Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.18/2018

1. MR. SHRIPAD YESSO NAIK, Son of late Mr. Yesso Naik, major of age, Businessman and his wife.

2. SMT. VIJAYA SHRIPAD NAIK (since deceased), aged 63 years, through Legal Heirs:

(a) Shri. Siddhesh Shripad Naik, son of Appellant No. 2, 35 years old,

(b) Smt. Swanupa Siddhesh Naik, wife of Shri. Siddhesh Shripad Naik, 35 years old,

(c) Shri. Saish Shripad Naik, son of Appellant No.2, 34 years old,

(d) Smt. Pratiksha Saish Naik, wife of Saish Shripad Naik, 34 years old,

(e) Shri. Yesso Shripad Naik alias Yogesh Shripad Naik, son of Appellant No.2, 30 years old,

(f) Smt. Yukta Yesso Naik alias Smt. Yukta Yogesh Naik, Naik, wife of Yesso Shripad Naik alias Yogesh Shripad Naik, 30 years old.

all residing at H. No. 111, Sao Pedro, Old Goa, Ilhas Goa.

... APPELLANTS

Versus

1. MR VASUDEV YESSO NAIK, Son of late Mr. Yesso Naik, Major in age, married and His wife.

2. SMT. VANDITA VASSUDEV NAIK, Major, housewife, Both residing at H.No.111, S. Pedro, Old Goa, Ilhas Goa.

3. SMT. RUKMINI PANDURANG NAIK, widow of Pandurang Naik, major in age, residing At Shantadurga Temple, Sancoale, Cortalim Goa.

4. MRS SUNITA ALIAS DARSHANA DEVENDRA VAINGANKAR, Major in age, teacher, Residing at H.No. 952, Santa Cruz, Ilhas Goa.

5. MR. DEVENDRA K. VAINGANKAR, Major, service, St. Agostinho Vaddo, Near Bank of Goa, H.No.952, Santa Cruz, Ilhas Goa.

6. MS SHITAL PANDURANG NAIK ALIAS SHITAL LAXMAN NAIK, Major in age, married, Residing at c/o Pinky Prajay travels, Kodar, Khandepar, Ponda Goa.

7. SHRI. SURENDRA PANDURANG NAIK, Major, unmarried, service,

8. SHRI SHASHIKANT PANDURANG NAIK, Major, unmarried, service

9. MS SUMAN PANDURANG NAIK, ALIAS SUMAN BHARATBHUSHAN NAIK, Major, married, Respondents 7 to 9, Residing near Shantadurga Temple, Sancoale, Cortalim Goa.

10. MS NITA PANDURANG NAIK, ALIAS NITA SANTOSH KHORJUWENKAR, Major, married, Residing near Kannad High School, Sasmolem, Baina, Vasco Goa.

11. NARAYAN YESSO NAIK, Major in age, unmarried, present address not

known, the last known address at H.No. 111, Sao Pedro, Old Goa. … RESPONDENTS

Mr S. D. Lotlikar, Senior Advocate with Ms S. Kenny, Mr T. Sequeira, Mr Sarvesh Sawant and Ms P. Volvoikar, Advocates for the Appellants.

Mr Shivan Desai with Ms M. Viegas and Ms T. Menezes, Advocates for the Respondents.

CORAM: M. S. SONAK, J.

Reserved on: 1st MARCH 2024
Pronounced on: 5th MARCH 2024

JUDGMENT:

1. Heard Mr S. D. Lotlikar, Senior Advocate who appears along with Ms S. Kenny, Mr T. Sequeira, Mr Sarvesh Sawant and Ms P. Volvoikar, for the Appellants and Mr Shivan Desai for the Respondents.

PRELIMINARIES AND THE SUBSTANTIAL QUESTIONS OF LAW FRAMED:

2. This appeal is directed against the Judgment and Decree dated 31.08.2017 made by the Ad-hoc District Judge-1, FTC Panaji (First Appellate Court) allowing the Regular Civil Appeal No.301/2010, setting aside the Judgment and Decree dated 06.06.2009 made by the Civil Judge, Senior Division at Panaji (Trial Court) in Special Civil Suit No.50/2001/A and decreeing the said Suit. In terms of the impugned Judgment and Decree, the Wills executed by Yesso and Jayashri Naik dated 14.01.1985 before the Notary – Ex-Officio of Margao were declared ineffective.

3. The first appellant is the original first defendant, and the appellants no.2(a) to 2(f) are the legal representatives of the second defendant in Special Civil Suit No.50/2001/A. The first and second respondents were the plaintiffs in the said suit. Respondents 3 to 11 were defendants 3 to 11 in the said suit. Since the real contest is between the appellants and the first and the second respondents, they shall be referred to as the defendants and the plaintiffs, respectively, even for the purposes of this appeal.

4. The plaintiffs Vasudev/Vandita instituted Special Civil Suit No.50/2001/A before the Trial Court to challenge the two separate Wills dated 14.01.1985 executed by Vasudev's parents, Yesso and Jayashri bequeathing the suit property admeasuring 1400 sq. mtrs. surveyed under No.3/1 at Sao Pedro, Old Goa, to his brother Shripad (first defendant).

5. The Trial Court, by Judgment and Decree dated 06.06.2009, dismissed Special Civil Suit No.50/2001/A. The plaintiffs appealed to the First Appellate Court vide Regular Civil Appeal No.301/2010. The defendants filed cross-objections because, according to them, the Trial Court, after recording a finding that the Suit was barred by limitation, failed to formally dismiss it by invoking the bar of limitation.

6. The First Appellate Court, by Judgment and Decree dated 31.08.2017 (impugned Judgment and Decree), allowed the Regular Civil Appeal No.301/2010 but dismissed the cross-

objections and thereby decreed Special Civil Suit No.50/2001/A. Hence, this appeal by the defendants, i.e. Shripad and legal representatives of his wife Vijaya.

7. This Second Appeal was admitted on 18.09.2018 on the following substantial questions of law:

> (a) Whether in the background of the factual matrix based on record the wills in question are said to be in breach of law?
>
> (b) Whether in the absence of any challenge to the Trial Court's finding that the suit is barred by limitation which fact is also accepted by the First Appellate Court to reverse the said findings?

APPELLANT'S/ DEFENDANT'S CONTENTIONS:

8. Mr Lotlikar learned Senior Advocate for the appellants (defendants) submitted that the Trial Court erred in placing the entire burden of proving that the Suit was barred by limitation on the appellants (defendants). He submitted that the finding about the Suit not being barred by limitation because the appellants' mother expired in 1999 is a clear instance of perversity because this year of the testatrix's demise is irrelevant for determining the issue of limitation.

9. Mr Lotlikar submitted that the plaintiffs have made a bald statement that they were not aware of the impugned Wills until the last week of December 1998. He submitted that both the impugned Wills refer not only to the suit property but also to the

share in the partnership firm M/s. Ramnath Saw Mill. Admittedly, Yesso (father) expired in 1987. Since 1987, it is the first appellant and his wife who have been managing and enjoying the firm and its assets to the exclusion of all the other legal representatives of Yesso and Jayashri, including the plaintiffs. Mr Lotlikar submitted that in these circumstances, the plaintiff's claim that he acquired the knowledge about the impugned Wills only in December 1998 was too far-fetched to warrant acceptance. This aspect also establishes a complete lack of due diligence on the plaintiffs' part. Mr Lotlikar submitted that from the pleadings and the evidence on record, it is apparent that the Suit was barred by limitation.

10. Mr Lotlikar submitted that there are no pleadings about any fraud being practised by the defendants upon the plaintiffs, whereby the knowledge about the execution of the impugned Wills was suppressed from the plaintiffs. The appellants (defendants) have pleaded and proved that the parents of the first plaintiff disclosed the factum of the execution of the impugned Wills in the presence of the first appellant in 1985 itself. Accordingly, the First Appellate Court, by ignoring the pleadings and the evidence on record and without coming into close quarters with the finding of the Trial Court, should not have reversed the Trial Court on the issue of limitation, particularly since not even a ground was raised in the appeal memo challenging the Trial Court's finding on limitation.

11. Mr Lotlikar submitted that the First Appellate Court has recorded a contradictory finding on the issue of limitation. In one place, the First Appellate Court holds that the Trial Court never dismissed the Suit on the ground of limitation. In another place, the First Appellate Court holds that though the Trial Court dismissed the Suit on the ground of limitation, the plaintiffs had not urged any ground to challenge this finding in the appeal memo and therefore, plaintiffs could not challenge the finding on limitation without leave. Such contradiction vitiates the First Appellate Court's finding on limitation.

