

IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO. 70 OF 2015

MRS. FILOMENA FERNANDES AND 2
ORS.,

... Appellants

Versus

STATE OF GOA, THE CHIEF SECRETARY,
GOVT. OF GOA AND 3 ORS.,

... Respondents

Shri B.S. Castelino, Appellant No. 3 and Attorney of Appellants
Nos. 1 and 2, in person.

Shri C.A. Coutinho with Shri S. Redkar, Advocates for the
Respondent No. 4.

CORAM:- C. V. BHADANG, J.

DATE:- 24th JULY, 2015.

ORDER:

By this appeal (initially filed as a Civil Revision Application), the appellants/plaintiffs are challenging the order dated 13.05.2015, passed by the learned District Judge, South Goa, Margao in Civil Suit No. 41/2014. By the impugned order, the plaint is rejected under Order 7, Rule 11(d) of the Code of Civil Procedure (the code, for short).

2. The brief facts are that the appellants have filed a suit, purportedly under Section 90 read with Order 36, Rule 1 of the Code, for "a decree of mutation", of Record of Rights in Survey No. 548/5 of Loutolim village, Salcete, Goa. The prayer clause of the plaint reads thus:

1. A Decree to state that in the Agreement for a Special Case under Section 90 of the Code of Civil Procedure 1908 as an Instrument under Article 5(d) of Schedule I-A to the Indian Stamp Act 1899 (as in force in the State of Goa) dated 03.01.2014 (3rd January 2014), the plaintiff-2 is entitled to Mutation of the Survey Record of Rights in Form I & XIV of Survey No. 548/5 of Loutolim village, Salcete Taluka, Goa deleting the names of "Fideliz Arango" and "Camilo Fernandes" figuring in the Occupants Column and by recording in their place the Entry - "Simon Francis Piexoto, represented by his father Lourence Piexoto" in the legal character and right of Owner as Landlord and Occupant Class I as per Section 20(2) of the Goa Land Revenue Code 1968, and
2. An Order for Execution of the Decree by the Court of the Mamlatdar by Mutation of the Survey Record of Rights.

3. The respondent no. 4, filed an application under Order 7, Rule 11 of the Code, for rejection of the plaint.

4. The learned District Judge, by the impugned order has upheld the contention of respondent no. 4, thereby, rejecting the plaint. That is how the plaintiffs are before this Court.

5. I have heard Shri Castelino, appellant no. 3, in person and Shri Coutinho, the learned Counsel for the respondent no. 4. None for respondent nos. 1, 2 and 3.

6. It is submitted that the suit could not have been dismissed, under Order 7, Rule 11 of the Code. It is submitted that the power under Order 7, Rule 11 can be exercised only, before the suit is formally registered in the register of the suits. It is submitted that once the suit is so rejected, then the plaint could not be rejected.

7. It is next submitted that the learned District Judge was in error in holding that there was no agreement between the

parties. It is submitted that a deemed agreement has to be inferred, when the respondent no. 4 failed to issue notice reply and in view of memorandum dated 08.05.2014, from the office of Collector and District Magistrate, South Goa, Margao, addressed to the Mamlatdar of Salcete, Margao, Goa and by virtue of the communication dated 06.08.2014, from the Joint Mamlatdar, Salcete, Margao, Goa, which is addressed to the appellant no. 3. It is also submitted that respondent no. 4 is a party to the agreement, by his acknowledgment dated 04.02.2014, with a copy being endorsed to the Chief Secretary stating that his father, Fidelis Araunjo has expired and that the suit did not lie against the deceased, but lies against him as the legal heir, as he has inherited all his father's assets by succession. It is submitted that in such a case, the agreement has to be inferred. Appellant no. 3 submitted that had there been a complete agreement consensus, no dispute would have arisen.

8. Shri Coutinho, the learned Counsel for the respondent no. 4 has raised a preliminary objection about maintainability of the civil revision application. It is submitted that an order

rejecting the plaint is a decree, which is appealable under Section 96 of the Code. In so far as, merits are concerned, it is submitted that admittedly, there is no agreement, which is the basic requirement for an action under Section 90 read with Order 36 of the Code. It is submitted that reliefs sought would not otherwise fall within the ambit of action under Section 90 read with Order 36 of the Code. It is submitted that the learned District Judge has rightly rejected the plaint.

