

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 764 OF 2014

SMT. GULABEM TOLIYO BHATIKAR.

... Petitioner

Versus

SHRI NAGU SHEMBHU VELIP (SINCE
DECEASED) REP. THROUGH LEGAL HEIRS
AND ANR.

... Respondents

Mr. E.O. Mendes, Advocate for the Petitioner.

Mr. R.G. Ramani, Advocate for the Respondents.

CORAM:- C. V. BHADANG, J.

DATE : 6th OCTOBER, 2015

ORAL ORDER:

By this petition, the petitioner is challenging the judgment and order dated 07.05.2014, passed by the learned District Judge, South Goa, Margao in Miscellaneous Civil Appeal No. 21/2013. By the impugned judgment, the appeal filed by now deceased Nagu Velip, challenging the orders dated 21.01.2013 and 22.01.2013, passed by the learned Civil Judge Junior Division, Sanguem in Inventory Proceedings No. 12/2003 has been allowed.

2. The brief facts necessary for the disposal of the petition may be stated thus:

That the petitioner herein alongwith her husband-Toliyo Bhatikar initiated inventory proceedings being Inventory Proceedings No. 12/2003 on the file of the learned Civil Judge Junior Division, Sanguem in respect of the properties left by now deceased, Shri Ladu Yesso Velip, Smt. Vatsal Ladu Velip, Shri Yesso Shembhu Velip and Smt. Yesso Velip. The petitioner initiated the proceedings claiming that she is the daughter of Ladu and Vatsal Velip. It appears that during the course of the inventory proceedings, the fact that the petitioner was the daughter of Ladu and Vatsal Velip was challenged as per the objections raised at Exhibits D-8 and D-9. The learned trial Court permitted the parties to lead evidence both, oral and documentary, during the course of which, a birth certificate (Exhibit RW-1/86) dated 14.08.1997 was produced on record, recording the date of birth of the petitioner as 25.11.1958. Admittedly, the said certificate was issued by the Mamlatdar/Executive Magistrate. The certificate was issued under the Registration of Births and Deaths

Act, 1969 (the Act of 1969, for short). While opposing the application, a contention was also raised that the petitioner would be an illegitimate child of Ladu and Vatsal Velip as Ladu Velip had married Vatsal Velip, during the subsistence of his marriage with one Abolem. The learned trial Court negated this contention on the ground that the law provides share to the illegitimate child also. Thus, the trial Court after taking into consideration the birth certificate (Exhibit RW-1/86) found that the petitioner was the heir of deceased Ladu Velip, Vatsal Velip, Yesso Velip and Smt. Yesso Velip. This was challenged by Nagu Velip in Miscellaneous Civil Appeal No. 21/2013. It appears that Nagu Velip died during the pendency of the appeal and his legal representatives were brought on record.

3. The learned District Judge framed three points for determination, including point no. 2, which is material for the present purpose, namely, whether the learned trial Judge has erred in holding that Smt. Gulabem Toliyo Bhatikar is an heir of the deceased. The learned Appellate Court answered all the three points in the affirmative and allowed the appeal and remanded the

matter back to the trial Court. Feeling aggrieved, the petitioner is before this Court.

4. It appears that the decision of the Calcutta High Court in the case of **Kanailal Hazra Vs. State of West Bengal and Others**, reported in **2004 AIR(Cal) 244**, was brought to the notice of the Appellate Court, in which the Calcutta High Court has held that the term 'Magistrate' as found in Section 13 of the Act of 1969 would mean a 'Judicial Magistrate' and not an Executive Magistrate. It appears that although, in the judgment of the Appellate Court there is no specific mention of the decision of the Calcutta High Court in the case of **Kanailal Hazra** (supra), however, the Appellate Court on the same reasoning found that the certificate (Exhibit RW-1/86) issued by the Mamlatdar/ Executive Magistrate was not valid. In that view of the matter, the appeal was allowed and the impugned order was set aside.

