

shakuntala

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 314 OF 2023

WITH

MISC.CIVIL APPLICATION NO. 533 OF 2023

WRIT PETITION NO.314 OF 2023

BRUNO NORONHA AND 3 ORS ... PETITIONERS

Versus

MICHAEL TONY FERNS AND 7 ORS ... RESPONDENTS

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MISC.CIVIL APPLICATION NO.533 OF 2023

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BRUNO NORONHA AND 3 ORS ... APPLICANTS

Versus

MICHAEL TONY FERNS AND 7 ORS ... RESPONDENTS

Mr. Neelesh Takkekar, Advocate for the Petitioners.

Mr. J.L. Dias for the Respondent No. 1.

Mr. Dinesh E. Naik and Mr. Richal Shirodkar, Advocate for
Respondent nos. 2 to 5.

CORAM:- A. G. GHAROTE, J.

DATED :- 18th March, 2024

ORAL ORDER

1. Learned counsel for the Petitioner seeks leave to delete Respondent nos. 6 to 8, as they are the petitioners in the petition.
2. Leave is granted.
3. Deletion be carried out forthwith.

4. Heard Mr. N. Takkekar, learned counsel for the Petitioner. The petition challenges the judgment of the learned Appellate Court dated 07.01.2023, whereby the learned Appellate Court in an appeal from the order below exhibit-D-4 dated 02.03.2012, passed by the learned Ad-hoc Additional Senior Civil Judge, “A” Court at Mapusa in Special Civil Suit No. 25/2011/A, granting the application for injunction filed by the Respondent No. 1, has partly set aside the same and the injunction is continued to operate against the undivided interest of the Petitioner No. 1 and Respondent Nos. 2 to 5 (Original Defendants) in the suit property.

5. It is contended by Mr. Takkekar, learned counsel for Petitioner that the findings in respect of the Petitioner No. 1, rendered by the learned Appellate Court are vitiated by the fact that the agreement in question, dated 14.06.2011, specific performance of which has been sought was claimed to have been executed by one Mr. Colin Savio Coelho on the basis of a Power of Attorney dated 30.12.2010 (page 286) which infact did not confer any power upon him to enter into an agreement. It is contended that by paper publication dated 30.06.2011 (page 294), the public at large was cautioned not to deal with the suit property and therefore, the actions of the attorney consequent thereto would

be *non est*. Further, a plea is raised, that on account of provision of section 35 of the Indian Stamp Act, the learned Courts below, could not have relied upon the Memorandum of Understanding dated 03.01.2011 to grant an injunction in light of the language therein. It is, therefore, contended that the impugned judgment by the learned Appellate Court, granting an injunction even in respect of the undivided share of the Petitioner no. 1 also could not be sustained.

6. The impugned judgment by the learned Appellate Court is supported by learned Counsel for Respondent No. 1 by contending that the Power of Attorney dated 30.12.2010 (Page 286) executed by the Petitioner no. 1 Mr. Bruno in favour of Mr. Colin Savio Coelho, binds the Petitioner No. 1 and therefore, the agreement dated 14.06.2011 as well as the Memorandum of Understanding dated 03.01.2011 had the force of law and therefore, the impugned judgment was justified

7. The property in question is Survey no. 156/1 situated at Camurlim, along with the H.No. 26 standing thereupon.

8. It is an admitted position that the Petitioner No. 1 Mr. Bruno and the Petitioner Nos. 3 to 4 (Defendant Nos. 6 to 8) are the joint owners of this property. The Respondent Nos. 2 to 5 are also claimed to have some rights in the aforesaid immovable

