IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.593 OF 2015

Mrs. Clotilda Jesuina
Rebello & Ors. … Petitioners

V/s

Mrs. Chayne Rebello & anr. … Respondents

Shri D. Pangam, Advocate for the Petitioners.

Respondent No.2 in person.

CORAM : C.V. BHADANG, J.

Reserved on : 24th JUNE, 2016

Pronounced on :28th JUNE, 2016

ORDER :

By this petition, the petitioners are challenging the judgment and order dated 16/01/2014 passed by the learned District Judge in Misc. Civil Appeal No.40/2013 and the order dated 23/04/2015 passed in Civil Review Application No.1/2014 by which the Misc. Civil Appeal was allowed and the application for review came to be dismissed.

2. The brief facts necessary for the disposal

of the petition may be stated thus:

Antonio F. Rebello and his wife Esmenia had three sons and two daughters. Presently, we are not concerned with the daughters, as they have given up their share in the estate. The three sons are Cyril Rebello (Engineer), Lazarus Rebello and Antonio B. Rebello. Antonio F. Rebello died on 6/08/1976 while his wife Esmenia died on 29/06/1978. It appears that (now deceased) Antonio F. Rebello was having a shop bearing no.535 situated at Comba, Margao in which the deceased was running liquor business. Cyril Rebello (since deceased) had filed Special Civil Suit No.33/89/I before the learned Civil Judge Senior Division at Margao against Lazarus Rebello, his wife Clotilda, Antonio B. Rebello and his wife Santolina. It was claimed that after the death of Antonio F. Rebello and his wife Esmenia, the liquor licence (bearing no.RS-FCL-52) which was standing in the name of Antonio, was transferred in the name of the plaintiff Cyril and his two brothers i.e.

Lazarus and Antonio B. Rebello. However, the defendants refused to allow him to operate the said liquor business and refused to show the accounts, stocks and other assets. The plaintiff Cyril Rebello had inter alia claimed an amount of Rs.3,000/- per month towards his share of the profits, out of the said business from February, 1986 onwards. The said suit was decreed on 7/03/2001 and a final decree was drawn on 22/10/2002 by which the defendants in the suit were held jointly and severally liable to pay an amount of Rs.1,08,000/- to Cyril Rebello, along with interest at the rate of 6% per annum with other reliefs. The decree is not executed as yet and Cyril Rebello (the decree holder) had not filed any execution proceedings.

3. It appears that in the year 2004 Regular Inventory Proceedings No.25/2004/D were initiated by Clotilda Rebello, the widow of Lazarus Rebello in which Antonio F. Rebello, his wife Esmenia and Lazarus Rebello are shown as

deceased estate leavers. Cyril Rebello was shown as interested party no.1. Santolina Rebello w/o. Antonio B. Rebello is the Cabeca de Casal in the said proceedings which are pending before the learned Civil Judge Junior Division at Margao. In the said proceedings in all 9 properties are listed including the shop premises (item no.8) and the liquor business (item no.9). Item nos. 1 to 7 are the movable articles, associated with the said shop.

4. On 29/10/2012, the respondents herein Chayne Rebello and her son Dr. Aaron Rebello (being the legal representatives of the deceased decree holder, Cyril Rebello) filed an application in the said inventory proceedings, purportedly under Article 1385 of the Portuguese Civil Code, 1867 (Code, for short) claiming that these interested parties have become creditors and have a right to execute the decree dated 22/10/2002 against the interested parties, and they be directed to pay an amount of

Rs.13,35,400.00 arising out of the final decree dated 22/10/2002.

5. The Cabeca da Casal and the other interested parties filed a reply to the same stating that they have no objection to settle the dispute arising out of the preliminary decree. The relevant averments in para no.2 may be reproduced thus:

> 2. That in respect of so-called debts or liabilities as put forth, by the said interested party-1, these parties without prejudice, state that they have no objection to settle the dues arising out of the said Decree dated 07.03.2001 and culminated into Final Decree dated 21.06.2002 or say corrected 22.10.2002 and that as per Final Decree, the mesne profits per month are determined as Rs.3,000/- and payable from February, 1989 to 08.03.1995 i.e. date upto which the premises had licence for use of the place for vending retail liquor of IMFL and CL, in the present proceedings to put an end to litigation and also to avoid execution proceedings, which is in fact a proper procedure to claim the benefits of the said decree.

6. The learned Trial Court by an order dated 18/03/2013 rejected the application filed by Chayne Rebello and Dr. Aaron Rebello holding that the decree was not against the deceased estate leaver and, as such, the amount recoverable under the decree, cannot be listed in the inventory proceedings, as a debt or liability. In short, it was found that unless and until the decree and the consequent claim of the creditor, is against the estate or the deceased estate leaver, the claim under the decree cannot be listed as a debt/liability, in the inventory proceedings. It was thus held that although the interested parties are entitled to get the decree executed, the claim under the decree cannot be listed as a debt in the inventory proceedings.

