

Amrut

**IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 62 OF 2023**

JOSE MARIO AGNELO BERNARDO
RODRIGUES @ JOSEPH RODRIGUES
(DEC) THR. LRS Appellants

Versus

AGNELO FELIX PHILIP RODRIGUES
AND 3 ORS. Respondent

Mr Sudin Usgaonkar, Senior Advocate with Mr Raunaq Rao and Ms Pooja Naik, Advocates for the Appellants.

Mr Jose Reis and Mr Anthony D'Silva, Advocates for Respondent Nos. 1, 2 and 4.

**CORAM: M. S. SONAK, J.
DATED: 12th JANUARY 2024**

ORAL ORDER:

1. Heard Mr Usgaonkar, learned Senior Advocate who appears along with Mr R. Rao for the Appellants. Mr Reis appears along with Mr A. D'Silva for Respondent Nos. 1, 2 and 4.

2. This Second Appeal is directed against the judgment and decree dated 13.09.2022 by which the First Appellate Court set aside the judgment and decree dated 02.03.2016 made by the trial Court in Special Civil Suit No.71/2005. The trial Court had dismissed the civil suit, but the First Appellate Court has now decreed the same. Hence, this Second Appeal.

3. The Appellants are the original defendants Nos. 1 and 2 in Special Civil Suit No.71/2005. Respondent Nos. 1, 2 and 3 are the original plaintiffs in the said suit. The plaintiffs instituted a Special Civil Suit seeking a declaration that the auction dated 07.12.2000 and the chart of allotment that was made absolute by order dated 24.04.2001 in Inventory Proceedings No.65/1996/B was null and void *inter alia* because it was a product of gross fraud played by the original defendant No.1 Jose Mario Agnelo Bernardo Rodrigues alias Joseph Rodrigues on the plaintiffs.

4. In the suit, it was pleaded that the plaintiffs had given power of attorney to the late Jose to take care of the plaintiff's interest in the Inventory Proceedings. Jose was one of the co-owners of the estate in respect of which the Inventory Proceedings had been initiated. Jose, abusing the trust placed in him, purchased the estate property in the auction without bothering to inform the plaintiffs about the date of the auction so that they, too, could have participated in the auction. The allegations in the plaint are that late Jose practised fraud and attempted to acquire the estate property at a price much less than what would have been obtained from them. The plaint also points out several procedural defects and complaints about the want of notice before the auction was held *inter se* amongst the co-owners.

5. The trial Court dismissed the suit, but the First Appellate Court, upon detailed consideration of the legal position as also evidence on record, decreed the suit.

6. Mr Usgoankar firstly submits that the plaintiffs erred in filing a separate suit when, in fact, they should have filed an appeal against the Inventory orders if they were indeed aggrieved by the same. He submitted that such a suit was not maintainable, and the Appeal Court erred in decreeing the suit. Mr Usgaonkar, secondly, contended that mother, Fremiota, was a necessary party to the suit, and in her absence, no decree could have been made to set aside the auction proceedings. Finally, Mr Usgaonkar submitted that from the perusal of the power of attorney, it was clear that no power had been granted to the late Jose to bid on behalf of the plaintiffs at auction. Therefore, he contended that no fault could be attributed to Jose for not having bid on behalf of the plaintiffs.

7. Based on the above submission, Mr Usgaonkar submitted that the following substantial questions of law arise in this appeal:

- (i) Whether the finding of the Ld. Appellate Court as well as the Ld. Trial Court holding that the suit was within limitation is contrary to Articles 677 and 688 of the Portuguese Civil Code and the law laid down by this Hon'ble High Court in the case of Aruna Devi Gaekwad Vs Sanjita Uday Singh Rane, reported in 2000(2) G.L.T. 479?
- (ii) Whether the Ld. Appellate Court erred in reversing the finding of the Ld. Trial Court that in order to declare the Final Order to be null and void, all the parties to the previous suit are required to be made a party to the suit for declaring such previous decree null and void and

the mother as well as John Rodrigues alias Joao Antonio Honorato Rodrigues and his wife Rita Rodrigues were necessary parties inasmuch as the relinquishment by John Rodrigues alias Joao Antonio Honorato Rodrigues and his wife Rita Rodrigues was only pursuant to the signing of the Consent Terms in the inventory proceedings?

- (iii) Whether the finding of the Ld. Appellate Court reversing the finding of the Ld. Trial Judge that as the Plaintiffs all along the course of the inventory proceedings had notice of the various steps, no further notice of the date of auction was required, is erroneous and perverse?
- (iv) Whether the finding of the Ld. Appellate Court that the participation of the Defendant No.1 in the licitation/auction placing reliance upon the Power of Attorney dated 05.12.2000 was not only for himself but also on behalf of the Plaintiffs is perverse as the said Power of Attorney did not contain any power to participate in licitation/auction on behalf of the Plaintiffs?

8. On the other hand, Mr Reis, learned counsel for Respondent Nos.1, 2, and 4 defended the impugned judgment and decree based on the detailed reasoning reflected therein. He submitted that one of the grounds for alleging fraud against Jose was that he failed to inform the plaintiffs, who were admittedly co-owners, about the auction date. Instead, the late Jose, by taking advantage of his fraud bid at the auction on his own behalf, managed to obtain estate property at throwaway prices to the detriment of

other co-owners, including the plaintiffs. Further, Mr Reis pointed out that there was an admission in the written statement filed by Jose that he has engaged the services of Advocate on behalf of all the parties. This was in response to Mr Usgaonkar's half-hearted contention that the Advocate represented the parties before the Inventory Court.

