

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 21 OF 2015

Shri Dattaram Sadashiv Wadkar,
Aged 78 years, residing at H. No.23,
Sunderpeth, Sanquelim,
Bicholim, Goa.

..... Appellant

V e r s u s

1. Shri Jaiprakash Dattaram Wadkar
alias, Prakash Dattaram Wadkar
Aged 54 years, and his wife

2. Smt. Chaya Prakash Wadkar,
Aged 47 years, housewife,
Both residing at H. No.62,
Village, Thane,
V. P. Dongurli Thane, Sattari-Goa.

..... Respondents.

Mr. M. B. Da Costa, Senior Advocate with Ms. Soniya Chodankar, Advocate
for the Appellant.

Mr. V. Menezes, Advocate for the Respondents.

CORAM: C. V. BHADANG, J.
DATE: 22ND SEPTEMBER, 2015.

ORDER:

By this appeal, the appellant/original plaintiff is challenging the judgment and order dated 29/12/2014 passed by the learned District Judge-1, Panaji in Regular Civil Appeal No.119/2013. By the impugned judgment, the appeal filed by the appellant challenging the judgment and order dated

21/10/2013 passed by the learned Civil Judge, Junior Division, Sattari at Valpoi in Regular Civil Suit No.18/2009, has been dismissed. The net result is that there is a concurrent finding of dismissal of the suit filed by the appellant, which is subject matter of challenge in this Second appeal.

2. The brief facts necessary for the disposal of the appeal may be stated thus: That the appellant had filed the suit against the respondents for declaration and permanent injunction. The first respondent happens to be the son of the appellant, while the second respondent is the wife of the first respondent. According to the plaint allegations, it was contended that Sadashiv Dattaram Wadkar, the father of the appellant died on 27/4/1980, while Smt. Parvati Wadkar, the mother of the appellant died on 19/1/2004. Smt. Premabai the wife of the appellant died on 22/10/2006. The appellant has five daughters namely, Smt. Manik Chanekar, Smt. Vimal Sirsat, Smt. Mangal Belekar, Smt. Amita Pawaskar and Smt. Vanita Shirodkar, apart from a son that is the first respondent i.e. Jaiprakash. It was contended that Dattaram Wadkar was the only son of Sadashiv Wadkar. Sadashiv Wadkar was owning and possessing various properties along with his wife Parvati Wadkar. However, the management and administration of the estate of the deceased was made by the appellant. It was contended that Parvati Wadkar was illiterate and was unable to read and write and was also not keeping good health during her old age. She died at the age of 90 years at village Thane. It

was contended that the first respondent was under the influence and thumb of the second respondent. On or about 22/11/2009, the appellant came to know that the second respondent acting as the Power of Attorney holder of the first respondent had made a representation dated 16/11/2009 to M/s. Infrastructure Logistic Pvt. Ltd. Pissurlem seeking compensation in respect of the properties bearing survey nos.10/4, 10/5, 44/16 and 44/17 of village Pissurlem. He also learnt that this was on the strength of an alleged will dated 26/7/1989 executed by Parvati in favour of her grand son that is the first respondent Jai Prakash. The said will was shown to be executed in the office of the Notary Public at Quepem Goa. It was contended that Parvati was not able to travel to Quepem to execute the will. Thereafter the appellant obtained a certified copy of the Will on 27/11/2009 and filed a suit seeking a declaration that the Will dated 26/7/1989 (Exhibit 38) recorded at the Notarial Book (Will) no.23 is null and void and to cancel the entry in the notarial book. The appellant also claimed an injunction restraining the respondents or anybody on their behalf from alienating or creating third party interest in the immovable property belonging to his parents namely Sadashiv Wadkar and Parvati Wadkar, without the appellant's consent. The suit was filed on 11/12/2009.

3. The respondents filed the written statement and while contesting the suit claim also raised a counter claim. All the adverse allegations were

denied.

4. It was contended that the suit suffers from non joinder of necessary parties namely, the five daughters and the sons-in-law of the appellant. It was also contended that the suit claim is barred by limitation. It was contended that the appellant was staying separately at Khandola Marcel since more than 40 years and did not take care of his parents at any time. He had left the house immediately after the birth of his youngest daughter. The appellant was living in adultery with one Kishori Haldankar and he has a daughter from the said relationship. The appellant never stayed or looked after his mother. She was looked after by the respondents during her old age. It was denied that the respondents have exercised any coercion or influence. It was denied that the Will is an outcome of any such coercion or influence. It was claimed that they came to know about the will some time on 13/10/2008 when a public notice was given for the compensation from the mining company. It was contended that the suit claim is false. The counter claim pertains to a declaration that the recitals in the Deed of Succession (Exhibit 39) dated 27/8/1996 that Parvati died without executing the will is incorrect.

5. On the basis of rival contentions the learned Trial Court framed the following issues:

- 1) Whether the plaintiff proves the will dated

26/7/1989 executed by the late mother of the plaintiff no.1 in favour of defendant no.1 is null and void and not binding on the plaintiff?

