
(2011) 06 BOM CK 0143
In the Bombay High Court
Case No : Second Appeal No. 110 of 2010

Smt. Daisy Senso Alias Daisy A. Serrao APPELLANT

Vs

Smt. Ivorine Danslay Noronha, Danivor Danslay Noronha RESPONDENT
alias Danslay Domnic Mascarenhas represented by his
Natural Guardian, Shri Ubaldo Noronha, Smt. Irene Noronha
and Smt. Irene Noronha

Date of Decision : 08-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Evidence Act, 1872 — Section 108

Citation : (2011) 5 ALLMR 257 : (2011) 5 BomCR 837 : (2011) 6 MhLj 73

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : Sudesh Usgaonkar, for the Appellant; J.E.C. Pereira and V. Braganza, for the Respondent

Final Decision : Allowed

Judgement

A.P. Lavande, J.—Heard Mr. Usgaonkar, learned Counsel for the Appellant and Mr. Pereira, learned Senior Counsel for Respondent Nos. 1 and 2.

2. By this Second Appeal, the Appellant takes exception to the judgment and decree dated 2nd November, 2010 passed by Ad hoc District Judge-2, FTC-II, South Goa, Margao in Regular Civil Appeal No. 171/2010 whereby and whereunder the appeal preferred by the Appellant herein against the judgment and decree dated 3rd May, 2008 passed by the First Additional Civil Judge Senior Division, Margao in Special Civil Suit No. 176/200/I was dismissed. Parties shall hereinafter be referred to as per their status before the trial Court.

3. Briefly, the facts relevant for disposal of this Second Appeal are as under:

Respondent Nos. 1 and 2 filed the above referred suit against the Appellant and Respondent Nos. 3 and 4 seeking declaration of nullity of Will, declaration of title,

permanent injunction and other consequential reliefs. The case of the Plaintiffs was that Plaintiff No. 1 was legally wedded wife of late Danslay Noronha alias Danslay Dominic Mascarenhas, who expired on 24th July, 1997 leaving behind Plaintiff No. 1 and his minor son Plaintiff No. 2. The said marriage was solemnized on 24th October, 1992 at Sacred Heart Church, Santa Cruz, Bombay. Plaintiff No. 1 and Danslay lived as husband and wife till the death of Danslay on 24th July, 1997. Danslay was the legitimate son of Smt. Viola Mascarenhas alias Viola Noronha and Shri Joaquim Dominic Mascarenhas. Danslay was born on 27th December, 1962. Joaquim Mascarenhas expired in the year 1999. Even before the death of Joaquim Mascarenhas, Smt. Viola Mascarenhas and Anthony Noronha entered into a second marriage on 31st March, 1979. During the lifetime of the Plaintiffs, late Viola had purchased the property in Ward No. 4 bearing plot No. 8 of the northern side portion of the property "Naicalem" alias "Santu Xenoilem Bhata" (hereinafter referred to as the suit property). After the purchase of the suit property, Viola Mascarenhas constructed residential bungalow in the suit plot known as "Green Acres" after obtaining licence in the name of her husband Shri Anthony Noronha and requisite permissions from the authorities. Viola Mascarenhas had purchased the suit plot before her marriage to Anthony Noronha by sale deed dated 11th March, 1976 and the marriage was duly registered in the year 1979. It was further the case of the Plaintiffs that even before the marriage in the year 1979, Viola and Anthony had intimate relations. After the construction of the bungalow in the suit plot, Viola and Anthony lived in the bungalow as husband and wife. Danslay Noronha also lived with foster father and mother in the said bungalow.

