

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

**WRIT PETITION NO. 660 OF 2019
WITH
CIVIL APPLICATION NO. 149 OF 2019**

1. Vinayak R. Mahale,
son of late Raghuvir R. Mahale, aged 72
years, widower, retired, residing at House
No.86, Ward No.12, Mala, Panaji, Goa.
2. Viren Vinayak Mahele,
son of Vinayak Mahale, aged 35 years,
unmarried, Priest, residing at House No. 86,
Ward No.12, Mala, Panaji, Goa.
3. Madhusudden R. Mahale
son of late Raghuvir Mahale, Aged 65 years
Married, business, Residing at House No,
86, Ward No. 12, Mala, Panaji, Goa, and his
wife
4. Mala M. Mahale,
Daughter late Balaji Audi, Aged 61 years,
service, residing at [H.No.](#) 86, Ward No.
12, ,Mala Panaji, Goa
5. Gayatri G. Mahale,
Daughter of late Sitaram Shimepunascar,
Aged 49 years, business, widow of late
Gurudas R. Mahale, residing at [H.No.](#) 86,
Ward No. 12, Mala, Panaji, Goa.
6. Gautami G. Mahale,
Daughter of late Gurudas R. Mahale, Aged

16 years, student, residing at [H.No. 86](#),
Ward No. 12, Mala, Panaji, Goa Represented
in this Act by her mother and Natural
guardian the above named Gayatri G.
Mahale, the Petitioner No.5.

... Petitioners.

Versus

1. Ramakrishna Raghuvir Mahale,
Son of late Raghuvir Mahale, Aged 76 years
years, married,
Businessman, residing at Xcon Haven
Building, Ground Floor, Torda, Porvorim,
Bardez, Goa, and his Wife;

2. Vassanti alias Savitri R. Mahale,
Daughter of late Krishna Bhobe, Aged 72
years, housewife, Residing Xcon Haven
Building, Ground Floor, Torda, Porvorim,
Bardez, Goa.

3. Jayaprakash Raghuvir Mahale,
Son of late Raghuvir Mahale, Aged 69 years,
married, business, Residing at Even View
Apartments, Flat No. D1, 2TM Floor, Bansai
Curchorem, Goa, 403706.

4. Supriya J. Mahale,
Daughter of late Manguesh Kakodkar, Aged
58 years, married, service, Residing at Even
View Apartments, Flat No. D1, 2TM 4 Floor,
Bansai Curchorem, Goa, 403706.

5. Vidatt Vinayak Mahale,
son of Vinayak R. Mahale, aged 37 years,
service, married, residing at [H.No. 86](#), Ward

No.12, Mala, Panaji, Goa

...Respondents.

Mr Peter Anthony Fernandes, Advocate for the Petitioners.

Mr S.M. Singbal, Advocate for Respondents No.1 to 4.

CORAM : M. S. SONAK, J.

DATE : 31st MARCH 2023

ORAL ORDER :

1. Heard Mr Peter Anthony Fernandes for the Petitioners and Mr S.M. Singbal for Respondents No.1 to 4.

2. This Petition is directed against the judgment and order dated 19th November 2018, by which the Appeal Court dismissed the Petitioners' appeal against the Inventory Court's order dated 18th April 2017.

3. The Inventory Court, in this case, disposed of the Applications at Exhibits 21 and 30 filed by the interested party and fixed the matter for inquiry on the following two issues :

(a) *Whether the interested party proves that the Cabeça de Casal derives income by renting out water of the two wells situated in the suit property?*

(b) Whether the Cabeça de Casal proves that the total income and expenditure derived towards the estate is correctly stated by him in the statement of accounts annexed to the Applications?

4. In this case, the common property, the subject matter of the inventory proceedings, has two wells. The Petitioners were using the water from the said two wells for commercial purposes. The interested parties allege that the Petitioners sell the water from these two wells and earn almost ₹50,000/- per month. Therefore, the interested parties contend that the Petitioners should be directed to furnish a true and correct account of such earnings from the common property.

5. The Petitioners resist not only furnishing true and correct account but submit that the water from the wells is a mineral which belongs to the Government. Consequently, the Petitioners contend that the water from the wells does not belong to the estate even though the wells are a part of the common estate.