12. Mr Lotlikar submitted that the alleged cause of action as pleaded arose under the Portuguese Civil Code, 1867. Article 1967 of this Code provides a special period of limitation to challenge a Will on the ground of defects of form or external solemn formalities, particularly where such a Will is registered. Applying the provisions of Article 1967 of the Code, the Suit as instituted was clearly barred.

13. Without prejudice, Mr Lotlikar submitted that even if the provisions of Articles 58 and 59 to the Schedule of Limitation Act, 1963 are considered, the Suit was ex-facie barred because the same was instituted almost sixteen years after the plaintiffs acquired knowledge of the execution of the impugned Wills. Mr Lotlikar relied on *C.S. Ramaswamy v. V.K. Senthil - 2022 SCC OnLine SC 1330* and *Dilboo v. Dhanraji - (2000) 7 SCC 702* to support the above contentions based on the bar of limitation.

14. Mr Lotlikar submitted that the substantial question of law based on limitation may therefore be answered favouring the defendants (appellants) by holding that the First Appellate Court was not justified in reversing the Trial Court on this issue.

15. In the context of the first substantial question of law, Mr Lotlikar submitted that there was full compliance with Article 1766 of the Portuguese Civil Code requirements. He submitted that this was not a case where only one of the spouses had, by Will, bequeathed a specific property to the defendants (appellants). He submitted that this was a case where both the parents (spouses) had, almost simultaneously but by separate Wills drawn one after the other before the same Notary Ex-Officio (Sub-Registrar), in the presence of the same witnesses, bequeathed the same property/share to the first appellant. He submitted that all this was more than sufficient to hold that the spouses consented to each other's action.

16. Mr Lotlikar submitted that Article 1766 refers to "acquiescence" and not consent. He submitted that there is a difference between the two expressions, and the First Appellate Court seriously erred in not noticing or respecting this distinction. He submitted that all the ingredients of Article 1766 were thus fully complied. Mr Lotlikar submitted that even if Article 1766 is construed as requiring "consent" from the spouses, all that Article 1766 requires is that such consent must be in the "authentic form". He submitted that no form is prescribed either in the Portuguese Civil Code of 1867 or the Notarial Decree

No.8373. He submitted that the circumstance that the two Wills were executed one after the other before the same Sub-Registrar, the same witnesses and the same interpreter were more than sufficient to conclude that there was consent in an authentic form.

17. Mr Lotlikar submitted that Article 1766 refers to "authentic form" and not "authentic document". He submitted that there are several provisions under the Portuguese Civil Code where the expression "authentic document" has been used. He submitted that the fact that such expression was not used in Article 1766 shows that the Legislature did not intend the consent to be recorded in an authentic document but that an authentic form was sufficient. He submitted that the First Appellate Court erred in equating the two different and distinct expressions while construing Article 1766 of the Code.

18. Mr Lotlikar submitted that in any case, the impugned Wills were authentic documents since they were executed before the Notary Ex-Officio (Sub-Registrar) in presence of witnesses. On a proper construction of both the Wills, it is apparent that each of the spouses had consented to the other spouse bequeathing the suit property and share in the partnership firm to the first appellant. Accordingly, the ingredients of Article 1766 were fully satisfied, and the First Appellate Court seriously erred in holding otherwise.

19. Mr Lotlikar submitted that the First Appellate Court acted perversely and adopted a hyper-technical approach in the context of the interpreter's role or compliance with the requirements of reading the Will aloud before its registration. He submitted that the plaintiffs never bothered to examine either the interpreter or the Sub-Registrar. He submits that the impugned will show full compliance with such requirements. Therefore the findings of the First Appellate Court to the contrary are vitiated by perversity and in fact constitute errors apparent on the face of record of the impugned Wills. Mr Lotlikar relied on the dictionary meanings and on the decision in ***Janardan @ Govind Vassudeva Bhat v/s. Mortibai Ramchandra Bhat – Second Appeal No.27 of 1999 decided on 19.06.2008*** in support of the above contentions.

RESPONDENT'S/PLAINTIFF'S CONTENTIONS:

20. PER CONTRA, Mr Desai, learned counsel for the plaintiffs defended the impugned Judgment and Decree of the First Appellate Court based on the reasoning reflected therein. He submitted that there were neither any pleadings nor evidence to conclude that the Suit was barred by limitation. He submitted that the plaintiffs had specifically pleaded about their being informed of the execution of the impugned Wills in the last week of December 1998. He submitted that the denials in the written statement were extremely evasive and amounted to admissions. Since the Suit was admittedly instituted within three years from December 1998, the same was not barred by limitation.

Accordingly, he submitted that such a finding does not call for interference in a second appeal.

21. Mr Desai submitted that the provisions of Article 1967 of the Portuguese Civil Code do not apply because the challenge was not based only on defect in form or external solemn formalities. He submitted that the challenge was based on the absence of a consent in an authentic form which was an essential requirement of Article 1766 of the Code.

22. Mr Desai relied on ***Shivshakara & Anr. v/s. H. P. Vedavyasa – 2023 SCC OnLine SC 358*** to submit that Courts cannot travel beyond pleadings of parties or consider any evidence which travels beyond the pleadings. He submitted that ***K. Chelliah Servai v/s. P. Muthusami – 1995 Supp (1) SCC 202*** provides that the Second Appellate Court cannot go into any question which was neither pleaded nor dealt with by the Trial or First Appellate Court. He relied on ***Zee Telefilms Limited v/s. Suresh Productions & Ors. - (2020) 5 SCC 353*** to hold that a cause of action accrues only when there is a clear and unequivocal threat to infringe a right.

23. Insofar as the first substantial question of law is concerned, Mr Desai submitted that the provisions of Article 1766 of the Portuguese Civil Code are mandatory, and they mandate written consent in an authentic form, i.e. due registration before the Notary Ex-Officio (Sub Registrar) signifying consent of each spouse to the other for the disposition of specific assets of the

marital estate. He submitted that since in this case there was no compliance with this requirement, the impugned Wills were correctly set aside by the First Appellate Court.

24. Mr Desai submitted that Article 1766 has to be read with Article 2422 of the Portuguese Civil Code. From a conjoint reading, it is apparent that in the absence of consent contained in an authentic document, the impugned Wills were nullities. He referred to dictionary definitions of the expressions "authentic act" or "authenticate" and submitted that consent by conduct or consent by any other form other than an authentic document was not acceptable.

25. Mr Desai submitted that the interpreter reached late, and there is no record of the interpreter translating and explaining the first two or three pages of Yesso's Will to Yesso. He, therefore, submitted that there is no record of the contents of the Will being read aloud by the Notary to the testators. He submitted that the First Appellate Court had correctly voided the two Wills for non-compliance with these essential requirements. Mr Desai accordingly submitted that the substantial question of law on limitation ought to be answered against the appellants and favouring the plaintiffs.

26. Mr Desai relied on the provisions of Article 1919 of the Portuguese Civil Code to contend that any Will which does not comply with the formalities prescribed in the Code would be of no effect. He submitted that there was no evidence that the

interpreter or the Notary read the Will in the presence of the testators and other witnesses. He submitted that there was no evidence about the interpreter taking an oath to discharge his functions faithfully. He pointed out that Yesso's Will records translation from third page onwards implying that the interpreter reached late. He submitted that all this amounts to a violation of Articles 75 and 78 of the Notarial Decree No.8373. He submitted that if the provisions of this Decree are considered along with Article 1919 of the Code, it is apparent that the impugned Wills were of no effect.

27. Mr Desai submitted that where a power was given to do a certain thing in a certain way, that thing must be done in that way or not at all and that other modes of performance were necessarily forbidden. He relied on ***Supertech Limited v/s. Emerald Court Owner Resident Welfare Association and Ors. - (2023) 10 SCC 817*** in support of this contention.

28. Mr Desai also relied on ***Zelia M. Xavier Fernandes Gonsalves v/s. Joana Rodrigues & Ors. - (2012) 3 SCC 188*** to submit that in terms of Article 1108 of the Code, the property of the spouses gets merged. He relied on ***Joana Errie v/s. Albano Vaz & Ors. - 2015 (1) Goa L.R. 293 (para 14)*** to submit that since Article 1919 of the Code does not state that consent can be inferred from the circumstances or can be presumed, the consent has to be specific. He submitted that the said principle also applies to the instant case since even Article 1766 does not refer to consent being inferred from circumstances. Mr Desai also

relied on the decision of this Court in ***Ulhas Shankar Barde v/s. Harischandra Shankar Barde – Second Appeal Nos.61 and 62 of 2009 decided on 09.07.2012*** in support of this proposition.

