

(2017) 05 BOM CK 0094
In the Bombay High Court
Case No : 14 of 2016

Sandeep Kashinath Parab, s/o late Kashinath Parab APPELLANT
Vs
Prasad Ramrai Sinai Dubhashi s/o Ramrai Dubhashi, & Ors. RESPONDENT

Date of Decision : 05-05-2017

Acts Referred:

[Transfer of Property Act, 1882](#), [Section 44](#) -
Portuguese Civil Code, 1867, — Article 1784, Article 2177, Article 1565, Article 1665, Article 1789

Citation : (2017) 05 BOM CK 0094

Hon'ble Judges : Nutan D.Sardessai

Bench : SINGLE BENCH

Advocate : Ryan Menezes, A. D. Bhobe, Parag Rao

Final Decision : Allowed

Judgement

1. Heard forthwith with the consent of the learned counsel for the parties.
2. Admit.
3. Shri A. D. Bhobe, learned Advocate waives service for the respondent no.1 and Shri Parag Rao, learned Advocate waives service for the respondents no.2, 3, 4 and 5.
4. The appellant has taken objection to the impugned order dated 08/01/2016 passed by the Civil Judge, Bicholim, pursuant to which he had secured the original plaintiff with the relief of injunction restraining the defendant no.27 i.e. the appellant herein, his agents, servants, relatives or any other person acting on his behalf from in any manner transferring, selling, disposing or creating any third party interest in the suit property based on the Sale Deed and Gift Deed.
5. Shri Ryan menezes, learned Advocate for the appellant contended at the outset that the respondent no.1 had instituted the suit for the relief of declaration that the Gift Deed dated 28/09/2011 and the Sale Deed dated

02/12/2013 were null and void. The respondent no.1/ original plaintiff was the son of the defendants no.1 and 2 being the respondents no.2 and 3 herein who had executed the Gift Deed in favour of the defendants no.3 and 4 and thereafter had executed a Sale Deed alongwith them in favour of the defendant no.26 i.e. the appellant herein. A Deed of Rectification/Ratification was also executed alongwith the defendants no.5 to 26. The plaintiff claimed a right to protect the legitime which was affected on account of the Gift Deed executed by the original defendants no.1 and 2 in favour of the respondent no.3 as it was executed without taking his consent. He adverted to the application for temporary injunction, the reliefs claimed against the defendants and the written statement particularly of the appellant / the defendant no.27 in which he had denied the right in favour of the plaintiff and his right, if any, to the property in question would crystallize only on the death of his parents.

6. Shri Ryan Menezes, learned Advocate for the appellants further contended that it was incumbent on the plaintiff to demonstrate that the parents had exceeded the disposable quota while executing the Gift Deed and there were more properties than the suit property owned by his parents. The appellant was prima facie the owner in possession and it was for the plaintiff to establish his right in the property who had failed to show by any documents on record how he had acquired right to the property of the original defendants no.1 and 2. The Trial Court was totally in error to harp only on the Gift Deed and not to the Sale Deed executed in his favour and was ultimately in error to hold in favour of the plaintiff when right had yet to arise in his favour. He relied in "Anastasio Gomes and another v/s. Bernado Gomes and others" [2012 (1) Goa L.R.11] and concluded his arguments that the erroneous findings rendered by the Trial Court had to be quashed and set aside and the injunction ought to be vacated.

7. Shri Parag Rao, learned Advocate for the respondents no.2 to 5 submitted at the outset that the suit was a nonstarter which was misconceived in law and facts and otherwise without any basis. He questioned the locus of the plaintiff who had no independent right to the suit property. The question of legitime would arise on the death of his parents when there would be an opening of the inheritance. The Trial Court had erred in relying on the Gift Deed. The defendants no.1 and 2 were the co-owners of the property with the defendants no.5 to 26 and not with the plaintiff and/or the defendant no.3. Article 2177 of the Portuguese Civil Code was not at all attracted to the case at hand and therefore looking to the tenor of the case, the order under challenge had to be quashed and set aside and the appeal had to be allowed.

