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**(1991) 12 BOM CK 0023**

**In the Bombay High Court**

**Case No : Appeal From Order No. 52 of 1991**

Vithaldas Rama Lotlikar

APPELLANT

Vs

Jose Menino Godinho and Others

RESPONDENT

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**Date of Decision : 18-12-1991**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2  
Foreign Exchange Regulation Act, 1973 — Section 31  
Powers of Attorney Act, 1882 — Section 1A, 2

**Citation : (1992) 2 BomCR 254**

**Hon'ble Judges : E.S. Da Silva, J**

**Bench : Single Bench**

**Advocate : A.F. Diaiz, for the Appellant; F. Rabello, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

E.S. Da Silva, J.—This is an appeal directed against the order of the learned Civil Judge, S.D., Margao, dated 25th June, 1991 in Civil Misc. Applications No. 381/88/B, 398/88/B, 399/88 and 65/90/B, attached to Special Civil Suit No. 205/88/B and Civil Misc. Application No. 4690/B attached to Special Civil Suit No. 32/90/B whereby he dismissed, among others, the appellant's Application No. 381/88/ seeking to restrain the respondents from interfering in the suit property "Dubaxalem" situated at Calata.

2. The appellant had filed a suit against the respondents alleging that he is the owner in possession of the suit property consequent upon its purchase by deed of Sale dated 8. 4. 1988. The property was belonging originally to the late Manual Agostinho Godinho and after his death it devolved on his four children, namely Rumaldino, Belezinha, Clementina and Jose Gulalberto. It is an admitted position that, on the death of his two sisters and brother Jose Gulalberto, Rumaldino became the exclusive owner of the property. The said Rumaldino and his wife Elvira had executed on 15.10.81 a general Power of attorney in respect of their properties in favour of one Gonsalo Luis. Prior to that all the properties

were being administered by Gonsalo's late brother Jose Roque and from 1981 the same were being managed by Gonsalo. The Deed of sale was thus executed by the said Gonsalo as Power of Attorney holder for Rumaldino and Elvira and prior to this an Agreement of sale, dated 16.4.84, had been entered into with the appellant by Gonsalo on behalf of the prospective sellers. By virtue of this agreement the property was to be sold to the appellant for Rs. 2 lakhs and an advance of Rs. 40,000/- was paid by him on the occasion. The property was sold in 1988 with the exclusion of an area admeasuring 650 sq. meters which the sellers had already disposed of before, also through Gonsalo, to one Antonio Mariano Fernandes and his wife Janette. The said Gonsalo sold many other properties of Rumaldino and his wife including the one situated at Betalbatim surveyed under No. 31/11 (which was the subject matter of Suit No. 32/90/B) and which is located about 200 meters away from the suit property purchased by him. The said property was sub-divided by Gonsalo into 10 plots and sold to various persons. Similarly Gonsalo sold another property, surveyed under No. 68/5; situated at Guiriem of Majorda Antonio Nazareth.

3. On 4.5.1987 Gonsalo Luis gave possession of the suit property to the appellant and executed a Power of Attorney in his favour. Since then the respondents No. 2 to 5 who were living in the property as mundcars started disturbing the Appellant's possession but inspite of their efforts the appellant has been able to do all the pluckings. For this reason a complaint was lodged by the appellant before the Police and a legal notice was also sent to them. In reply the respondents No. 2. to 5, although acknowledging that they were mundcars of the property, some of them however claimed that they were in the enjoyment of the said property as "tolls" caretakers, expressing at the same time their willingness to purchase their respective plots. One of the respondents, being respondent No. 3, even filed a case against Gonsalo before the Mamlatdar of Selected to declare him as mundcar and as such he was so declared.

