

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 60 OF 2014

1. Meera Vishwanath Patkar,
alias Mrudul Dhananjay Wadnerkar,
Aged 52 years, married,
wife of Dhananjay Wadnerkar,
residing at H.No.F-3,
Pudumjee Palace,
813/44, Bhawani Peth,
Pune – 42.
2. Mr. Dhananjay Wadnerkar,
50 years of age, married,
son of Tukaram Wadnerkar,
residing at H.No.F-3,
Pudumjee Palace,
813/44, Bhawani Peth,
Pune 42.

Appellant No.1 and 2 represented herein
by their Constituted Attorney
Shri Deelip Pandurang Madaikar,
40 years of age,
son of Pandurang Madaikar,
resident of H.No.499,
Sakle Bhat,
Carambolim Goa.
(Constituted vide POA dated
17/06/2013 Executed before
Notary Shri P. A. Kamat)

... Appellants.

V e r s u s

1. Ms. Late Premabai Ramchandra Dessai,
(dropped as per order dated 16/06/2012)
daughter of Ramchandra Ganesh Dessai,
r/o H.No. 694, Junas Wada,
Mandrem, Pernem Goa.
2. Shri Milind Ashok Desai,
son of Ashok M. Desai,
major of age,

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Residing temporarily at H.No.694,
Junas wada, Mandrem,
Pernem Goa.

3. Shri Tito Goes Proenca,
major of age,
Son of late Benjamin Goes Proenca,
Resident of H.No. 221-A,
Naika wada, Calangute,
Bardez Goa.

4. Mr. Lester Morgan Fernandes,
major of age,
Son of late Lawrence Fernandes,
Resident of H.No.643,
Modlo Maz, Mandrem,
Pernem Goa.

.... Respondents

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

Mr. D. Pangam, Advocate for respondent no.2.

Mr. J. P. Mulgaonkar, Advocate for respondent nos. 3 and 4.

**Coram:- F. M. REIS &
K. L. WADANE, JJ**

Date :- 31st March, 2015

ORAL JUDGMENT (Per F. M. Reis, J)

Heard Mr. A. D. Bhobe, learned counsel appearing for the appellants, Mr. D. Pangam, learned counsel appearing for respondent no.2 and Mr. J. P. Mulgaonkar, learned counsel appearing for respondent nos. 3 and 4.

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2. Admit. Heard forthwith with the consent of the learned counsel.

3. The learned counsel appearing for the respective respondents waive service.

4. Upon hearing the learned counsel appearing for the respective parties, the following point for determination arises in the present appeal.

POINT FOR DETERMINATION

Whether the learned Judge was justified to pass the impugned order holding that the suit filed by the appellants stands abated ?

5. Briefly, the facts of the case are that the plaintiffs filed a suit inter-alia praying for a declaration that the sale deed executed in favour of the defendant nos. 3 and 4 is null and void as the plaintiffs were the co-owners of the disputed property. Further relief sought by the plaintiffs was to declare the deed of succession executed by the deceased defendant no.1 as a nullity as the averments therein are false. (The parties shall be referred to their original status in the cause title of the impugned order). Another relief sought by the plaintiffs was for a permanent

injunction restraining the defendants from interfering with the disputed property. The original defendant no.1 did not file any written statement but however she expired on 28.09.2010. The plaintiffs filed an application dated 08.12.2010 inter-alia contending that the defendant no.1 had expired and the plaintiffs were only heirs of the deceased defendant no.1 in view of the Will executed by the deceased defendant no.1. The application was allowed and the defendant no.1 was deleted as a party defendant. Thereafter, it appears that the remaining defendant nos. 3 and 4 filed an application inter-alia contending that the suit had abated in terms of the provisions of Order 22 Rule 4 of the Civil Procedure Code on the ground that no legal heirs of the deceased defendant no.1 were brought on record. The learned Judge by impugned order has allowed the said application and dismissed the suit as abated. Being aggrieved by the said order, the plaintiffs have preferred the above appeal.

