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Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 89 OF 2005

Mrs. Terezinha Martins David,
daughter of the late Antonio Baptista, major of age, resident of House No.180, Mestabhat, Near the Pick-up Stand, New Market, Margao, Goa .... Appellant.

Versus

1) Mr. Miguel Guarda Rosario Martins alias Michael Rosario Martins,
son of the said late Antonio Baptista Martins, aged about 49 years, married, businessman; and his wife

2) Mrs. Annie Martins,
daughter of Salvador D'Souza, major in age, housewife; both r/o Lawrence Apartments, and Floor, Opp. Agha Khan Road, Pajifond, Margao, Goa;

3)(Mrs. Maria Matilda Virginia Martins,)
(deleted in terms of order dated 12/10/2007 in MCA 724/07).

4) (Mr. John Jacob Rosario Martins)
(deleted as per order dated 7/1/11).

5) Cruz I. Rosario Martins,
son of the said late Antonio Baptista Martins, aged 57 years, married, businessman; and his wife

6) Mrs. Olinda Martins,
daughter of Romano Araujo, aged 49

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years, housewife;
both r/o Coelho Apartments, Flat No.5, 3rd Floor, Opp. St. Sebastian Chapel, Aquem Alto, Margao, Goa;

7) Mr. Judas Rome Rosario Martins, son of the said late Antonio Baptista Martins, aged 59 years, married, businessman; and his wife

8) Mrs. Joanita Martins,
aged 54 years, businesswoman;

both carrying on business at Indira Footwear, Indira Complex, Near Bus Stand, Ponda, Goa;

9) Mrs. Judith Martins,
daughter of the said late Antonio Baptista Martins, aged 60 years, married, housewife; and her husband

10) Mr Jose Gracias,
son of Joao Xaverino Gracias, aged 64 years, service both r/o House No.496, Dandeavaddo, Chinchinim, Salcete, Goa

10 a) Mrs. Lavita Joan Gracias
b) Jerryson Savio Gracias
c) Jovita Gracias
all residents of H. No. 496, Dandeavaddo, Chinchinim, Salcete, Goa.

11) Mrs.Eliza Martins,
daughter of the said late Antonio Baptista Martins, aged 54 years, married, housewife; and her husband

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12) Mr. Custodio Costa,
Inacio Piedade Costa, aged 58 years, service;

both r/o Flat No.B1(S-2), Second Floor, Hema Apartments, Borda, Margao, Goa;

13) Mrs. Antonieta Martins,
daughter of the said late Antonio Baptista Martins, aged 50 years, married, housewife; and her husband

14) Mr. Nelson D'Souza, - son of John D'Souza, aged 52 years, married, service;

both r/o Silver Arrow, First Floor, Flat No.102, Opp. Golden Orchard, Sundar Nagar, Kalina, Mumbai-98;

14 a) Sophia Scarlet D'Souza,
b) Shawn D'Souza,
c) Franklin D'Costa (Deleted)
d) Queenie D'Costa (Deleted)
All residents of Flat No.102,
Opp. Golden Orchard, Sundar Nagar,
Kalina, Mumbai 98.

15) Mr. Cecil David,
son of Jos David, aged 74 years, married, service, r/o Coelho Apartments, Flat No.5, 3rd Floor, Opp. St. Sebastian Church, Aquem Alto, Margao, Goa

….Respondents.

Mr C.A. Coutinho, with Mr Ivan Santimano, Advocates *for the Appellant.*

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Mr A.F. Diniz, Senior Advocate, with Mr Ryan Menezes & Ms S. Alvares, Advocates *for Respondent No.1 and 2.*

CORAM : M. S. SONAK, J.

Reserved on : 24th February 2023
Pronounced on : 16th March 2023

JUDGMENT :

1. Heard the learned Counsel for the parties.

2. This Appeal was admitted on 18th June 2008 on the following substantial questions of law :

(A) Whether the Deed of Transfer dated 8-9-1990 is null and void as it has been executed contrary to the provisions of Article 1565 r/w Article 10 of the Civil Code, 1867?

(B) Whether some of the co-heirs could execute the Deed of Transfer dated 8-9-1990 without the consent of the Appellant who was also a co-heir under Article 2016 r/w Article 2177 of the said Code?

3. On 27th January 2023, after hearing the learned Counsel for the parties and in terms of the provisions of Section 100 (5) of the C.P.C., the following substantial questions of law were formulated:

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(C) Whether non-challenge to the consent decree passed in the suit in which the Appellant was not a party, could defeat the alleged substantive rights of her inheritance to inherit the estate of the deceased? and

(D) Whether without any evidence on record the suit could be held to be time barred when the Plaintiff claimed that cause of action arose on 26/6/1994 when she came to know for the first time of the deed executed on 8/9/1990, which deed was executed without the consent?

4. Accordingly, the learned Counsel for the parties were heard on the above four substantial questions of law. Arguments concluded on 24th February 2023.

5. The Appellant is the original Plaintiff, and the Respondents are the original Defendants in Special Civil Suit No.226/1994/A instituted in the Court of Civil Judge, Senior Division, at Margao. The suit was instituted to declare the Transfer Deed dated 8/9/1990 null and void and a mandatory injunction for its cancellation. The Appellant also prayed for a permanent injunction to restrain Defendants No.1 to 4 from transferring or conveying the suit property based on the Transfer Deed dated 8/9/1990 without the written consent of the Appellant and other

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co-owners.

6. The Defendants contested the Suit and also raised a counter-claim for the cancellation of the Deed of Succession and an injunction.

