

IN THE HIGH COURT OF BOMBAY AT GOA
PANAJI-GOA

WRIT PETITION NO. 395 OF 2015

Mrs. Maria Zelia Filomena Maura
 Mascarenhas Portugal E Barreto
 Major of age, occupation-Housewife
 r/o B-2, Wellworth Residency,
 Opp. J. P. Andrade Colony,
 Borda, Margao, Goa. ::

PETITIONER

..Versus..

1. Mr. Antonio Anselmo Gama
 Major of age,
 r/o H. No.335, 4th Ward, Colva,
 Saleete, Goa.
2. Mr. Mario Joseph Barreto,
 Major of age, married, service.
3. Mr. Savio George Barreto,
 Major of age, married, service.
4. Mr. Elvis Carlos Conceicao Barreto,
 Major of age, married, service.
 All residents of B-2, Wellworth Residency,
 Opp. J.P. Andrade Colony,
 Borda, Margao, Goa. ::

RESPONDENTS

.....
 Mr. Sudesh Usgaonkar Adv. With Ms. R. Pereira, Advocate for the petitioner.
 Mr. C. A. Ferreira, Adv. With Ms. Richelle Nmeida & Mr. Ashwin C. Costa,
 Advocates for the respondents.

CORAM : S. B. SHUKRE, J.
DATE OF RESERVING THE JUDGMENT : 23/02/2016
DATE OF PRONOUNCEMENT OF JUDGMENT : 29/4/2016.

J U D G M E N T

Heard. Rule is made returnable forthwith. Heard finally by
 consent.

2. This writ petition challenges legality and correctness of two orders, one dated 14/11/2014 and the other dated 18/4/2015, both passed in Inventory Proceedings Nos.18640/1970/1 by the Additional Senior Civil Judge (Adhoc), Margao.

3. By order dated 14/11/2014, learned Senior Civil Judge did not accept the chart of partition proposed by the petitioner, who is the head of the family and upheld the objection taken in respect of the chart by respondent No.1. By the subsequent order dated 18/4/2015, learned Senior Civil Judge dismissed the Civil Misc. Application (PORT) No.205/2014/1 filed in the said inventory proceedings for review of the first order holding that no case was made out for reviewing the first order.

4. What is involved here is the estate of Pedro Joaquim Carlos Mascarenhas Portugal and his wife Maria Innocencia, awaiting its partition amongst the legal heirs of the couple in the inventory proceedings. The petitioner, being the head of the family, is Cabeça de Casal of the estate and respondent Nos. 2 to 4 are the other heirs of the couple. Respondent No.1 is a person, who claims his right to the share of the daughter of the couple, Maria Auta, who is one of the heirs of the couple, on the basis of a will executed in his favour by Maria Auta.

5. Pedro Joaquim Carlos died on 16/10/1965 and proceedings of partition of his estate commenced as far back as in the year 1970. The share of his wife, Maria Innocencia, was sold to a stranger and now there is no controversy in respect of her share as it has passed on to the preemptors, whose preemption has been granted as per Article 1376 of Portuguese Civil Procedure Code and the preemptors have stepped into the shoes of the seller. So, what is an issue in the present case is, the share of one of the heirs, daughter Maria Auta, to the estate of Pedro Joaquim Carlos.

6. Maria Innocencia, widow of Pedro Joaquim Carlos, died on 02/5/1984. The couple did not leave any will in respect of any of their properties. One of the heirs, Maria Auta, was married to one Joao Jose Peres, who expired. There were no issues from the marriage. Therefore, half of the share of the husband of Maria Auta devolved on his collaterals and according to the petitioners, the half share of Maria Auta devolved upon her collaterals, in terms of Article 1969 and as shown in the proposed chart of the partition. Maria Auta, during the pendency of inventory proceedings, on 25/5/1988, executed a will in favour of respondent No.1. Maria Auta expired on 06/9/1997. The inventory proceedings were then pending and they are still pending. Since Maria Auta had bequeathed her share to respondent No.1 and as the petitioner thought it fit to bring on record

these facts in view of the requirement under Article 1429, informed the Inventory Court that Maria Auta expired and she left a will constituting respondent No.1 as universal heir of her estate. Accordingly, respondent No.1 was brought on record.