8. Shri A.D. Bhohe, learned Advocate for the respondent no.1 /original plaintiff contended that assuming that the Gift Deed dated 28/9/2011 was valid, the question still arose on the right of the defendants no.1 and 2 to sell the property in favour of the appellant. He adverted to the recitals of the Gift Deed and submitted that having disposed off the property by virtue of the Gift Deed, no rights survived in them and therefore they could not execute the Sale Deed in

favour of the appellant/plaintiff. He adverted to Article 1665 of the Portuguese Civil Code and submitted that there was no authority for the defendants no.1 and 2 to dispose off the property. He relied on the judgment in Shri Norberto Paulo Sebastiao v/s. Shri Gabriel Sebastiao Idalino (Second Appeal No.3 of 2006) and Smt. Premavati Basu Naik and others v/s. Shri Suresh Basu Naik and another [2012 (5) BCR 549], apart from the judgment in Shri Manojkumar Ramakant Naik Gaonkar v/s. Shri Paresh Ramakant Naik Gaonkar [Writ Petition No.529 of 2015] to buttress his plea that there was locus for the plaintiff to file the suit and it was for the defendants to justify the validity of the Gift Deed. Once again he questioned the authority of defendants no.1 and 2 to execute the Sale Deed if at all the Gift Deed was valid and how at all they could execute the Sale Deed as owners apparent from the recitals. The conduct of the parties was also relevant who at one time were claiming of the validity of the Gift Deed and at the other that it was a common property. The Trial Court had appropriately appraised the material on record and passed the impugned order holding that the plaintiff had made out a triable case and therefore the injunction could not have been vacated.

9. Shri R. Menezes, learned advocate for the appellant / the defendant no.27 contended that Article 1565 of the Code was restricted to the sale and mortgage to the children and that it did not apply to the Gift Deed. He clearly distinguished the judgment in Premavati's case as it related to a sale and not a gift and therefore Article 1565 could not at all be applied to the case at hand. The Trial Court had only focused its attention on discussing the Gift Deed and not the Sale Deed in his favour. In any event, the presence of the defendants no.1 and 2 in the Sale Deed was not at all fatal which was otherwise not at all discussed by the Trial Court. He relied in Anastasio Gomes (supra) and submitted that the co-owner had conveyed the right in favour of the appellant and there was no locus standi in the plaintiff to challenge the Sale Deed and he was therefore entitled to the reversal of the impugned order. Shri P. Rao, learned Advocate for the respondents no.2 to 5 contended that it was settled law that the weakness in the defence would not enure in favour of the plaintiff. Assuming for a moment that the Gift Deed was invalid, the Trial Court nonetheless had not examined the Sale Deed. He referred to Article 1784 regarding the indispensable portion and Article 1789 and on his part pressed for the dismissal of the injunction and allowing the appeal of the appellant.

10. The plaintiff had carved a case that the property in question was an ancestral, common and undivided property which had not been partitioned amongst the legal heirs of late Pandharinath. His parents i.e. appellants no.1 and 2 had acquired an undivided share in the said property on the death of his father. The defendants no.1 and 2 by the Gift Deed dated 28/9/2011 gifted the entire suit property exclusively to his son i.e. the defendant no.3 which they could not have executed and therefore it was void, illegal and liable to be set aside. Moreover the defendants no.1 and 2 alongwith the defendants no.3 and 4 by the Sale Deed dated 02/12/2013 had sold the entire suit property to the defendant no.27 which was to deprive the plaintiff and the other co-owners of the rights

and shares of the suit property and therefore apprehending that the defendant no.27 would dispose off the property and/or otherwise deal with the property to his disadvantage. He had maintained the suit for a declaration, Gift Deed dated 28/9/2011 and Sale Deed dated 02/12/2003 were null and void and not binding on him and simultaneously prayed for the relief of injunction.

11. The defendants no.1 to 4 had questioned the locus standi of the plaintiff to file the suit on the premise that no right accrued qua the suit property during the lifetime of his parents and pressed for dismissal on that ground alone. They had gifted the suit property to the defendant no.3 by the Gift Deed dated 28/09/2011 and denied that it was either undivided or common or their right was restricted only to 1/7th. The plaintiff did not have any right to the suit property during their lifetime and therefore he could not challenge the Gift Deed. They had sold the suit property to the defendant no.27 vide the Sale Deed dated 02/12/2013 which did not in any manner affect the right of the plaintiff. No cause of action had arisen in his favour and therefore the suit was liable for dismissal. The defendants no.5 , 6, 7, 10 and 11 reiterated that the plaintiff had not acquired any right in the estate of his parent's property during their lifetime and therefore he was legally not entitled to claim the right of inheritance and pressed for the dismissal of the suit. The defendant no.27 who is the appellant herein questioned the locus standi of the plaintiff to maintain the suit and maintained that the defendants no.1 and 2 as the owners in possession of the suit property had full right to alienate it in any manner. He had purchased their disposable share which is the suit property by the Sale Deed dated 02/12/2013 and the Deed of Rectification cum Ratification. No question arose of taking the plaintiff's consent to alienate the suit property and it is only after satisfying himself that the title of the vendor was clear and marketable and purchased property. The suit and the application therefore were liable for dismissal.