4. It is the further case of the appellant that respondent No. 1 was a servant of Mumaldino's house and in this Capacity he was looking after their properties as a caretaker, although he claims to be the adopted son of the late Manuel Agostinho. Therefore, in the absence of any of Manuel Agostinho's children, either due to their staying abroad and in respect of some of them on account of their death, since the respondent No. 1 was residing in the house the house property as well as some other properties were surveyed in his name. However, the same respondent on 1.1.1985 did swear an affidavit acknowledging the error in the entries and expressing his no objection that necessary changes be made in the survey records so that the correct names of its owners Ruzaldino and Elvira be entered in the said records.

5. After the filing of the complaint and issuing of the illegal notices respondents No. 2 to 5 stopped interfering with the appellant's possession but on 21.7.88 respondent No.1, under the instigation of these respondents, forcefully plucked the coconuts from the suit property. A complaint was immediately lodged by the

appellant at the Margao Rural Police Station. In spite of that on 21.8.1988 when the appellant was doing agricultural works in the property by engaging labourers, the respondents tried to physically obstruct them. The appellant was therefore compelled to file the present suit wherein an injunction was prayed against the respondents to restrain them from interfering in the suit property which was ultimately refused by the Trial Judge

6. It is a well laid down law that on the question of granting a temporary injunction of the type which was sought for by the appellant what really matters is not the real title or the strict ownership of the property but instead its possession which, however, must be shown by the petitioner/appellant as being linked to some sort of title. It is in this context that we should examine the appellant's plea for a temporary equitable relief vis-a-vis the respondents both proprietary and possessory rights in respect of the suit property.

7. Shri Diniz, learned Counsel for the appellant, submits that by Deed dated 8.4.1988 the appellant purchased the said property from Rumaldino and his wife through Gonsalo Luis, their power of Attorney holder. Prior to that Rumaldino and Elvira had become the exclusive owners of this property consequent upon the death of Rumaldino's surviving widowed sister Belezinha in the year 1986. On 16.10.1981 Rumaldino and his wife along with their son Dr. Kevin had executed a general Power of Attorney in favour of Gonsalo to administer, manage and even sell all their properties and on 16.4.1984, acting upon this Power of Attorney, Gonsalo entered, "on behalf of Rumaldino and Elvira, into an Agreement of Sale of the suit property which was subsequently handed over to the appellant in actual possession by executive at the same time a Power of Attorney in the month of March, 1987. It has been however contended by Shri Rebello, learned Counsel for the respondents, that this deed of sale dated 8.4.1988 is null and void because from the documentary evidence on record it is found that Rumaldino was not alive at the time of the execution of the instrument of conveyance. As such neither Gonsalo could have acted on his behalf on the strength of this Power of Attorney nor Rumaldino's share could have been transmitted in the purchaser by Gonsalo on behalf of Rumaldino's legal heirs as well Shri Rebello urged that the record also shows that besides Dr. Kevin, who had joined his parents in giving to Gonsalo that Power of Attorney, Rumaldino had two more children who were not parties in this instrument. Even the Power of Attorney conferred by Dr. Kevin was executed in favour of Gonsalo during the lifetime of his parents and as such the Power of Attorney holder could not have used it to deal with any rights acquired by Dr. Kevin after his father's death. Hence the Deed of Ratification purportedly executed by Dr. Kevin and this also through the same Power of Attorney was not to be held as valid for the above reason. Shri Rebello, further urged that once Rumaldino and his wife along with Dr. Kevin had purportedly issued a joint instrument of Power of Attorney in favour of Gonsalo, after the death of one of its executants, the Power of Attorney should be deemed as having lapsed thus being inoperative. In this respect reliance was placed by Shri Rebello in the case of Garapati Venkanna v. Mullapudi

Atchuntaramanna and others, AIR 1938 Madras 542 which has ruled that when a Power of Attorney has been executed by several principals in favour of a person, and one of the principals having distinct interest in subject matter of the power of attorney dies, the death terminates the power or attorney.