property. It is also an admitted position that the Petitioner Nos. 2 to 4, had on 06.12.2010 executed a Power of Attorney in favour of Petitioner No. 1, clause 18 of which permitted sub-delegation of the powers contained therein to a third person, by the Petitioner no. 1 (clause 18/page 248). Under the terms of this clause 18 of the Power of Attorney dated 06.12.2010, the Petitioner no. 1 as an attorney of Petitioner Nos. 2 to 4 had executed a General Power of Attorney in favour of the said Collin Savio Coelho on 30.12.2010 (page 286) which was notarised with the notary public on the same date, on the basis of which the said Colin Savio Coelho is claimed to have executed the agreement of sale dated 14.06.2011 in favour of the Respondent No. 1 and an Memorandum of Understanding dated 03.01.2011 (Page 252) also in favour of the Respondent No. 1. Paragraph 4, internal page 3, record page 288 of this Power of Attorney specifically states that the power as conferred upon the Petitioner No. 1 by the Petitioner Nos. 2 to 4 under the Power of Attorney dated 06.12.2010 were being delegated to the said Mr. Colin Savio Coelho. Consequent to the Power of Attorney dated 06.12.2010 an addendum was executed between the Petitioner No. 1 on the one hand and the Petitioner Nos. 2 to 4 on the other, on 27.12.2010 (page 250) which indicated, that the powers conferred upon the Petitioner

No. 1 by the Petitioner Nos. 2 to 4 could not be exercised by him without consent in writing of the Petitioner Nos. 2 to 4. It is in this context that in absence of the consent in writing of the Petitioner Nos. 2 to 4, the learned Appellate Court has set aside the order dated 02.03.2012 passed by the learned Trial Court vis-a-vis the Petitioner Nos. 2 to 4.

9. In so far as the Petitioner No. 1 is concerned, it is necessary to state, that he had independently executed a Power of Attorney in favour of the said Mr. Colin Savio Coelho on 30.12.2010 (page 299), which was in respect of his own share in the property. Though it is contended that the public at large by a public noticed dated 30.06.2011 issued on behalf of the Petitioner no. 1 (page 294) was cautioned not to deal in respect of the said property, what is material to note, is that it does not make any mention of the Power of Attorney dated 30.12.2010 (page 299) executed by the Petitioner No. 1 in favour of Mr. Colin Savio Coelho, nor does it revoke the said Power of Attorney which was in favour of Mr. Colin. Even otherwise, what is material to note is that the Memorandum of Understanding dated 03.01.2011 (page 252) and the agreement dated 14.06.2011 are prior to the aforesaid public notice and therefore, the issuance of the public notice has no bearing, whatsoever, upon the aforesaid two

documents.

10. The plea based upon Section 35 of the Indian Stamp Act in my considered opinion is clearly misconceived for the reason that Section 35 would come into play when the agreement is admitted in evidence and not otherwise. Since we are considering a stage which relates to the decision of exhibit D-4, an application for injunction that would have no bearing regarding the consideration of this agreement, for the purpose.

11. In that view of the matter, the agreement of sale would continue to bind at least the Petitioner No. 1, who is admittedly a signatory to the said agreement dated 14.06.2011 as well as the earlier Memorandum of Understanding dated 03.01.2011, through his attorney named above and since there is no subdivision of the property in question, between the Petitioner No. 1 on the one hand and the Petitioner Nos. 2 to 4 on the other, the judgement of the learned Appellate Court, restricting the injunction, vis-a-vis the undivided share of the Petitioner No. 1 in the suit property cannot be faulted with.

12. Though, it is true that the order below exhibit D-4 of the Trial Court injuncts the Original Defendant Nos. 2 to 5, which is also a position reflected from the judgment of the learned Appellate Court, inspite of the fact, that they have not been

demonstrated to be parties to the agreement dated 14.06.2011 and therefore, would not be bound by the agreement, however, what is necessary to note is that there is no appeal filed by the Original Defendant Nos. 2 to 5, either against the order below exhibit D-4 passed by the learned Trial Court nor the judgment of the learned Appellate Court has being challenged by them. I, therefore, do not propose to go into that question, though it is contended by the learned Counsel for the Respondent Nos. 2 to 5 herein, who are Original Defendant Nos. 2 to 5 before the learned Trial Court, that the judgment of the Appellate court needs modification, on that count too.

13. The petition, therefore, is without any merits and is accordingly dismissed. No order as to costs.

AVINASH G. GHAROTE, J.