

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 960 OF 2017**

Mario Cardozo and Anr.,

... Petitioners

Versus

Luciano Fernandes and Anr.,

... Respondents

Mr. Rohit Bras De Sa, Advocate for the Petitioners.

Coram: C. V. BHADANG, J.**Date : 22nd November 2017****ORAL ORDER:**

Heard Shri Rohit Bras De Sa, the learned Counsel for the Petitioners.

2. By this Petition under article 227 of the Constitution of India, the Petitioner is challenging the Order dated 08.06.2017 passed by the learned Civil Judge, Junior Division at Panaji in CMA/13/2017/C which is arising out of Inventory Proceedings no. 79/2009/C. The said Civil Miscellaneous Application was purportedly filed, as a 'suit' for rescission of partition, under Section 448 of The Goa Succession, Special Notaries and Inventory Proceedings Act, 2012 (for short, 'the Act') for the following reliefs:

- a) The above Inventory proceeding be ordered to be re-opened.
- b) The applicant No. 3 be appointed as "Cabeca de Casal" to look after and administrator all the assets of the communion between the applicant, legal heirs, estate leaver.
- c) The heirs of the estate leaver be declared afresh;

d) The share in the assets of the estate leaver be declared as per law afresh.

e) Fresh chart of Partition may be ordered.

3. In short, according to the Petitioner, Mr. Luciano Fernandes fraudulently initiated Inventory Proceedings in which no notice or summons were served upon the Petitioners/interested parties. It was contended that the Petitioner and his wife Mrs. Emelia Mario Cardozo, were not joined as legal heirs of late Maria Quiteria Fernandes and Reginaldo Cardozo. In short, according to the Petitioner the final Chart of Partition prepared in the said Inventory Proceedings is vitiated.

4. The learned Trial Court as indicated earlier registered the said suit as a 'Civil Miscellaneous Application' in the Inventory Proceedings. The learned Trial Court in para 7 of the impugned order found that although the main application is registered as Civil Miscellaneous Application, it is titled as a 'suit'. The learned Trial Court further observed that even assuming that the application is to be considered as a 'suit' it is not supported by any affidavit or verification nor it mentions any proper cause title. The suit is not valued and no Court fee is paid. The learned Trial Court finally noticed that the Respondents have paid the necessary stamp duty as well as the owelty money is deposited in the Court and the name of the Petitioner is also reflected in the Chart of Allotment prepared in the Inventory Proceedings. In that view of the matter, the application came to be dismissed.

5. Shri De Sa, the learned Counsel for the Petitioner submits that although section 448 of the Act provides for a 'suit' for recession of partition as per the practice followed, such a suit is registered as a Civil Miscellaneous Application in the Inventory Proceedings. It is submitted that such a suit attracts fixed Court fee which has already been paid. He therefore submits that notwithstanding the fact that the application was registered as Civil Miscellaneous Application, it is in fact a suit relatable to section 448 of the Act. The learned Trial Court has placed reliance on the decision of this Court in the case of **John D'cruz and Anr., versus Mrs. Elizabeth Fernandes Gracias & Ors (Appeal from Order no. 41 of 1995 and 16 of 1996)** decided on 19th July, 1996 and, in particular, para 9 thereof. He, therefore, submits that the suit, as was framed, filed and registered, is maintainable and the learned Trial Court was in error in holding that it is not a 'suit'.

6. I have carefully considered the circumstances and the submissions made. Section 448 of the Act provides for a remedy of filing a suit for recession of partition. Section 448(A)(1) provides that a suit for rescission of judicial partition which has become final, may be filed, where there is preterition or non-joinder of any of the co-heirs and if it is found that the other party has acted fraudulently or malafidely, whether the malicious conduct relates to the preterition or to the partition.

7. If, according to Petitioner, there is a practice where such suits are registered as civil miscellaneous applications in the Inventory Proceedings, the fact remains that if such a suit is dismissed (assuming that it is a suit), the Petitioner would have a remedy of filing appeal in accordance with law. The Petitioner can always point out and satisfy the Appellate Court that the 'Civil Miscellaneous Application' as framed and filed and registered was a 'suit' relatable under Section 448 of the Act. The Judgment which is relied upon on behalf of the Petitioner has arisen out of the provisions of Article 2164 and 2165 of the Portuguese Civil Code which provisions were in operation prior to the coming into force of the Act. In view of the fact that the Petitioner can avail of alternate remedy of appeal, (as according to the petitioner the Civil Miscellaneous Application has to be treated as a suit), I decline to entertain the Petition. It is made clear that this Court has not examined the merits of the contentions raised on behalf of the petitioner, nor the question whether the Civil Miscellaneous Application, as framed, filed and registered can be treated as a suit. With this, the Petition is dismissed.

8. In the event the Petitioner opts to file an Appeal the Appellate Court shall have due regard to Section 5 and Section 14 of the Limitation Act, while considering the case for condonation of delay.

C. V. BHADANG, J.

msr.