7. The Trial Court, by Judgment and Decree dated 31/05/2003, dismissed the suit and partly decreed the counter-claim by cancelling the Deed of Succession. However, the First Appellate Court upheld the dismissal of the suit, set aside the Decree in the counter-claim and upheld the Succession Deed showing the Appellant (Plaintiff) as one of the successors of the late Antonio Baptista Martins.

8. The Appellant has instituted this Second Appeal questioning the dismissal of the suit on the substantial questions of law referred to above. Respondents have not questioned the rejection of their counter-claim or the declaration of the Succession Deed as valid.

9. Mr C.A. Coutinho, the learned Counsel for the Appellant, submitted that upon the death of Antonio Baptista Martins, his estate was not inventoried nor partitioned through inventory proceedings or a deed of partition. He offered that the consent decree, upon which the impugned Transfer Deed dated 8/9/1990

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was purported to be based, was made in a suit to which the Appellant was never a party. Accordingly, neither the Consent Decree nor the Transfer Deed made in pursuance of the same could bind the Appellant, given the provisions of Section 35 of the Specific Relief Act. He submits that the two courts did not adequately appreciate this crucial aspect.

10. Mr Coutinho submitted that the Transfer Deed dated 8/9/1990 violates the provisions of Articles 1565 and 2177, read with Article 10 of the Portuguese Civil Code, 1867 (Code) because the suit shop was not allotted to any of the transferees in the Transfer Deed. Further, Respondent No.3 (mother) purported to sell her share to Respondent No.1 (her son). He relied on ***Robert Felicio Coutinho & anr. vs. Maria Angelic Botelho D'Souza (deceased) through her L.R.s.***[1] in support of his contention.

11. Mr Coutinho submits that the Respondents' defence about the oral partition is barred under Article 2184 of the Code. He submitted that the two Courts committed an error apparent on the face of the record in accepting such a defence. He relied on ***Tertuliano Renato de Silva and anr. Vs Francisco Lourenco***

1. 2002(1) Goa L.T. 109

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Betterncourt De Silva and anr.[2] and *Molu Custa Molic vs. Shrinivas Roghoba Molic and ors.*[3] in support of this contention.

12. Mr Coutinho submitted that in terms of Article 59 of the Limitation Act, 1963, a suit to cancel or set aside an instrument could be filed within three years from when the facts entitling the Plaintiff to have the instrument or Decree cancelled or set aside or the contract rescinded first became known to him. He submitted that the onus of establishing that the transfer deed was known to the Appellant before 6/6/1994 was on the Respondents. He submitted that there is no evidence on record to show that the Appellant was aware of the Transfer Deed before 6/6/1994. Therefore, the finding on limitation was a perversity. He relied on *K. S. Nanji and Company vs Jatashankar Dossa and others*[4] to support his contention.

13. Mr Coutinho submitted that there were neither any pleadings nor any evidence to establish that the suit shop was, at any time, made a partnership asset. Even the transfer deed records that the mother had half share in the suit shop when, admittedly, the mother was not even claimed to be the partner in the so-

2. [2017] (2) Goa L.R. 389 (PB)]
3. Second Appeal No.21 /2009 decided on 14/2/2014.
4. AIR 1961 SC 1474

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called partnership firm. He submitted that no documents like partnership deeds, balance sheets, etc., were produced on record to prove the partnership's existence as claimed.

14. For all the above reasons, Mr Coutinho submitted that the substantial questions of law, as framed, may be answered in favour of the Appellant, and based thereon, her suit be decreed.

15. Mr A.F. Diniz learned Senior Advocate for Respondents No.1 and 2 submitted that the finding about the suit being barred by limitation was a mixed question of law and fact. He submitted that the evidence on record backs the concurrent findings on this limitation issue. He, therefore, offered that no substantial question of law on the issue of limitation was involved in this Appeal. He relied on ***Jamila Begum (Dead) thr. L.R.s. vs. Shami Mohd. (Dead) thr. L.R.s. and anr.***[5] in support of this contention.

16. Mr Diniz submitted that the transfer deed was based upon the consent decrees in earlier suits that the Appellant had full knowledge. He submits that in the absence of any challenge to the consent decrees, the suit only to challenge the transfer deed made in pursuance of the consent decrees was not even

5. (2019) (2) BCR 201

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maintainable. Mr Diniz, therefore, submitted that the two Courts were justified in dismissing the Appellant's suit.

17. Mr Diniz submitted that the Appellant did not question the existence of a partnership between the father and two sons, at least qua the two shops, which was the subject matter of the consent decrees in two separate suits. He submitted that there was no evidence about the two shops being leased. He offered that the Appellant retained the space behind the shop and the earlier house of her father. He submitted that all this proves that the Appellant was duly settled by giving her a portion of her family estate at the time of her marriage. Mr Diniz submits that these are all findings on fact, backed by evidence on record. Accordingly, he submits that no substantial question of law arises in this Appeal.

18. Mr Diniz submits that the Trial Court had dismissed the suit because the Appellant took no steps to appoint a guardian for Defendant No.4, who was admittedly of an unsound mind. He submits that this finding was not even challenged before the First Appellate Court and had, therefore, attained finality. He submits that the non-appointment of a guardian for an unsound Defendant is a vice that goes to the root of the maintainability of the suit. He, therefore, submits that no case is made out to

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interfere with the impugned decrees.

19. Mr Diniz pointed out that this Appeal was dismissed against some of the parties considering the order dated 28/6/2007 and other orders on record. He submitted that dismissal of the Appeal against some of the Respondents entails dismissal of the entire Appeal as otherwise, there would be inconsistent decrees regarding the same subject matter. He relied on ***Frank Moraes (Deceased) thr. L.R.s. vs. Joaquim de Mascarenhas & ors***.[6] in support of this contention.