4. Viola Mascarenhas expired on 11th March, 1993. Thereafter, late Anthony Noronha continued to reside in the said bungalow along with Danslay till Danslay expired on 24th July, 1997. Anthony Noronha expired on 17th July, 2000. It was further the case of the Plaintiffs that by joint Will Anthony Noronha and Viola Mascarenhas had bequeathed the suit property and other assets to Shri Danslay Noronha by duly registered Will dated 10th October, 1980. It was further the case of the Plaintiffs that Anthony Noronha in July 2000 was in a critical state of health and Defendant No. 1 had taken possession of the suit property and taking advantage of a critical health of Anthony Noronha, she got Will dated 15th July, 2000 executed by Anthony Noronha in her favour. According to the Plaintiffs, the Will was not voluntary and it was obtained by Defendant No. 1 fraudulently and as such, it was unenforceable in law. It was further the case of the Plaintiffs that the deceased had no right to bequeath the property of late Viola. The Plaintiffs being the legitimate heirs of late Danslay Noronha and moiety holder of the estate, were entitled to enjoy the entire estate including the suit property of Danslay Noronha. Based on these pleadings, the Plaintiffs filed the suit seeking several reliefs against the Defendants.

5. Defendant No. 1 filed written statement. Defendant Nos. 2 and 3 also filed common written statement. The defence of the Defendants was that Danslay was Goan by birth and as such, was governed by personal law applicable to Goans;

the marriage between Plaintiff No. 1 and Danslay was not registered and as such, the marriage was not valid in law; Danslay was not son of Viola and Joaquim Mascarenhas; Anthony Noronha was not married to Viola Mascarenhas on 31st March, 1979. Even presuming that there was a marriage, the same was illegal since the marriage was contracted during the lifetime of her first husband Joaquim Mascarenhas; the suit house was constructed by Anthony Noronha after obtaining licence in his own name and investing his own funds after obtaining loan from his employer Shipping Corporation of India and after obtaining fire insurance policy in his own name. The Will dated 15th July, 2000 executed before Sub-Registrar-cum-Ex-Officio Notary by late Anthony Noronha in favour of Defendant No. 1 was voluntary and was not fraudulent.

6. On the basis of the pleadings of the parties, the trial Court framed the following issues:

(i) Whether the Plaintiffs prove that Plaintiff No. 1 was legally married to the late Shri Danslay Noronha @ Danslay Dominic Mascarenhas on 24.10.1992 at the Sacred Heart Church, Santa Cruz, Bombay ?

(ii) Whether the Plaintiffs prove that late Smt. Viola Noronha had during her lifetime purchased a property situated in Ward 4, bearing plot No. 8 of the northern side portion of the property known as "Naicalem" alias "Santu Xenoilem Bhata", corresponding to 2/3rd of the property of the same name, registered in the Land Registration Office of Salcete under No. 37916 new, situated at Aquem, Margao ?

(iii) Whether the Plaintiffs prove that the Will dated 15.7.2000 is illegal, fraudulent and unenforceable at law ?

(iv) Whether the Defendants prove marriage between Shri Anthony Noronha and Smt. Viola Mascarenhas was totally illegal as the marriage between the two was never dissolved during the lifetime of Shri Joaquim Dominic Mascarenhas ?

(v) Whether the Defendants prove that the property situated in Ward 4 bearing plot No. 8 of the northern side portion of the property known as "Naicalem" alias "Santu Xenoilem Bhata", corresponding to 2/3rd of the property of the same name, registered in the Land Registration Office of Salcete under No. 37916 new, situated at Aquem was purchased only by Anthony Noronha but in the name of his wife Smt. Viola Noronha who is a person different from Viola Mascarenhas ?

(vi) Whether the Defendants prove that suit house and the suit property belongs to Defendant No. 1 ?

(vii) What order ? What relief ?

7. The Plaintiffs examined their power of attorney Shri Xavier Bonifacio Fernandes, the father of Plaintiff No. 1 as PW1 and Ramesh Anand Lotlikar as PW2 and placed reliance upon several documents mentioned in paragraph No. 10 of the trial Court's judgment. The Defendants examined Daisy Serrao as DW1,

Anthony D'Mello as DW2 and Jose Martin D'Souza as DW3. The Defendants also produced documents exhibits 60 to 65 which are mentioned in paragraph No. 11 of the trial Court's judgment.