29. Mr Desai relied on ***Claudio Francisco v/s. Eulalia Fernandes – 2005 (2) ALL M.R. 247*** and ***Jose Antonio Miranda & Anr. v/s. Joao Luis Miranda – AO/17/1998*** to submit that this Court came to a conclusion that the sale in violation of Article 2177 of the Code is void. He submitted that Article 1766 is mandatory and in the absence of written consents from the spouses in wills bequeathing specific assets would be nullities.

30. He relied on ***Mithilesh Singh v/s. Union of India & Ors. - (2003) 3 SCC 309*** to contend that the Courts should not reject any words as meaningless or a construction which results in the rejection of words as meaningless has to be avoided. He relied on ***State of Jharkhand & Anr. v/s. Govind Singh – (2005) 10 SCC 437*** to contend that the Court is bound to give effect to the clear and unambiguous words of a statute irrespective of the consequences.

31. For all the above reasons, Mr Desai submitted that this Second Appeal may be dismissed.

CONSIDERATION OF THE RIVAL CONTENTIONS:

32. Based on the rival contentions and the substantial questions of law framed at the stage of admission of this Second Appeal, the following two points arise for determination:

(A) Was the Suit for declaring the impugned Wills dated 14.01.1985 ineffective barred by the law of limitation prescribed under the Indian Limitation Act, 1963 and/or Article 1967 of the Portuguese Civil Code, 1967?

(B) Were the impugned Wills dated 14.01.1985 liable to be declared ineffective for want of compliance with Article 1766 and any other Articles of the Portuguese Civil Code, 1867?

LIMITATION:

33. Admittedly, in this case, the impugned wills were executed before the Notary Ex-officio (Sub-Registrar) on 14.01.1985. This suit was instituted only in 2001, i.e. after about 16 years. Therefore, The burden was squarely on the plaintiffs to show that the suit was within the prescribed period of limitation. For this, there had to be proper pleadings, which had to be further proved by cogent evidence.

34. Therefore, to begin with, reference becomes necessary to the pleadings in the plaint. The averments in paragraphs 6, 7 and 22 of the plaint deal with the aspect of limitation, and they read as follows:-

*"**6.** In the last week of December 98 the defendant No. 1 informed the plaintiffs that Yesso had left the property to him by a Will dated 14/01/1985 executed before the*

Notary Ex-Officio of Margao. Only then the plaintiffs came to know for the first time of the existence of the said Will dated 14/01/1985 and a copy was obtained on 1/1/99.

7. Later the plaintiffs carried out search in the office of the Ex-Officio Notary at Margao for the deed of consent and found that no such deed was executed but then found that subsequently the defendant No. 1 got the Will executed by Smt. Jayashri ***on 14th January 1985*** *(Amendment carried out as per order dated 19/9/2001 on 19/9/2001).*

22. *The cause of action arose on 1st Jan. 1999 when the plaintiffs came to know for the first time about the said will of Yesso Naik and with respect to the construction it arose on 4-5-2001 when the apprehension of that the plaintiffs were confirmed that the defendants are out to put up construction in the suit property."*

35. The above averments are nothing but bald assertions that the plaintiffs came to know about the impugned Wills in the last week of December 1998. There are no pleadings about the circumstances in which the plaintiffs came to know about the execution of the impugned will only in the last week of December 1998. There are no pleadings about the occasion on which the first defendant informed the plaintiffs that Yesso had left the suit property to him by the impugned Wills dated 14.01.1985.

36. Perhaps realising the lacunae in the pleadings, in evidence, the first plaintiff deposed that he was undertaking repairs to the kitchen platform in the house in the suit property, and it is at that time that the first appellant objected to such repairs by pointing out that Yesso and Jayashri had already bequeathed the suit house to him. However, such an uncorroborated statement is not backed by any pleadings in the plaint. *Shivshakara & Anr. v/s. H. P. Vedavyasa (Supra),* relied on by Mr Desai, clearly holds that Courts cannot travel beyond the pleadings of parties or consider any evidence which travels beyond the pleadings.

37. The burden of proving that the Suit was instituted within the prescribed period of limitation was on the plaintiffs. Therefore, such pleadings were necessary. By clever or vague drafting, the plaintiffs cannot attempt to pass off a Suit instituted after the prescribed period of limitation as one instituted within. A bald assertion, without anything further that the plaintiffs came to know of the impugned Wills only in the last week of December 1998 when the first defendant allegedly informed them about the same, is ordinarily not sufficient to bring a Suit within limitation.

38. Mr Desai, however, contended that the pleadings about the plaintiffs knowing about the impugned Wills for the first time in the last week of December 1998 or the pleadings about the first defendant informing the plaintiffs about the impugned Wills in the last week of December 1998 were never denied or were evasively denied by the defendants (appellants). He, therefore,

contended that such pleadings were admitted by the appellants/ defendants, and no further proof was necessary. This contention cannot be accepted in the present case.

39. The responses to the averments in paragraphs 6, 7 and 22 of the plaint are contained in paragraphs 4, 4A, 5, 5A and paragraphs 15 and 16 of the Written Statement. Accordingly, these paragraphs are transcribed below for the convenience of reference:-

> " *With reference to para 6:*
>
> *4) The contents are denied.*
>
> *4A) Plaintiffs were well aware of the will executed by late Yesso as they were informed about the same by the said Yesso immediately after the execution of the will.*
>
> *With reference to para 7:*
>
> *5) It is denied that Defendant no.1 got the will executed by Smt. Jayashri. The remaining contents are denied for want of knowledge.*
>
> *5A) The Plaintiffs were well aware of the execution of the will by late Jayashri (mother of Plaintiff No.1 and Defendant Nos. 1, 3 & 10). As the said Yesso and Jayashri informed the Plaintiffs about the will immediately after its execution.*

With reference to paras 21 & 22:

15) There is no cause of action to file the Suit.

16) Reliefs (a) & (b) for declarations are vague as respects the wills."

40. Thus, the contents of paragraphs 6 and 7 of the plaint have been duly denied by the defendants (appellants). As if this was not sufficient, the defendants (appellants) have specifically pleaded that the plaintiffs were well aware of the impugned Wills executed by Yesso and Jayashri as they were informed about the said by Yesso and Jayashri immediately after the execution of the impugned Wills. Insofar as paragraph 22 of the plaint is concerned, the same was denied by contending that there was no cause of action to file the Suit. Therefore, Mr Desai's contention about there being no denials or that the denials were only evasive cannot be accepted.

41. Ultimately, the responses in the Written Statement have to be construed in the context of pleadings in the plaint. As noted earlier, the pleadings in the plaint are bereft of any material particulars. Since the Suit was instituted almost sixteen years after the execution of the impugned Wills dated 14.01.1985, the plaintiffs were required to plead material facts and particulars to show how, according to them, the suit was instituted within the prescribed period of limitation. Except for a bald assertion, the plaintiffs avoided pleading any facts or particulars about the circumstances or the occasion on which they obtained knowledge

about the impugned Wills only in the last week of December 1998. Therefore, it would not be correct to hold that the defendants (appellants) failed to deny the bald assertions in the plaint or that the denials were, in any sense, evasive so as to constitute admissions by non-traverse.

42. In the context of suits that were prima facie instituted beyond the prescribed period of limitation but attempts were made to pass off such suits as instituted within the prescribed period of limitation, reference can usefully be made to the decision of the Hon'ble Supreme Court in *C. S. Ramaswamy (supra).* In this case, suits were filed after nearly ten years for setting aside the sale deeds executed in the year 2005. The plaintiffs claimed that they were induced to sign the sale deeds by practising fraud upon them. They pleaded that they came to know of the fraud played on them only in April 2015 and immediately thereafter filed the suits in question. The Trial Court and the High Court dismissed the applications under Order 7 Rule 11(d) of the Civil Procedure Code by holding that the issue of limitation in such circumstances was a mixed question of law and fact and permitted the suit to go to trial.