7. The petitioner, in the capacity of Cabeça de Casal, submitted a proposed chart of partition on 15/12/2013 under Article 1414 of the Portuguese Civil Procedure Code. Respondent No.1, however, objected to the proposed chart of partition claiming that by the will executed in his favour by Maria Auta, her share in the estate had been bequeathed to him and such bequeathal be considered in the chart of partition. The objection was resisted by the petitioner on the ground that by the said will, only assets of the testatrix at the time of her death as stated in that will were bequeathed to him and the estate of the father, which had not been partitioned and allotted to the respective legal heirs, was not and could not have been bequeathed by the testatrix to respondent No.1. However, by order passed on 14/11/2014, the Inventory Court upheld the said objection of respondent No.1 and directed the petitioner to modify the chart of partition by including the name of respondent No.1.

8. The petitioner filed a review application in terms of Article 668 read with Article 669 of the Portuguese Civil Code on the ground that there were nullities in the said order. By the order passed on

18/4/2015, however, the review application was dismissed by the Inventory Court. It is these two orders which have been challenged for their legality and correctness in the present writ petition.

9. Shri Sudesh Usgaonkar, learned Counsel for the petitioner submits that a careful perusal of the will in question discloses bequeathal of daughter's or testatrix's assets only and not the father's assets. He submits that under Article 2015, where there are several persons entitled simultaneously to inherit the estate, their rights to the estate are indivisible both in respect of possession as well as ownership as long as the partition is not effected. Therefore, by a will executed by the testatrix, the property, which has not been allotted to her share by effecting partition, would go to the legal heirs as per the order of succession under Article 1969 of the Civil Code of 1867 and in the instant case, the estate, so far as the share of Maria Auta is concerned, would go to the laterals, i.e. brothers and their descendants as ordained at Sl. No.3 in the order of legal succession mentioned in the said Article. He also submits that under Article 2177 of the Civil Code, a co-owner cannot dispose of any specific part of the common assets unless the same is assigned to him/her in partition. He further submits that these provisions of law would have to be taken into account while interpreting the will in question, which has been executed on 25/5/1988 by Maria Auta in favour of respondent No.1.

He submits that by this will, what has been bequeathed by Maria Auta is the property, which she owned till her death and not the property which would come her way after partition.

10. Learned Counsel for the petitioner further submits that the law of legal or interstate succession governing the field would control the interpretation of the will in question and in order to find out true intention of the testatrix, one cannot take a stand *de hors* the law and say that the testatrix even intended to bequeath that property which is not her own and which belonged to her father. He further submits, if respondent No.1 adopts such an interpretation, it would stand directly in the teeth of prohibition under Article 2105 as well as Article 2177. He submits that Articles 1735, 1736 and 1737 are also relevant. He submits that these Articles explain the difference between testamentary succession and legal succession and also clarify the concept of heir and legatee. He submits that these Articles would show limitations on the power of Maria Auta, the testatrix, to dispose of her share in the inheritance of the estate to legatee. He submits, relying on Article 1736, that a person in whose favour no sum of money or no specified object or certain part thereof has been bequeathed, cannot be called as legatee. He submits, if it is held, just for the sake of argument, that disposition of share has been done, it is done in respect of unspecified share in the inheritance and, therefore,

respondent No.1 is not qualified to be called a legatee. In short, learned Counsel submits that by the will in question what has been bequeathed to respondent No.1 is only the property that testatrix specifically owned till her death and not the property which might have fallen to her share upon the partition being effected on the culmination of the inventory proceedings.