8. The trial Court upon appreciation of the evidence held that Plaintiff No. 1 was legally married to late Danslay Noronha on 24th October, 1992. The trial Court further held that the Plaintiffs had proved that Viola Noronha had purchased the suit property and consequently negated the contention of the Defendants that the suit property was purchased by Anthony Noronha in the name of his wife Viola. The trial Court further held that Will dated 15th July, 2000 executed by Anthony Noronha was not legal and as such unenforceable. In so far as the validity of marriage between Anthony Noronhas and Viola Mascarenhas is concerned, the trial Court recorded the finding that the Defendants had not proved that the said marriage was illegal since no documentary evidence was produced by the Defendants in support thereof. The trial Court recorded the finding that the suit house and the suit property did not belong to Defendant No. 1. Consequently, the trial Court declared Will dated 15th July, 2000 as null and void and held that the Plaintiffs were entitled for eviction of Defendants from the suit house.

9. The lower appellate Court in appeal preferred by Defendant No. 1 framed the following points for determination:

(i) Whether the Plaintiffs have proved that Viola Mascarenhas was also known as Viola Noronha ?

(ii) Whether the Plaintiffs have proved that late Anthony Noronha and his wife Viola jointly bequeathed their entire house property and other assets to the late husband of the Plaintiff No. 1.

(iii) Whether the Plaintiffs have proved that the Will dated 15th July, 2000 is illegal, fraudulent and unenforceable in law ?

(iv) Whether the Defendant No. 1 has proved that the Defendant No. 1 in lawful possession of the suit house and the property ?

(v) Whether the impugned Judgment, Order and Decree calls for interference ?

10. The lower appellate Court held that the Plaintiffs had proved that Viola Mascarenhas was also known as Viola Noronha and the Plaintiffs had proved that late Anthony Noronha and late Viola had jointly bequeathed their entire house property and assets in favour of late husband of Plaintiff No. 1. The lower appellate Court further held that the Plaintiffs had proved that Will dated 15th July, 2000 was illegal, fraudulent and unenforceable in law and Defendant No. 1 was not entitled to possession of the suit house and the suit property. With these findings, the lower appellate Court dismissed the appeal.

11. At the stage of admission of Second Appeal, the matter was extensively argued on behalf of the Appellant and Respondent Nos. 1 and 2. Respondent

Nos. 3 and 4 chose not to put in appearance in spite of service. The appeal was admitted on 6th April, 2011 on the following substantial questions of law:

(i) Whether the appellate Court was right in holding that the Joint Will dated 10/10/1980 relied upon by Respondent No. 1 as valid because Joint Testators are not governed by the Family Laws or the Laws of Succession applicable to the State of Goa, as the said Joint Will was registered before Joint Sub-Registrar at Bombay and that neither legatee Danslay was born in Goa nor said Testators Anthony and Viola were married in Goa ?

(ii) Whether the appellate Court was right in holding that Anthony was not entitled to any right to the suit house in the property when the appellate Court itself held that the suit house was constructed by Anthony Noronha from his funds and on construction licence obtained by him subsequent to his marriage with Viola Noronha and had also further held that marriage of Viola with Anthony was proved and, therefore, even assuming that Anthony had not purchased the property, he had acquired right thereto by virtue of his marriage to Viola ?

(iii) Whether the appellate Court was right in holding that Anthony and Viola are not governed by the Law of Communion of Assets because their marriage was solemnized at Mumbai ?

(iv) Whether the appellate Court was right in holding that fraud committed by the Appellant in the execution of the Will by Anthony on 15/07/2000, when the Will was openly executed by the Testator in terms of law before the Registrar and in presence of the witnesses and the Advocate who drafted it as per the say of the Testator, was examined ?

(v) Whether the appellate Court was right in declaring that Will dated 15/07/2000 as invalid, null and void when the appellate Court has not recorded any finding on the specific pleas of Respondent No. 1, viz. that the Will dated 15/07/2000 was executed by the Appellant and signature of Anthony Noronha was obtained two days before his death; that the Will was not made by the deceased Anthony Noronha and that Anthony had lost consciousness and was unaware that a Will was being executed in favour of the Appellant ?