8. Shri Diniz, in his turn, countered by relying on the decision of Monindra Lal Chatterjee Vs. Hari Pada Ghose and Others, as well as in the case of Badrinarain Agarwalla v. Brijnarayan Roy and another, AIR 1917 Cal 436. In the first one the Court observed :-

"Where there are two or more principals and they are joint and several, and if one of them dies, the agency terminates only as regards the representative of the deceased principal, but it continues as regards the surviving principal."

Similarly in the second decision the court held on the latter of section 201 of the Contract Act (1872) in case of a power of attorney granted by joint co-persons in favour of another, the death of some of the executants did not put an end to the power built that so long as the object of the power continued to be capable of realisation, it retained its vitality.

9. I am, however, not very much concerned with the conflicting views taken by the two courts on this vacate question nor did I find it necessary to consider in this case the question as to whether upon the death of one of the executants of a joint power of attorney the same subsists or is deemed to have been terminated also in relation to the surviving executants. In other words, I am not required to adjudicate in this appeal as to which of the judgments has laid down the correct proposition of law. I am satisfied that, for all purposes, it is suffice to note that irrespective of rumaldino's death ostensibly and prior to the sale deed executed by Gonsalo on his behalf neither his legitimate heirs nor legal representatives objects to the sale and on the contrary one of them (Dr. Kevin) even got it expressly ratified. It should not also be overlooked in this context that the agreement of sale dated 16.4.1984 was entered into by the parties during Rumaldino's lifetime. Being so, it can be perfectly said that the power of attorney having been already exercised by Gonsalo the sale deed was only a consequential act of the early agreement and therefore, the power of attorney once utilised would not terminate or cease in relation to future acts which are only consequential to the previous acts, already done.

10. In this view of the matter we must look at the part played by Rumaldino's widow Elvira who was also one of the executors of the power of attorney: If there is no doubt that even assuming that on the death of her husband, Elvira would not be able to convey to the purchaser a specific portion of the property, however, one cannot dispute that she was entitled to do so in relation to her potential share although restricted to half. This means that by virtue of the deed the appellant is certainly able to claim that he became at least a co-owner of the suit property in respect of the undivided share belonging to Elvira and although his title could not thus be said to be complete, however, on the strength of his

potential right acquired from Rumaldino's widow, the appellant was justified in approaching the Court to protect his rights so as to prevent and see to it that the suit property was not being trespassed by the respondents or wasted by them. Shri Diniz is therefore, correct in his submission that the only persons who could have challenged his title to the suit property were the legal heirs of Rumaldino or at the most Elvira herself and not certainly these persons who are total strangers to any ownership rights to the property. That respondent No. 1 Jose Menino had no title or right at all to the suit property, this having been already acknowledged by the learned Trial Judge in the impugned order in respect of the Suit No. 32/90 wherein the expressly referred to the "suit properties" thus meaning both properties surveyed under No. 38/11 and the property surveyed under No. 20/1 as well. Similarly the status of the remaining respondents, who are admittedly mundcars and/or caretakers of the property, the question of any of them being allowed to challenge the appellant's title does not and could not even arise in the special circumstances to this case.

11. It was next submitted by Shri Diniz that the finding given by the learned trial judge on the ground raised by the respondents that because Rumaldino and his wife were admittedly British Nationals at the time the sale deed was executed by Gonsalo Luis on their behalf and also Dr. Kevin was a British National when the alleged deed of ratification was also done in his name the failure of the sellers in securing the necessary permission from the Reserve Bank of India to hold, sell or dispose of their properties, in terms of section 31 of the Foreign Exchange Regulation Act, 1937, render these transactions null and void is also wrong and misconceived. Shri Diniz urged that Gonsalo Luis has relied on the Proviso to the aforesaid section 31 and claimed that in view of his affidavit dated 10.10.88 to the effect that all the formalities required to be done to secure permission for holding properties and clearance had been complied with and prayer was even made to the Reserve Bank as far back in 1982, such permission was deemed to have been granted. This position has not been disputed by the respondents. Shri Diniz has also placed reliance in the case of Joaquim Mascarenhas Fiuza Vs. Smt. Jaime Rebello and another, which while dealing with section 31 of the Act held that the Act, as the preamble itself shows, is to regulate the foreign exchange and the penalties provided in the Act are incidental and, therefore, do not make it a penal statute. Though there are some penalties imposed in the Act for some violations of its provisions, it is clear that the Act was enacted with a view to consolidate and amend the law regulation payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency and bullion, for the conservation of the foreign exchange resources of the country and its proper utilisation. The statute is not basically a penal statute, though some offences are mentioned and penalties for such offences are provided for. It is thus seen that the Act does not prescribe that a foreigner who has not obtained licence or permission from the Reserve Bank to hold or sell his property in India is divested of his title in relation to the property. He is only deprived of enjoying the same as it appears to have been so