9. The rival contentions now fall for determination.

10. In this case, clear and categorical allegations of fraud and even breach of trust were made against Jose. The First Appellate Court has not only considered the pleadings of the parties but also evidence, both oral and documentary, on record and, after appreciating legal provisions concerning Inventory Proceedings, quite correctly concluded that the suit deserves to be decreed.

11. Findings of fact have been recorded by the Appeal Court, which is normally the final fact-finding Court when it comes to the findings of fact, and there is no perversity demonstrated in the record of finding of fact so as to warrant interference in the second appeal. There were clear and cogent pleadings backed by oral and documentary evidence. The conflict of interest on the part of Jose was apparent. Jose took undue advantage of the trust reposed in him and managed to obtain the estate property without a fair and transparent auction involving all the co-owners as required under the law. Such findings warrant no interference.

12. As regards Mr Usgaonkar's first contention as to why no appeal was lodged and a separate suit was filed, firstly, no bar to the filing of such a suit has been pointed out. Secondly, this is a case where the plaintiffs have alleged fraud, and therefore, a suit was very much maintainable. A fraud, as is well settled, vitiates even the most solemn of proceedings.

13. The fraud that was alleged in this case concerned *inter alia* a complete breach of trust by Jose, who was appointed as power of attorney by the plaintiffs. The plaintiffs were possibly confident that Jose would take care of their interests and not take advantage of the power conferred upon him only to further his own personal interest. In case of conflict of interest and duty, Jose should have either given up the attorneyship conferred upon him or at least disclosed to the plaintiffs his interest in acquiring the properties. Instead, without intimating the plaintiffs about the auction date, this attorney purchased the property for himself, thereby playing fraud upon the plaintiffs.

14. In such a situation, to expect that an appeal should have been lodged against the auction proceedings and that too within a period of hardly eight days or so is unrealistic. In any case, this was a case of fraud, and the plaintiffs were entitled to maintain separate suit to establish this fraud. In appeal, there might have been difficulties in leading oral evidence because of the form of appellate proceedings. Accordingly, there is no merit in the first contention, and the substantial question of law at (i) does not arise. The suit was filed well within the prescribed period of limitation to obtain

a declaration that orders for auction and final allotment were obtained by fraud. There is no breach of any of the articles referred to in the substantial questions of law or the decision cited.

15. In this case, a suit complaining of fraud could have been maintained by any of the parties claiming that fraud was practised upon them. To such a suit, the mother was not at all necessary party. In any case, it is not as if the mother complains about her exclusion. The complaint of non-joinder is on behalf of Jose, the perpetrator of fraud, who and after him, his legal representatives no doubt wish to retain the fruits of such fraud for some time longer. No argument about the non-joinder of John and Rita was raised even though the question proposed refers to the non-joinder. There is no merit in the argument about the non-joinder of the necessary parties. Accordingly, the substantial question of law at (ii) based upon this argument does not arise, and if it arises, then the same is required to be answered against the Appellants.

16. The third contention based upon the reading of the power of attorney also deserves no acceptance. Firstly, the power of attorney appears to be a general power of attorney. However, if Mr Usgaonkar's argument that Jose was not given any specific power to bid at auction on behalf of the plaintiffs is to be accepted, then it was all the more necessary that Jose should have informed the Court, as well as the plaintiffs, regarding this position and the auction date. Based on the premise that Jose had no

power to bid at auction on behalf of the plaintiffs, there is no question of reversing or interfering with the impugned decree.

17. If Jose had no power, then the minimum that was expected of Jose was to point out to the Court that he had no such power. Therefore, it was necessary that the Court issue a notice to the plaintiffs giving them an opportunity to participate in the auction. Considering the trust that was placed upon Jose, it was the duty of Jose to intimate about the auction date. Instead, Jose took advantage of the situation by eliminating competition from the plaintiffs and purchasing estate property for less than appropriate price and to the detriment of other co-owners including the plaintiffs. The trial Court's finding that the plaintiffs had knowledge was clearly erroneous, if not perverse. The trial Court imputed knowledge to the plaintiffs from the circumstance that a common lawyer appeared for all the parties. However, as was correctly pointed out by Mr Reis, the trial court failed to appreciate that this was a lawyer appointed by Jose acting on the power of attorney granted. This position was admitted by Jose in his written statement in no uncertain terms. Accordingly, the third contention and the proposed substantial questions of law at (iii) and (iv) based thereon do not arise or are required to be answered against the Appellants.

18. On perusal of the impugned judgment and decree by the First Appellate Court, it is seen that the First Appellate Court has considered all the evidence and law on the subject. The findings of fact recorded by

the First Appellate Court are borne out from the evidence on record. There is no error of law, and accordingly, there is no question of law, much less any substantial questions of law involved in this second appeal. This entire attempt is to hold on to the estate property that Jose managed to obtain based on a fraud that he played on the plaintiffs.

19. Accordingly, this appeal is liable to be dismissed and is hereby dismissed with costs of ₹25,000/- payable within four weeks from today.

20. The costs must be deposited in this Court with intimation to the Advocates for the Respondents. After deposit, Respondents 1,2 and 4 are allowed to withdraw the same.

M. S. SONAK, J.

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