43. The Hon'ble Supreme Court, after reviewing the law on the subject, including the law of pleadings, reversed the Trial Court and the High Court and held that the plaint deserved to be rejected because the law of limitation barred the suit based on the pleadings in the plaint. In doing so, the Court held that even the averments and allegations in the plaint with respect to fraud were

not supported by any further averments and allegations of how the fraud had been committed/played. Merely stating in the plaint that the fraud has been played is not enough, and allegations of fraud must be specifically averred in the plaint; otherwise, merely by using the word "fraud", the plaintiffs would try to get the suits within the limitation. The Court held that by vague allegations concerning the date of knowledge, the plaintiffs cannot be permitted to challenge the documents after ten years. By such clever drafting and using the word "fraud", the plaintiffs tried to bring the suits within the period of limitation, which was impermissible.

44. In *Dilboo (supra)*, the Hon'ble Supreme Court held that it is always for the party who files the suit to show that it is within time. Thus in cases where the suit is filed beyond the prescribed period of limitation of twelve years, the plaintiff would have to aver and then prove that the suit was within twelve years of his/her knowledge. In the absence of any averment or proof to show that the suit is within time, it is the plaintiff who would fail. Whenever a document is registered, the date of registration becomes the date of deemed knowledge. *In other cases where a fact could be discovered by due diligence, then deemed knowledge would be attributed to the plaintiff because a party cannot be allowed to extend the period of limitation by merely claiming that he had no knowledge*.

45. Upon evaluation of the averments in the plaint applying the law laid down by the Hon'ble Supreme Court in the above two

decisions, it does appear that the suit was sought to be passed off as one instituted within the prescribed period of limitation, by merely making a bald averment that the plaintiffs had no knowledge about the impugned Wills before the last week of December 1998. The Trial Court had, in fact, dismissed the Suit both on merits as well as on account of the bar of limitation. The First Appellate Court, by incorrectly placing the burden of proving that the Suit was instituted beyond the prescribed period of limitation on the defendants (appellants), has reversed the Trial Court's finding. In *Dilboo (supra)*, the Hon'ble Supreme Court has, in clear and categorical terms, held that it is always for the party who files the Suit to show that the same was instituted within the prescribed period of limitation.

46. Apart from the above-referred pleadings, there is hardly any evidence led by the plaintiffs of the issue of limitation. Realising that some explanation was due in the pleadings to explain the circumstances or explain the occasion on which the first defendant allegedly informed the plaintiffs about the impugned Wills in the last week of December 1998, the first plaintiff, Vasudev Naik (PW1) deposed that he was constructing a kitchen platform in the last week of December 1998 and it was then that the first defendant informed him about the impugned Wills and objected to the construction. If this was true, then the plaintiffs should have, and perhaps, would have pleaded all this in the plaint. As noted earlier, the evidence that travels beyond the pleadings can be of no avail.

47. The plaintiffs had to explain in the pleadings why suddenly, in the last week of December 1998, the first defendant would inform the plaintiffs about the impugned Wills executed by their parents, i.e. Yesso Naik and Jayashri Naik. Significantly, Jayashri, i.e. the mother, expired only in 1999, and the suit was instituted in May 2001. If the first defendant indeed informed the first plaintiff about the impugned Wills in the last week of December 1998, it is reasonable to hold that the first plaintiff would have surely inquired with his mother Jayashri, who was living along with the plaintiff and the first defendant in the same house about the execution of such Wills. However, there are neither any pleadings nor any evidence on this aspect.

48. In the cross-examination of PW1, upon being asked as to why there were no pleadings about the alleged incident of constructing a kitchen platform or such construction being objected to by the first defendant in the last week of December 1998 was never pleaded in the plaint, PW1 failed to give any answer. The Trial Court duly considered all these aspects for concluding that the Plaintiffs failed to prove that the suit was instituted within limitation. The First Appellate Court, by wrongfully reversing the burden of proof and by completely ignoring the principle that the evidence which travels beyond the pleadings is inadmissible, has wrongly reversed the trial Court.

49. The plaint in the Suit refers only to the property surveyed under No.3/1, measuring 1400 sq. mtrs. as "suit property". However, the impugned Wills bequeathed not only the suit

property but also the entire share in M/s. Ramnath Saw Mill, a partnership firm of the first defendant. Yesso Naik, i.e. the father, died in 1987. Soon after 1987, it was the first defendant who got his father's share in M/s. Ramnath Saw Mill, a partnership firm, continued with the business of the said firm accordingly. From 1987 to 2001 there was no objection raised by the plaintiffs for the first defendant inheriting the share in the partnership firm, to the exclusion of the plaintiffs or other legal representatives of Yesso Naik. The First Appellate Court did not even consider this important aspect much less appreciate the same.

50. The fact that the first defendant inherited and began to enjoy Yesso's share in the partnership firm, which was bequeathed to the first defendant by the impugned Wills from 1987 onwards, should have put the plaintiffs on guard or at least prompted them to make inquiries of the basis of such inheritance and enjoyment. However, nothing was done by the plaintiffs up to 2001. Significantly, even in the Suit, no relief is sought in the context of the share in the partnership business. Only the immovable property surveyed under No.3/1 is described as the suit property.

51. All this suggests that the plaintiffs were aware of the impugned Wills and accepted the same, or at least the plaintiffs were not sufficiently diligent and did not bother to obtain information about the impugned Wills. In either case, a suit instituted after 16 years cannot be passed off as one within limitation based only on a bald or bare assertion that the plaintiffs were unaware of the impugned wills until the last week of

December 1998. There are no pleadings and, consequently, no evidence on the aspect of due diligence. Considering all these aspects, it is difficult to hold that the Suit was instituted within the period of limitation prescribed under Article 58 or 59 of the Schedule to the Limitation Act, 1963.

52. The Trial Court, in the Judgment and Decree dated 06.06.2009, discussed the pleadings and the evidence and concluded that the story put forth by the first plaintiff that he came to know about the execution of the impugned Wills by his father only in the last week of December 1998 cannot be believed without a pinch of salt. The Trial Court held that the burden of proving the facts that bring a Suit within limitation lies on the plaintiff. The Trial Court evaluated the evidence of the parties and recorded a specific finding that the plaintiff had failed to prove that the Suit was not barred by limitation. The Trial Court considered and rejected the plaintiff's other objections to the impugned Wills and finally dismissed the Suit on the plea of limitation and merits.

53. The plaintiffs appealed the Trial Court's decree dated 06.06.2009 vide Regular Civil Appeal No.301/2010. The appeal memo is on record on pages 62 to 69. Except for ground (d), in which it is stated that the Trial Court failed to appreciate that the Will operates only upon the death of the testator or testators and not on the date on which it was made, there is no ground to challenge the clear and categorical finding of the Trial Court that the Suit was barred by limitation. There are some vague grounds

about the Trial Court failing to appreciate that only material facts have to be pleaded or that the plaintiffs cannot be required to prove negative facts. The contention in the ground (d) was not even pressed in this Court, and Mr Desai submitted that the only test would be the date of knowledge of the impugned wills.

54. The First Appellate Court, with respect, dealt with the issue of limitation rather cursorily. The First Appellate Court dismissed the defendant's statement/deposition, both in the Written Statement and in the evidence that the plaintiffs were informed of the execution of the impugned Wills by Yesso and Jayashri in 1985 itself, as mere self-serving statements that were not corroborated by any other material on record. However, the First Appellate Court failed to appreciate that even the bald assertions of the plaintiffs that they came to know of the impugned Wills only in the last week of December 1998, when the first defendant informed them about the same, were nothing but self-serving statements to bring the Suit instituted almost sixteen years after the execution of the impugned Wills, within limitation. Besides, such statements had no corroboration whatsoever, unlike the Defendants' statements that had corroboration from the fact the Plaintiffs never reacted to the first defendant inheriting the partnership share in M/s Ramnath Saw Mills and openly enjoying the same to the exclusion of all other legal representatives from 1987 onwards.

55. The First Appellate Court (at paragraph 15) held that even if it was assumed that the plaintiff's case about knowledge of the

impugned Wills in the last week of December 1998 could be considered with a pinch of salt, but the same cannot be considered as a false story by applying the test of preponderance of probabilities. The First Appellate Court completely failed to appreciate that the test of preponderance of probabilities applies equally to the defendant's case, where the defendants had pleaded and even deposed that the execution of the impugned Wills was made known to the plaintiffs by Yesso and Jayashri in 1985 itself.

