

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.640 OF 2014

1. Shri Lourdes Gregorio Gomindes,
Age 78 years, married, retired,
represented by his power of attorney,
Godfrey Gomindes, Major of age,
resident of H.No.235, Daguale, Alto,
Maina Curtorim, Salcete, Goa.
2. Smt. Maria Piedade Milagres Fernandes,
wife of said Lourdes Gomindes, Age 70 years.
Both residents of H.No.235, Daguale,
Alto, Maina Curtorim, Salcete, Goa. Petitioners.

V/s

1. Shri Milagres Santana Gomindes,
Age - about 80 years, married,
Occupation-landowner and his wife
2. Smt. Letinha Rebelo E Gomindes,
Wife of the said Respondent No.1,
Age about 74 years, married,

Both residents of H.No.184/B,
Daguale, Alto, Maina Curtorim,
Salcete, Goa. Respondents

Mr. Sudesh Usgaonkar, Advocate for the Petitioners.

Mr. M.P. Almeida, Advocate for the Respondents.

CORAM : N.M. JAMDAR, J.

DATE : 12 FEBRUARY 2015

ORAL JUDGMENT :

Rule. Rule made returnable forthwith. Respondents waive service. Leave is granted to the petitioners to challenge all the three orders in one petition.

2. By this petition, the petitioners challenge the orders passed by the District Judge, South Goa, Margao in Misc. Civil Application No.122/2013 dated 28 September 2012, Misc. Civil Application No.121/2013 dated 28 January 2013 and Misc. Civil Application No.120/2013 dated 12 April 2013. By the impugned orders, the learned District Judge essentially has dismissed the appeal filed by the petitioners as not maintainable.

3. The learned District Judge has relied upon Article 1414 and 1435 of the Portuguese Civil Code which is applicable in respect of inventory proceedings. The learned District Judge has come to the conclusion that the orders challenged in appeal are only directing how the partition should be effected and there is no final order in respect of the partition and, therefore, appeals are not maintainable.

4. The dispute between the parties is long pending and there have been various rounds of litigation. It is not

necessary, for the purpose of this petition, to enumerate all those facts. The litigation is in respect of properties of late Maria Albertina Fernandes. It is the case of the respondents that certain properties which were earlier belonging to late Maria, which were gifted or sold by her, should be included for the consideration in the inventory proceedings. The respondents had filed two applications for the said inclusion but they were rejected and the only property that is now for consideration is plot no.C-1. By the order impugned in appeal, the learned Civil Judge took a view that, though the properties earlier disposed of by late Maria could not be brought into consideration in partition, the effect of the same can be considered for the purpose of determining the shares. The learned Civil Judge accordingly directed that final chart of partition should be drawn up by taking into consideration the effect of those transactions.

5. The learned Counsel for the parties agree that in the inventory proceedings by any order if assets are included or are excluded, then such order is appealable under Section 104 of Civil Procedure Code. The question that arises is whether an order directing that effect of the transaction of the properties which are earlier disposed, is to be considered for determining the shares would amount to inclusion of those properties in the inventory, and whether from such order, an appeal would lie.

6. Mr. Usgaonkar, the learned Counsel for the petitioners relying on the various provisions of Portuguese Civil Code

pointed out that the scheme of the Code indicates that only that estate which is definitely listed before the Court can be considered, and that would also include notional inclusion. He submitted that it is not permissible for the Court to even notionally consider the properties which are not part of the proceedings, without formally including the same. Mr. Usgaonkar further submitted that having failed to get the said properties included in inventory proceedings, an attempt is made to notionally include them. He submitted that such order will have the same effect as actual inclusion, for the purpose of maintainability of the appeal. Mr. M.P. Almeida, the learned Counsel for the respondents on the other hand submitted that under the provisions of Portuguese Civil Code itself it is a mandate of law to consider the effect of such transactions.

7. The question therefore arises, and which is missed by the appellate Court while dismissing the appeals as not maintainable, is what is the effect of considering a property notionally for the purpose of determining the share in an inventory proceedings. If the inventory proceedings must take place only in respect of the estate described, then question would arise as to what is the effect of notional inclusion thereof. It appears from the impugned order that learned District Judge has not gone into those aspects at all and has simply held that the order directs how the partition should be effected and therefore it is not appealable at this stage. The various questions which are indicated above have not been addressed by the learned District Judge.

8. The learned Counsel for the parties state that there is no decision of this Court in that regard. Since the learned District Judge has not addressed itself to this issue it would be appropriate that the learned District Judge considers this aspect while deciding whether the appeal is maintainable or not. Therefore, the matter needs to be remanded back to the District Court for reconsideration.

9. It is clarified that the discussion above is only to focus on the matter to be resolved and it is not a reflection on the merits of the rival contentions. All contentions are kept open.

10. Accordingly, the impugned orders in Misc. Civil Application No.122/2013 dated 28 September 2012, Misc. Civil Application No.121/2013 dated 28 January 2013 and Misc. Civil Application No.120/2013 dated 12 April 2013 are quashed and set aside. The appeal filed by the petitioners are restored to file. The learned District Judge to consider the maintainability of the appeals in the light of what is stated above. Since the litigations are pending for a considerable period, and the issue is only of maintainability of the appeal, the learned District Judge will consider giving priority to the decision on the issue of maintainability. Writ Petition is disposed of in above terms.

N.M. JAMDAR, J.

NH/-