(vi) Whether the appellate Court was right in holding that the Testator was incapacitated from making Will and that the Appellant got the said Will executed from the Testator without giving any finding that mental state of the Testator was unsound, only because the Testator was suffering from kidney ailment and diabetes and was discharged from the Hospital on 13/07/2000, two days before the execution of the Will on 15/07/2000 ?

(vii) Though it was specific case of the Plaintiffs in paragraph 20 of the plaint that the Will dated 15/07/2000 is unenforceable in law, illegal and invalid as Antonio, the Testator, had no right to the properties bequeathed by the said Will specifically the property "Green Acres" which was owned by Viola, whether the appellate Court was right in recording finding about the invalidity of the Will in

respect of the other properties bequeathed by the Will ?

12. Although the appeal is of the year 2010 since the matter was extensively argued at the stage of admission, the appeal was fixed for final hearing on 19th April, 2011 and thereafter, was heard on merits.

13. At the time of hearing on admission of Second Appeal, Mr. Coelho Pereira, learned Senior Counsel appearing for Respondent Nos. 1 and 2 (the Plaintiffs) submitted that the Plaintiffs are restricting their claim to the suit property (including the suit house) and they do not want to claim any right in the other properties jointly bequeathed by Anthony Noronha and Viola Noronha by the Will dated 10th October, 1980 and also the other properties bequeathed in favour of Defendant No. 1 by Will dated 15th July, 2000, which has been declared null and void.

14. Mr. Usgaonkar, learned Counsel for Defendant No. 1 submitted that the Joint Will dated 10th October, 1980 executed by Viola Mascarenhas @ Viola Noronha and Anthony Noronha was null and void in view of Article 1753 of Portuguese Code of Civil Procedure, which clearly prohibits Joint Will. According to learned Counsel both Viola and Anthony were admittedly Goan by birth and as such, they were governed by the laws as applicable in the State of Goa and, therefore, clearly Article 1753 of Portuguese CPC was attracted and merely because the Will was executed in Mumbai before Sub-Registrar, the same would not be legal. According to the learned Counsel, the finding given by the lower appellate Court that the executant of the said Will was not governed by laws applicable to the State of Goa, is patently unsustainable in law. According to learned Counsel, since both the executants were of Goan origin and domiciled in Goa, they were governed by the family laws of Goa and, therefore, the Will dated 10th October, 1980 was patently illegal.

15. In so far as the Will dated 15th July, 2000 executed by Anthony Noronha is concerned, Mr. Usgaonkar submitted that no doubt the burden to prove that the Will is genuine is on the propounder of the Will and once the execution of Will before the officer empowered to record and register the Will is proved, the onus shifts on the other side to make out the circumstances which make the Will suspicious and not reliable. According to learned Counsel, in the Will it has been clearly mentioned that Civil Registrar and three witnesses found the testator to be in sound state of mind and as such, the finding given by both the Courts that the Will was fraudulent is patently unsustainable in law. In any case, Mr. Usgaonkar submitted that both the Courts have not rendered any finding on the basis of the pleadings of the Plaintiffs and in the absence of any finding that the mental state of testator was unsound, the finding given by both the Courts that the Will was unenforceable and fraudulently obtained, cannot be sustained. In so far the challenge to the Will dated 15th July, 2000 on the ground that the testator had no right to bequeath the suit plot with house existing therein is concerned, Mr. Usgaonkar submitted that the trial Court had given a finding that the marriage of Viola with Anthony Noronha was valid since Viola had divorced