20. Mr Diniz submitted that the evidence on record had established the existence of a family arrangement. He offered that such a family arrangement was binding upon the family members, who were estopped from setting up a case contrary to such a family arrangement. He relied on ***Kale and ors. vs. Deputy Director of Consolidation and ors.***[7] in support of this contention.

21. Mr Diniz relied upon ***Md. Noorul Hoda vs. Bibi Raifunnisa and ors.***[8] and ***Bahubali Estates Ltd. vs. Sewnarayan Khubchand and ors***[9] on the limitation and

6. F.A. 62/1997 decided on 5/8/2004
7. (1976) 3 SCC 119
8. (1976) 7 SCC 767
9. AIR 2022 Cal 294

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partnership issues. He submitted that this Appeal should be dismissed, relying upon these two decisions.

22. The rival contentions now fall for my determination.

23. The dispute, in this Appeal, concerns shop No.25 in the property known as "9th Plot of UDEGO or MESTABATA", which bears Land Registration No. 9634 at Book B New and Matriz (Revenue) no.147 (rustic) and 123 (urban) and bears Chalta no.67 at P.T. Sheet No.239, at New Market in Margao City (suit shop).

24. The late Antonio Baptista Martins admittedly purchased the suit shop and the property beneath the same by a registered Sale Deed dated 12/1/1972. Accordingly, it was the Appellant's case that the suit shop and the property beneath the same were owned by her father, Antonio and her mother, Maria Matilda Virginia Martins (Matilda) (Defendant No.3). The Appellant had pleaded in the suit that her father Antonio operated a shoe shop under the name and style of "Sapataria Modisto" in the suit shop since much before the liberation of Goa. This continued after the purchase of the suit shop in 1972.

25. Antonio expired on 12/4/1980. His widow-moiety holder Matila (Defendant No.3) and his eight children survived him.

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The Appellant was the eldest daughter of Antonio and Matilda. All the Defendants, except Matilda (Defendant No.3), are the children/their spouses or legal representatives of the children/their spouses. Admittedly, Antonio had not left behind any will or gift. However, a Deed of Succession was executed on 12/4/1994, which, according to the Appellant, establishes the position that she, along with other children/spouses, were the legal heirs of late Antonio and Matilda.

26. In the suit, the Appellant pleaded in paragraph 7 of the Plaint that she was shocked to learn about six weeks before the institution of the suit that a transfer deed was executed on 8/9/1990 by which Defendants No.3, 5, 6, 7, and 8 purported to transfer the suit shop in favour of Respondents No.1, 2 and 4 without consent or intervention of the Appellant and Defendants No.9 to 15.

27. In paragraph 9 of the Plaint, the Appellant pleaded that on 8/8/1994, the Appellant saw Defendant No.1 negotiating with an unknown person to sell the suit shop and the property beneath the same. Therefore, on 9/8/1994, the Appellant caused a publication of a notice in the daily "Herald" cautioning the public about her undivided co-ownership rights in the suit shop and the property beneath the same. Finally, in paragraph 13, the

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Appellant pleaded that the cause of action arose on or about 26/6/1994 when the Appellant came to know for the first time about execution of the Transfer Deed dated 8/9/1990.

28. In short, the Appellant's case in the Plaint is that she is the co-owner of the suit shop and the property beneath the same, having inherited the same from her father, the late Antonio. The Appellant has further pleaded that since the suit shop was purported to be transferred to Defendants No.1, 2, and 4 by Defendants No.3, 5, 6, 7, and 8 without her intervention or consent, such a transfer deed is null and void and, in any case, not binding upon her.

29. Based upon this, the Appellant sought to declare the transfer deed dated 8/9/1990 as null, void, and inoperative and further that the Appellant has the undivided right in the suit shop and the property beneath the same. The Appellant also applied for a mandatory injunction to cancel the Transfer Deed. The Appellant finally applied for a permanent injunction restraining Defendants No.1 to 4 from transferring or conveying the suit shop and the property beneath the same without the Appellant's and other co-owners written consent and/or from inducting any person whosoever into the suit shop in any capacity whatsoever.

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30. Defendants No.1, 2, and 10 filed a written statement and a counter-claim. They submitted that the suit was barred by limitation because the Appellant was aware of the Transfer Deed dated 8/9/1990, more than three years before the institution of the suit on 30/8/1994. They submitted that the suit shop and the property beneath it was a partnership property operating under the name and style "Sapataria Modista". They pleaded that this partnership was founded by the late Antonio and his three sons. Defendants No.1, 5, and 7.

31. They submitted that Antonio had four sons and four daughters, of which one son John Martins (Defendant No.4), was of unsound mind. Four daughters were settled by payment of sufficient dowry at their marriages, and the late Antonio and his three sons founded the partnership. The suit shop and the property beneath the same were brought into this partnership and were an asset of this partnership firm. Based upon all this, they contended that neither the Appellant nor her three sisters had any right, title, or interest in the suit shop.

32. The above Defendants pleaded that some dispute arose after the demise of Antonio on 12/4/1980 over the immovable estate left behind by the late Antonio. This dispute was between the late Antonio and his three sons. Therefore, three sons

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instituted three separate suits. All these three suits were compromised and disposed of by consent decrees drawn on 7/3/1987. They submitted that in terms of one such consent decree dated 7/3/1987, the late Antonio and his two sons Judas and another agreed to surrender their rights in the suit shop, which would be then transferred to Miguel and John. Based upon this consent decree dated 7/3/1987, the Transfer Deed dated 8/9/1990 was executed, effecting the transfer favouring Miguel and John.