11. Mr. Ferreira, learned Counsel for respondent No.1, making a strong opposition, submits that the petition is not maintainable in law as the impugned orders are appellable orders and, therefore, appeal under Section 104 of the Civil Procedure Code would lie against them and not a writ petition. In support, he places reliance upon the case of ¹*Mrs. Bharti Parkar Vs. Mr. Vilas Mahadev Pilankar & others* decided by Full Bench of this Court in the reference. Learned Counsel further submits that as per Article 1761, the will has to be assigned that interpretation which seems most compatible with the intention of the testator in the light of the context of the will. He further submits that upon a careful reading of the will in its entirety, the only interpretation that can possibly be assigned to it is that Maria Auta intended to bequeath all her assets including her share in the undivided inheritance left by estate leaver Pedro. He submits that under Article 2009, the inheritance opens up as a result of the death of

¹ Vide Misc. Civil Application No. 926 of 2013 decided on 22/12/2015.

the estate leaver and further submits, relying upon Article 2011, the transmission of ownership and possession of the inheritance to the estate whether by intestate succession or testamentary succession occurs the moment the death of the estate leaver occurs. According to him, cumulative effect of Articles 2009 and 2011 is that inheritance to the estate opens and its ownership together with possession is transferred to the intestate heirs in case of intestate or legal succession and to testamentary heirs in case of testamentary disposition at the very moment of the death of estate leaver. In other words, he submits that if there are more than one heirs, the ownership and possession of the inheritance to the estate would pass on to all the heirs and these heirs shall hold the same jointly and commonly till the time the partition is effected.

12. Learned Counsel further submits that in this case, the death of estate leaver Pedro occurred on 16/10/1965 and from that date onwards, all the heirs including Maria Auta became entitled to succeed to the inheritance to the extent of their respective shares therein and all the heirs thus became co-owners of the entire estate. Therefore, he further submits, Maria Auta was within her rights to make a testamentary disposition of her share in the undivided inheritance to the estate in favour of respondent No.1 by the will in question. He further submits that Article 2177 places embargo upon disposition of

any specific part of the common estate or thing till the time the common estate or thing is allotted to the testators in partition. This Article, according to him, does not prohibit disposition, by bequeathal or otherwise, of the entire share in the common estate or thing and the prohibition is applicable only to a specific part of the undivided share in the common estate or thing. He submits that a careful reading of the will in question would show that Maria Auta has disposed of all her assets including her share in the inheritance to the estate of Pedro and that she has not bequeathed only some portion of that share. Therefore, he submits that the learned Senior Civil Judge has rightly held that prohibition under Article 2177 has no application to the facts of the present case. On these grounds, learned Counsel for respondent No.1 submits that the writ petition deserves to be dismissed.

13. In this case, a preliminary objection regarding the maintainability of this writ petition has been taken by respondent No.1 and, therefore, it would be necessary for me to first decide the preliminary objection. The preliminary objection emanates from the reference answered by the Full Bench of this Court in ²M.C.A. No.926 of 2013 decided on 22/12/2015. The reference was on the questions; *Whether the first appeal need to be filed from a final order passed in inventory proceedings and whether thereafter a right of second appeal*

² Ibid 1.

would follow or not? The reference was made by learned Single Judge of this Court by his order passed on 02/3/2015 in M.C.A. No.926 of 2013. The reference was answered in terms that the first appeal would lie in terms of Section 96 of the Indian Civil Procedure Code read with the provisions of the Civil Courts Act against a final judgment homologating the partition in the inventory proceedings and thereafter a right of Second appeal would follow in terms of Section 100 of the Indian Civil Procedure Code. It was also held that against all other orders, an appeal from order in terms of Section 104 of the Civil Procedural Code would lie. We are concerned in this writ petition with the order which has been passed during the pendency of the inventory proceedings and which is not a final judgment. Therefore, it would be necessary to consider the second answer given by the Full Bench of this Court. The second answer as it appears in Paragraph-32 of the said judgment dated 22/12/2015 is reproduced as under.:

“(ii) All other orders passed in the inventory proceedings can be challenged by filing an Appeal from Order in terms of Section 104 of the Civil Procedural Code.”

It is clear from the above answer that all other orders passed in the inventory proceedings can be assailed if an appeal from that order in terms of Section 104 of the Civil Procedural Code is

permissible. Therefore, it would be necessary to also refer to Section 104 of the Civil Procedure Code, the relevant portion of which is reproduced as under.:

“104, Orders from which appeal lies.- (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :-.....”