her husband Joaquim Mascarenhas as admitted in the cross-examination of the Plaintiff's witness. Mr. Usgaonkar submitted that the lower appellate Court did not reverse this finding but observed that there remains a question mark as regards the validity of marriage. Thus, both the Courts having not held that the marriage between Viola and Anthony was invalid and having regard to the fact that in the sale deed dated 11th March, 1976, Viola has been described as wife of Anthony, it cannot be said that Anthony Noronha had no right to the suit plot and the suit house. In any case, once the marriage is held to be valid on account of Law of Communion of assets, Anthony got ownership rights in the suit property, which was purchased by Viola and as such, the lower appellate Court was not justified in holding that the Law of Communion of Assets would not apply to Anthony and Viola because their marriage was solemnized in Mumbai and not in the State of Goa. Mr. Usgaonkar further submitted that Anthony Noronha had every right to bequeath the suit property by Will dated 15th July, 2000. According to Mr. Usgaonkar, since Joaquim Mascarenhas was not heard for a period of more than seven years after the birth of Danslay, he was presumed to be dead in terms of Section 108 of the Evidence Act and as such, the marriage of Viola with Anthony in the year 1976, which was registered on 31st March, 1979, was valid. Mr. Usgaonkar lastly submitted that in any case, both the Courts could not have annulled the Will dated 15th July, 2000 in toto since the Plaintiffs could not have claimed right to the other properties bequeathed by the said Will except the property "Green Acres" which according to the Plaintiffs was owned by Viola.

16. Mr. Coelho Pereira, learned Senior Counsel appearing for the Plaintiffs submitted that the Plaintiffs are restricting their claim to the suit plot including the suit house known as "Green Acres" and they have no claim whatsoever in respect of the other properties bequeathed by Anthony and Viola by Will dated 15th July, 2000. Mr. Coelho Pereira further submitted that Viola Mascarenhas was married to Joaquim Mascarenhas on 16th July, 1953, which has been proved by marriage certificate at exhibit 43 and the Civil Registration Certificate exhibit 45. According to learned Senior Counsel, it is the case of the Defendants that Viola got married to Anthony Noronha in the year 1976 and the marriage was registered on 31st March, 1979 during the lifetime of Joaquim Mascarenhas, who expired in the year 1999 and as such, the so called marriage of Viola with Anthony Noronha which was registered in 1979, was invalid in terms of Articles 4 and 11 of Family Laws as applicable to the State of Goa. He, therefore, submitted that since the marriage between Viola and Anthony in the year 1979 was illegal and void, Mr. Anthony could not have bequeathed the property belonged to Viola and admittedly in the present case, the suit plot was purchased by Viola in the year 1976 by the registered sale deed executed in her favour and as such, Defendant No. 1 cannot claim any right to the suit plot by virtue of the Will dated 15th July, 2000 in as much as Anthony had absolutely no right to the said suit property. According to learned Counsel, on this ground alone, the decrees passed by both the Courts below to the extent of the suit property including the suit house, are not liable to interfered with. Learned Counsel further submitted that

in view of the fact that the marriage of Viola with Anthony was invalid in law, the issue as to whether the Will dated 10th October, 1980 was valid or second Will dated 15th July, 2000 was void or illegal, on the ground of fraud is inconsequential since irrespective of the same, the Plaintiffs are entitled to prayer (a) of the plaint. Learned Senior Counsel further submitted that the Will dated 15th July, 2000 to the extent it bequeathes the suit plot including the suit house is null and void since Anthony Noronha had absolutely no right to bequeath the property "Green Acres" in favour of Defendant No. 1.

17. Mr. Usgaonkar, learned Counsel appearing for Defendant No. 1 submitted that the trial Court having held the marriage between Viola and Anthony valid, in the absence of any cross-objection having been filed before the lower appellate Court, the Plaintiffs are not entitled to now contend that the said marriage was invalid. In support of this submission, Mr. Usgaonkar relied upon the following judgments:

(i) Choudhary Sahu (Dead) by Lrs Vs. State of Bihar, .

(ii) Banarsi and Others Vs. Ram Phal, .

