

**IN THE HIGH COURT OF BOMBAY AT GOA****SECOND APPEAL NO. 46 OF 2007**

Rama Shirvoikar,  
Indian National, married, major,  
labourer, residing at Nagali,  
Taleigao, Tiswadi Taluka,  
(since deceased) through his  
legal representatives  
Vishnu Narayan Diukar,  
major, married, service,  
Indian National, resident of  
Nagale, Taleigao, Tiswadi, Goa. .... Appellant.

Versus.

Smt. Parvati Rajaram Gauns  
(since deceased) through her  
legal representatives  
Smt. Vimal Mangesh Palkar,

1. Vijay Mangesh Palkar,  
2. Vilas M. Palkar,  
3. Vishal M. Palkar,  
4. Miss Rupa M. Palkar,  
All residents of Palem,  
Siridao, Tiswadi, Gao. .... Respondents.

Mr. A. D. Bhobe, Advocate for the appellant.

None for the respondents though served.

**CORAM :- F.M. REIS, J.**

**Date : - 11 September 2015.**

**ORAL JUDGMENT :-**

Heard Mr. A.D. Bhobe, learned Counsel appearing for the appellant. None for the respondents though served.

2. The above appeal came to be admitted by an order date 14/5/2007, on the following substantial questions of law :

(1) Whether the learned Ad hoc District Judge II at Panaji could have allowed the amendment application dated 20/2/06 and thereby could permit the respondents to challenge the deed of adoption dated 4.7.03 and thereby reopen the issue as to whether the appellant was the heir of the deceased Rama Shirvoikar, more particularly when the said issue of the appellant being the heir of the deceased defendant Shri Rama Shirvoikar, was concluded by the Order dated 25.1.06 passed by the learned Civil Judge, Junior Division, Panaji, which order had in fact attained finality for want of challenge ?

(2) Whether when Vishnu Narayan Diukar had expressly come to the Court on the pleading that he was the sole

heir of the deceased Rama Shirvoikar on the basis of Deed of Adoption dated 4.7.2003 and the Court after having conducted an inquiry and having arrived at a categorical finding that Shri Vishnu Narayan Diukar was the legal heir of the deceased Rama Shirvoikar, the Appellate Court was right in holding that an inquiry under Order XXII Rule 5 of the Civil Procedure Code was to determine whether a person is or not a legal representative and the Court could not decide the heirship of the deceased defendant ?

3. Mr. A. D. Bhobe, learned Counsel appearing for the appellant has pointed out that the learned Lower Appellate Court was not justified to pass the impugned order as, according to him, once in an inquiry under Order XXII, Rule 5 of the Code of Civil Procedure the appellant was accepted to be the legal heir of the original defendant, the question of readjudication on the basis of the amended pleadings would not arise at all. The learned Counsel points out that the appellant was adopted by the original defendant and consequently was entitled to be the legal heir to be brought on record of the deceased defendant. The learned Counsel further submits that when such an application was filed by the appellant, an inquiry was conducted by the learned Trial Judge and after appreciating the evidence brought on

record by an order dated 25/1/2006, the appellant was accepted as the legal representative of the deceased defendant. The learned Counsel further points that the suit was for injunction and declaration that the survey records are erroneous and in such a suit, the question of reexamining whether the appellant was the legal heir of the deceased or not would not arise. The learned Counsel further submits that in such a suit, the aspect of possession of the disputed portion is material and consequently, the respondents are not entitled for any relief sought in the suit. The learned Counsel has taken me through the impugned order to point out that the learned Judge has erroneously allowed the application for amendment filed by the respondents and remanded the matter to the learned Trial Judge to decide the matter afresh. The learned Counsel further submits that in view of the said order passed by the learned Trial Judge dated 25<sup>th</sup> January, 2006 which has become final, any findings on the basis of the amended pleadings would be *res judicata*. The learned Counsel, as such, submits that the substantial questions of law be answered in favour of the appellant.

4. As stated above, the respondents though served remained absent. Though a number of opportunities were given to the

respondents when the matter was taken up for hearing, none appeared for the respondents. On perusal of the impugned Judgment, I find that the inquiry held by the learned Judge under Order XXII order 5 of the C.P.C. was only to examine as to whether the appellant could be brought on record as the legal representative of the deceased defendant. If one examines the definition of the words “legal representative” apart from the legal heirs, the intermeddlers in the estate of the deceased can also be brought on record. Besides, in the present case, the respondents' contend that the deceased defendant was issueless and as such, the inheritance would devolve upon the respondent in case he has expired without leaving behind any descendant or any disposition.

5. On perusal of the Judgment of the learned Lower Appellate Court, I find that the learned Judge has rightly examined the matter in controversy and come to the conclusion that the learned Trial Judge was not justified to refuse leave to the respondents to amend the plaint. As such, considering the facts and circumstances of the case, I find that the question of any interference in the impugned Judgment would not arise when the learned Judge has restricted the remand only for the

purpose of deciding the matter in controversy based on the proposed amendment sought to be incorporated by the respondents. There is no reason to interfere with the impugned Judgment. Needless to state that all defences available to the appellant are left open. The substantial questions of law are answered accordingly.

6. For the aforesaid reasons, the appeal stands dismissed.

**F.M. REIS, J.**

ssm.