It would be clear from the language used in Section 104 that an appeal lies under this Section only against that order which has been specifically mentioned in this Section. In addition to the orders specified in the Section, the appeal also lies from those orders in respect of which a right of appeal has been expressly provided in the body of the Civil Procedure Code or any other law for the time being in force. Then, the most important part of the Section comes into picture and it has to be found in words, *“from no other orders”*. Use of these words would clearly show that right of appeal under Section 104 is restricted to only those appeals for which a specific provision has been made under Section 104 or any other parts of the Civil Procedure Code or any other law for the time being in force and if there is no such express provision, no appeal could be filed under Section 104 of the Civil Procedure Code. It would also mean that if right of appeal is expressly taken away by any specific provision in any other law in force for the time being, appeal cannot be filed under this

Section. Incidentally, the order impugned here does not find any place in the list of appealable orders specified in the said Section. So, in terms of the Full Bench order, ordinarily an appeal would lie under Section 104 of the Civil Procedure Code against an interim order which is not finally passed in inventory proceedings, unless there is express bar on it provided under any other law, in this case, the Portuguese Civil Code. Such being the scope and nature of Section 104-right of appeal, now it would be necessary for us to find out whether there is any express prohibition in the Portuguese Civil Code of 1867 against filing of appeal against the order impugned here passed in the inventory proceedings, which is an interim order.

14. Learned Counsel for the petitioner submits that such prohibition has to be seen in Article 1414 of the Civil Code. It would be useful to reproduce this Article here. It reads thus:

³Article 1414

(Third examination and inspection of the file. Order as to manner how the partition is to be effected)

“After the provisions of the preceding Articles have been complied with, the file shall be made available for the examination, for a period of five days, to the advocates of heirs and of the administrator, and then for the inspection, for the same period to the Public Prosecutor, in case the inventory is of orphan's

3 Family Laws of Goa, Daman And Diu, Volume II, pp. 117, 118 – by M. S. Usgaonkar, Sr. Advocate. Published by Vela Associates. Panaji. Goa.

jurisdiction, to give their say as to how the partition should be effected.

In the next ten days an order shall be passed directing as to how the partition should be effected.

In the said order all the questions shall be decided and which have not been decided so far and which are necessary to be decided, for drawing the chart of partition, it being permissible to direct the parties to lead evidence which may be found necessary.

But where there are questions which require a large investigation, the parties shall be directed in this part to pursue normal remedies.

Paragraph 1: The question which are required to be decided in normal course of the inventory, shall not be left to be decided at the time of passing the order as to how the partition should be effected.

Paragraph 2: No special appeal shall lie from the order referred to in this Article; however, the order may be challenged in the final appeal against judgment confirming the partition.”

A perusal of Article 1414 would disclose that in paragraph-2 thereof there is an express bar created on filing of an appeal against the order referred to in this Article. It is also provided therein that the order may be challenged in the final appeal against the judgment confirming partition. The order contemplated by Article 1414 is the

one which directs as to how the partition should be effected or the one which decides all the questions which are necessary to be decided for drawing the chart of partition. The order impugned in this case decides the question necessary for drawing the chart of partition and, therefore, as rightly submitted by learned Counsel, the impugned order would have to be considered as having been passed under Article 1414. It would then follow that by application of prohibition in paragraph-2, no appeal under Section 104 of the Civil Procedure Code would lie and, therefore, the remedy would be in the nature of writ petition, subject to its limitations, as has been availed of by the petitioner. I, therefore, find by following the Full Bench order upon reference vide ⁴M.C.A. No. 926 of 2013 dated 22/12/2015 that the present writ petition is maintainable and, therefore the preliminary objection of respondent No.1 is rejected.

15. Now, the main questions involved in the petition.:

(a) Whether the will in question can be interpreted to signify intention of the testatrix to dispose of even her share in the indivisible right of ownership and possession in the undivided assets of Pedro which have devolved upon all the heirs by intestate succession pending partition? and

(b) Whether by testamentary disposition, a testatrix like Maria Auta, could transfer her undivided share or indivisible right of ownership and possession in the

⁴ Ibid 1.

undivided assets of Pedro, pending partition?

