

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 99 OF 2015**

VINCENTE GRACIAS ALIAS
VICENTE FERNANDES. APPELLANT.

VERSUS

JOSE LUIS JAQUES FERNADNES
(DECEASED) THROUGH HIS LRS. RESPONDENTS

Mr. V.P. Thali, Advocate for the appellant.

Mr. G. Teles, Advocate for the respondents No. 1(a) to 1(d).

CORAM :- F.M. REIS, J.

Date : - 24 JUNE 2016.

ORAL ORDER :-

Heard Mr. V.P. Thali, learned Counsel appearing for the appellant and Mr. G. Teles, learned Counsel appearing for the respondents No. 1(a) to 1(d).

2. The above appeal challenges the Judgment passed by the learned Additional District Judge, Margao in Regular Civil Appeal No. 117/2014 whereby an ex parte Decree passed by the learned Trial

Judge came to be quashed and set aside and the matter was remanded to the learned Trial Court to dispose of the suit filed by the appellant, on merits.

3. It is the contention of Shri Thali, learned Counsel appearing for the appellant that the Judgment which was impugned before the Lower Appellate Court was an ex parte decree passed by the learned Trial Judge and as the respondents have not availed of the remedy in filing an application under Order 9, Rule 13 of the C.P.C., to set aside the ex parte decree, the appeal itself was not maintainable. The learned Counsel further points out that in any event, the issues which were to be examined while disposing of the application under Order 9, Rule 13 CPC, could not be considered by the learned Lower Appellate Court while deciding the appeal under Section 96 of the C.P.C.. The learned Counsel further points out that the learned Lower Appellate Court has relied upon an affidavit filed by the daughter of the deceased defendant to come to the conclusion that the service effected on the deceased was not proper. The learned Counsel further points out that as the deceased defendant was duly served, the learned Lower Appellate Court was not justified to set aside the ex parte

Judgment passed by the learned Trial Court and, as such, there is a substantial question of law on that count which arises in the present petition. The learned Counsel further points out that the respondents themselves had no locus standi to file the appeal as, according to him, as the reliefs sought by the appellant was in respect of the act in persona committed by the deceased defendant, the action of the LRs. of the said deceased would not arise at all. The learned Counsel further points out that the learned Lower Appellate Court has misconstrued the material on record and has erroneously come to the conclusion that the deceased defendant was not duly served and consequently quashed and set aside the ex parte decree passed by the learned Trial Judge.

4. On the other hand, Shri G. Teles, learned Counsel appearing for the respondents No.1(a) to 1(d) has pointed out that after the remand, the learned Trial Judge has rejected the plaint and dismissed the suit filed by the appellant. The learned Counsel, as such, points out that the appeal itself had become infructuous and, as such, the question of examining the validity or otherwise of the impugned Judgment would not arise. The learned Counsel further points out that

as the deceased defendant was not duly served in the suit filed by the appellants, the learned Judge, after minutely examining the material on record and the arguments advanced by the respondents and the appellants has come to the conclusion that the deceased defendant was not duly served. The learned Counsel further points out that there are no substantial questions of law which would arise in the present appeal for consideration.

5. I have considered the submissions of the learned Counsel and I have gone through the record. The contention of Mr. Thali, learned Counsel appearing for the appellant that the appeal itself preferred by the respondents before the learned Lower Appellate Court is not maintainable, cannot be accepted. The liability to pay the amount would devolve upon the respondents to the extent of their estate left behind by the deceased. In such circumstances, the contention that the respondents have no locus standi cannot be accepted.

6. With regard to the contention of Shri Thali, learned Counsle appearing for the appellant that the grounds which can be

raised under Order 9, Rule 13 CPC, cannot be raised in an appeal under Section 96 of CPC., would have to be examined in the context as to whether the respondents had availed of their remedy to file an application under Order 9, Rule 13 CPC.. In the present case, it is an admitted position that the respondents had not availed of such a remedy. A party has got a right to elect the remedy, as the remedies are concurrent, though their scope is entirely different. In an appeal under Section 96 of the C.P.C., the Appellate Court has wider jurisdiction to go into all aspects, as well as the merits of the decree passed. In such circumstances, it is for the concerned defendant to elect his remedy. As such, the respondents are not precluded to point out to the Appellate Court on the basis of the material on record that the alleged service of summons on the deceased defendant was not in accordance with law.

7. With regard to the contention of Mr. Thali, learned Counsel appearing for the appellant that the learned Judge ought to have given an opportunity to the appellants to lead evidence, I find that admittedly, the appellant did not choose to cross examine any of the parties, nor lead evidence. Even on perusal of the impugned Judgment, I find that

there were no arguments advanced on that count before the learned Lower Appellate Court, nor any such contentions raised before the Lower Appellate Court. As such, the question of contending that there is substantial question of law which arises in the present proceedings based on such contention would not arise at all. Apart from that, the learned Lower Appellate Court, on the basis of the material on record, and on scrutiny of the relevant material before the learned Trial Judge has come to the conclusion that the summons has not been duly served. This finding of fact, on that count, cannot be reappreciated by this Court as there is no perversity pointed out by the appellant on that aspect. Hence, I find that no substantial question of law would arise in the present appeal for consideration.

8. With regard to the contention of Shri Teles, learned Counsel appearing for the respondents that the suit itself has now been disposed of by the learned Trial Judge after the said remand, I find that the validity or otherwise of such a decision cannot be examined by this Court in the present second appeal. All contentions of both the parties with regard to correctness or otherwise of the order passed by the learned Trial Judge are left open to be examined in an appropriate

forum, in accordance with law.

9. Subject to the above, the appeal stands rejected.

F.M. REIS, J.

ssm.