

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO 929 OF 2016

- 1 Mrs. Amelia Diniz,
Aged about 57 years,
Resident of House No.200,
Adaovado, Majorda, Goa.
- 2 Mrs Lenette Pereira,
Major of age,
Housewife
and her husband
- 3 Mr Savio Benjamin Mascarenhas
Major of age, Businessman,
Both residents of House No.199
Adao Vado, Majorda, Goa. ... Petitioner

V e r s u s

1. Mr Vittol Bhawant Kamat,
and his wife
2. Mrs Trupti Vithal Kamat,
Both residents of House No.336
Costa vado Majorda Salcete, Goa.
3. Mr Antonio Pereira
Aged about 65 years,
Businessman,
Resident of House no.200,
Adao Vado, Majorda, Goa. ...Respondents

Shri J. P. Mulgaonkar, Advocate for the Petitioners.

Shri R. G. Ramani, Advocate for the Respondent nos.1 and 2.

Coram:- NUTAN D. SARDESSAI, J.

**Reserved for Judgment on : 22nd September 2017
Judgment Pronounced on : 24th November 2017**

JUDGMENT

1. Heard Shri J. P. Mulgaonkar, learned Advocate for the Petitioners and Shri R. G. Ramani, learned Advocate on behalf of the Respondents.

2. Rule, heard forthwith with the consent of the learned Counsel. Learned Counsel appearing for the Respondents, waives service.

3. This Petition under Article 226 and 227 of the Constitution of India takes exception to the Order dated 13.10.2015 passed by the learned Additional Senior Civil Judge, Margao, and that dated 11.08.2016 passed by the District Judge-II, Margao, in Misc. Civil Appeal No.16/2016.

4. Heard Shri J. P. Mulgaonkar, learned Advocate on behalf of the Petitioners who contended at the outset that two questions arose for determination in this Petition as to whether who could be the Cabeça-de-casal in the Inventory Proceedings and secondly whether a common Inventory

Proceeding was possible where there were different heirs of the two deceased spouses. He adverted to the application filed by one Lila Kamat, since deceased, who had initiated the Inventory Proceedings on the death of her brother Francisco, the order appointing her as the Cabeça-de-casal and subsequently to the application filed by her son on her demise for his appointment as the Cabeça-de-casal. The application was silent on the relationship of the Applicant to any of the deceased for his appointment as a Cabeça-de-casal. Yet, however, the learned Senior Civil Judge by the order dated 13.10.2015 appointed him i.e. the Respondent No.1 as the Cabeça-de-casal. In Appeal, the District Court did not address itself to the issue in question and instead confirmed the said order appointing the Respondent No.1 i.e. the son of the deceased Cabeça-de-casal as the next Cabeça-de-casal, when, on the contrary, the Respondent No.3 had to be preferred for appointment as the Cabeça-de-casal. He adverted to the relevant provisions of The Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 and submitted that it was only the heirs who could initiate the Inventory Proceedings and that the late Lila who was not the heir of the widow and therefore the Respondent No.1 who was her son could not be appointed as the Cabeça-de-casal. The heirs of the widow were not the heirs of the deceased husband. The learned

District Court had relied on Article 1431 erroneously. The sister of the deceased was appointed as the Cabeca-de-casal of the deceased Inventariante but her son could not qualify as a heir of the other deceased spouse. The appointment of the Cabeca-de-casal was not an empty formality and an inquiry was contemplated in the matter. There was a basic jurisdictional error in the finding of the District Court and also the Trial Court and therefore the impugned Order justified interference in the Petition.

5. Shri R. G. Ramani, learned Advocate for the Respondent nos.1 and 2 contended that the Petitioners were not seeking their appointment as Cabeca-de-casal but of the Respondent No.3 who had never objected to the appointment of Lila Kamat as the Cabeca-de-casal on the death of Francisco and Carmelina. The Petitioner No.2 was the daughter while the Petitioner No.3 was the son in law of the said Antonio and who had no preference to be appointed as the Cabeca-de-casal. The said Antonio i.e. Respondent No.3 had not at all assailed the impugned Order and therefore it was not available to the Petitioners to seek for his appointment as the Cabeca-de-casal by assailing the order under challenge. In terms of the old Code, objections had to be filed within 10 days under Article 1374 while now objections had to be filed within 30 days as

per Section 394 of the 2012 Act. The Objections were raised after more than 8 years when the Inventory was initiated in 2008. There was otherwise no basis in the contention on behalf of the Petitioners that one Inventory Proceeding could not be filed on the death of both the spouses when consolidation of inventory was contemplated in terms of Article 1433. There was no case for interference with the impugned order and therefore the Petition had to be dismissed.

