

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.10 of 2009**

Jose Cruz Fulgencio Gomes,
son of late D.M.Gomes,
residing at Bazaar,
Cuncolim, Salcete, Goa. .. Petitioner

Versus

Flossy Gomes,
widow of Gonzaga Gomes,
resident of Bazaar,
Cuncolim, Salcete, Goa. .. Respondent

Mr. Sudin Usgaonkar, Senior Advocate with Mr. K.
Padgaonkar, Advocate for the petitioner.

CORAM :- C. V. BHADANG, J.

DATE :- 6th JUNE, 2016.

ORAL JUDGMENT :

Heard Shri Usgaonkar, the learned Senior Counsel for the petitioner. None appears for the respondent. On 02/02/2015, this Court had noted the absence on behalf of the respondent and as such, last opportunity was granted to the respondent and it was stipulated that if none appears for the respondent on the next date of hearing, the matter shall be heard in her absence. Thereafter, on 10/02/2015 and 24/02/2015, time was sought by the learned Counsel for the respondent, which was granted. Today, again there is no

appearance on behalf of the respondent. In such circumstances, I have heard the learned Senior Counsel appearing for the petitioner and the petition is being disposed of.

2. The petitioner is the head of the family (Cabeca da Casal) in Inventory Proceedings No.56/1993/A which is pending before the learned Civil Judge, Senior Division at Margao. It appears that there were three lists of assets filed. For the present purpose, we are concerned with the list at I Exh.18 in which, Item No.2 was described as under :

"Item No.2

Property Gormando alias Tinto situate at Cuncolim village, bounded towards the East by the national highway, West by the road under project and lote no.19 of Condado, North by lote no.21 and the said road, and south by the bus-stand, inscribed in the Taluka Revenue Office under matriz no.5176, surveyed under no.1/9, and admeasuring an area of 478 sq.metres. Approximately value - Rs.1.00 lakh."

3. It appears that on 31/10/2002, an application was filed by the petitioner, which was styled as an

application for amendment to the description of the assets whereby, description of the aforesaid item no.2 was modified / amended in order to show that the said property namely 'Gormando' alias 'Tinto', has got a building which has not been mentioned in the said item. As such, after the words " alias Tinto", the following sentence was added "together with the building which consists of old structure and new structure of ground plus 3 floors."

4. On 10/10/2006, an application came to be filed on behalf of the petitioner praying for an enquiry for the purpose of deciding on the list of assets, sought to be added or in the alternative, for fixing the matter for auction, as was earlier fixed.

5. The Inventory Court, by an order dated 23/01/2007, framed a solitary point as to whether an enquiry has to be held to decide the list of assets, sought to be added and after answering the same in the affirmative, the application (Exh.43-B) was allowed. This was challenged by the respondent in Miscellaneous Civil Appeal, before the learned Adhoc District Judge at Margao.

6. By a judgment and order dated 29/11/2007, the appeal came to be dismissed thereby confirming the order directing an enquiry passed by the Inventory Court. It appears that the respondent filed an application for review of the appellate judgment. The contention raised on behalf of the respondent was that the Court had ignored the formal map of partition (Exh.42), which was an error apparent on the face of the record. The learned District Judge, by a detailed order, allowed the application for review on 24/09/2008, which is the order which is subject matter of challenge in this petition.

5. It is submitted by the learned Senior Counsel for the petitioner that the learned District Judge has dealt with the application for review, as if he was considering the appeal in the first instance. It is submitted that an application for review cannot be converted or cannot be an appeal in disguise. The learned Senior Counsel points out that the enquiry was necessary in respect of the item no.2 of list of assets (Exh.18) as there was an addition made to the said item by incorporating in the description a house standing on the property namely 'Gormando' alias 'Tinto.' It is submitted that the learned District Judge, by the

impugned order, while allowing the review application, had directed partition of the properties as listed in the list Exh.18 while permitting enquiry in respect of assets at list nos.2 and 3. He submits that there was no occasion or justification for directing the partition in so far as list Exh.18 is concerned when the order so far as directing enquiry in respect of assets in list nos.2 and 3 was maintained. It is further submitted that the formal map for partition (Exh.42) was prior in point of time to the correction of the description of item no.2 of list Exh.18 and as such, the same had no bearing on the order directing enquiry so far as the assets in the three lists are concerned.

8. I have considered the circumstances and the submissions made.

9. It is apparent that initially the asset at Item No.2 of list Exh.18 as described was an open land better known as 'Gormando' alias 'Tinto' and subsequently, the said description was amended to include a house standing thereon. In view of the application for amendment to the description of assets,

the petitioner had filed yet another application on 10/10/2006 praying for enquiry for the purpose of deciding on the list of assets sought to be added or in the alternative, for fixing the matter for auction, as it was earlier fixed. This application was also allowed by the Inventory Court directing such enquiry which was also confirmed by the learned District Judge. In my considered opinion, thus, it was not open for the learned District Judge to have modified the said order on the ground that there was a formal map of partition Exh.42 prepared which is said to be much prior in point of time to the amendment to the description of assets including the Item No.2 of list Exh.18. A perusal of the impugned order does give an impression that the learned District Judge has reconsidered the entire matter afresh when ordinarily, the learned District Judge should have confined the considerations to find out whether there is an error apparent on the face of the record. I also find that no prejudice would be caused to the respondent if the enquiry is held as ordered by the Inventory Court in respect of the three lists. I also find that the manner in which the application for review is treated and decided would be a jurisdictional error which requires interference.

10. In such circumstances, following order is passed :

(i) The petition is allowed.

(ii) The impugned order dated 24/09/2008 is hereby set aside. The order dated 29/11/2007 dismissing the appeal is hereby restored.

(iii) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

SMA