7. The respondents challenged the same before the learned District Judge in Misc. Civil Appeal No.40/2013 which has been allowed on 16/01/2014 which is subject matter of challenge in this

petition. The learned District Judge placing reliance on Article 2056, 2057 & 2058 of the Code found that the amount under decree can be claimed by the decree holders as creditors at any time and they are not bound to seek execution of the decree in separate execution proceedings. It was found that the creditor can claim the dues from the co-heirs who are in possession of the estate under Article 2070 and 1385 of the Code under which the creditor can claim dues by an application in the inventory proceedings. It was further found that a creditor can take part in inventory proceedings and lodge a preferential claim. The learned District Judge further found that the respondents had an executable judgment against inheritance with respect to item no.9 (i.e. the liquor business) in inventory proceedings and, therefore, the finding of the learned Inventory Court that as on the date of the opening of inheritance, there were no such debt and the respondents were not creditors, is illegal and perverse. The learned District Judge further found that the aforesaid articles permit the creditors to execute the judgment/decree, against the inheritance in the inventory proceedings itself. In that view of the matter, the appeal was allowed directing that the amount of Rs.13,35,400/- arising from the final decree shall be paid to the creditors/respondents herein, in the inventory proceedings.

8. Feeling aggrieved, the legal heirs of Lazarus and Antonio B. Rebello are before this Court.

9. I have heard Shri D. Pangam, the learned Counsel for the petitioners and the respondent no.2 in person who claims to be the power of attorney holder of the respondent no.1.

10. It is submitted by Shri D. Pangam, the learned Counsel for the petitioners that the learned Trial Court was right in holding that

there was no debt as such, in existence, against the deceased estate leavers and, therefore, the respondent cannot claim the amount under the decree as creditor in the inventory proceedings. He submitted that the reliance placed by the learned Appellate Court on Article 2057 and 2058 is misplaced, as the claim of the creditors presupposes that it is against the deceased estate leavers or the estate as such. He submits that the decree in favour of Cyril Rebello, the predecessor of the respondents, was personally against Lazarus and his wife Clotilda and Antonio B. Rebello and his wife Santolina and the same cannot be listed as a debt/liability in the inventory proceedings. The learned Counsel for the petitioners submitted that a decree of which the execution is barred by limitation cannot be sought to be executed by a circuitous mode, by getting it listed/described as a debt, in the inventory proceedings. It is submitted that the decree was not against the deceased estate leavers and, as such, cannot be executed in the inventory proceedings. In so far as the reliance placed by the appellate Court on Articles 2056, 2057 & 2058 is concerned, it is submitted that, to the extent they apply to creditors, the said articles stand repealed, in view of the extension of the Code of Civil Procedure Code, 1908 to the State of Goa.

11. On the contrary, it is submitted by the respondent no.2 that the decrees is in respect of liquor business, conducted in the shop, both of which are listed in the inventory proceedings as item no.8 & 9. He has also pointed out the reply dated 6/07/2012 filed by the Cabeca de Casal and the interested parties, in which they had agreed to settle the dues arising out of the decree i.e. the mesne profits at the rate of Rs.3,000/- per month payable from February, 1989 to 8th March 1995 i.e. when the liquor licence was cancelled. He, therefore, submits that no interference is called for.

12. I have given careful consideration to the facts and circumstances and the submissions made and I do not find that any case for interference is made out. In so far as the ground that the execution of the decree is time barred, it may be mentioned that the judgment and decree passed in Special Civil Suit No.33/1989 was subject matter of challenge before this Court in First Appeal No.45/2002. By an order dated 4/07/2002 passed in Misc. Civl Application No.55/2002, this Court had granted stay of the said decree. Eventually, the First Appeal was transferred to the District Court and registered as Regular Civil Appeal No.287/2010, which was ultimately dismissed on 13/12/2010. Thus, the stay can be said to have been vacated only on 13/12/2010. For this reason the submission on behalf of the petitioners cannot be accepted.

13. It appears that the learned District Judge has placed reliance on Articles 2056, 2057 &

2058 of the Code and also on Articles 2070 and 1385. The learned District Judge has observed that a creditor can claim the dues from the co-heirs who are in possession of the estate under Article 2070 and under Article 1385 a creditor can claim the dues by an application in inventory proceedings. Articles 2056 and 2057 in particular provide that during the pendency of the inventory, the administrator of the estate may pay the legatees and the debts when all the heirs and legatees agree for such payment. In the present case, as noticed above in para 2 of the reply dated 6/07/2012 filed by the Cabeca de Casal and the other interested parties, they had agreed for payment of the mesne profits from February 1989 to 8th March 1995 ~~1985~~. It is not shown that the provisions of these Articles stand abrogated in view of the application of the Code of Civil Procedure, 1908 to State of Goa. For these reasons, I do not find that the impugned judgment calls for interference. In the result, the Writ Petition

Correction carried out as per order dtd. 29/09/16 in MCA No.633/2016.

is dismissed in limine with no order as to costs.

C.V. BHADANG, J.

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