56. The First Appellate Court did not even consider that the impugned Wills had bequeathed not only the suit property but also the share in the partnership firm M/s. Ramnath Saw Mill to the first defendant. After Yesso died in 1987, defendants no.1 and 2, based upon Yesso's Will, appropriated Yesso's share in the partnership firm and continued as the partners to the exclusion of all other legal representatives. The First Appellate Court failed to consider that the plaintiffs had not even pleaded about the circumstances in which the first defendant had any occasion to inform the plaintiffs about the execution of the impugned Wills in the last week of December 1998.

57. The First Appellate Court, in short, not only ignored the relevant and vital evidence on the record but also failed to come into close quarters with the Trial Court's reasoning on the limitation issue. Instead, in one place (paragraph 16), the First Appellate Court held that the Trial Court had not even dismissed the Suit by invoking the bar of limitation when perusal of the Judgment and Decree made by the Trial Court would show a

clear and categorical finding to the contrary. At another place (paragraph 18), the First Appellate Court recorded that the plaintiffs had not even challenged the finding about the Suit being barred by limitation in their appeal memo and, therefore, the plaintiffs were not entitled to argue on the finding of limitation without seeking any leave from the appeal court.

58. The First Appellate Court seriously erred in placing the entire burden of proving that the Suit was barred by limitation on the defendants (appellants) even though the Hon'ble Supreme Court, in the case of *Dilboo (supra)* or *C. S. Ramaswamy (supra)* has held that the burden is always on the plaintiff to show that the suit was instituted within the prescribed period of limitation. The First Appellate Court cursorily took into account evidence which was backed by no pleadings. The First Appellate Court failed to consider, let alone evaluate, most material evidence on record. The entire approach of the First Appellate Court was contrary to the law laid down by the Hon'ble Supreme Court in *Dilboo (supra)* or *C. S. Ramaswamy (supra).* For all these reasons, the First Appellate Court's finding on limitation is vitiated by clear perversity.

59. The First Appellate Court reversed the burden of proof, possibly because the defendants filed cross-objections on the issue of limitation. The Trial Court had clearly recorded a finding that the Suit was instituted beyond the prescribed period of limitation. Accordingly, the Suit was dismissed both on merits as well as the bar of limitation. The cross-objections, it appears, were filed

either out of overenthusiasm or as a matter of abundant caution. Merely because the cross-objections were filed, the First Appellate Court was not justified in placing the entire burden on the defendants/cross-objectors to show why the Suit was beyond the prescribed period of limitation.

60. Finally, in paragraph 18, the First Appellate Court observed as follows:-

> *"**18.** The finding of the trial court about the suit being barred by limitation is not challenged by the appellant in the memo of appeal and therefore cannot be heard on that ground of objection except by the leave of the court and the appeal is liable to be dismissed as barred by limitation. Moreover Jayshree expired in the year 1999 and therefore the suit filed in 2001 cannot be said to be barred."*

61. As noted earlier, there is an inherent contradiction in the reasoning/discussion of the First Appellate Court on the issue of limitation. This contradiction is further amplified in paragraph 18 of the impugned Judgment and Decree. If no ground was raised in the memo of appeal on the aspect of limitation and the First Appellate Court failed that leave was necessary to raise such a ground, the First Appellate Court should have refrained from interfering with the Trial Court's finding on the issue of limitation. In any case, the First Appellate Court could not have reversed the Trial Court by simply observing that Jayashri expired

in 1999 and therefore the Suit instituted in 2001 could not be said to be barred by limitation.

62. Mr Desai agreed that the limitation for instituting a Suit to challenge the impugned Wills would commence from the date of the knowledge of the impugned Wills. Thus, the issue of Yesso's or Jayashri's death was quite irrelevant to the issue of the Suit being within the prescribed period of limitation. If the First Appellate Court's logic in the last two lines of paragraph 18 is correct, then, the Suit was ex-facie barred by limitation qua Yesso's Will, because Yesso admittedly expired in 1987. Again, this is an instance of contradictory approaches or contradictory findings by the First Appellate Court.

63. Mr Lotlikar's contention based on Article 1967 of the Portuguese Civil Code need not be gone into because the Suit will have to be held as barred by limitation, even going by the provisions of the Limitation Act 1963. Since the plaintiffs failed to establish that they had no knowledge about the impugned Wills at any time before the last week of December 1998, the Suit will have to be held as barred by the law of limitation, even going by the provisions of the 1963 Limitation Act.

64. For all the above reasons, the first point for determination and consequently the second substantial question of law will have to be answered in favour of the appellants (defendants).

COMPLIANCE WITH ARTICLE 1766 AND OTHER ARTICLES OF THE PORTUGUESE CIVIL CODE, 1867:

65. By the impugned separate Wills dated 14.01.1985 executed by Yesso and Jayashri, the parents of Vasudev (plaintiff no.1) and Shripad (defendant no.1) bequeathed the following to Shripad (defendant no.1):-

a) The property known as Aforamento de Baiguinim along with the residential house situated therein admeasuring 1400 sq. mtrs. and surveyed under No.3/1, Sao Pedro, Panvelim, Goa (suit property);

b) The entire share in M/s Ramnath Saw Mills, a registered partnership firm.

66. Admittedly, the impugned Wills are registered before the Notary Ex-Officio, i.e. the Sub-Registrar of Margao. There are pleadings and evidence which establish that both Yesso and Jayashri executed the Wills before the Notary Ex-Officio, i.e. the Sub-Registrar of Margao, on the same day (one after the other) in the presence of the same witnesses and with the intervention of the same interpreter/translator. The contents of both the Wills are almost identical, inasmuch as Yesso and Jayashri have bequeathed the above two items, i.e., the suit property and the share in the partnership firm, to Shripad (defendant no.1).

67. Vasudev (plaintiff no.1) and his wife challenged the above Wills on the grounds set out in paragraphs 8 and 9 of the plaint.

The grounds are almost the same, and therefore, the averments in paragraph 8 of the plaint concerning Yesso's Will are transcribed below for the convenience of reference:-

> "***8.*** *The Will of the said Yesso Naik is invalid for the following:*
>
> *a) In those years the said Yesso and Jayashri were totally in the hands of the defendant No. 1 and the defendant No. 1, by exercise of his undue influence got the same executed by them.*
>
> *b) The said Will has not been consented to by the moiety-holder Jayashri as the search carried out by the plaintiff No.1 did not reveal any consent given to each other or by anyone of them.*
>
> *c) The said Yesso Naik did not know English and the interpreter was patently not present except when the Will had reached its end. Only when almost the whole Will was recorded the interpreter was brought in. The said interpreter therefore had no role required by law in the execution of the Will.*
>
> *d) The interpreter did not take oath and did not undertake on oath to convey to the testator to the best of his ability whatever was recorded in the Will. This fact about oath is not recorded in the Will.*

e) The Will itself shows that Yesso Naik was not in his proper senses and this is evident from the fact that he himself stated that it was his first Will and yet he stated that he revokes all his previous Wills.

f) The translation was not read over to the testator after the Will was drawn."

68. The Trial Court found no merit in any of the aforesaid challenges and dismissed the Suit. The First Appellate Court also dismissed the challenge on the ground of "undue influence". However, the First Appellate Court set aside the impugned Wills on the grounds (b), (c), (d), (e) and (f) by reference to the provisions of Article 1766 read with Articles 2422, 2423 and 2425 of the Portuguese Civil Code. The First Appellate Court also referred to Articles 75 and 78 of the Notarial Laws (Decree No.8373) for setting aside the impugned Wills.

69. From the pleadings, it is apparent that no case whatsoever was made out for claiming the exercise of "undue influence" by Shripad (defendant no.1). The pleading that "*Yesso and Jayashri were totally in the hands of defendant no.1 and defendant no.1, by exercise of his undue influence got the same executed by them*" hardly qualifies as any pleading sufficient to consider the plea of undue influence. The First Appellate Court's observation in paragraph 24 that the identical pleading in paragraph 9 of the plaint constitutes sufficient pleading of undue influence is patently wrong.

70. Besides, the evidence on record establishes that the plaintiffs and defendants no.1 and 2 were staying in the same house along with their parents, Yesso and Jayashri. The evidence also establishes that defendant No. 1 was not even present in the Sub Registrar's office at the time of execution of the impugned Wills or that he had anything to do with the execution of the impugned Wills. The two Courts have, therefore, concurrently held that the ground of undue influence was not established. No cross-objections have been filed in this Second Appeal to challenge this finding.