33. The written statement pointed out that the family arrangement was made regarding two other shop premises, held by the partnership firm "Golden Footwear Agency" and "Goodwill Footwear and General Stores" operated by the late Antonio and three sons.

34. In short, the contesting Defendants No.1, 2, and 10 pleaded that the suit shop and property beneath the same was partnership property, not the ancestral property of late Antonio and Matilda. They pleaded that there was a family arrangement in which the daughters were settled by paying dowry at their marriages. In partnership with their father, the sons operated three shops, including the suit shop. A plea of oral partition was also raised in the written statement. Based upon all this, the

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contesting Defendants contended that the suit should be dismissed.

35. The contesting Defendants raised a counter-claim to declare the Deed of Succession dated 12/4/1994 made after Antonio's death null and void. This counter-claim was raised because this deed would contradict the case pleaded in the written statement about oral partition and the three shops being partnership assets.

36. The Trial Court, as noted earlier, dismissed the suit. But partly allowed the counter-claim and cancelled the Deed of Succession dated 12/4/1994. The Appeal Court did not finally interfere with the Trial Court's Decree dated 31/5/2003. However, the Appeal Court held that the Appellant's contention based upon Articles 2177 and 1565 of the Code could have been accepted. The Appeal Court partly allowed the Appeal and set aside the Decree in the counter-claim, thereby restoring the Succession Deed dated 12/4/1994. But the Appeal Court also held that the suit was time-barred.

37. As against restoration of the Succession Deed dated 12/4/1994, none of the Respondents have bothered to file an appeal or contest the said part of the First Appellate Court's

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Decree dated 16/2/2005, and this Appeal is instituted by the original Plaintiff being aggrieved by the rejection of her suit concerning the suit shop and the property beneath the same.

38. The first issue to be considered is the issue of limitation. Regarding this, reference must be made to the substantial question of law (D) at this Judgment's commencement. Mr Diniz is justified in contending that the limitation, in this case, involved a mixed question of law and fact. However, the question is whether any evidence on record backs the fact-portion of the finding or whether the same is a product of no evidence, as contended by Mr Coutinho.

39. The limitation period, in this case, was governed by the provisions of Article 59 of the Schedule to The Limitation Act 1963. For a suit to cancel or set aside an instrument or a decree or for the rescission of a contract, the period of limitation prescribed is three years. The time for which this period begins to run is when the facts entitling Plaintiff to have the instrument or Decree cancelled or set aside or the contract rescinded *first become known to him.* Therefore, the crucial question, in this case, was when the Transfer Deed dated 8/9/1990 became known to Plaintiff.

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40. In *K.S. Nanji and Company* (supra), while considering the expression "when the person having the right to the possession of the property first learns in whose possession it is" in Article 48 of the old Limitation Act, the Hon'ble Supreme Court explained that where a person has a right to sue within three years from the date of his coming to know of a certain fact, it is for him to prove that he had the knowledge of the said fact on a particular date, for the said fact would be within *his peculiar* knowledge. Once sufficient evidence is adduced on this aspect, the onus would shift on the defendants.

41. In ***Talyarkhan v Gangadas I.L.R. (1935) 60 Bom. 848*** *Rangnekar, J., formulated the legal position thus:*

> *"The onus is on the Plaintiff to prove that he first learnt within three years of the suit that the property which he is seeking to recover was in the possession of the defendant. In other words, he has to prove that he obtained the knowledge of the defendant's possession of the property within three years of the suit, and that is all. If he proves this, then to succeed in the plea of limitation the defendant has to prove that the fact that the property was in his possession became known to the Plaintiff more than three years prior to the suit."*

42. The Hon'ble Supreme Court in *K.S. Nanji (Supra)* specifically approved the above formulation of the legal position. However, the two Courts in the present case have not applied the law as laid down by the Hon'ble Supreme Court and our High

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Court in evaluating the evidence on the limitation issue.

43. Applying the law in the context of Article 59 of the Limitation Act, the Appellant would have to discharge the onus of proving that she first came to know of the facts entitling her to have the Transfer Deed dated 8/9/1990 set aside within three years from the date of institution of the suit on 30/8/1994. In other words, the Appellant had to prove that she became aware of the Transfer Deed dated 8/9/1990 about six weeks before the institution of the suit on 30/8/1994 as pleaded by her in paragraph 7 of her Plaint and not at any time beyond three years from the date of institution of the suit.

44. If the Appellant were to prove this, then the onus of proving that the Appellant was aware of the Transfer Deed dated 8/9/1990, more than three years before the institution of the suit, would shift upon the Defendants in the suit. This would be the purport of the provisions of Article 59 of the Limitation Act and the decision of the Hon'ble Supreme Court in *K.S. Nanji and Company* (supra).

45. The Trial Court has non-suited the Appellant on the ground of limitation by simply observing that "*It appears that the Plaintiff who is the elder sister of the defendant no.1 and stays at*

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Margao and also occupies space which is at the back side of the suit shop was fully aware of the proceedings of Special Civil Suit Nos. 105/1984/A, 77/1984/A, and 78/1984/A which were pending between brothers in respect of the partnership business, and that all three suits came to an end by filing compromise terms way back in the year 1987".

46. Based upon the above tentative finding or rather the surmise and the observations in paragraph 27 of the impugned Judgment and Decree that during the trial, the Plaintiff had not mentioned that she was not aware of the Court proceedings or that she did not know the document Exhibit PW.1/F (Transfer Deed dated 8/9/1990), the Trial Court concluded that the suit was barred by limitation. To my mind, this was a slender base to non-suit the Appellant on the limitation issue. The Trial Court failed to account for the evidence where the Appellant disclaimed knowledge about the Court proceedings to which she was not a party and, of course, the transfer deed.

