were indeed obtained by fraud and decreed the suit. The First Appellate Court upheld this Decree vide Judgment and Order dated 07.02.2018. Hence, this Second Appeal.

10. Mr Dukle, learned counsel for the appellants, submits that though there are concurrent findings of facts recorded by the two Courts, the same are liable to be interfered with on account of perversity in not evaluating the most vital and relevant document, i.e. the Sale Deed dated 02.01.1983 (Exhibit-21). He submits that in this Deed, late Antonio had acknowledged the appellant herein as tenants of the suit property. He submits that though the Civil Court may have set aside the Sale Deed, the same can still be looked into for collateral purposes. Accordingly, he submits that the substantial questions of law arise in this Appeal on account of perversity in the record of findings of fact.

11. Mr Coutinho, learned counsel for respondents no.1, 2(a), and 2(c), defends the impugned Judgments and Decrees based on the reasonings reflected therein. He submits that fraud was practised on the Authorities by the appellant impleading only her daughter and obtaining a declaration against the daughter when, in fact, the Sale Deed in favour of her daughter was already set aside by the Civil Court. He submits that no substantial questions of law arise in this Appeal and, therefore, this Appeal may be dismissed.

12. Rival contentions fall for my determination.

13. From the facts set out above, it is apparent that the Civil Court set aside the Sale Deed of 02.01.1983. An appeal was filed against this Decree, which was dismissed. This matter was not pursued further by the appellant or her daughter.

14. Accordingly, the appellant was not justified in seeking a tenancy declaration against her own daughter by suppressing the fact that the Civil Court had already set aside the Sale Deed in favour of the daughter. Even assuming that the second wife of Antonio was impleaded, that does not reduce the intensity of the fraud practised upon the two Courts.

15. As noticed earlier, on 02.05.1977, Antonio's first wife had already expired. As a result, the appellant was duty-bound to implead Antonio and his first wife's daughter, i.e. the plaintiff in the suit in which the impugned Decrees have been made. The attempt to obtain tenancy declaration and purchase orders which orders are completely cursory and passed almost on consent, was indeed an attempt to fraudulently deprive the original plaintiff of her rights to the suit property. Accordingly, the two Courts have concurrently set aside such fraudulent orders or orders fraudulently procured.

16. The Civil Court already set aside the Sale Deed dated 02.01.1983. Even assuming that such a document, which was declared null and void would still be looked into for collateral purposes, the precondition for such would be impleadment of the plaintiff herein as respondent to the application seeking declaration

of tenancy. Further, it was incumbent upon the applicant to have made full and candid disclosure to the Mamlatdar before seeking such declaration and purchase orders. Accordingly, this is not a case where any relevant evidence was excluded from consideration. Further, if at all it was excluded from consideration, the appellants have to thank themselves for not being candid with the Courts.

17. Therefore, there is no error in the record of finding of fact concurrently by the two Courts. There is neither perversity involved nor was there any exclusion of vital and relevant evidence as urged by Mr Dukle.

18. For the above reasons, this Appeal is liable to be dismissed and is hereby dismissed.

19. Further, it is clarified that the dismissal of this Appeal or the Decrees made by the two Courts will not, prima facie, preclude the appellants from filing fresh proceedings claiming their alleged tenancy rights by impleading all parties, including, in particular, the plaintiff herein. If such an application is made, no doubt, the same shall be decided by the appropriate Authority in accordance with law.

20. The Appeal is hereby dismissed with the above clarifications. There shall be no order for costs.

M. S. SONAK, J.