71. In ***Meena Pradhan And Others v/s. Kamla Pradhan And Another – (2023) 9 SCC 734,*** the Hon'ble Supreme Court has held that one who alleges fraud, fabrication, undue influence, et cetera has to prove the same. Further, if there are suspicious circumstances, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation. Suspicious circumstances, however, must be "real, germane and valid" and not merely "the fantasy of the doubting mind". (See ***Shivakumar v/s. Sharanabasappa – (2021) 11 SCC 277***).

72. Regards grounds 8(d) and 8(f) of the plaint, there appear to be errors apparent on the face of the record because the impugned Wills show that the interpreter who interpreted/translated the contents of the Wills upon his honour, which was the requirement and further, the Notary (Sub-Registrar) actually read out the contents of the Wills aloud to Yesso and Jayashri after the

contents were written down by the Notary (Sub-Registrar) manually. The First Appellate Court, holding otherwise, therefore, amounts to an error apparent on the face of the record.

73. Article 75 of the Notarial Laws (Decree No.8373) provides what authentic extra-official documents should contain. Sub-clause (6) of Article 75 provides that such document must mention the "oath of honour" of the interpreters, stating the reasons for their intervention and how the interpreters found the parties' desire and transmitted to them the contents of the documents. Further, Sub-clause (9) of Article 75 provides that the documents should contain a mention of the reading out of the documents, loudly by the Notary, to the parties in the simultaneous presence of them, of the witnesses and of the other intervening persons, and of the reading of the interpreter or by any of the parties or anyone at their request when it is obligatory.

74. Now Yesso's Will (on pages 124 to 130 and typed copy on pages 139 to 141) records that "*the interpreter upon his word of honour and also verbally conveyed to me the wish in English and to the aforesaid party, the contents of this Will which I read aloud and it was found in accordance by all who are going to sign with the interpreter and with me said Notary Ex-Officio*." The Will also records that Yesso declared his wish in the Konkani language, which was translated and conveyed to the Notary (Sub-Registrar) in the English language. The Will, on one side, records the English version and, on the other, the translated Konkani version. All this more than sufficiently complies with the requirements of

Article 75(6) and (9) of the Notarial Laws (Decree No.8373). The same is the position with Jayashri's Will, which was executed soon after Yesso executed his Will before the same Notary/Sub-Registrar, with the intervention of the same interpreter, in the presence of the same witnesses and on the same date.

75. Article 78 of the Notarial Laws (Decree No.8373) provides that where any one or more of the parties have no knowledge of the Portuguese language, interpreters chosen by them, even from the foreigners, shall intervene, and they shall transmit to the notary the declaration of their wish and the translation of the document to the same parties. The interpreter shall swear on oath upon their word of honour that they shall perform well the functions assigned to them. The original and the translation shall be written one by the side of the other, dividing the pages of the book for this purpose in columns, and both shall be signed in general terms. The interpreter shall read the translation of the documents in which they have intervened.

76. Neither Mr Desai nor Mr Lotlikar were able to throw any light on the reference to any one or more of the parties having no knowledge of the Portuguese language. They submitted that after the liberation of Goa, this requirement has been, as a matter of practice, construed to mean knowledge of the English language. Without going into this issue, and based on the text of the impugned Wills and other evidence on record, it is more than amply established that there was full compliance with the requirements of Article 78 of the Notarial Laws (Decree

No.8373). At this stage, it is necessary to clarify that this Court has not gone into the issue of whether the Notarial Laws (Decree No.8373) survive the extension of the Indian Registration Laws to Goa. Neither of the parties raised any such contention. Therefore, this matter is decided based on the premise that such laws continue to operate.

77. The First Appellate Court, perhaps, without careful reading of the impugned wills and the precise provisions of Articles 75(6) and 75(9), chose to void the impugned Wills. There are presumptions that generally go with the registration of wills before a Sub-Registrar, particularly in matters of procedural compliances. The burden is therefore on the party that contests the wills alleging the lack of procedural compliances. Significantly, the plaintiffs, who were required to discharge the burden of establishing non-compliance, chose not to examine either the Notary (Sub-Registrar) or the interpreter Advocate, Dinkar Vinayak Amonkar or any of the witnesses to the impugned Wills. The First Appellate Court has also assumed some matters, which it could not have assumed in the absence of any depositions of the Notary (Sub-Registrar), interpreter or the witnesses. Admittedly, neither the plaintiffs nor defendants no.1 and 2 were present before the Notary (Sub-Registrar) at the time of execution of the impugned Wills. Accordingly, the First Appellate Court's findings in the context of grounds 8(d) and 8(f) are vitiated by complete perversity, and they warrant interference.

78. In *Carlos Tavora & Others v/s. Maria Felicidade Fernandes e Lobo & Others – 2005 SCC OnLine Bom 62*, the Division Bench of this Court comprising Lawande A. P. and Britto N.A., JJ. in the context of execution of wills before the Notary (now Sub-Registrar) as envisaged under the Notarial Law of Decree No.8373 dated 18.09.1922 has made the following observations at paragraphs 12 and 13 which would apply to the present case:-

> "***12.*** *…….. In the case at hand the plaintiffs have produced a certified copy of the said Will. In this State and in case the Will was executed with the intervention of a Notary Public, who is a public functionary under the law in force, namely Decree No.8373 dated 18-9-1922 and in accordance with Articles 1911 onwards of the Civil Code, 1867, and therefore is a public document which can be proved by production of a certified copy as provided by section 77 of the Indian Evidence Act, 1872. Such a Will carried with it a ring or a halo of its authenticity and reliability and it is presumed to be true until disproved.*
>
> ***13.*** *It is to be noted that a Notary as envisaged under the Notarial Law of Decree No. 8373 dated 18-9-22 is a public servant whose functions, under the said law, in general are to intervene in all extrajudicial acts which are in need of certainty and authenticity, and in particular to record, inter alia, public wills and all other authentic extra judicial official documents or to intervene in their making. Therefore, a Will made in this State under the said law*

carries with it a presumption of correctness, authenticity and reliability, a presumption which has got to be accepted until the contrary is proved. In other words, every statement made by the Notary of what was said and done by him in his official capacity is to be presumed to be true until the contrary is proved. A similar system of law relating to notaries public is followed in France. With a view to explain this system to British Jurists to acquire the knowledge of French law. Sir Otto Kahn Freund, Claudine Levy and Bernard Rudden in their Book "A Source Book on French Law System Methods Outlines of Contract" says:-

> *"The legal significance of his (Notary's) office stems partly from the much stronger force which notarial documents (actes authentiques) have compared with private documents (actes sous seing prive)."*

.....Each statement made by a notaire of what was said or done before him in his official capacity is presumed true until disproved in a formal procedure (inscription de faux) which is hardly ever used."

79. The First Appellate Court, in the context of ground 8(e), or 9(d) has diffidently suggested at paragraph 24 that Yesso and Jayashri '*may not have been in their senses*' at the time of the execution of the impugned Wills. Again, this finding is completely perverse, being de hors the plaintiff's pleadings and even otherwise, the evidence on record. The extract from the same is transcribed below for convenience of reference:-

> "***24.*** *The finding of the trial court that both of them were over 60 years at para 16 and therefore both may not recollect of any alleged wills made if any, which itself shows that the testatrix are failing in their memory. The plaintiff at para 9 have clearly pleaded about the undue influence and the defendants have vaguely denied the same in their written statement. However it cannot be disputed that the fact that the document is executed by undue influence is required to be proved by the party who alleges the same in support of its claim by cogent evidence and therefore the finding by the trial court that the document has been executed by undue influence cannot be said to be proved by the plaintiffs*."

80. Apart from the fact that the pleadings in paragraph 8 or 9 do not qualify as pleadings in support of the plea of undue influence, a perusal of the impugned Wills would show that the testators have merely stated that this was their first Will and that they revoked all their previous Wills and other testamentary dispositions made by them "*if any*". Now, merely because of this statement in each of the Wills and the fact that the testators may not have previously executed any Wills, it cannot, by any stretch, be even suggested that the testators were not in their senses at the time of the execution of the impugned Wills.

81. In the context of the ground in paragraph 8(c), which is peculiar only to Yesso's Will, the First Appellate Court has inferred that the interpreter reached slightly late, and that is

perhaps the reason why the record of the translated portion of the Wills starts from its third page. Again, this finding is perverse. Though, the translated version is recorded from the third page onwards, still, there is no dispute and it could not be disputed that the entire contents of the Will have been duly translated. Based upon such a flimsy ground and without examining whether such a ground can be the basis for setting aside a solemn Will, the First Appellate Court acted perversely in setting aside Yesso's Will almost sixteen years after it was executed.