5. It is submitted by the learned Counsel for the petitioner that there was other evidence on record, which the trial Court, has not considered. It is submitted that the petitioner should be

granted opportunity to establish that she is the heir of Ladu and Vatsal Velip. The learned Counsel has placed reliance on Article 116 of the Portuguese Civil Code in order to submit that such an opportunity ought to have been granted. It is submitted that although the matter is remanded, the Appellate Court has not indicated as to what is to be done, after remand.

6. On the contrary, it is submitted by Mr. Ramani, the learned Counsel appearing for the respondents that this Court by judgment dated 14.10.2014, in the case of **Mr. Jayraj Nagesh Naik and Another Vs. Executive Magistrate of Canacona and Others** (Writ petition No. 188 of 2014) has held that the word 'Magistrate' under Section 13 of the Act of 1969 would mean a 'Judicial Magistrate'. He therefore submitted that no exception can be taken to the finding recorded by the Appellate Court. In so far as reliance on Article 116 of the Portuguese Civil Code is concerned, it is submitted that it presupposes that there is some initial written proof, arising from both the parents, jointly or severally, which is not forthcoming in this case. It is submitted that when the very basis of initiating an inventory proceeding

claiming that the petitioner was the daughter of Ladu and Vatsal Velip having fallen apart, no further opportunity can be granted, once the petitioner has availed the opportunity of leading oral and documentary evidence.

7. I have considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

8. Mr. Mendes, the learned Counsel for the petitioner fairly submitted that the word 'Magistrate' as used in the Act of 1969 has been consistently held to be a 'Judicial Magistrate'. It is undisputed that the present case would be governed by Section 13(3) of the Act of 1939, in as much as the birth in this case was not registered within a period of one year. The provisions of Section 13(3) which are relevant can be reproduced as under:

"13. Delayed registration of births and deaths -

(1).....

(2).....

(3) Any birth or death which has not been registered within one year of its occurrence,

shall be registered only on an order made by a Magistrate of the first class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of the prescribed fee."

9. It is thus clear that an order made by a Magistrate of the first class or a Presidency Magistrate would clearly mean that the order is made by a Judicial Magistrate. I am in respectfully agreement with the decision of this Court in the case of **Mr. Jayraj Nagesh Naik and Another Vs. Executive Magistrate of Canacona and Others** (Writ petition No. 188 of 2014). Thus, in my considered view, no exception can be taken to the finding recorded by the learned Appellate Court. The certificate, which was not issued by a Judicial Magistrate, could not have been accepted.

10. This takes me to the provisions of Article 116 which read thus:

Article 116

"In the absence of registration of birth,

authentic document and living in such status, the legitimate filiation may be proved by any other evidence, there being an initial written proof, arising from both the parents, jointly or severally.”

(Emphasis supplied)

11. A bare reading of the Article 116 of the Portuguese Civil Code would show that, in the absence of registration of birth, authentic document and living in such status, the legitimate filiation may be proved by any other evidence, there being an initial written proof, by both the parents, jointly or severally. It can thus, be seen that Article 116 of the Portuguese Civil Code, presupposes that there is some initial written proof arising from both the parents in the absence of the registration of birth. It appears that on behalf of the petitioner, sole reliance was placed on the birth certificate (Exhibit RW-1/86) in support of the claim of heirship by the petitioner and no other document was pointed out, which can be a document of initial written proof as required under Article 116 of the Portuguese Civil Code. Thus, in my considered view, the reliance placed on Article 116 of the Portuguese Civil

Code is misplaced and of no avail to the petitioner. In my considered view merely because, the Appellate Court in the operative order has stated that the matter is remanded, would not justify a conclusion that the petitioner was granted a fresh opportunity to establish her claim of heirship. The perusal of the impugned judgment does show that any such opportunity was claimed before the Appellate Court.

12. In that view of the matter, no interference is called for in the impugned order, in the exercise of the extra ordinary jurisdiction of this Court under Article 227 of the Constitution of India. It is needless to mention that other legal remedies, if any available to the petitioner are kept open.

13. In the result, the petition is without any merit and is hereby dismissed, with no order as to costs.

C. V. BHADANG, J.

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