47. The Appellant had consistently maintained that she came to know about the Transfer Deed hardly six weeks before the institution of the suit. This would mean that the Appellant learned about the Transfer Deed on or about 19/7/1994 because the suit was instituted on 30/8/1994. The Appellant has also

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pleaded in that suit that on 8/8/1994, she saw Defendant No.1 trying to negotiate with an unknown person about the sale of the suit shop, and she also heard that Defendant No.1 was trying to sell the said property and suit shop.

48. The Appellant, in her evidence, deposed that she filed the suit because defendant No.1 was trying to sell the suit shop, which belonged to all the brothers and sisters. She also deposed about seeing Defendant No.1 measuring the suit property along with one person he perhaps intended to sell the suit shop and the property beneath the same. Mr Diniz argued that there was variation between the pleadings and proof. He submits that the pleadings were that the Appellant became aware of the transfer deed in July 1994, but in evidence, she deposed about being aware on 8/8/1994. He submitted that this exposes inconsistencies in the Appellant's case.

49. In my Judgment, however, there is no evidence on record to show that the Appellant was aware of the transfer deed dated 8/9/1990, more than three years before the institution of the suit on 30/8/1994. Based upon Mr Diniz's arguments, it cannot be said that there was any variation between the pleadings and the proof. Ultimately, even the time gap between 19/7/1994 and 8/8/1994 is not so significant as to invite some adverse comments

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or hold that the suit was barred by limitation.

50. The Appellant had pleaded that she came to know about the Transfer Deed dated 8/9/1990 "*about six weeks ago*". This corresponds approximately to the incident of 8/8/1994 pleaded by the Appellant in paragraph 9 of the Plaint. Such phrases are not to be construed with mathematical precision. The Appellant's conduct in issuing a public notice on 9/8/1994 is also relevant. Merely because the Appellant may have lived behind the suit shop was no ground to infer that the Appellant was aware of the litigation between the brothers and the father or, in any case, that the Appellant was aware of the transfer deed dated 8/9/1990 much in time, more than three years from the date of the institution of the suit.

51. The finding recorded by the Trial Court on this aspect is backed by no evidence whatsoever except, perhaps, a self-serving and vague statement of the Defendant No.1. The Trial Court's finding on the issue of the Appellant's knowledge is, therefore, vitiated by perversity. The same has no backing of any legal evidence or, in any case, is contrary to the weight of the evidence on record. The trial Court has also not followed the law about shifting of onus.

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52. The Appeal Court has also endorsed the line adopted by the Trial Court by falling into the same errors. Even the Appeal Court failed to appreciate that the time gap between 19/7/1994 and 8/8/1994 was insignificant. Either of the dates sufficed to bring the suit within limitation. Based upon this time gap, the Appellant's statement in the pleadings and her evidence about her acquiring knowledge of the transfer deed *about* six weeks before the institution of the suit could not have been doubted. Both the Courts failed to consider the onus of proof in such matters as explained by the Hon'ble Supreme Court in *K.S. Nanji and Company* (supra).

53. The evidence produced on record by the Appellant was more than sufficient for the onus to shift upon the Defendants to establish that the Appellant had knowledge of the Transfer Deed dated 8/9/1990 more than three years before the institution of the suit. Moreover, this onus was not even attempted to be discharged by the Defendants to the suit. The finding on limitation was thus vitiated by perversity and the failure to apply correct legal principles.

54. *MD. Noorul Hoda (Supra),* relied on by Mr Diniz, was a case of a benamidar who had full knowledge of the Decree or instrument belatedly alleged to be the product of fraud. This was

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also a case of derivative title. In such peculiar facts, the bar under Article 59 was applied. This decision cannot assist the Respondents and is distinguishable on facts.

55. Accordingly, the substantial question of law at (D) will have to be answered favouring the Appellant and against the contesting Defendants.

56. The next question which arises for consideration is whether the Appellant could have been non-suited for failure to challenge the consent decree dated 7/3/1987 in Special Civil Suit No. 105/1984/A. This is reflected in the substantial question of law at (C) above.

57. Admittedly, the Appellant was not a party to Special Civil Suit No. 105/1984/A. Judas Martins instituted this suit against Michael Martins, John Martins, and Cruz Rosario Martins. The consent decree dated 7/3/1987 passed in this Suit records that Judas and Cruz Rosario Martins shall relinquish and surrender all their partnership and all other rights, interests, and claims in the partnership business "Sapataria Modista", having its premises at Shop No.25 at Francisco Loyola Road, New Market, Margao, Goa in favour of Michael and John Martins. The pleadings in Special Civil Suit 105/1984/A are not on record. However, there

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is no dispute that the Appellant was not even a party to the civil suit.

58. On the premises that the Appellant was the eldest sister in Martin's family and, therefore, she must have been aware of the litigation between the brothers, is an inference that could not have been drawn based upon the material on record. In any case, since the Appellant was not even a party to this suit, and the consent decree in this Suit had merely recorded that the two of the brothers were surrendering their rights in favour of the other two brothers. Therefore, there was no occasion for the Appellant to challenge this consent decree. Based upon such a decree in a suit to which the Appellant was not even a party, the Appellant's rights as a co-owner could never have been defeated.