82. Significantly, plaintiffs chose not to examine the Notary (Sub-Registrar) who actually recorded the Will in his own handwriting or the interpreter/ translator or any of the witnesses before whom the Will was executed. Accordingly, based upon ground 8(d) of the plaint and due to the fact that the plaintiffs did not bother to examine either the Notary (Sub-Registrar) or the interpreter Advocate, Dinkar Vinayak Amonkar or any of the witnesses to the impugned Wills, the First Appellate Court was not at all justified in setting aside Yesso's Will on flimsy and unsubstantiated grounds.

83. Mr Desai, however, laid the greatest emphasis on what he termed as non-compliance with the mandatory provisions of Article 1766 of the Portuguese Civil Code because, in this case, he pointed out that there was no authentic document separately executed by Yesso and Jayashri recording their consent to the disposition of two specific assets from out of the testators' estate. He submitted that such consent by means of an authentic and

separate document was a must, and since the same was not found in the present case, both the Wills had to be declared ineffective for non-compliance with Article 1766 of the Portuguese Civil Code.

84. Article 1766 of the Portuguese Civil Code (official translation) reads as follows:-

> *"Article 1766 - Prohibition of disposition of the assets of spouses - Those married as per the custom of the country shall not, on pain of nullity, dispose of certain and specific assets of the marital estate, except if the said assets have been allotted to them in partition, or are not included in the communion, or if the disposition has been made by one of the spouses in favour of the other,* ***or if the other spouse has given consent by authentic form."***

85. Article 1766 of the Portuguese Civil Code refers to "*consent by authentic form*". However, the First Appellate Court has construed this expression as "consent by authentic document". The First Appellate Court then referred to Article 2422 of the Portuguese Civil Code, which provides that an authentic document is one which is issued by a public officer or through his intervention as prescribed by law. Thus, by reading "authentic form" as "authentic document", the First Appellate Court concluded that since there is no document, dehors the impugned Wills in which the two testators (husband and wife or spouses) had recorded their consent and had such document

registered before the Notary/Sub-Registrar, there was no compliance with the requirement of Article 1766 of the Portuguese Civil Code.

86. Mr Desai defended this line of reasoning and submitted that in the absence of such separate and authentic documents being executed by the spouses, the impugned Wills by which the disposition of specific assets by the spouses was sought to be effected would fail to be effective. He referred to the provisions of Article 1919 of the Portuguese Civil Code, which provides that when any of the formalities are lacking, the Will shall be of no effect, but the Notary shall be held liable for damages and shall lose his office.

87. Article 1766 of the Portuguese Civil Code does not refer to "authentic document", but it does refer to "consent by authentic form". The First Appellate Court has, without much discussion, held that there is no difference between the two expressions and, therefore, the expression "consent by authentic form" appearing in Article 1766 must be read and construed as "consent by authentic document".

88. Mr Lotlikar pointed out the provisions in the Portuguese Civil Code where the expression "authentic document" has been specifically used whenever the Legislature intended any act to be recorded in an authentic document. For example, he referred to Article 780 of the Code, which makes specific reference to "authentic document". He also referred to Article 63 of the

Notarial Laws (Decree No.8373), which provides that certain acts or transactions shall be proved only by "authentic extra-official documents". He pointed out that the record of the consent of the spouses for the disposition of specific assets through a Will was not one of the acts that were required to be proved only by authentic extra-official documents. In any case, Mr Lotlikar submitted that the execution of identical Wills by the spouses, one after the other, before the same Notary/Sub-Registrar, same interpreter and same witnesses amounts to the record of consent by authentic form and also, by authentic documents because each of the separate Wills will operate as a consent of the other.

89. Since the Portuguese Civil Code refers to the expression "consent by authentic form" in Article 1766 and the expression consent by "authentic document" in some other provision of the same Code, it would not be appropriate to lightly equate the two expressions or hold that the two expressions mean the same thing unless very strong reasons exist for holding so. The principles of interpretation of statutes do not generally favour the two separate expressions used by the Legislature to be construed as meaning the same in the absence of very strong reasons for doing so. By treating the two expressions as the same, the Court would be rendering the actual expression used in Article 1766 as otiose or redundant.

90. In *DLF Qutab Enclave Complex Educational Charitable Trust v/s. State of Haryana – (2003) 5 SCC 622,* the Hon'ble Supreme Court was considering the expression "at his own cost"

and the expression “at its cost” at two different places in the same statute. The High Court had treated both these expressions as signifying the same thing. However, the Hon’ble Supreme Court held that the High Court committed a manifest error in holding that despite the fact that the statute uses two different expressions as regards the cost to be incurred for the construction of schools, hospitals, community centres, etc., the effect thereof would be the same. In case of the licensee the words used are “at his own cost” whereas in respect of the others, the words used are “at its cost”. When the Legislature uses different terminologies it must be presumed that the same had been done consciously with a view to convey different meanings.

91. Similarly, in ***B. R. Enterprises v/s. State of Uttar Pradesh – (1999) 9 SCC 700***, the Hon’ble Supreme Court explained that significantly, the different use of words in the two Articles is for a purpose; if the field of the two Articles is to be the same, the same words would have been used. It is true, as submitted, that since "trade" is used both in Articles 298 and 301, the same meaning should be given. To this extent, we accept it to be so, but when the two Articles use different words, in a different set of words, conversely, the different words used could only convey different meanings. If a different meaning is given, then the field of the two Articles would be different. So, when instead of the words "trade and commerce" in Article 301, the words "trade or business" are used, it necessarily has a different and wider connotation than merely "trade and commerce". "Business" may be of varying activities and may or may not be for profit, but it

necessarily includes within its ambit "trade and commerce"; so sometimes it may be synonymous, but its field stretches beyond "trade and commerce".

92. Therefore, by applying the above principles of interpretation of statutes, it will have to be held that the First Appellate Court was not right in lightly equating the expression "consent by authentic form" with the "consent by authentic document". All that Article 1766 of the Code requires is that the spouses who have married under the regime of the communion of assets in Goa should not dispose of certain specific assets of the marital estate except where the other spouse is given consent by authentic form. This is to avoid disputes about whether such consent was indeed given or not at a later stage.

93. But in the present case, as noted above, Yesso and Jayashri (the spouses) have signed and executed two separate but identical Wills on the same date, before the same Notary (Sub-Registrar), with the intervention of the same interpreter and in the presence of the same witnesses. There can be no dispute that both the Wills are authentic documents, even going by the definition of "authentic documents" in Article 2422 of the Portuguese Civil Code r/w the Notarial Laws (Decree No.8373). Both these documents, as noted above, have been executed in accordance with the procedure prescribed under Article 75 or 78 of the Notarial Laws (Decree No.8373). By bequeathing identical property/share to Shripad on identical terms at almost the same time and in front of the same Sub-Registrar, interpreter, and

witnesses, the spouses have manifested their respective consents by authentic documents.

94. Admittedly, Article 1766 does not prescribe any particular form to express the spouse's consent. Article 1766 does not say that the spouses' consent must be recorded and registered in some separate document. As long as the consent is expressed or manifested in some authentic form or authentic document, there would be compliance with the requirement of Article 1766. This is certainly not a case where one of the spouses wished to bequeath a specific asset to one of the sons and the other did not. Instead, this is a case where both the spouses wished to bequeath the same specific assets to the same son. To express or manifest this, both the spouses have signed and executed two separate but identical Wills on the same date before the same Notary (Sub-Registrar), with the intervention of the same interpreter and in the presence of the same witnesses.

95. Thus, even if it is held that the expression "consent by authentic form" is to be regarded as "consent by authentic document", this is a case where consent is indeed expressed or manifested by each of the spouses to the other by an authentic document. The two identical wills and the circumstances in which each of the spouses executed the same constitute the manifestation of their respective consent to each other for bequeathing specified assets to their eldest son Shripad vide authentic documents. In any case, each of the two wills (which are authentic documents) constitute separate documents qua each

other manifesting the consents of each of the spouses. In the absence of any form prescribed by Article 1766 or any specific requirement that the consent must be recorded in some Separate document, the Trial Court was right in holding that there was compliance with the requirement of Article 1766 of the Portuguese Civil Code.