18. Per contra, Mr. Coelho Pereira, learned Senior Counsel for the Plaintiffs submitted that since the decree of the trial Court was in favour of the Plaintiffs, it was not necessary for the Plaintiffs to file any cross-objection challenging only the finding recorded by the trial Court that marriage between Anthony and Viola was valid. Learned Counsel further submitted that in any case the lower appellate Court has not given a categorical finding about the validity of marriage and has stated that there remains a question mark about the validity of the said marriage. In this factual background, the Plaintiffs are entitled to contend in this Second Appeal that the marriage between Anthony and Viola was invalid, which actually was the case of the Defendants themselves. In any case learned Counsel submitted that whether the marriage between Anthony and Viola is valid or not has to be decided in terms of the law applicable, on the basis of the evidence led by the parties. According to Mr. Coelho Pereira, unless divorce between Joaquim Mascarenhas and Viola Mascarenhas was proved, the second marriage between Viola and Anthony was invalid and non-est in terms of the laws applicable to the State of Goa. In support of his submission, Mr. Coelho Pereira relied upon the following judgments:

(i) Balbir Kaur and Another Vs. U.P. Secondary Education Services Selection Board, Allahabad and Others, .

(ii) Jagdish Kumar and Others Vs. State of H.P. and Others, .

19. I have carefully considered the rival submissions and perused the record and the judgments relied on.

20. In view of the submission made by Mr. Coelho Pereira, learned Senior Counsel appearing for the Plaintiffs that the Plaintiffs are restricting their claim to the suit plot and the suit house, it would be appropriate to deal with the

submission made on behalf of the Plaintiffs that Anthony Noronha could not have bequeathed the suit plot and the suit house to Defendant No. 1 since he had no title thereof, his marriage with Viola being invalid, null and void. Admittedly, the suit plot was purchased by Viola in the year 1976 by registered sale deed and at the relevant time, the marriage between Viola and Anthony Noronha was not registered. The marriage between Viola and Anthony Noronha which was registered on 31st March, 1979 was not valid in law in as much as admittedly, Joaquim Mascarenhas, who expired in the year 1999 was living. In terms of Articles 4 and 11 of the Law of Divorce, a marriage contracted during the subsistence of the valid marriage, is invalid and null and void. The trial Court relied upon the evidence of Smt. Daisy Sanso @ Daisy A Serrao-DW1 and further held that nothing was produced on record to prove that the marriage between Anthony Noronha and Viola was illegal. The trial Court further held that the evidence of DW1 proved that Viola was divorced from Joaquim Mascarenhas. As stated above, the lower appellate Court held that there was a question mark as regards the validity of marriage of Viola with Anthony Noronha.

21. The question whether the second marriage contracted during the subsistence of the first marriage is valid or not, has to be decided in terms of the provisions of law. In terms of Article 4 of Law of Divorce, the second marriage cannot be contracted during the subsistence of earlier marriage. In terms of Article 11 of Law of Divorce, any marriage in contravention of Article 4 of Law of Divorce is null and void as if it had never existed. The trial Court could not have given a finding that the second marriage between Viola and Anthony Noronha was not illegal. In my considered opinion, the trial Court has completely erred in placing reliance upon the oral evidence of DW1 to hold that there was divorce between Joaquim Mascarenhas and Viola. The lower appellate Court has not given a categorical finding on this issue, which the lower appellate Court was bound to give. At this stage, I would deal with the submission of Mr. Usgonkar that in the absence of any cross-objection before the first appellate Court, the Plaintiffs are not entitled now in Second Appeal to contend that the marriage between Viola and Anthony Noronha was illegal. The argument deserves to be rejected on several grounds. Firstly, whether there was a valid marriage or not, has to be decided on the basis of the laws applicable and the evidence led by the parties. As stated above, except for oral testimony of DW1, there is absolutely no evidence on record to hold that there was divorce between Viola and Joaquim Mascarenhas. Secondly it was the case of Defendant No. 1 herself that the marriage between Viola and Anthony Noronha was invalid, null and void. Although the Plaintiffs claimed that the said marriage was valid, at the cost of repetition, I would like to state that the validity of marriage does not depend exclusively on the pleadings and oral evidence and having regard to the law as applicable in the State of Goa, divorce between Viola and Joaquim Mascarenhas could have been only proved by documentary evidence. In the absence of any such evidence, it has to be presumed that there was no valid divorce between Viola and Joaquim Mascarenhas. In so far as the argument of Mr. Usgaonkar that

in the absence of any cross-objection by the Plaintiffs before the lower appellate Court, the said finding cannot be disturbed in Second Appeal is concerned, I do not find any merit absolutely. The judgments of the Apex Court relied upon by Mr. Usgaonkar, do not advance the case of Defendant No. 1.