2) Whether the plaintiff proves that he is entitled for an order of permanent injunction against the defendants, their agents and servants preventing the defendants from creating any third party interest in the suit property?

3) Whether the plaintiff proves that the counter claim filed by the defendants suffers from non joinder of necessary parties?

4) Whether the present suit is barred by law of limitation?

5) Whether the defendants prove that the deed of succession dated 27/8/1996 is null and void?

6) What reliefs? What orders?

6. The parties went to trial. The appellant examined himself (PW.1) apart from one Shri Gokuldas Aikar (PW.2) and Pradeep Bhartu (PW.3). The second respondent Ms.Chhaya Wadkar examined herself as (DW.1), apart from Santosh Shirodkar (DW.2) and Smt. Anandi Gaonkar (DW.3). The parties also produced documents. The learned Trial Court answered the

issues no.1 and 2 in the negative. The issue no.3 was also answered in the negative. In so far as the issues no.4 and 5 are concerned, the same were answered in the affirmative. Thus the Trial Court found that the suit was barred by limitation. In the face of such finding while dismissing the suit the counter claim filed by the respondents was partly allowed in terms of prayer clause (a) declaring the Deed of Succession (Exhibit 39) dated 27/8/1996 as partly null and void to the extent that it stated that the Grand mother of the first respondent had expired without executing any will. The prayer clause (b) in the counter claim was dismissed.

7. The First Appellate Court proceeded to consider and examine the matter in the context of the issues framed by the learned Trial Court and concurred with the same thereby dismissing the appeal. That is how the appellant is before this Court.

8. I have heard Mr. M. B. Da Costa, the learned Senior Counsel for the appellant and Mr. V. Menezes, the learned counsel for the respondents.

9. It is submitted by Mr. Da Costa, the learned Senior Counsel for the appellant that in the absence of any partition or division of the estate Parvati Wadkar could not have executed the will in respect of the specified assets. The learned Senior Counsel has placed reliance on the decision of this Court

in case of **Mr. Robert Felicio Coutinho and others vs. Mrs. Maria Angelica Botelho D'Souza (since deceased) through LRs, reported in 2002 (1) Goa L. T. 109,** in order to submit that under Article 2177 of the Portuguese Civil Code a specified half right in the suit property could not be parted with/willed away. It is submitted that this Court in the case of Robert Coutinho (supra) has placed reliance on its earlier decision in the case of **Jose Antonio Philip Pascoal da Piedade Cirilo dos Milagres Miranda and another Vs. Joao Luis Laurente dos Milagres Miranda and others reported in 1999 (1) GLT 77.** It is submitted that the law as laid down in the case of Jose Antonio (supra) (which pertains to Gifts) would apply with equal force to Wills as well. In short, the submission is that without the partition/separation, a specified share has been willed away which is impermissible. The learned Senior Counsel has taken me through the contents of the Will in order to support his submission. He submitted that the Courts below have failed to address this issue and as such the impugned judgments need to be set aside.

10. On the contrary it is submitted by Mr. Menezes the learned counsel appearing for the respondents that a perusal of the Will does not show that a specific share has been willed away. It is submitted that there is no prohibition in undivided share in the immovable property being subject matter of will. The learned Counsel has placed reliance on the recitals of the

will to support his submissions. He submitted that the decision in the case of Robert Coutinho (supra) and for the matter of that Jose Antonio (supra) would not apply in view of the factual situation as obtaining in this case.

11. I have given my anxious consideration to the rival circumstances and the submissions made. With the assistance of the learned counsel, I have perused the relevant record as also the impugned judgments. I have also perused the translated copy of the Will (Exhibit 38).

12. In the appeal memo, the appellant has set out the following draft substantial questions of law:

- A) Whether after the death of her husband, the surviving widow, having a living son, can dispose of by will or gift only a notional undivided half of their moiety share or her notional disposal portion in the estate of the couple and not the entire estate or specific assets of the undivided estate or inheritance?
- B) Whether the findings of the Courts below are perverse in that the Courts below in that the principles laid down by the Hon'ble High Court in Miranda Jose Antonio Philip Pascoal da Piedade Miranda and ors. v. Joao Luis Laurente dos Milagres and Robert Coutinho are applicable to wills as well?

- C) Whether the will made by the surviving widow after the death of her husband, having a living son of specific immovable properties is null and void when there has been no partition of the undivided inheritance and allotment of properties?
- D) Whether without prejudice in the Succession Deed drawn upon the death of the father, when the mother was admittedly still living, any reference could be made to the will made by the mother and consequently the judgment and decree which partly allowed the counter claim, is perverse and illegal and liable to be set aside?

13. At the outset it needs to be mentioned that there is a concurrent finding of the Courts below that the suit was barred by limitation. Even so far as the issue no.1 is concerned as to whether the appellant/plaintiff proves the will to be null and void and not binding on the plaintiff, there is a concurrent finding which is against the appellant. From the perusal of the substantial questions of law and the arguments advanced at the bar the only challenge appears to be on the ground that a specified share could not have been bequeathed in the absence of separation/partition. In this regard paragraphs 2, 5, 6 of the Will (Exhibit 38) would be relevant and they read thus:

"2. The Testatrix further stated that the properties included in this Will belongs to

communion of assets and her late husband Shri Sadashiv Dattaram Wadkar, has not left any will nor made any will in respect of the proprieties included in this will.