59. Assuming that the Transfer Deed dated 8/9/1990 was a consequence of the consent decree dated 7/3/1987, it was sufficient for the Appellant to challenge the transfer deed because it is based on the transfer deed that the Appellant's brothers attempted to sell the co-ownership property. Suppose party 'A' commits to sell or surrender rights in the suit property to 'B', and a consent decree settles such dispute. In that case, it is not as if 'C', who is an actual owner of the suit property or who has the right and interest in the said property, cannot question the sale or

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surrender simply because 'C' may not have challenged the consent decree in a suit between 'A' and 'B'. The consent decree in the suit, in no manner, binds 'C'. Therefore, 'C' was not obliged to challenge such a consent decree. However, it was sufficient for 'C' to challenge the transfer or surrender effected pursuant to such consent decree because such transfer directly affected 'C's' rights and interests in the suit property.

60. The consent decree, in this case, only records the agreement or commitment to surrender or transfer. Therefore, even if the consent decree were to remain, it would not affect the Appellant's rights. The impugned transfer deed purports to affect the transfer of the suit shop to the detriment of the Appellant's rights as a co-owner. After upholding the succession deed, at least, the Appeal Court could not have approved the trial Court non-suiting the Appellant for want of challenge to the consent terms in a suit to which she was never a party.

61. Therefore, the Appellant could not have been non-suited for failure to challenge the consent decree dated 7/3/1987, which was, in any case, not binding upon the Appellant because the Appellant was not even a party in the suit where such a consent decree was issued. Therefore, the substantial question of law at 'C'

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will have to be answered favouring the Appellant.

62. The next question is whether the Transfer Deed dated 8/9/1990 is void, being contrary to the provisions of Articles 1565 and 2177, read with Article 10 of the Code. This is reflected in substantial questions of law at (A) and (B) referred to above. In principle, even the Appeal Court has accepted the legal position favouring the Appellant. But due to the findings on other issues declined relief to the Appellant.

63. Admittedly, the Appellant is the daughter of the late Antonio and Matilda. The Deed of Succession dated 12/4/1994 establishes this position, without a doubt. The Appellant and most of the Defendants were involved in making this Deed of Succession dated 12/4/1994. Accordingly, the Appeal Court has dismissed the counter-claim seeking cancellation of this Deed of Succession dated 12/4/1994. This dismissal was never challenged by the contesting Defendants who had raised the counter-claim.

64. Article 1565 of the Code provides that the parents or grandparents shall not be entitled to sell or mortgage to children or grandchildren if the other children or grandchildren do not consent to the sale or mortgage.

65. In ***Pemavati Basu Naik and ors. vs. Suresh basu Naik***

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and anr.[10] the Court has held that under Article 1565 of the Code, there is an express bar under which the parents cannot sell immovable property to the children without the consent of all the children.

66. In ***Norberto Paulo Sebastiao Fernandes & ors. vs. Gabriel Sebastiao Idalino Fernandes and ors.***[11] the learned Single Judge of this Court has expressly rejected the contention that provisions of Article 1565 of the Code stand repealed after the extension of The Transfer of Property Act, 1881 to Goa. On the contrary, the learned Single Judge of this Court (F.M. Reis, J.) held that the provisions of Article 1565 of the Code were enacted to protect and ensure that the legitimate does not get affected and, as such, deal with "succession". Under this provision, there can be no dispute that the parents are not entitled to convey and/or sell their property in favour of their children or grandchildren without the consent of other children/grandchildren.

67. In *Norberto Fernandes* (supra), reliance was placed upon a decision of the Judicial Commissioner's Court in Civil Revision Application No.208/1980 (Dr Couto, J) in which the following

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10. 2012(2) Goa LR 282 (Bom)

11. Second Appeal no. 3/2006 decided on 9/12/2011

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observations were made :

> *"7. Coming now to the merits of the Revision, I may say at the outset that the learned Judge did not commit any illegality, nor he exercised his jurisdiction with material irregularity. Undoubtedly, the Transfer of Property Act repealed the Chapter of the Civil Code dealing with the contract of "purchase and sale", but, as correctly observed by the learned Judge, Art. 1565 is a provision by nature special and intimately connected with the succession law. In fact, the provision of Art. 1565 is aimed to protect the shares in the estate of their parents guaranteed by law to the children. It specifically prohibits the sale or hypothecation of properties by the parents to any of their issues without prior consent of the other issues and therefore, is meant to defend the issues against collusions between the parents and any of them in prejudice of the others. The Portuguese succession law is still in force in this Territory and as such, the provision of Art. 1565, being intimately connected to the said law, has to be construed as continuing in force. I, therefore, am unable to accept the contentions of the petitioners to the contrary."*

68. In *Norberto Fernandes* (supra), the learned Single Judge of this Court referred to the Commentary of Dr Cunha Gonsalves, Tratade de Direito Civil, Vol. VIII pages 506-507. The same reads thus :

> *"On the contrary, the purchases and sales made with infraction of Art. 1565, which the Ord. Felip. said were none or of no effect, are only relatively null or simply annullable. And it is not little; because this nullity has only*

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the aim of impeding the efficious gifts; and it would be enough that the legislator submitted himself to the regime of these gifts, instead of radically annulling them. This nullity can only be applied for by any of the sons, whose consent would be needed for the validity of the contract. It is a case of protecting a merely private interest, exactly as in the case of the reduction of inofficious gifts. Can the Judge reduce a gift of such type, on his own, without any interested party applying for it, proving the inofficiousness? Certainly not.

However, it is to be noted that, without prejudice to Art. 1565 being a protection of the 'legitima' (legitimate shares) of the descendants, there is no need to wait for the death of the father or grand father vender to apply for the annulment of the sale, because it is not necessary to prove, concretely, the effects of the same 'legitimas', the suspicion is enough, the legal presumption of juris et de jure, that the same Art. 1565 established, declaring the contract anuullable.