6. Mr. Bhobe, learned counsel appearing for the appellants in support of the above appeal has pointed out that once the Court had granted the earlier application dated 08.12.2010 allowing deletion of the deceased defendant no.1, the question of thereafter holding the suit as abated does not arise at all. The learned counsel further pointed out that it is the case of

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the plaintiffs that they are the sole heirs and successors of the deceased defendant no.1. It is further the contention of Mr. Bhobe, learned counsel that as the estate of the deceased defendant no.1 was represented by the plaintiffs, the question of holding that the suit stands abated is totally misplaced. The learned counsel thereafter has taken us through the impugned order passed by the learned Trial Judge to point out that the learned Judge has lost sight of the fact that the plaintiffs had already filed an application on 08.12.2010 intimating the death of the defendant no.1 and that the plaintiffs were the only heirs and successors of the deceased defendant no.1. The learned counsel as such submits that the impugned order be quashed and set aside.

7. On the other hand, Mr. J. P. Mulgaonkar, learned counsel appearing for defendant nos. 3 and 4 has pointed out that considering the prayers of the suit and the reliefs sought by the plaintiffs, as no legal heirs of the deceased defendant no.1 were brought on record within the time prescribed, the learned Judge was justified to hold that the suit be dismissed as abated. The learned counsel further pointed out that admittedly the plaintiffs have not filed any application to bring the legal heirs of the deceased defendant no.1 on record and consequently in terms of the Order 22 Rule 4 of the Civil Procedure Code, the suit stands

abated. The learned counsel further submits that the learned Judge as such was justified to hold that the suit be dismissed as abated. The learned counsel has thereafter taken us through the application as well as the averments in the earlier application to point out that there is no averment to substitute the deceased defendant no.1 by the plaintiffs. The learned counsel as such submits that the appeal be rejected.

8. Mr. D. Pangam, learned counsel appearing for respondent no.2 has supported the submissions of Mr. Mulgaonkar, learned counsel appearing for respondent nos. 3 and 4.

9. We have given our thoughtful consideration to the rival contentions and we have also gone through the records. The record reveals that in fact the plaintiffs had filed an application dated 08.12.2010 to the effect that the plaintiffs were the only legal heirs and successors of the deceased defendant no.1. The said application was not opposed by the defendants and in fact it is pointed out by Mr. Bhobe, learned counsel appearing for the plaintiffs that the application was allowed and consequently the name of the defendant no.1 was ordered to be deleted. In such circumstances, the question of examining whether the suit has abated or not by the learned Judge while passing the impugned

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order was not at all justified as it is not the case of the defendants that the deceased defendant no.1 is survived by other legal representatives. Once it is the case of the plaintiffs that they are the exclusive heirs of the deceased defendant no.1 as they are already on record the question of holding that the suit stands abated cannot be accepted unless such averment is proved to be false. In such circumstances, we find that the learned Judge was not justified to come to the conclusion that the suit stands dismissed as abated.

10. Apart from that, the suit filed by the plaintiffs is in respect of the properties surveyed under survey No. 272/11 admeasures total area of 4118 square metres. It is the case of the plaintiffs that they learnt that a deed of sale was executed by the defendant no.2 as a power of attorney holder of the defendant no.1 dated 01.04.2008 whereby an area of 2600 square metres were allegedly sold to the defendant nos. 3 and 4 without the consent of the plaintiffs and as such invalid. The cause of action according to the plaintiffs arose on 16.04.2008 when they learnt about the said illegal sale deed. The relief in the suit is also to declare the said sale deed dated 01.04.2008 as null and void. Even on perusal of the application filed by the defendant no.2, it is contended by the said defendant that the plaintiffs have sought a

declaration that the sale deed is null and void and that both the parties to the sale deed namely the seller and the purchasers are necessary parties to such suit. It is further his case that the plaintiffs did not file any application to bring the legal heirs of the deceased defendant no.1 on record within the time prescribed and as such, the suit has abated. In reply filed to the said application, the plaintiffs have contended that there are no legal heirs of the deceased defendant no.1 except the plaintiffs and that they have already produced a death certificate to that effect.