interpreted by the learned Single Judge. The result of the judgment is that such permission or authorisation is a condition precedent for the holder of the properties to exercise his rights and title, in other words, to act upon it. In the instant case we have seen that the appellant contended that permission was actually sought for by Gonsalo Luis and the same is deemed to have been granted in terms of the proviso to section 31.

12. Besides the record also shows that the respondent No.1 was a confirming party in a number of sale deeds executed by Gonsalo Luis in respect of plots belonging to Rumaldino and his wife situated close to the suit property. Therefore, the further submission of Shri Diniz that this fact amounts to some sort of estoppel operating against him to dispute the validity of the sale deeds and therefore, the Court should have taken *sou motu* cognizance of this fact to reject the respondent No. 1's attempt to challenge the appellant's title based on the deed of conveyance executed by Gonsalo Luis in favour of the said appellant appears to be sound and deserving acceptance.

13. Now and with regard to actual and physical possession of the suit property claimed by the appellant right from March, 1977 consequent upon its purchase and even prior to the execution of the sale deed in the month of April, 1988, the record shows that as far as respondents No. 2 to 5 are concerned they were admittedly mundcars of the property and as such their possession could not go beyond their right to enjoy their dwelling houses. But even assuming that they were also caretakers of the property, as contended by them at a certain stage of the proceedings, the fact remains that in this capacity no possession could be claimed in this behalf. It is an admitted

position that the possession of a caretaker is not his own possession but instead the possession of the owner himself. As such any act of possession eventually exercised by the respondents No. 2 to 5 on the suit property could be only an act of possession exercised in the name and in benefit of its owner Rumaldino or his legal heirs and representatives. Similarly and with regard to respondent No. 1 his claim of possession, either adverse possession against the legal heirs of the late Manuel Agostinho and/or even possession simpliciter in his own name, has been thoroughly negatived by the learned trial Judge in the same impugned order which refers to Suit No. 32/ 1990. In this respect the learned Judge has given definite and clear findings and obviously there is no scope for him to back out now from these findings. The learned Judge after considering the question of the respondent No. 1's title on account of his claim that he was the adopted son of the late Manuel Agostinho expressly held that the law does not recognise such a person on inherit the estate of the adoptive father and therefore, he could not have acquired any right or title to the state left by the said Manuel Agostinho nor could he have acquired such right or title upon the death of his so called adoptive brothers and sisters. Therefore, by no stretch of imagination could be claim ownership to the "suit properties". So far the question of possession is concerned it is pertinent to textually quote the following passage of the impugned order:---