12. The Gift Deed which is the subject matter of challenge reveals that the defendants no.1 and 2 as the donors had gifted in favour of the donee i.e. the defendant no.3 the suit property being the owners in possession thereof and out of natural love and affection. The defendants no.1 and 2 thereafter by the Sale Deed dated 02/12/2013 alongwith the defendants no.3 and 4 had sold the property and which Deed of Sale was later rectified/ratified on 07/03/2014 not only by the defendants no.1 to 4 but also the defendants no.5 to 26. These documents are however not the subject matter of challenge in the suit filed by the original plaintiff. From the tenor of the pleadings it is apparent that the plaintiff is claiming right to protect his legitime which was affected by the Gift Deed executed by the defendants no.1 and 2 in favour of the defendant no.3 and on the premise that his consent was not taken at the time of its execution. It is another matter that the question of legitime would come into play only upon the death of the parents and on opening of the inheritance and not during the lifetime of the parents.

13. Article 1565 provides that the parents or grandparents shall not be entitled

to sell or mortgage to the children or grandchildren if the other children or grandchildren did not consent to the sale or mortgage. The sole paragraph thereto provides that if any of them refused the consent or is incapable of granting the same or it is not possible to obtain such consent, the consent may be made good through family council constituted and summoned for this purpose in the manner set out in Article 257. Therefore a plain reading of Article 1565 would amply demonstrate that the element of consent would arise only when the parents or grandparents intend to sell or mortgage and by no stretch would it cover the case of gift, per se.

14. It was not particularly in dispute that the defendants no.1 and 2 who are parents of the plaintiff had more properties than the suit property and the plaintiff for that matter assuming that they were not entitled to dispose off the property by the Gift Deed had demonstrated that they had exceeded their disposable quota while executing the Gift Deed. Moreover the Trial Court basically harped upon the validity or otherwise of the Gift Deed and completely ignored the Sale Deed in the appellant's favour pursuant to which he had acquired right in the suit property and confirmed by the Deed of Rectification of March, 2014. Shri R. Menezes, learned Advocate for the appellant had rightly contended that the plaintiff had to establish his right in the property which he had failed to do by any document on record and rightly so since he could not claim any independent right in the suit property of the parents during their lifetime.

15. In Shri Norberto Paulo Sebastiao (supra), the learned Judge of this Court framed a substantial question of law for consideration whether the provisions of Article 1565 of the Portuguese Civil Code are not repealed under Section 44 of the Transfer of Property Act. The learned Single Judge answered the substantial question holding that the provision of Art. 1565 had to be construed as continuing in force. Besides, Article 1565 of the Portuguese Civil Code was the protection of the "legitima" (legitimate shares) of the descendants and there was no need to wait for the death of the father or grand father vnder to apply for the annulment of the sale, because it was not necessary to prove, concretely, the effects of the same "legitimas".

16. Smt. Premavati Basu Naik (supra), challenged the judgment and decree passed by the learned District and Sessions Judge, South Goa, Margao, whereby the respondent's appeal was allowed and the Deed of Sale dated 21/12/1993 registered before the Sub-Registrar of Mormugao came to be declared as null, void and ineffective and without any legal effect. In the brief facts, the respondents had filed the suit setting out a case that the suit property was purchased by the respondent's father and that the appellant nos.2, 4 and 6 misguided the appellant no.1 and her husband and without the knowledge and consent of the respondents induced the parents of the respondent no.1 to execute a Sale Deed in favour of the appellant nos.2, 4 and 6 in respect of the suit property and which came to be registered before the Sub-Registrar. The

appellant no.2 then filed a complaint against the respondent no.1 at the Police Station wherein she disclosed that the suit property was purchased by them. Accordingly, the suit came to be filed in which the respondents raised a plea that the Sale Deed was in breach of Article 1565 of the Portuguese Civil Code. The appellants resisted the suit and pressed for its dismissal which came to be dismissed by the learned Civil Judge Senior Division, Vasco, giving rise to the appeal at the instance of the respondent before the learned District Judge. The learned Additional District Judge, South Goa, Margao, allowed the appeal and set aside the judgment of the Civil Court giving rise to the appeal.