96. Since there is compliance with the provisions of Article 1766 of the Portuguese Civil Code as also the various articles of the Notarial Laws (Decree No.8373)., the principle in *Supertech Limited (supra)* that where power was given to do a certain thing in a certain way, that thing must be done in that way or not at all and that the other modes of performance were necessarily forbidden, also stands complied with. In this case, the consent has been recorded in authentic form and in authentic documents. Accordingly, the First Appellate Court's reasoning about the non-compliance with the provisions of Article 1766 of the Portuguese Civil Code warrants interference.

97. Mr Lotlikar referred to the Portuguese text of Article 1766 and submitted that the original text does not refer to "consent" but refers to "acquiescence". He submitted that there is a difference between consent and acquiescence. He submitted that apart from the fact that this was a case where the spouses had consented in an authentic form or through an authentic document, based on the original Portuguese text, what was necessary was only acquiescence and not consent. Mr Lotlikar

submitted that there was overwhelming evidence on record to establish acquiescence.

98. Although the original Portuguese text refers to the expression "acquiescence", the official translation has translated this expression as "consent". Learned counsel for the parties produced several translations based on several dictionaries and other source material. However, some of the translations/source material refers to "consent", and other refers to "acquiescence". Since, in this case, consent is established by authentic form or even by authentic documents, this issue of the differences between "acquiescence" and "consent" or whether mere acquiescence, as opposed to consent, would suffice need not be pursued further.

99. Mr Lotlikar did point out that the official translation of Article 1766 of the Code made by the Government of Goa differs from the translation provided by the *Instituto de Cooperação Jurídica da Faculdade de Direito da Universidade de Lisboa*. The original Portuguese text and the translation provided by the faculty of law, University of Lisbon is transcribed below for convenience of reference:-

> *Artigo 1766º*
>
> *Os casados segundo o costume do país não podem, sob pena de nulidade, dispor determinadamente de certos bens do casal, salvo se esses bens lhes tocarem em partilha, ou não tiverem entrado em comunhão, ou se a disposição tiver sido feita por um dos cônjuges em favor do outro, ou se o*

outro cônjuge manifestar por forma autêntica a sua aquiescência.

(Redacção dada pelo Decreto nº 19.126, de a 16/12/1930)

Article 1766

Persons married according to the custom of the country may not, under sanction of nullity, dispose of specific property of the couple, except if such property is theirs as a result of a partition, or if it was not included in the communion, or if the disposition was made by one of the spouses in favour of the other, or if the other spouse expresses his/her approval by authentic form.

(As revised by Decree no. 19.126, of 16/12/ 1930)

100. There does appear to be a difference between the two translations. The Lisbon University (Law faculty) translation would further strengthen the Appellants' case, but the official translation does not weaken the Appellants' case. Therefore, even going by the official translation relied upon by Mr Desai, the impugned wills comply with the requirements of Article 1766 of the Portuguese civil code. Accordingly, even the issue of translation and its impact is not examined, at least in this matter.

101. *Zelia Gonsalves (supra)* holds that in terms of Article 1108 of the Portuguese Civil Code, the properties of the spouses get merged, where the marriage is under the regime of the communion of assets. There can be no dispute about this proposition. But Article 1766 provides that notwithstanding

such merger or community in the marital assets, one of the spouses can still bequeath specific assets of the marital estate to any person if the other spouse has given consent by authentic form.

102. In the present case, both the spouses, by separate but identical Wills, have bequeathed the very same assets to Shripad (defendant no.1). Both these Wills were executed one after the other before the same Notary (Sub-Registrar), with the intervention of the same interpreter, and in the presence of the same witnesses. Accordingly, there is not even the remotest breach of the principle under Article 1108 or the law laid down by the Hon'ble Supreme Court in *Zelia Gonsalves (supra)*.

103. *Joana Francisca Errie (supra)* was a case where the two gift deeds were executed 26 years apart (in 1956 and 1982, respectively), purporting to gift the same property in favour of two different persons. In these circumstances, the Coordinate Bench held that both the gift deeds made without the consent of the spouses were ineffective, inter alia, because there was no evidence of even inferring consent at the time of execution of the two gift deeds. This decision would not apply to the fact situation in the present case which is entirely different.

104. The decision in *Ulhas Shankar Barde (supra)* also proceeds on a fact situation which is not at all comparable to the facts of the present case. There, the Coordinate Bench was concerned with a Will executed by the father Shankar Barde on 04.12.1986

purporting to bequeath the suit property and the house existing therein belonging jointly to himself and his wife Indumati to one of their legal representatives. However, the facts disclosed that Indumati Barde had already expired on 16.11.1985. Therefore, her share had devolved inter alia on her legal representatives. In such circumstances, the Court held that Shankar Barde was not at all the exclusive owner of the suit property and the house existing therein because, admittedly, no partition proceedings were finalised upon the demise of Indumati Barde. In such circumstances, Shankar's Will purporting to dispose of a specific asset was held to be impermissible. As noted earlier, the facts in the present case are not even remotely comparable to these facts.

105. In *Claudio Francisco (supra)* the Coordinate Bench of this Court, comprising Bobde S. A., J. (as His Lordship then was) has held that a co-owner was not entitled to sell any portion of the co-owned property which was not allotted to him in a partition. Again, that is not at all the issue involved in the present case. Therefore, based upon the said decision or the provisions of Article 2177, no case is made out to void the impugned Wills made by Yesso and Jayashri with each other's consent.

106. *Mithilesh Singh (supra) and Govind Singh (supra)* relied upon by Mr Desai hold that the intention of the Legislature is to be primarily gathered from the language used and the construction which results in the rejection of words as meaningless is to be voided. This decision holds that when the words of a statute are clear and unambiguous, the Court is bound

to give effect to the meaning irrespective of consequences. By applying the principles laid down in these decisions, firstly, the language employed by the Legislature in the context of consent by authentic form and not an authentic document will have to be respected. Secondly, and in any case, this is a matter where consent has been recorded by authentic documents.

107. The First Appellate Court also failed to apply the well-settled principle that the courts must, to the extent possible, give effect to the intention of the testators rather than be astute in finding faults. This was more so in a case where the Wills were challenged after 16 years based on a bald statement that the plaintiffs were unaware of the Wills. The plaintiffs claimed knowledge in December 1998 when one of the testators, i.e. the mother Jayashri, was very much living. But the suit was instituted after her demise.

108. The First Appellate Court also failed to appreciate that the plaintiffs made patently false and vague allegations of the parents (testators) '*not being in their senses'* or that undue influence was being exerted in the plaint. But these allegations were not at all substantiated or proved. Infirmities in the registration procedures were alleged on the part of the Notary Ex-officio (Sub-Registrar) and the Interpreter, but neither of them was examined. Even the witnesses to the execution of the wills before the Sub-Registrar were not examined. There was due compliance with all the substantive and procedural formalities prescribed in the Portuguese Civil Code and the Notarial Laws (Decree no. 8373),

as discussed in the earlier paragraphs in some detail. The Plaintiff failed to establish that the suit was instituted within limitation or that the impugned wills were ineffective.

109. At this stage, it is necessary to note that the plaintiffs had, in paragraphs 14 and 15 of the plaint, attempted to raise an issue that in case the Wills were held as valid, the bequest made therein was in excess of the disposable quota or the *legitime* (legitimate quota). However, neither before the trial or the First Appellate Court nor before this Court was such a point ever pressed, even though the same was explicitly raised in the plaint. No evidence also appears to have been led by any of the parties on this point. Mr Desai merely pointed out that such a ground was raised in the pleadings. Mr Lotlikar countered by submitting that the bequest was within the disposable quota limits since the testators left behind a large estate. Even in the memo of Regular Civil Appeal No.301/2010, no ground, based on bequest beyond the disposable quota, was raised by the plaintiffs. This was also not a point that the First Appellate Court accepted.

110. For all the above reasons, it will have to be held that the impugned Wills comply with the requirements of Article 1766 of the Portuguese Civil Code & Notarial Laws (Decree no. 8373), and there are neither any procedural nor substantive infirmities in the impugned Wills, warranting a declaration that they are of no effect. The second point for determination and the first substantial question of law will also have to be answered favouring the appellants.

CONCLUSION:

111. For all the above reasons, the two substantial questions of law are answered in favour of the appellants. The First Appellate Court's impugned Judgement and Decree dated 31.08.2017 is hereby set aside, and the Trial Court's Judgment and Decree dated 06.06.2009 in Special Civil Suit No.50/2001/A is restored.

112. This Second Appeal and the Civil Application No.31/2018 are disposed of in the above terms without any order for costs.

M. S. SONAK, J.

SUCHITRA NANDAN SINGBAL
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