"..... The plaintiff has next pleaded that he is in exclusive possession for the last 20 years i.e. upon the death of Marin Clementina on 27-12-68. However, this plea of the plaintiff also cannot be accepted on the face of it since the other sister was staying in the house till about 1981 and died admittedly only on 4-4-86. Therefore, there is no question of the plaintiff having come in possession adversely against the other heirs of the late Manuel Agostinho Godinho. Plaintiff, therefore, fails to prove prima facie title to the suit plot or to suit property Surveyed under No. 31/ 11. The other aspect pleaded by the plaintiff is as regards possession. The plaintiff has filed affidavit dated 1-1-85 stating that he is not the owner of survey No. 31/ 11. and has further stated that he has no objection to delete his name in respect of the said survey number. The plaintiff has been a confirming party in the suit sale deed through his attorney, the defendant No. 2. The plaintiff has been a confirming party himself in the sale deed of plot A. There is no explanation whatsoever from the plaintiff as regards this position and therefore the defendants are right in contending that the plaintiff had no moral courage to affirm personally position that the possession of a caretaker is not his own possession the contents of para 16 of the plaint and for that reason has filed the suit through an attorney. The plaintiff has given a statement to the Police dated 26-4-88 stating that the house was sold with his contest. The said statement can certainly be raised in civil proceedings and the objection of the plaintiff on this aspect in their written but instead the possession of the owner himself. As such any act of possession eventually exercised by the respondents No. are right in contending that the plaintiff had no moral courage to affirm personal arguments cannot be accepted. It is an accepted position that Belezinha went to the home for the aged in 1981 which fact can also be otherwise confirmed from the certificate issued by Divine Providence Convent. The defendants have produced letter, though all written between July-August, 1981 which clearly show that the properties were being administered by the brother of defendant No. 2 and which rebut the plaintiffs claim of being in possession."

14. It thus follows that the learned Judge was satisfied that the respondent No. 1 was not in possession of the suit property because his claim of possession has been thoroughly rebutted. It is true that the observations referred to were made by him while dealing with the property surveyed under No. 31/11 but they are also actual and to be fully applied in respect of the property surveyed under No. 20/1 as well. There is absolutely no reason to differentiate because the situations of these two properties either in relation to the respondent No.1 or with regard to the appellant as well as to the power of attorney holder Gonsalo Luis in Special Civil Suit No. 205/83 is entirely similar to the one occupied by the said respondent No.1, the defendant No.1 and Gonsalo Luis in Special Civil Suit No. 32/90, although in this suit the respondent No.1 is shown as plaintiff and the defendant Luis stands in the same place of the appellant as purchase of the property sold by Gonsalo Luis in his capacity of power of attorney for Rumaldino and Elvira also after the death of Rumaldino.

15. Further the record shows that till 1981 the suit property was being looked after by Gonsalo Luis' late brother Jose Roque alias Jesito on behalf of Rumaldino which can be made out from the letters dated 19.7.81, 26.7.81 3.8.81 and 23.8.81 produced by the appellant along with the rejoinder. It is contended by the appellant and so does Gonsalo Luis that from 1981 onwards due to Jesito's ill health it was Gonsalo who started looking after the suit property as well as other properties of Rumaldino. This fact appears to be substantiated by certain admissions of the respondent No.1 himself and also from other relevant circumstances. In para 14 of his affidavit-in-reply R.1 admits that Gonsalo Luis, as power of attorney for Rumaldino and his wife, sold in the year 1984 another property belonging to them situated at Guiriem of Calata and surveyed under No. 6815 to one Minguel Antonio Hazarath. In para 16 of the same reply R. 1 further admits that R.3 was declared as mundkar of Gonsalo Luis. This very fact suggests that Gonsalo was in undisputed possession and management of the suit property because otherwise R.3 who was a mundkar of the property would have never applied to be declared as mundkar of Gonsalo Luis. In the same para 16 R.1 acknowledges that it was Gonsalo who was signing the today tapping declaration in respect of the coconut trees in the suit property which once against suggests that the possession of the property was with the said Gonsalo and not with respondent No. 1.