6. It was undisputed that Lila Kamat, mother of the Respondent No.1 and since deceased, had initiated the Inventory Proceedings upon the death of the Inventariade Francisco being his sister and claiming to be the right person to be appointed as the head of the family. It is however pertinent to record that although the said Francisco had expired in 1998 and his wife Carmelina had expired in August 2007, Inventory Proceedings were initiated for the first time only after her death. Be that as it may, the learned Trial Court had appointed the said Lila Kamat as the Cabeça-de-casal in the proceedings considering the averments in the application, the supporting affidavit and she being the closest interested party of the male estate leaver. It is equally a matter of record that the said Lila expired on 23.04.2014 and an application was filed by her son i.e. the Respondent No.1

carving a case that he was the sole universal heir and he was the right and proper person to be appointed as the head of the family i.e. Cabeca-de-casal in the said proceedings and prayed for his appointment as such.

7. The interested parties namely the Petitioners herein alongwith the Respondent No.3 raised objections on the premise that the estate which was sought to be partitioned essentially belonged to late Carmelina, widow of Francisco and that the said Carmelina had left behind only one male sibling i.e. her brother Antonio, the Respondent No.3 and as such he was the only person on whom the office of the Cabeca-de-casal devolved and who could be appointed in the case. Besides, both the Inventariados i.e. Francisco and Carmelina were living permanently in the company of the said Antonio and his wife, that the Respondent No.1 had no nexus with the deceased Carmelina and/or Francisco and therefore pressed for the appointment of Antonio as the Cabeca-de-casal. The Petitioner Nos.2 and 3 too had raised objections to the application of the Respondent No.1 on the premise that one Inventory Proceeding could not be initiated to deal with the estate of two individuals and even otherwise, the Respondent No.1 was not entitled to be appointed as the Cabeca-de-casal as he did not fulfil the prerequisites of Article 2068 and that

the Respondent No.3 was the appropriate person to be appointed as the Cabeca-de-casal.

8. It was clearly lost on the Trial Court that the Respondent No.1 had not set out any right devolved on him or his nexus with the Inventariados Francisco and Carmelina to be appointed as the Cabeca-de-casal on the death of the earlier Cabeca-de-casal Lila Kamat but had merely set out a case that he was the heir of the said Lila and he was the right and proper person to be appointed as the head of family i.e. the Cabeca-de-casal as though the Inventory Proceedings were initiated on the death of the said Lila or otherwise on the specious premise that the right of Cabeca-de-casal was heritable. The learned Senior Civil Judge in his wisdom and in a matter of fact way concluded that the Respondent No.1 was most competent and eligible to be appointed as the Cabeca-de-casal being the son of the late Cabeca-de-casal and as heir of the estate leaver husband and proceeded to appoint him as such.

9. The District Court in his wisdom overlooked the case carved on behalf of the Petitioners and the Respondent No.3 that the original Cabeca-de-casal could not have initiated the Inventory Proceedings on the death of the deceased

Inventariado Carmelina as not being her heir. A perusal of the impugned order would clearly reveal that though the District Judge considered other aspects of the matter namely the provisions of the Portuguese Code, nonetheless, he did not address himself to the core issue i.e. the appointment of the Cabeça-de-casal. What was materially lost on the District Court was that the son of the deceased Cabeça-de-casal was not the legal heir of the Inventariade Carmelina and quite on the contrary it was the Respondent No.3 who was proximately placed to her and with whom she was residing who had to be considered for appointment as the Cabeça-de-casal. The learned District Judge also lost the import of Article 2068 in the matter of devolution of office of Administrator i.e. the Cabeça-de-casal and that in the order of sequence, the heir living with the deceased in terms of Clause 3(b) was more proximately placed to be appointed as the Cabeça-de-casal unlike confirming the appointment of the Respondent No.1 who was mechanically appointed by the learned Senior Civil Judge as the heir of the deceased original Cabeça-de-casal Lila.