11. The learned Judge while passing the impugned order has noted that the suit filed by the plaintiffs is on the basis that the defendant no.1 who was admittedly the sister of the deceased mother of the plaintiff no.1 had illegally sold a portion of one of the suit properties bearing survey no.272/11 to the defendant nos. 3 and 4 by sale deed dated 01.04.2008 and also to declare the succession deed as a nullity. The learned Judge further noted that no legal heirs were brought on record within the time prescribed, and as such the suit stands abated as the relief do not survive against the surviving defendants. However, it is not disputed that the purchasers or transferees of the deceased defendant were already on record. The claim of the plaintiffs is that the sale deed is a nullity. In any event, the plaintiffs contend that they are the

only legal heirs of the deceased defendant no.1. But however, as the transferees of the said defendant no.1 were already on record, the question of holding that the suit had abated cannot be sustained. The defendant nos. 3 and 4 can be treated as legal representatives of the deceased defendant no.1 being an intermeddler in the estate of the deceased defendant no.1 and as such the question of holding that the suit has abated as a whole is unsustainable. The Apex Court in the judgment reported in **AIR 1982 SC 948(1)** in the case of **Mohammad Arif V/s Allah Rabbul Alamin and others**, has observed at para 2 thus :-

“2..... But that apart, in the second appeal itself Mohammad Arif had been joined as co-appellant along with his vendor Mohammad Ahmad. On the death of Mohammad Ahmed all that was required to be done was that the appellant who was on record should have been shown as a legal representative inasmuch as he was the transferee of the property in question and at least as an intermeddler was entitled to be treated as legal representative of Mohammed

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Ahmed. He being on record the estate of the deceased appellant qua the property in question was represented and there was no necessity for application for bringing the legal representatives of the deceased appellant on record. The appeal in the circumstances could not be regarded as having abated and Mohammad Arif was entitled to prosecute the appeal. We, therefore, set aside the order of the High Court and send the appeal back to the High Court for disposal according to law.”

12. The Apex Court in another judgment reported in (2010) 7 SCC 603 in the case of ***K. Naina Mohamed (Dead) through LRs. V/s A. M. Vasudevan Chettiar (Dead) through LRs and others,*** has observed at para 21 thus :-

“**21.** The definition of the term “legal representative” contained in Section 2(11) of the Code of Civil Procedure also supports the argument of the learned counsel for the

respondents that the second appeal cannot be treated as having abated because the appellant who had purchased the property was representing the estate of the deceased.....”

Taking note of the said observations of the Apex Court, as the defendant nos. 3 and 4 who are alleged to be the transferees of the suit property are already on record in view of the sale deed which is under challenge in the suit, the learned Judge was not justified to hold that the suit itself had abated as a whole.

13. Apart from that, whether the stand of the plaintiffs that they are the legal representatives of the deceased defendant no.1 is correct or not is a matter which would have to be examined by the learned Judge on its own merits during the hearing of the suit. At this stage, considering that it is the contention of the plaintiffs that they are the only legal heirs of the deceased defendant no.1, the learned Judge was not justified to pass the impugned order and dismiss the suit as abated. The defendants, if so advised would have to take appropriate steps to raise their defence with that regard in accordance with law. The point for determination is

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answered accordingly.

14. In view of the above, we pass the following :

O R D E R

(i) The impugned order dated 06.11.2012 is quashed and set aside.

(ii) Special Civil Suit No.11/2010/C is restored to the file of the learned Judge.

(iii) The learned Judge shall proceed with the suit in the light of the observations made herein above in accordance with law.

(iv) The parties are directed to appear before the learned Judge on 15.06.2015 at 10.00 a.m.

(v) The appeal stands disposed of accordingly.

K. L. WADANE, J

F. M. REIS, J

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