5. The Testatrix further stated that she does hereby declare and bequeath all her properties assets, all her rights, titles and interests in the following undivided immovable proprieties to Shri Jai Praskash Dattaram Wadkar alias Prakash Dattaram Wadkar absolutely to be held and enjoyed by said Prakash Dattaram Wadkar by way of absolute form of disposal:

A) Immovable property known as "Predio Rustico Xamblcho Temb" situated at Pale Village of Thane of Sattari Taluka and registered in the Land Registration office under No.16368 at pages 76 of Book B-42 (new) consisting of three additions. The third addition is bounded on the east by Govt. land, on the North by road, on the west by road from Valpoi to Quelandem, on the south by Govt. land having an area of six hectares and seven thousand four hundred twenty eight square meters granted by Alvara of Concession No.1430 dt. 28/3/1945 Processo de Concessao No.352/cd 1941. (B) Immovable property known as Dolichovado of Pale Village of Sattari Taluka bearing latest survey no.2/3 in form I and XIV admeasuring about one hectare and five thousand five hundred square meters consisting of about 200 coconuts and about 60 mango trees (C) Immovable property known as Kajrayache Temb of Pale village of Sattari Taluka bearing latest survey no.39/2 consisting of five thousand four hundred square metres of cashew plantation and four thousand two hundred square metres of paddy cultivation. (D) Immovable property known as "Mandalgirache Moll" bearing latest survey no.5/27 of Donguli Village of Sattari Taluka consisting of five hundred and fifty square metres comprising residential house. (E) Immovable property known as Patraxir situated at Pissurelem of Bicholim Taluka bounded on the east by the field paddy of Babu Rau Desai on the west by the

field paddy of Arjuna Sazrea Porob, on the North by the rock and coconut grove and on the south by nalla which property is entered under Matriz No.206 & which property is bearing latest survey no.44/16 & 44/17 of Pissurlem Village of Sattari Taluka admeasuring about nine hundred and twenty five square metres land under paddy cultivation and one thousand two hundred square metres under paddy cultivation respectively. (F) Immovable property known as “Xelcho Addo” situated at Pissurlem of Bicholim Taluka of production of Sorodio & Vaigana and it is bounded on the East by the property of the same name belonging to the heirs of Nari Porobo on the North by the areca grove belonging to the said heirs & on the south by the rivulet which property is registered in the Land Registration Office under Matriz No.57 and which property is bearing latest survey nos. 10/4 & 10/5 of Pissurlem Village of Sattari Taluka admeasuring about two thousand two hundred and seventy five square metres and two thousand four hundred and fifty square metres under paddy cultivation. 6. The Testatrix by this present Will hereby stated that any other properties, assets, movable or immovable which are omitted to be mentioned in this Will or which she may hereafter acquire during her lifetime shall be taken by and held absolutely by the said Prakash Dattaram Wadkar.”

(emphasis supplied)

14. It can thus be seen that, the properties included in the Will were belonging to Communion of Assets of the testatrix and her husband Sadashiv Wadkar. A perusal of para 5 of the Will would clearly show that what is bequeathed is the undivided immovable properties, as mentioned in para 5 (A) to (F). In para 6, the Will also covers any other properties, assets,

movable or immovable which are omitted to be mentioned in this Will or which the testatrix may acquire during her life time. Merely because the properties are enumerated would not make the Will one in respect of a specified share. The fact remains that what is bequeathed is the "undivided proprieties", which means an undivided share. Thus in my considered view, the submission that the Will seeks to bequeath a specified share cannot be accepted.

15. In the case of Jose Antonio (supra) it was observed thus in para 8 of the judgment:

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 unfettered 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 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 Piedde Cirilo dos Milagres Miranda and another V. 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 separate in loco”.

16. It was thus held that under Article 2177 of the Portuguese Civil Code there is a prohibition on the alienation of a property in the form of a gift of any person unless the said property exclusively belongs to the donor. It was also found that under the said Article the co owner cannot 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. It would appear that both, in the case of Jose Antonio (supra) and the decision in the case of Robert Coutinho (supra), the challenge was to a Gift Deed. We are concerned with a case where there is a will. That apart the question would depend on the facts and circumstances of each case and particularly the recitals in the deed. I do not find that in the face of the recitals in the Will, the submission that a specified share has been bequeathed can be accepted. Thus the substantial questions of law at paras A, B and C will have to be answered against the appellant.

17. Even so far as the substantial question of law at "D" is concerned, the recital in the Succession Deed and the point of time when the Will takes effect cannot be equated. Thus although the Will takes effect on the death of the testator/testatrix, the factum of execution of the Will can find place in the succession deed.

18. In that view of the matter, no substantial question of law arises in the case. The Second Appeal is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/-