17. In Smt. Premavati Basu Naik (*supra*), the appellants assailed the judgment essentially on the ground that the provisions of Article 1565 of the Portuguese Civil Code have been repealed in view of the Transfer of Property Act and though Article 1565 of the Portuguese Civil Code did not permit the parents to sell the property to their children without the consent of the other children, nevertheless in the present case according to the appellants, there was deemed consent from the other children. Besides, most of the children were already made parties to the Sale Deed except the son, the respondent no.1. Considering that the appellant no.1 and her deceased husband had four children, three daughters being the beneficiaries of the Sale Deed, therefore the question of seeking any consent from the respondent no.1 would not arise and that no suit for declaration simpliciter was maintainable without seeking for the restoration of possession. The appellants were in possession of the suit property therefore the learned Judge was not justified to pass the impugned judgment.

18. In Smt. Premavati Basu Naik (*supra*), the learned Single Judge observed that it was not disputed that under Article 1565 of the Portuguese Civil Code, there was an express bar whereby the parents could not sell the immovable property to the children without the consent of all the children. In the case at large it was not disputed that the respondent no.1 was the son of the appellant no.1 and as such, the consent of the respondent no.1 had not been obtained. There was no material on record to show that there was any consent from the respondent no.1. Besides, the contention on behalf of the appellants that the provisions of the Transfer of Property Act had repealed the provisions of Article 1565 of the Portuguese Civil Code was not at all available to the appellants in view of the judgment passed in Shri Norberto Paulo Sebastiao (*supra*) (Second Appeal No. 3 of 2006). This was the case where Article 1565 came to be discussed and held as applicable but relating to the sale of the property which was prohibited thereunder. In our case, what is involved is a Gift Deed which cannot be enveloped by any stretch to be brought within the four corners of Article 1565 of the Code assuming for a moment that the respondent no.1 / plaintiff had locus standi to question the disposal of the property by his parents without his consent.

19. In Manojkumar Naik (*supra*), a learned Judge (Shri Justice C. V. Bhadang, J.) of this Court observed that nothing was brought to his notice to limit the application of Article 1565 to the property other than the self acquired property

and observing further that prima facie the said Article could not be read with a limitation that it only applied to the property other than the self acquired property.

20. Anastasio Gomes (supra), challenged in the Second Appeal the judgment and decree passed by the Court below in the suit filed by the appellants for a declaration that they were the owners in possession of the property situated at Gogola ward, Margao City, District of Goa, Sub-District and Taluka of Salcete, bearing the distinct land registration number and surveyed under Chalta Nos.1, 2, 3, 4, 5, 6, and 7 of P.T. sheet No.131, of Margao City. The learned Civil Judge Junior Division, Margao, by judgment and decree dated 21.07.2008 dismissed the suit concluding that they had failed to establish that they were the lawful owners of the suit property. They preferred an appeal before the learned District Judge which came to be dismissed by the judgment dated 02/01/2009 in which the learned District Judge came to the conclusion that the appellants had failed to establish that they were the exclusive owners in possession of the suit property giving rise to the Second Appeal.

21. In Anastasio Gomes (supra), the learned Judge framed a substantial question of law whether the conclusions drawn by the Courts below were perverse. It was contended on the appellants' behalf by referring to the pleadings that there was no dispute raised by the respondents on the ownership of the appellants qua the suit property and the only plea raised by the respondent was that they were in occupation of a portion of the house located in the suit property and claiming co-ownership to the suit property. There was no particular dispute on the ownership of the suit property with the appellants but there was a cause of action established by them to entitle them to seek a declaration as prayed for in the suit and that the entries in the survey records did not give them any cause of action to file the suit. On examining the pleadings and documents this Court held that the Court's below were not justified to come to the conclusion that the appellants were not the owners in possession of the suit property. The document of title produced by the appellants conclusively established that they had title and ownership as far as the suit property was concerned. The well settled proposition that possession follows title was reiterated but there was no relief sought by the appellants with regard to the occupation of any portion of the suit house by the respondents. In that context a reference was made to the provisions of Article 2011 of the Portuguese Civil Code, where the right of inheritance devolved only upon the death of the estate leaver. Hence, the question of claiming any rights to the suit property during the lifetime of the parents would not arise at all. In the ultimate it was held that the Courts below were not justified to refuse the declaration as prayed for by the appellant and answered the substantial question of law accordingly.