16. The appellant besides the affidavit of Gonsalo Luis has produced six more affidavits of various persons including of one Esmeralda Dourade who has stated that it was Gonsalo who signed the toddy tapping declarations with regard to the trees tapped by her in the suit property and also from a ploughman and neighbours of the properties who have sincerely testified on facts of their personal knowledge about Gonsalo's possession and enjoyment of the same property on behalf of the owners Rumaldino and his wife. The appellant in his affidavit-in-rejoinder has also disputed the credibility of each and every witness who swore affidavits in support of the respondent No.1 and convincingly dealt with them to show that they were false and fabricated. Shri Diniz is therefore, justified in his grievance that inspite of the evidence available the learned trial judge grossly overlooked and/or mis-assessed the whole evidence and recorded a wrong finding that the appellant was not able to establish his possession because it was clear from the same that he was only allowed to enter in possession of the property and at the most the fact shows that the case is one of disputed possession where no injunction can be granted.

17. In fact, the learned judge while considering the case of the appellant's possession appears to have been more concerned in dealing with the aspect of the actual title of the appellant or the intrinsic validity of the deed of sale executed by Gonsalo in his favour on the ground that the power of attorney of Gonsalo had lapsed consequent upon the death of Rumaldino and other technical grounds like the one regarding the applicability of the principle "delegates non potest contest delegate" instead of judiciously applying his mind to the overwhelming evidence both documentary and affidavit strongly pointing out to

the exclusive possession of Gonsalo who after conveying it over to the appellant swore an affidavit in his favour.

18. Shri Diniz's reliance in the case of Southern Roadways Ltd. Madurai v. S.M. Krishnan (1989) S.C.C. 603 appears thus to be very much to the point. This was a case between an agent and the principal of a Company. The Court held that agent acquires no interest in principal's property and after termination of agency the agent cannot interfere with the business of the principal on the ground of his possessory title to the premises on which such business is carried on. The possession of the agent was found to be of the principal. Shri Rebello's submission that the principle laid down in this judgment cannot be extended to our case because the facts are different and the circumstance of the peculiar relationship between an agent and his principal unassailably reveals that an agent steps into the shoes of the principal is not convincing. In our case the respondent No. 1 claiming the status of an adopted son of Manuel Agostinho attempts to derive his rights by pleading adverse possession against his legal heirs and assailing at the same time the title of the legitimate owner on the strength of an imaginary title of a caretaker. This shows that both the respondent No.1 and the remaining respondents have grossly overlooked that their possession, if any, was always the possession of the principal for all purposes. Therefore, the learned Judge was expected and required to take into consideration this important aspect to hold that what the respondent No.1 had pleaded in his Suit No. 32/90 and the findings recorded by the trial Judge in this regard should have been accounted by him to oppose the appellant's prayer for injunction in this case so as to adjudicate the appellant's possession of the suit property by virtue of its purchase from the real owners. This being the position it should not lie in Shri Rebello's mouth to argue that the learned Judge was justified in declining to grant relief to the 18 appellant who was supposed to come to the Court seeking equity on establishing not only his title but also possession beyond title. In this respect both these requirements are being disputed by the respondents in this case.

19. Shri Rebello has lastly cited the case of Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi, to bring home his point that on matters of appeal the appellate Court should be slow in interfering with the exercise of the discretion by the trial Court solely on the ground that if it had considered the matter at the trial stage it might have come to a contrary conclusion. However, from a careful consideration of the matter and specially bearing in mind that the findings rendered by the learned trial Judge in respect of Special Civil Suit No. 32/90 which, according to him, raises identical questions of law and similar questions of fact and thus had prompted him to dispose both Suit No. 32/90 and the present Suit No. 205/88 by a common order are totally inconsistent and contradictory, I am constrained to hold that in the present case this discretion unfortunately seems to have been exercised by the learned trial Judge rather unreasonably and capriciously by ignoring relevant facts.

20. The result is that the appeal is to succeed and is hereby allowed with costs. The order of learned Civil Judge, Senior Division, Margao, to the extent that it refers to Special Civil Suit No. 205/88/B and so far as it refers to Civil Misc. Application No. 381/88/B is quashed and set aside. All the respondents, including respondent No.1, are therefore, restrained personally and also through their relatives, servants and agents from interfering in the suit property, beyond the mundcarial rights of the houses of respondents No. 2,3,4 and 5 till the final disposal of the suit.