10. Article 1433 no doubt provides for consolidation of inventories for the purpose of partition of different inheritances but subject to the predicates of the conditions of clauses 1, 2

and 3 namely when the persons amongst whom the properties are to be partitioned are the same, when the case is of inheritance left by two spouses and when one of the partitions is dependant on the other. It however does not justify the initiation of a **common inventory** where different heirs are involved in respect of the two deceased Inventariados. Moreover, this was not a case of consolidation of the Inventory Proceedings but one common Inventory Proceeding being held on the death of two different Inventariados and which is not contemplated in terms of Article 1433 of the Family Laws. Besides, in terms of Section 247 of the Goa Succession Act of 2012, the office of the head of the family belongs in order of priority to (a) the surviving spouse, unless the spouse does not have a share in the assets to be partitioned and does not have descendants, who are still minors, as heirs; (b) the children, who are not under a disability, and in default of children, other descendants who are not under a disability; and (c) the other heirs who are not under a disability and (3) the heir, who was residing permanently in the company of the estate leave only, shall be deemed to be the heir living with the estate leaver.

11. Therefore, even on a reading of Article 2068 of the Family Laws and Section 247 of the Goa Succession Act 2012,

it is apparent that it is only the Respondent No.3 who could have been appointed as the Cabeça-de-casal and not the Respondent No.1 as was wrongly done by the learned Trial Judge and further upheld by the order of the District Court. There is otherwise force in the contention of Shri Mulgaonkar, learned Counsel appearing for the Petitioners that it is only the heirs who can initiate Inventory Proceedings and that Lila not being the heir of the widow, no Inventory Proceedings could have been initiated but much less her appointment as Cabeça-de-casal.

12. Section 375 of the Goa Succession Act 2012, deals with the manner in which the Inventory Proceedings are to be initiated. It signifies in terms of sub-section (3) that the interested party means a heir, moiety holder of the deceased, the executor in a will where there was minor interdicted or absent heirs or legatees and the persons who have the right to usufruct of a part of the inheritance without specifying its value or the thing, and also the executor. In any event, the sister of the deceased Inventariado Francisco much less her son could qualify as the heir of the deceased Carmelina. Besides, in terms of the said Succession Act 2012, Section 376 provides for the appointment of the Head of the Family and its bare reading would indicate that it is not an empty formality

and quite on the contrary, an inquiry is contemplated to decide who shall hold the office of the Cabeca-de-casal.

13. Shri Ramani, may strike a point on his contention that the Respondent No.3 Antonio never objected to the appointment of Lila Kamat as Cabeca-de-casal on the death of Francisco and Carmelina but that would not validate the order of appointment of the son of Lila in particular as the Cabeca-de-casal when he did not at all qualify as the heir of Inventariado Carmelina. Therefore, considering the scheme of the Act of 2012 which also contemplates consolidation of inventories in terms of Section 374, it cannot by any stretch of the imagination justify the order of the learned District Judge confirming the Order passed by the learned Senior Civil Judge appointing the Respondent No.1 as the Cabeca-de-casal. Last but not the least, the contention of Shri Ramani that the Respondent No.3 had not challenged the impugned order would also stand duly answered by importing the principle in Order XLI Rule 4 of the Civil Procedure Code which would equally apply to a Petition under Article 227 of the Constitution of India and therefore there is no basis in such a contention that the Respondent No.3 had not challenged the order. The impugned order reflects a basic jurisdictional error in the findings rendered by the learned District Judge and in view

thereof and applying the principles laid down by the Hon'ble Apex Court in the matter of Shalini Shyam Shetty & anr. vs. Rajendra Shankar Patil [(2010) 8 SCC 329], the impugned Order justifies interference and cannot be allowed to stand.

14. In the result, the Writ Petition is bound to succeed and the impugned Order appointing the Respondent No.1 as Cabeça-de-casal confirmed by the District Judge, is quashed and set aside.

NUTAN D. SARDESSAI J.