6. The Inventory Court has not accepted the Petitioners' contentions. Now the Appeal Court, vide impugned judgment and order dated 19th November 2018, has upheld the Inventory Court's order and dismissed the appeal.

7. Mr Fernandes submits that even though the two wells may be in the estate, the water from the two wells belongs to the

Government. Therefore, he presents that there can be no inquiry regarding the income derived by the Petitioners from these two wells.

8. Without prejudice, Mr Fernandes submits that in terms of Section 379(a) of The Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 (said Act), the Cabeça de Casal can be called upon to furnish accounts in the miscellaneous proceeding, in case the usufruct of the assets does not belong to him. He submits that neither can such accounts be called for nor can there be any inquiry into such earnings in the main inventory proceedings. For these reasons, Mr Fernandes submits that the impugned orders warrant interference.

9. Mr Singbal, learned Counsel for some interested parties, defends the impugned orders based on the reasoning reflected therein. He submits that since there is no dispute that the two wells are in the estates being inventoried, the Petitioners, as the Cabeça de Casal, cannot refuse to furnish the accounts of their earnings in the inventory proceedings. In any case, there is nothing wrong with the Inventory Court's order fixing inquiry on the above two issues.

10. The rival contentions now fall for my determination.

11. In this case, there is no dispute that the two wells are in the estate the Inventory Court is inventorying. The fine distinction that the Petitioners seek to draw between two wells and the water in the two wells cannot be appreciated in the context of the scope and the purpose of inventory proceedings. If denuded of the water in the same, the two wells will be substantially valueless. Based upon such contentions, neither can the head of the family exclusively appropriate the estate's assets nor can he refuse to account for the earnings.

12. The Appeal Court has made the following observations in paragraph 15 while dismissing the Petitioners' claim :

"...There is no dispute that the well is in the immovable property of the deceased which is a private property and the water from the well as rightly pointed out by the advocate for the respondent is the right to use the water for the beneficial enjoyment of the property by the owner/possessor and the right to user of the water from the well will also flow to the heirs which was available to the deceased. There is no document produced on record to show that there was grant or lease given to the cabeça de casal or the deceased by the Government and therefore the right to use is available to all the heirs and therefore the cabeça de casal cannot be said to draw the water from the well which is in the suit property and earn income illegally without the permission or consent of the other heirs and as such the cabeça de casal in the absence of any independent right cannot claim that he is not acting as a Head of the family while drawing water from the well and selling and

therefore the trial court has rightly fixed the matter for inquiry as the question which is a matter of fact. Although the decision of the Madras High Court was passed before the coming into force of the Mines and Mineral Act it has dealt with the point as regards to whether the ownership of water can be considered independent to the ownership of land after considering the definition of Transfer of Property Act and held that ownership water cannot be held different from the ownership of the land. The water, therefore, forms a part of the well which is an immovable property. Further the issue as regards to the water being Government property or a private property cannot be said to be an issue as the right to draw water from the immovable property is a valuable right which would flow to the person in possession and enjoyment of the property."

13. The above observations and reasoning warrant no interference. The appeal Court has correctly recorded that there was no document produced on record to show that there was a grant or lease given to the cabeca de casal or the deceased by the Government for the exclusive user of the water from the two wells in the estate. Based upon the theory that water is a mineral belonging to the Government, the Petitioners cannot, on the one hand, commercially exploit such water exclusively and, on the other hand, refuse to account for the same. This Petition argues that the inventory Court must not even inquire into the two issues referred to in paragraph 3 above. Such an argument cannot be accepted.

14. Several decisions of the Madras High Court are instructive on the issue raised in this Petition. In *Jayaraman and ors vs Perunayammal and Pachamuthu* AIR 1929 Madras 25, the Court held that the ownership of water in a well is not independent of the well or the land ownership. Therefore, if one co-owner uses water for another land which damages the other sharers, they can sue for damages and injunction to restrain unauthorised use. To a similar effect are the observations of the Division Bench of the Madras High Court in *Venkataramana Sastri vs Venkatanarasayya* 1929 AIR Mad 2.