22. There was no dispute in particular that the defendants no.1 and 2 were the co-owners with the defendants no.5 to 26 and that the plaintiff and the defendant no.3 had no independent right to the suit property. It has been earlier

observed that the plaintiff had no locus standi even by invoking Article 1565 of the Portuguese Civil Code. Article 2177 provides that co-owner may not, however dispose of any specific part of the common asset or thing, unless the same is assigned to him in partition; and the extinguishment of the right to the portion which is to belong to him may be delimited in terms of the law. It provides that co-owners are not entitled to dispose off either the entire property or any specific portion thereof unless and until the share of the co-owner is allotted, partitioned and separated in loco.

23. A plea was raised on behalf of the plaintiff that the defendants no.1 and 2 having gifted the suit property in favour of the defendant no.3, no right survived in them and therefore they had no authority to execute the Sale Deed in favour of the defendant no.27. The plaintiff cannot be allowed to take such a plea when he questioned the very validity of the Gift Deed and cannot be allowed to approbate and reprobate at the same time. The defendants no.1 and 2 in their wisdom had chosen to join the defendants no.3 and 4 as parties to the Sale Deed in favour of the defendant no.27 and further to give every credibility to the transaction entered into qua the Deed of Rectification/Ratification. Even assuming at the highest that the Gift Deed was not valid, they could still dispose off the property in favour of the defendant no.27 who had acquired a valid title in the suit property and which aspect was clearly ignored by the learned Trial Court while considering the matter at large before it.

24. Article 1784 deals with the indisposable portion and reads that legitime means the portion of the assets that the testator cannot dispose off, because it has been set apart by law for the heirs in straight line descendant or ascendant. Article 1789 deals with the reduction of inofficious gifts and dispositions and provides that when the testator had gifted or disposed of more properties than he is permitted to dispose, the forced heirs may apply, at the time of opening of the inheritance, that the gift or disposition, be reduced, as provided in Articles 1493 and 1494. Therefore on a plain reading of these Articles it would be apparent that the right of the plaintiff, if any, would crystallize in his favour upon the death of his parents and if at all the parents have decided to gift or dispose of more properties, the foster heir at the time of opening of the inheritance can apply to have the gift or disposition to be reduced.

25. The learned Trial Court while considering the case at large before him was seized of the fact that the plaintiff had not produced any title documents proving that the suit property was the common property as claimed by him. The learned Trial Judge was seized of the fact that the plaintiff was not in possession of the suit property and had no ownership rights in the suit property which he could get only upon the death of the estate leaver i.e. the defendants no.1 and 2. However, the learned Trial Judge went of at a tangent while appreciating the Rectification Deed to hold that the defendants no.1 and 2 had made an incorrect statement of being the exclusive owners of the suit property at the interlocutory stage. The learned Judge for that matter went on to observe that there were false

statements contained in the Gift Deed and also the Deed of Rectification. The learned Trial Judge did not at all look into the Sale Deed in favour of the defendant no.27 i.e. the appellant herein who had acquired right to the suit property for consideration and harped more on the Gift Deed and entitlement of the defendants no.1 and 2 to gift the entire property in favour of the defendant no.3 without the consent of the plaintiff. The Trial Court for that matter erroneously applied Article 1565 to the case at large before him and for no justifiable reason concluded that the disposal of the suit property in favour of one son without the consent of the other affected the legitime of the suit property.

26. The Trial Court also failed to consider the import of Article 1565 of the Portuguese Civil Code and to hold that the plaintiff was seeking to enforce his legitime which would actually accrue in his favour upon the demise of his parents. The Trial Court therefore erroneously held that the plaintiff had succeeded in raising a fair question which needed investigation on merits and in that light hastily concluded that the case was tilted in favour of the plaintiff who was required to be protected by an equitable relief of injunction. The impugned order virtually failed to take into account the right which had crystalized in favour of the appellant pursuant to the Sale Deed in his favour for consideration and therefore could not have secured the plaintiff with the relief of injunction. Even applying the principles in *Wander Limited and another v/s. Antox India P. Ltd.* [1990 suppl SCC 727], the impugned order cannot be allowed to stand and therefore, i pass following: O R D E R

The appeal is allowed and the impugned order securing the plaintiff with the order of injunction is quashed and set aside.