22. In the case of Chaudhari Sahu (supra), the Apex Court held that in appeal preferred by the State, a finding given in favour of the landholder could not have been interfered with by the Commissioner, who was appellate authority. In the said case, Collector ordered allotment of 12 units in favour of the Petitioner and in appeal preferred by him before the Commissioner, the Commissioner set aside the entire order and remanded the case for disposal. The Apex Court held that since the Petitioner had filed an appeal aggrieved by allotment only of 12 units and not 15 units claimed by him, the appellate authority could not have reversed the finding in favour of the Petitioner landholder. The facts of the said case are entirely different and do not advance the case of Defendant No. 1.

23. In the case of Banarasi and Ors. (supra), in a suit for specific performance, the trial Court granted only refund of money and refused specific performance. The Defendant filed the appeal challenging the decree. The appellate Court modified the decree and granted relief for specific performance. In this factual background, the Apex Court held that in the absence of cross-objection by the Plaintiffs claiming specific performance in appeal preferred by the Defendant against the decree, relief could not have been granted by the appellate Court against the Plaintiffs even under Order 41, Rule 33 of CPC. In this case also, the facts are entirely different.

24. In the case of Jagdishkumar (supra) relied upon by Mr. Coelho Pereira, the Apex Court was dealing with an appeal before the Apex Court. The Apex Court held that in an appeal preferred by Appellant, the Respondent can support the judgment of the High Court on the grounds negatived therein. Similar view has been taken by the Apex Court in the case of Balbir Kaur (supra) relied upon by Mr. Coelho Pereira.

25. In my considered opinion, the judgments relied upon by Mr. Coelho Pereira are squarely applicable in the present case. Since the decree was in favour of the Plaintiffs in an appeal preferred by Defendant No. 1, it was not necessary for the Plaintiffs to file cross-objection challenging only the finding given by the trial Court regarding the validity of marriage between Viola and Anthony Noronha. The decree was admittedly in favour of the Plaintiffs and no relief was refused by the trial Court to the Plaintiffs. Therefore, in my considered opinion, the objection taken by Mr. Usgaonkar that the finding of validity of marriage given by the trial Court has reached finality and cannot be reopened in Second Appeal, has no merit.

26. Once it is held that the marriage between Viola and Anthony Noronha was not valid in law, the necessary sequitur is that Anthony Noronha could not have bequeathed the property which belonged to Viola. Admittedly, the suit plot was

purchased by Viola in her own name in the year 1976 and, therefore, the exclusive title in respect of the suit plot vested in her. Merely because she styled herself as the wife of Anthony Noronha in the sale deed by itself would not be sufficient to confer validity on second marriage between Viola and Anthony. In so far the argument advanced by Mr. Usgaonkar that the lower appellate Court has given a finding that the suit house was constructed by Anthony Noronha by obtaining financial assistance from Shipping Corporation of India, appears to be correct, in view of the documentary evidence adduced by DW1 is concerned, the documents produced by DW1 suggested that Anthony Noronha had obtained loan from his employer Shipping Corporation of India and had also taken out a fire insurance policy in his name. However, these facts by themselves would not be sufficient to confer title on Anthony Noronha in respect of the suit house constructed in the plot of Viola. Since the suit plot admittedly belonged to Viola the title to the suit house constructed on the said plot would also vest in Viola. Therefore, in my considered opinion, mere fact that Anthony Noronha had obtained loan for the construction of the house in the suit plot by itself would not confer title on Anthony Noronha either in respect of the suit plot or the suit house.