15. In *Valliammal vs. Udayar Konal* 1945 I M.L.J. 1 NOC, the Madras High Court held that where the joint ownership of a well is incident to the joint ownership of certain lands, acts of enjoyment referable to the ownership of the well must necessarily appertain to the ownership of those lands. It is not open to one of the owners to use water from the joint well to irrigate other lands and yet contend that he has not exceeded his share of the right to take water from the well.

16. Similarly, in *Nanjappa vs Ramaswami* 1951 A.I.R. Mad 439, the Court held that the right in the well could not be considered dissociated from the land to which the well was attached. Therefore, parties' rights to the water in the well have to be measured and co-extensive with the rights to irrigate the

respective shares in the common property. To the same effect are the observations in *Palani Gounden vs Karuppa Goundan* 1954 II M.L.J. 58

17. In *Ponnuswamy Gounder vs Balakrishna Gounder* 99 L.W. 944, the Madras High Court held that the ownership of water in the well is not independent of the ownership of the land. This view was reiterated by the Madras High Court in *Kasi Naidu vs Govindarajan and ors.* 2000 1 L.W. 470 on a survey of most of the above decisions.

18. The Bombay High Court in *Tanhabai Jaivanta Ilag vs Dhondiram Pandurang Ilag* 1973 SCC OnLine Bom 65 substantially approved the above decisions by referring to *Nanjappa vs Ramaswami* (supra). The Court also relied upon the following observations from *Ramu Krishna Benapure vs Dnyanu Bapu Bengapure* (Second Appeal No. 934/1965 decided by Vaidya J., on 10/10/192) (unreported) :

"It is thus clear that a co-sharer cannot ask for more water than he used to take from a common well without the consent of the other co-sharers. It is also clear that where the use of the water is restricted in respect of certain lands and the well is linked to the land, a co-sharer cannot claim water for any other land."

19. In *Tanhabai Jaivanta Ilag vs. Dhondiram Pandurang Ilag* (supra), the Court finally held that persons who acquired a share in a portion of the land and a share in the well must accordingly use the water for that land only. In the absence of any express terms in the sale deed or other evidence of immemorial user, there could be no restriction on a co-sharer right as long as the co-sharer does not exceed the enjoyment of his share in the common well. Ultimately, Plaintiff was restricted from using more than $2/3^{\text{rd}}$ share corresponding to his right in the common estate.

20. Thus, the above decisions of the Madras High Court and the Bombay High Court substantially support the Trial Court and the Appeal Court's conclusions. The conclusions accord with equity as well. Accordingly, no case is made out to warrant interference with the impugned orders and the conclusions recorded therein.

21. The argument based upon Section 379 (a) of the said Act is unacceptable. This Section provides that the head of the family, as manager of the estate, shall receive all income and profits of the assets in his possession and shall meet the normal liabilities of the inheritance and shall every year render accounts to the Court in the miscellaneous proceeding, in case the usufruct of the assets does not belong to him. The head of the family is bound to

render accounts from the date he takes charge of the assets of the inheritance and to deposit the balance amount in a Nationalized Bank after the amount required to meet the expenses for managing the assets is deducted. Any sum handed over to the heirs under section 252 shall be included in the expenses.

22. Nothing in Section 379 of the said Act is based upon which the Petitioners, as the Cabeça de Casal, can refuse to render accounts concerning the commercial exploitation of water from the two wells in the estate. Mr Fernandes states that the Petitioners are willing to render accounts but shall do so in miscellaneous proceedings and not in the inventory. This cannot be accepted because, at least prima facie, the two wells and the water therein form part of the estate. In any case, based upon either such a hyper-technical plea or an attempt to deny the co-owners a share in the common estate, the Petitioners cannot resist the inquiry on the two issues referred to above.

23. There is no error, much less any jurisdictional error, in the decisions of the two Courts to warrant interference in the exercise of extraordinary jurisdiction under Article 227 of the Constitution. Besides, the extraordinary jurisdiction of this Court cannot be invoked to commercially exploit a portion of the common estate exclusively while holding the position of the head of the family or the Cabeça de Casal.

24. For all the above reasons, this Petition is dismissed. Accordingly, there shall be no order for costs. However, the inventory Court must endeavour to dispose of the inventory expeditiously.

25. Civil Application No. 149/2019 also stands dismissed, given the disposal of the Petition.

26. There shall be no order for costs.

M. S. SSONAK, J.

SANTOSH S MHAMAL
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