16. According to learned Counsel for the petitioner, answer to the first question is in the negative and even answer to the second question would go the same way having regard to the provisions of Articles 2015 and 2177 of Portuguese Civil Code. Learned Counsel for respondent No.1, however, has a different opinion. He would like to answer both these questions positively. In order to support their arguments, learned Counsel for the petitioner and learned Counsel for respondent No.1 place reliance upon the following Articles.:

Article	Subject
1969	Determines the order of devolution of the estate by legal or intestate succession.
1735	Defines testamentary succession and legal or intestate succession.
1736	Defines heir and legatee.
1737	Explains what is inheritance indicating that it comprises the properties, rights and obligations of the deceased, which are not personal and which are not excluded by disposition made by the deceased or by the law.
1738	Deals with situation when deceased and his heirs or the legatees simultaneously die.
1739	Explains concept of will by laying down that it is the act by which a person disposes of the whole or part of his property, which is to take effect after his death is called a will.
2015	Explains how rights of several heirs over the asset remain indivisible so long as there is no partition.

In addition to the above Articles, Shri Usgaonkar, learned

Counsel for the petitioner, has also relied upon Article 2177 dealing with disposal of specified portion of a common asset. He has relied upon the cases of ⁵*Jose Antonio Philip Pascoal da Piedade & another Vs. Joao Luis Laurente dos & others* and ⁶*B. C. Dalal Vs. Custodian and others*.

Shri Ferreira, learned Counsel for respondent No.1 has additionally relied upon the following Articles.:

Articles	Subject
1761	Explains how the testamentary disposition should be interpreted, in case of a doubt,
1826	Shows that right of legatee is a transmissible right and it starts from the day the testator dies.
2009	Explains how the inheritance opens.
2011	Explains when the transfer of interest in the asset of the author of inheritance or estate leaver takes place.

17. On careful consideration of all the above Articles, I find that only some of them are relevant for determining the controversy involved in this case. These relevant Articles are; Articles 1735, 1736, 1761, 1826, 1969, 2009, 2011, 2015 and 2177. Therefore, it would be convenient for us to reproduce those Articles here and are reproduced as under.:

⁵ 1999(1) Goa L.T. 77, First Appeals No. 70/99 and 72/99 decided by this Court on 2/8th July, 2004.

⁶ (2006) 13 SCC 736.

⁷**Article 1735** : Any person can succeed, on the death of another, to all the properties of the deceased, or to a part thereof, under the disposition of his last Will, as well by virtue of the law. In the first case, there is testamentary succession; in the second, legal succession.

⁸**Article 1736** : An heir is a person who succeeds to all of the inheritance, or to a part thereof, without specification of value or object. A legatee is one in favour of whom the testator disposes of specific value or objects, or of a part thereof.

⁹**Article 1761** : In case of doubt regarding the interpretation of a testamentary disposition, whatever seems most compatible with the intention of the testator, in light of the will's context, shall be complied with.

¹⁰**Article 1826** : A pure and simple legacy grants the legatee a transmissible right, starting from the day the testator dies.

¹¹**Article 1969**: Intestate succession shall occur in the following order:

1. To the descendants;
2. To the ascendants, except in the case of Article 1236.
3. To the siblings and their descendants;
4. To the surviving spouse;

7 Ibid 3.

8 -"-

9 Family and Succession Law in the Portuguese Civil Code of 1867 : A 21st Century Approach, 2nd edition, 2014 by Instituto de Cooperacao Juridica Faculdade de Direito da Universidade de Lisboa, published by Broadway publishing House – p.291.

10 -"- p.324.

11 -"- pp.368, 369.

5. To collateral relatives not included in no.3, up to the sixth degree;
6. To the State, with the exception of the provisions of article 1663.

Single §) In the cases of no.s 1, 2 and 3, the goods and gathered or pending fruits, meant and necessary for the couple's consumption, shall be considered as exclusive property of the surviving spouse, as long as there was no pending or decided legal action for divorce or for separation of persons and property at the time of the opening of the inheritance.

¹²**Article 2009** : The inheritance is opened as a result of the death of its author; the place of the opening of the inheritance shall be determined in accordance with the following provisions:

§ 1) If the deceased had a domicile, the inheritance shall be opened at the place of that domicile.

§ 2) In the absence of a domicile, the inheritance shall be opened at the place where the deceased had immovable property.