Finally, the case of Art. 1565, without prejudice to the reference to the preceding articles, is not comprised in the sanction of art. 1567, as it can be inferred from the reference to interposed person. The sales or purchases by interposed person have the aim of illuding the prohibition of direct contracts. But, this can only have some efficacy, till the interposition is not discovered and proved, in the cases of arts. 1562, 1564 and 1565 and it would be absolutely useless in the remaining cases. For the interposition of person it would not be necessary that the law should prohibit to some one else the purchase of an undivided share, which prohibition does not exist in law. But, the sale of the undivided right, made to the

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interposed person, shall be covered by the preference, when the interposition is not discovered."

69. Thus, from the above decisions, it is clear that the provisions of Article 1565 of the Code are still in force. Therefore, in terms of the said Article, Matilda, the mother, was not entitled to transfer her share in the suit shop to her two sons without the consent of the other sons and daughters. The Transfer Deed dated 8/9/1990 was thus hit by the provisions of Article 1565 of the Code, which are still in operation.

70. Similarly, Article 2177 of the Code provides that a co-owner may not, however, dispose of any specific part of the common property unless the same is allotted to him in partition; and the transfer of the right which he has to the share which belongs to him may be restricted in terms of the law. In ***Jose Antonio Philip Pascoal da Piedade Carlos dos Milagres Miranda vs. Joao Luis Laurente dos Milagres Miranda***[12] , a co-owner is not entitled to dispose of either entire property or any specific portion unless and until his share is allotted, partitioned, and separated in loco.

71. The contention about the repeal of Article 2177 of the Code by the provisions of Section 44 of the Transfer of Property

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12. 1999 (1) Goa LT 77

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Act, was rejected in the case of *Robert Felicio Coutinho & anr.* (supra). In ***Caridade and anr. vs. Domingos Fernandes and anr.***[13] it was held that under the provisions of Article 2177, which are still applicable to the State of Goa, alienation of a property in the form of a Gift Deed by any Donor unless the said property exclusively belongs to the Donor, is prohibited. In ***Joana Errie vs. Albano Vaz and ors.***[14]**,** this Court has held that transfer by one co-owner without consent of others is prohibited under Article 2177 of the Code, which continues to be in force in the State of Goa.

72. The above position of law was reiterated in *Norberto Fernandes* (supra) by referring to the decision in *Robert Felicio Coutinho* (supra). The relevant observations from *Robert Felicio Coutinho* (supra), read as follows :

> *"**8**. Article 2177 of the Portuguese Civil Code, deals with the substantive rights of the co-owners and prescribes the mode or puts an embargo on unfetted rights to alienate the property held jointly by others. A procedural law can be deemed to have been repealed if it is in conflict with the general procedural law. Since, this law deals with the substantive rights of the parties, the provisions of the Transfer of Property Act cannot be said to have impliedly repealed the provisions of the Portuguese Civil Code. The Transfer of Property Act is a general statute and the Portuguese Civil Code is a special statute. The provisions of the*

13. 2014 (2) Goa LR 530

14. 2015 (1) Goa LR 293 (Bom) (PB)

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special statute, which is applicable to the State of Goa would prevail over the provisions of the general statute. The learned Single Judge of this Court in the matter of Jose Antonio Philip Pascoal da Piedade Cirilo dos Milagres Miranda and another V/s. Joao Luis Laurente dos Milagres Miranda and others (supra) has after careful consideration of Article 2177 of the Portuguese Civil Code come to the conclusion that Article 2177 of the Portuguese Civil Code prohibits the alienation of a property in the form of a gift of any person unless the said property exclusively belongs to the Donor. The learned Single Judge of this Court has further held that Article 2177 of the Portuguese Civil Code does not entitle the co-owner to dispose of either the entire property or any specific portion of any property unless and until the share of such co-owner is allotted, partitioned and separated in loco".

73. Therefore, given the provisions of Articles 1565 and 2177 of the Code, it is apparent that the Transfer Deed dated 8/9/1990 was null and void. Furthermore, the suit shop was not allotted to the transferors in the Transfer Deed dated 8/9/1990 either by a Deed of Partition or any inventory proceedings. Therefore, the transferors were only the co-owners, entitled to an undivided share in the suit shop. The transferors could, therefore, not have transferred this suit shop in disregard to the provisions of Articles 1565 and 2177 of the Code.

74. Possibly to escape from the consequences of Articles 1565 and 2177 of the Code, the contesting Defendants raised a plea about the suit shop being a partnership asset or that there was an

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oral partition between the family members. Both the pleas are not identical and, to some extent, inconsistent. However, Mr Diniz pointed out that the Defendants are entitled to raise even mutually incompatible pleas by way of defence.

75. There is no evidence whatsoever about the suit shop being brought into the firm's stock. The suit shop was neither acquired nor purchased by the so-called firm. There is no evidence of registration of the firm. There is no evidence of the suit shop being declared as the firm's asset in any statutory or non-statutory returns or the accounts. On the contrary, a registered partnership deed was produced in *Bahubali Estates ltd (Supra).* Besides, there was overwhelming evidence about the property being throughout treated as partnership property. There were admissions, and the conduct also established this position.

76. In *Lachhman Das v/s Gulab Devi* A.I.R. 1936 All 270(D.B.), it was held that persons may be mere co-owners of a property and may be partners in the profits made out of its use. Thus persons may be co-owners of a coal mine-take the case of two brothers to whom it may have been devised by the will of their father. However, the mere fact that they work the mine in partnership does not make the mine itself a part of the partnership property. The mere use of the property by the

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partnership for its business does not make the property as belonging to the partnership.

77. To the same effect are the observations in *Arm Group Enterprises v/s Woldorf Restaurant* AIR 2003 SC 4106 and *Arjun Tankar v/s Shantaram Tankar* (1969)3SCC555.