27. Once it is held that the marriage between Viola and Anthony Noronha was invalid, null and void, the necessary sequitur is that Anthony Noronha had no legal right to bequeath the suit plot and the suit house in favour of Defendant No. 1 by Will dated 15th July, 2000. On this ground alone, the Will dated 15th July, 2000 is liable to be declared null and void to the extent of the suit plot and suit house. Since there is no dispute that the other properties mentioned in the Will dated 15th July, 2000 belonged to Anthony Noronha, he was entitled to bequeath the said properties in favour of Defendant No. 1 and the Plaintiffs have no locus to challenge the bequeath made in favour of Defendant No. 1. Therefore, the Will dated 15th July, 2000 to the extent it bequeaths the suit house and the suit plot in favour of Defendant No. 1 is liable to be quashed and set aside.

28. Although it is not strictly necessary to deal with the other submissions made by Mr. Usgaonkar, I would prefer to deal with the same. In so far as the finding given by the lower appellate Court that the Joint Will dated 10th October, 1980 was valid because the testators were not governed by the Family Laws or Laws of Succession applicable to the State of Goa, as the Will was registered by Joint Sub-Registrar Bombay is concerned, I find that the said finding is patently unsustainable in law since admittedly both the testators were Goan by birth. They were governed by Laws of Succession as applicable to the State of Goa. In terms of Article 1753 of Portuguese CPC Code, a Joint Will is forbidden. This being the position, the testators who were governed by Family Laws of Goa, could not have executed the Joint Will dated 10th October, 1980. Merely because it was executed in Mumbai or because Anthony Noronha and Viola were not married in Goa, the Will could not be said to be valid. The mere fact that Anthony Noronha and Viola married in Mumbai by itself would not mean that they were

not governed by the Laws of Succession as applicable to the State of Goa as it is well settled that a person is governed by his/her personal laws. Therefore, the finding recorded by the lower appellate Court that the Will dated 10th October, 1980 was valid is liable to be set aside and is hereby set aside. But that would not debar the Plaintiffs from claiming right to the suit plot and suit house for the reasons already stated hereinabove. In so far as the finding recorded by both the Courts that the Will dated 15th July, 2000 was obtained by fraud committed by Defendant No. 1 is concerned, in view of the finding recorded above that the Plaintiffs have no locus to challenge the bequeath made by Anthony Noronha in favour of Defendant No. 1 in respect of other properties, the issue as to whether the Will is vitiated by fraud does not arise and to that extent the finding of both Courts that the Will is vitiated by fraud is set aside. However, as already held, the said Will to the extent of the suit plot and the suit house is set aside on the ground that Anthony Noronha had no authority to bequeath the same in favour of Defendant No. 1.

29. In view of the above discussion, the substantial questions of law at serial Nos. (i) and (iii) are answered against the Plaintiffs and in favour of Defendant No. 1. The substantial questions of law at serial Nos. (ii) and (vii) are answered in favour of the Plaintiffs. It is not necessary to record any specific finding on the substantial questions of law formulated at serial Nos. (iv), (v) and (vi).

30. In the result, therefore, the appeal is partly allowed. The suit is decreed in terms of prayer Clause (a) and (c) of the suit. In so far as the prayer (b) is concerned the Will dated 15th July, 2000 is declared null and void to the extent of the suit plot and the suit house only. In other words, Defendant No. 1 is held entitled to other properties bequeathed to her by Anthony Noronha except the suit plot and the suit house. The impugned decree dated 2nd November, 2010 passed by the lower appellate Court would stand modified accordingly. Considering the facts and circumstances of the case, the parties to bear their own costs.

31. Pursuant to order dated 6th April, 2011, interim relief was granted in favour of the Appellant subject to the Appellant depositing in this Court compensation at the rate of Rs. 6,000/- from November, 2010 to April, 2011, within a period of four weeks. The said amount along with interest, if any, shall be paid to Respondent No. 1.