§ 3) If the deceased had immovable property in different places, the inheritance shall be opened where most of that property is found, this assessment being made on the basis of the respective land revenue.

§ 4) If the deceased does not have a domicile nor immovable property anywhere, the inheritance shall be opened in the place where he/she died.

¹³**Article 2011** : The transmission of the ownership and possession of the inheritance to the testamentary or intestate heirs shall occur at the moment of the death of the

¹² Ibid 9 -p.390.

¹³ Ibid 9 -p.391.

its author.

¹⁴**Article 2015** : If several people are called simultaneously to the same inheritance, their right over it shall be indivisible, regarding both possession and ownership, so long as there is no partition.

¹⁵**Article 2177 : Disposal of specified portion of a common asset** - A co-partner may not, however dispose of any specific part of the common asset or thing, unless the same is assigned to him in partition; and the extinguishment of the right to the portion which is to belong to him may be delimited in terms of the law.

18. It is clear from Articles 1735 and 1736 that the Portuguese Civil Code explains how the succession to the estate of the deceased takes place and assigns specific meaning to the terms, “heir” and “legatee”. An heir is a person who succeeds to the totality of the inheritance or a part thereof, without specifying the sum of money or particular part of the inheritance. A legatee is a person who acquires a right of ownership and possession in respect of a sum of money or a specific object or its part. The expression “specific object” is capable of including in it a share in the undivided property. The reasons are not too far to be seen. The words “specific object” do not appear to be defined in the Portuguese Civil Code, at least my attention was not

¹⁴ Ibid 9 -p.391.

¹⁵ Taken from English translation of Article 2177 supplied by Mr. C. A.Ferreria, learned Advocate for respondent No.1 vide list of Articles of Portuguese Civil Code, 1867 at document 'X'.

drawn to any definition of them. In such a case, they have to be understood by their common parlance meaning. The word “specific” has been defined in Concise Oxford English Dictionary, Indian Edition, p.1386 as: clearly defined or identified; relating uniquely to a subject etc. Same dictionary at p.986 explains the word “object” as having the meaning: a material thing that can be seen and touched; a thing external to thinking mind or subject; a person or thing to which an action or feeling is directed. An undivided share in the common asset has a definite proportion as e.g. $\frac{1}{2}$, $\frac{1}{4}^{\text{th}}$ etc; is a thing which exists in fixed limits in the common asset, is external to thinking mind and is clearly defined and identified in terms of its proportion or extent relating uniquely to common asset and, therefore, fits into common parlance meaning of the words “specific object”.

19. Article 1761 serves as a guideline for interpreting a document of will effecting testamentary disposition of the property when there is a doubt about it and prescribes that interpretation must be made in a manner that it is compatible with the intention of the testator, as gathered from the language employed and context of the will.

20. Article 1826 lays down that in a pure and simple legacy the legatee would acquire transmissible right starting from the day the testator dies. Article 1969 determines the order in which the heirs

succeed to the estate by intestate succession. Article 2009 shows that inheritance to the estate opens as a result of death of its author. Article 2011 lays down that the moment the author dies, all rights of ownership and possession of the inheritance get transferred either by way of a testamentary disposition (in case there is a will) or by legal or intestate succession (when there is no will) to the heirs shown in the will or in Article 1969, subject to other relevant provisions, as the case may be. Article 2015 clarifies that as long as there is no partition, rights of ownership of the heirs over the inheritance remain indivisible.

21. Article 2177, the most significant Article for resolving the dispute involved in this case, places an embargo upon the right of a co-owner or an heir to dispose of or alienate any specific part of the common property, unless that specific part is assigned to him/her in partition. The language employed in this Article is plain and unambiguous. What it prohibits is disposition of any specific part of the common asset and not the unspecific part of the common asset. An undivided share of a co-owner in the common asset is an example of the latter category of interest in the common asset. Its extent is already fixed as per the order of legal succession (Article 1969), though to which particular part of the common asset it would get attached is not fixed, till partition is effected. The distinction between