78. In any case, property that does not even exclusively belong to the so-called partners cannot become partnership property to the exclusion of the other co-owners of the property who are not partners in the firm. Qua the partners, the issue of partnership property may be relevant, but not qua co-owners who have nothing to do with the so-called partnership or its business.

79. Therefore, in this case, it is evident that the plea of partnership property was a weak and misconceived attempt to ward off the legal effects of Articles 1565 and 2177 of the Code. Besides, both in terms of the consent decree or the case of a partnership as pleaded, Matilda was never a partner in the so-called partnership. Yet Matilda was one of the transferors in the impugned transfer deed dated 08.09.1990. The deed refers to Matilda as the moiety holder having half rights to the suit shop. If Matilda, the mother, had rights to the suit shop, then even the family's daughters had rights of co-ownership to the suit shop by

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the same logic. The contesting defendants never explained this aspect.

80. In so far as the plea of oral partition is concerned, firstly, there is no evidence whatsoever to sustain such a plea. Merely stating that there was some family arrangement by which four daughters of Antonio and Matilda were given dowry at the time of their marriages is insufficient to spell out the ingredients of the family arrangement or an oral partition. Secondly, in terms of Article 2184 of the Code, a partition which is merely severance of a joint status cannot be effected orally and has necessarily to be by a written document.

81. The decision in *Kale and others* (supra) does not apply to the facts of the present case because there are neither any serious pleadings nor any proof about a family arrangement. *Kale and others* (supra) was a case where a family partition was pleaded and proved. Further, some parties seeking to deny the existence of such family arrangements had taken advantage of the same family arrangement. The Hon'ble Apex Court held that the doctrine of estoppel would be attracted. The factual position in the present case is not at all comparable.

82. Regarding oral partition, a reference can be usefully made

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to the provisions of Article 2184 of the Code, which provides that the partition of immobile assets is null if not carried out in a public deed or public proceedings. Thus, the Defendants, in this case, have neither proved that there was any oral partition. Moreover, given the provisions of Article 2184, it would appear that such an oral partition is not even contemplated under the Portuguese Civil Code 1897. Thus, the substantial questions of law at (A) and (B) will have to be answered in favour of the Appellant.

83. The objection, based upon the non-appointment of a legal guardian for Defendant No.4, does not survive because Defendant 4, impleaded as Respondent No.4 in this Court, expired and was deleted from the array of Respondents. Admittedly, Respondent No.4 died bachelor, leaving no legal representatives other than those already on record. Respondent No.5 was even appointed as a guardian on behalf of Respondent No.4 in this Court.

84. The interest of Respondent No.4 was adequately represented by Respondent No.1 and also Respondent No.5 before the Trial Court and the First Appellate Court. Moreover, the First Appellate Court did not even go into appointing a guardian for Respondent No.4 before the Trial Court. In any case,

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post-demise of Respondent No.4 without leaving behind any L.R.s. other than those already on record, there is no good reason to deny the Appellant the relief in this Appeal.

85. The last contention about the Appeal being dismissed against some of the Respondents for failure to take steps to serve them is also not very well founded. No formal orders for dismissal are found on record. Ultimately, all the Respondents were duly served and had full opportunity to contest this Appeal. In the peculiar facts of the present case, orders, in this case, would not result in any contradictory decrees. The contesting Respondents were served, and they contested these proceedings vigorously. Based upon this ground, no relief can be denied to the Appellant.

86. The evidence on record shows that the joint family property was purported to be exclusively usurped by the brothers to exclude the sisters. Merely because one of the sisters deposed in favour of the brothers does not mean that the issue of family arrangement or oral partition was duly proved. There is no evidence about providing a sufficient dowry to the daughters of the house. However, even if it is assumed that some dowry was provided to the daughters, that does not mean that the daughters cease to have any right in the family property. The rights of the daughters could not have been extinguished in the manner in

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which they have been attempted to be extinguished by the brothers, post the father's demise.

87. Mr Coutinho explained that no suit was filed regards two other shops because the family did not own the said shops. But, the family only had tenancy rights. In this case, the Deed of Succession stands under the Judgment and Decree of the Appellate Court. The Deed of Succession recognizes the Appellant as one of the L.R.s of deceased Antonio and Matilda. Considering this position, the suit should have been decreed and not dismissed.

88. Therefore, for all the above reasons, the substantial questions of law are answered in favour of the Appellant.

89. The Appeal is allowed, and the suit is decreed in terms of prayers clauses (a), (b), and (c) of the Plaint, which read as follows :

> "(a) declaring that the said deed dated 8/9/90, registered with the Sub-Registrar of Salcete under No. 672 at pages 259 to 275 at Bock no. I, Volume no. 220, is null, void and inoperative and that no title in the same is passed to the Defendants nos. 1, 2, and 4 and further that the Plaintiff has an undivided right in the same;

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(b) of mandatory injunction directing the Sub Registrar of Salcete, Margao, to cancel the registration in their records. under 672, at pages 259 to. 275 at Book no.I, T.M.O. Volume no. 220 and directing the Defendants nos. 1, 2, 3 and 4 to produce the original of the said deed for cancellation and are also entitled to the cancellation of the same by this Hon'ble Court for all intents and purposes.

(c) of permanent injunction restraining the Defendants nos. 1, 2, 3, and 4 from transferring or conveying the said property in any manner whatsoever to any one whosoever ever in future except with the written consent of the Plaintiff and other co-owners of the same, and/or from inducting any person whosoever into the same in any capacity whatsoever."

90. Misc Applications, if any, are also disposed of. There shall be no orders for costs.

M. S. SONAK, J.