9. In reply to the contention about maintainability of the revision application, it is submitted by appellant no. 3 that there is a bar in filing an appeal, in so far as, orders passed under Order 36 Rule 5 are concerned. Such a bar is to be found under Order 36 Rule 6 of the Code. It is submitted that wherever an appeal does not lie, a revision lies and that is how, the civil revision application would be maintainable.

10. I have considered the rival contentions and the submissions made. The facts and the dispute involved is unusual to a certain extent.

11. The following points arise for my determination. I have recorded my findings against the same, for reasons which follow:-

<u>POINTS</u>	<u>FINDINGS</u>
I. Whether the Civil Revision Application, as framed and filed, would be maintainable. If not, what would be the course of action ?	Converted into First Appeal
II. Whether the impugned order is legal and proper ?	In the Affirmative
III. What order ?	As per final order

12. Point No. I: Undoubtedly, the order rejecting a plaint passed under Order 7, Rule 11 amounts to a "decree", within the meaning of Section 2(2) of the Code and would thus be amenable to an appeal, under Section 96 read with Order 41 of the Code. The provisions of Order 36, Rule 6 cannot be called in aid, to rule on maintainability for the simple reason that, what Rule 6 prohibits is an appeal against an order passed under Rule 5 of Order 36 of the Code. In the present case, the impugned order is not passed under Order 36, Rule 5 of the Code and in that view of the matter,

it cannot be said that no appeal lay. The impugned order is essentially, one of rejection of the plaint, which amounts to a “decree” and would be amenable to an appeal under Section 96 of the Code. Thus, the civil revision application as framed and filed would not be maintainable. However, this may have a little bearing on entertaining this proceedings as a first appeal. In fact, the appellants would get a wider scope of challenge in an appeal, than in a civil revision application. Thus, only in order to set the record straight, the civil revision application shall be re-registered as a First Appeal. The point is answered accordingly.

13. Point No. II: At the outset, the submission that powers under Order 7, Rule 11 of the Code can be exercised, only before the registration of the suit and not thereafter, has only to be stated to be rejected.

14. This takes me to the merits of the matter. Section 90 falls in part V of the Code, entitled “Special Proceedings”. Under Section 90 of the Code, the parties can state a case for the opinion of the Court. Such a case can be presented for opinion by

agreement between the parties in writing. Order 36 prescribes the manner in which the Court shall try and determine the same. It is difficult to envisage as to how, the dispute as to some mutation entries between the appellants and the respondent no. 4 can be the subject matter of a proceeding under Section 90 read with Order 36 of the Code. A bare perusal of the prayer as set out earlier, would clearly show that the suit is entirely misconceived. That apart, the learned District Judge has examined the issue from the point of existence of agreement in writing, which is the requirement of Section 90 of the Code. On behalf of the appellants, reliance is placed on the provisions of Section 7(4)(b) (c) of the Arbitration and Conciliation Act, in order to submit that there would be a deemed agreement between the parties, by virtue of acknowledgment of the notice sent to the appellants. Reliance is also placed on some office memorandum dated 08.05.2014, from the office of the Collector and District Magistrate addressed to the Mamlatdar and a letter dated 06.08.2014, sent by the Joint Mamlatdar addressed to the appellant no. 3. By office memorandum dated 08.05.2014, the Mamlatdar is directed to take action and submit a report, in view of the notice issued by the

appellants under Section 80 of the Code. Similarly, by a communication dated 06.08.2014, the Mamlatdar had informed that there has been no application or inquiry on the issue pending, in the office of the Mamlatdar in the matter. It is extremely difficult to know as to how, these communications by any stretch of imagination, can constitute an agreement. Thus, to my mind, the suit as framed and filed under Section 90 read with Order 36 of the Code, for the reliefs as prayed, was clearly not maintainable, as has been rightly held. The point is answered in the affirmative.

15. In the result, no case for interference is made out. The appeal is hereby dismissed, with no order as to costs.

C. V. BHADANG, J.

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