specific part of the property and its unspecific part like an undivided share lies in the susceptibility to recognition of the property. A specific part of the common asset would mean that portion of asset which is distinguishable or separate from the rest and amenable to recognition by naked eyes. An undivided share in common asset by its very nature does not refer to such a distinguishable or separate part of the asset, rather it refers to entitlement to receive some part thereof in fixed proportion. So, under Article 2177 taboo is transfer of distinguishable part of common asset and not its undivided part in certain proportion. This can be illustrated by giving an example; if there are four heirs succeeding to the inheritance and the inheritance consists of A,B,C, and D properties, each of the heirs would have $\frac{1}{4}^{\text{th}}$ undivided share in the common asset comprising A,B,C, and D properties and their right to ownership and possession of specific properties in the common asset to the extent of $\frac{1}{4}^{\text{th}}$ share would get crystallized only when partition is effected by metes and bounds. Till that time, what would be permissible for them, under this Article, is disposition of their $\frac{1}{4}^{\text{th}}$ share in the common asset or disposition of a portion of this $\frac{1}{4}^{\text{th}}$ share as per Article 1736 and not the disposition by A or B or C or D properties forming part of the common assets. As and when the partition takes place, the transferee would get that specific property or specific part of the asset, which would be allotted to the

share of the transferor. So, the concept that this Article 2177 puts forth is the prohibition of transfer of specific part of the property commonly owned on the one hand and permissibility of transfer of share in that undivided property on the other. If the share in the common asset is alienated, the transferee would get a right to take part in inventory or partition proceedings and take away that part of the undivided property which would be allotted in partition to the transferor. This concept is also seen to exist in the other system of law in India and is not new to the Portuguese Civil Code. In the case of ¹⁶*Shanmughasundaram & others Vs. Diravia Nadar (Dead) by lrs. & another*, Hon'ble Apex Court has held that the co-owners inheriting the property as heirs under the Hindu Succession Act cannot sale the specific property and they are competent to sell only to the extent of their undivided share in the property. Same view has been taken by the Hon'ble Apex Court in the case of ¹⁷*Hardeo Rai Vs. Sakuntala Devi & others*.

22. Having understood the law governing the field, let us now turn to the will in question executed in the year 1988. Relevant portion of the will manifestly disclosing Maria Auta's intention is extracted here from pages 65 and 66 of the paper-book, though some minor grammatical errors are seen. It reads as under:

¹⁶ (2005) 10 SCC 728.

¹⁷ (2008) 7 SCC 46.

“...That the Testatrix is desirous of making in the disposition of her last wish and in fact she does by this testament in the manner hereinafter expressed that she has no descendants or ascendants entitled to right of legitime and as such she being free to dispose of all her assets in favour of any person she institute her friend Shri Antonio Anselmo Gama, aged about 39 thirty nine son of Santan Higin Gama, businessman residing at Arossim, Cansaulim, who is helping and looking after her, as her sole and universal heir, bequeathing to him all her assets, moveable, immoveable, rights, shares, and any other assets she may own, until her death without any exception...”

It clearly seen from above that by this will, Maria Auta has bequeathed all her assets, moveable, immoveable, rights, shares, and any other assets she may own, until her death without any exception.

23. According to learned Counsel for the petitioner, the words, “all her assets” and the words, “and any other assets she may own, until her death” would not include the undivided share of Maria Auta in the estate left by deceased Pedro as the rights of the co-heirs are yet to be crystallized and they would devolve upon the heirs and would get defined and determined only upon the partition and till that time the property would continue to be of deceased Pedro and not of Maria Auta. So, what is not of heirs cannot be disposed of by her, so submits the learned Counsel. Learned Counsel for respondent No.1 disagrees and, I think, he is right. The argument of learned Counsel for the

