

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.54 OF 2002

Shri Gill de Sa Coelho,
major, bachelor, service,
residing at St.Cruz,
Ponda, Goa.

... Appellant.

versus

1. Shri Victor de Sa Coelho,
since deceased, represented
by Legal Representatives:
- 1a. Shri Oscar Coelho,
son of Victor Coelho,
major, unmarried.
- 1b. Shri Mario Coelho,
son, major, unmarried,
both r/o Ponda, Near
Bus-stand, Behind
Lotlikar petrol Pump,
Ponda-Goa.
- 1c. Mr. Cora Coelho Abreu,
major, married, daughter,
c/o Allan Abreu, Teacher,
Almeida High School,
Ponda, Goa.
- 1d. Mr. Allan Abreu,
major, married, son-in-law,
Teacher, Almeida High School,
Ponda, Goa.
- 1e. Mrs. Vera Coelho Coutinho,
major, married,
c/o Tereza Coelho,
Behind Lotlikar Petrol Pump,
Near Bus Stand,
Ponda, Goa.
- 1f. Dr. Agnelo Coutinho,
major, married, son-in-law,
residing at c/o Tereza Coelho,
Behind Lotlikar petrol Pump,
Near Bus Stand, Ponda, Goa.

2. Smt. Maria Tereza Coelho,
major, married, housewife,
r/o Near Bus Stand,
Behind H.P. Petrol Pump,
Ponda, Goa.

... Respondents.

Mr. V. A. Lawande, Advocate for the Appellant.

Mr. U. S. Kolwalkar, Advocate for the Respondents.

CORAM: P. V. HARDAS, J.

DATED: 30TH JANUARY, 2003.

ORAL ORDER

This Second Appeal has been filed by the unsuccessful Plaintiff who has been lost in the two Courts below. The Appellant/Plaintiff had filed Regular Civil Suit No.55/89/A praying for a decree of declaration that the Plaintiff is entitled to possess and occupy flat No.F-1 in view of the agreement between the Plaintiff and the Defendants. The other relief that was prayed was for issuance of an injunction restraining the Defendants, their servants, agents, family members or any other person interfering in flat No.F-1 or occupying the same and for restraining them from selling, alienating or transferring in any manner flat No.F-1.

2. The Plaintiff had filed the suit for the above reliefs against the Defendants on the allegations that

they had induced the Plaintiff and his mother to leave Panaji to stay in the old ancestral house bearing No.28/1 in Ponda Municipality known as "Casa Napoleao" and that the Plaintiff resided in the said ancestral house till 1986 when the house came to be demolished for construction of a commercial cum residential complex. It was further averred in the plaint that in 1963, the Plaintiff was induced by the Defendants to sell his share and the land of the property known as "Casa Napoleao" under representation of constructing a commercial cum residential complex and to re-start the 100 year old "Coelho Syrup". It was stated in the plaint that the Defendant No.1 represented to the Plaintiff that he wanted to mortgage the property "Casa Napoleao" to facilitate the Defendant in obtaining the loan for the manufacture of "Coelho Syrup" and accordingly the Plaintiff executed a Sale Deed of his share in the name of Defendant No.1. The said Sale Deed, dated 19th November, 1963, is at Exh.D.W.1/A. It was alleged by the Plaintiff that the said Sale Deed had been executed without any consideration.

3. In the written statement filed by the Defendants, they had denied the allegations levelled by the Plaintiff and it was stated that in 1963, the Plaintiff had informed Defendant No.1 that he was not

interested in retaining the share in the said property and also in the other two properties and that the Defendants as co-owners should purchase the same from the Plaintiff. The Defendants specifically pleaded that the sale consideration had been paid by them.

4. The learned Trial Judge found (1) that there was no evidence on record to show that the property "Casa Napoleao" had been mortgaged by Defendant No.1 to obtain loan for starting century old Coelho Syrup and also that there was no evidence that the Defendants had obtained the Sale Deed on account of any inducement. (2) The learned Trial Judge rejected the plea of the Plaintiff. (3) The learned Trial Judge found that the Sale Deed at Exh.D.W.1/A had not been challenged and the Plaintiff was debarred from leading any evidence contrary to the terms of the written document.

5. In Appeal, the learned lower appellate Court after adverting to the evidence of the parties observed that there was absolutely no pleading in the plaint that the Sale Deed dated 19th November, 1963 was executed merely as a "family arrangement". The learned lower appellate Court also found that the plea regarding the inducement set out by the Plaintiff in para 5-A had not been deposed by P.W.1. The learned lower appellate

Court also observed that there was no evidence at all that the property had been mortgaged by Defendant No.1 to obtain loan for starting the home made Coelho Syrup. In respect of non payment of consideration, the learned lower appellate Court has appreciated the evidence that the Plaintiff cannot be permitted to lead oral evidence contrary to the terms of the written document.

6. Mr. V. A. Lawande, the learned Counsel appearing on behalf of the Appellant has urged before me that proviso to Section 91, in the facts of the present case would permit the Plaintiff to lead evidence of non payment of consideration. I have examined the deposition of the Plaintiff and the other witnesses. The only evidence is the bald assertion made by the Plaintiff regarding non payment of consideration. A suggestion was put to the Defendants regarding non payment of consideration which was denied by the Defendants. The Sale Deed has been allegedly executed in the year 1963 and the suit came to be filed in the year 1989. There is no other evidence which would show that the consideration for the sale had not been paid by the Defendants. Even otherwise, there is absolutely no evidence that the Defendants had not paid the sale consideration. Two Courts below have appreciated the evidence and have recorded finding of fact. There are

no pleadings that the Sale Deed had been executed merely as a "family arrangement". An amendment to the pleadings was sought to be made for the first time in this Second Appeal to incorporate the pleading of "family arrangement". No reasons have been stated in the amendment application as to why the amendment was not made earlier. The amendment is, therefore, an attempt to overcome the loop holes in the pleadings. The amendment at this stage, therefore, cannot be allowed.

7. I have given my anxious consideration to the submissions of the learned Counsel appearing on behalf of the Appellant and I find that there is no perversity in the reasonings of the two Courts below to warrant any interference in the Second Appeal.

8. This Second Appeal is devoid of any merit and is, therefore, dismissed in limine.

P. V. HARDAS, J.

RD.