petitioner is not consistent with the provisions of Articles 2009 and 2011. Under Article 2009, the inheritance opens as a result of death of its author and under Article 2011 the transmission of the ownership and possession of the inheritance to the heirs takes place at the very moment of the death of its author. Article 2015 prescribes that rights of ownership and possession of the heirs over the inheritance would be indivisible as long as there is no partition. A cumulative effect of these provisions of law on the inheritance involved in this case would be that Maria Auta became entitled to her undivided share in the estate left by deceased Pedro at the moment he died and after his death, the estate was not of his but of all the heirs holding the same as co-owners till its partition. Admittedly, he died on 16/10/1965, Inventory proceedings were commenced in the year 1970 and Maria Auta died on 06/9/1997 during the pendency of these proceedings. So, Maria Auta, at the time of her death, did possess her undivided share in inheritance, which, by the will in question, she bequeathed in favour of respondent No.1. Respondent No.1 on his part acquired a transmissible right in the undivided share of Maria Auta from the day of her death by virtue of Article 1826 read with Article 1736. The expression "all her assets, moveable, immoveable, rights, share and any other assets she may own until her death without any exception" used in the will in question is wide enough to take within its fold

undivided share of Maria Auta in the estate left by deceased Pedro. If we consider this will in its entirety, we would notice that nowhere in the will, Maria Auta has expressed anything about exclusion of her undivided share in the inheritance left by deceased Pedro. Therefore, the only interpretation that can be assigned to this will, keeping with the spirit of Article 1761, is that Maria Auta intended to also transfer her undivided share in the said estate in favour of respondent No.1 by testamentary disposition. So, the first question is answered accordingly.

24. Now, the next question is; as to whether transfer of an undivided share in the inheritance of deceased Pedro was permissible in view of Article 2177 read with Article 2015 of the Portuguese Civil Code or not?

25. While interpreting the scope and nature of the above referred Articles, I have already found that such alienation is not prohibited and what is prohibited under Article 2177 is disposition of a specific part of the common asset and not the undivided share therein. I have also found, while considering the legal impact of Article 1736 earlier, that legatee is a person who acquires right of ownership and possession in respect of a specific object like an undivided share. This article, thus does not prohibit a legatee from succeeding to an undivided share in a common asset by testamentary

disposition. The inevitable conclusion then would be that Article 1736 is not the inhibitor but the facilitator of disposition of undivided share or interest in the common asset, an interpretation that goes well with Article 2177. Therefore, the second question is also answered as in the affirmative. The only disability the respondent No.1 would suffer in this case is in respect of claiming right to a particular part of the common property and that he will have to wait till the inventory proceedings presently pending are culminated and partition, working out his right in the specific property, is effected.

26. Learned Counsel for the petitioner has relied upon the cases of ¹⁸*Jose Antonio Philip and Shri Claudia Francisco Vs. Smt. Eilalia Fernandes & others* (supra). Both these cases have been turned on entirely different facts. In the first case there was a gift deed of the three properties forming part of the estate left behind by the estate leaver and the estate having not been partitioned, those properties were not assigned exclusively in favour of the donor. Therefore, it was held that such alienation was prohibited under Article 2177. But, the interpretation, the learned Single Judge ultimately gave to Article 2177 is no different than the one made by me here. This can be seen from his observations appearing in para-9 which are extracted as under:

¹⁸ Ibid 5.

“9. Article 2177 of the said Code provides that a co-owner cannot dispose of specifically any portion of the common property without the same being assigned or allotted in partition to him...”

Even in the second case of Shri Claudio Fransciso, one of the heirs Constancio, had sold two plots ademeasuirng in total about 380 sq. mtrs. from out of the estate left by the estate leaver, which was not partitioned. So, by placing reliance upon the case of Jose Antonio Philip (supra), it was held that Constancio was not entitled to sell any portion of such property which had not come to him in a partition. Both these cases, it is obvious, do not advance the case of the petitioner, rather they lean on the side of the respondent No.1.

27. Learned Counsel for the petitioner has also referred to me the case of ¹⁹B. C. Dalal Vs. Custodian & others (supra). The case is about the legality or otherwise of the direction made by Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 for sale of some items of notified person seized by Income-Tax department and handed over to custodian and so has no bearing of any nature on the facts of this case.

28. In the circumstances, I find that neither any illegality nor any perversity could be noticed in the order dated 14/11/2014 impugned herein. Consequently, the order passed on 18/4/2015

¹⁹ Ibid 6.

rejecting the review application would also have to be upheld as rightly passed. I find no merit in this writ petition and it deserves to be dismissed.

Writ petition stands dismissed. No order as to the costs.

Rule is discharged.

JUDGE