IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL APPLICATION (REVIEW) NO.16 OF 2013

IN

APPEAL FROM ORDER NO.66 OF 2013

Mrs. Esther Sankwalkar,
wife of Ashok Yeshu Sankwalkar,
major of age, resident of 168, Penta,
Chicalim, Goa 403 711. …. Applicant

V/s

1 Shri Manuel Filandro de Carvalho
(since deceased) through LR's

1(a) Mr. Savio Carvalho
son of late Manuel Filandro de
Carvalho,
major of age.

1(b) Mr. Sean Carvalho
son of late Manuel Filandro de
Carvalho,
major of age,

Both residents of E-349,
Dr. Wolfango da Silva Road,
Panjim Goa – 403 001.

2 Mrs. Beatrice Lucy Flaviana Costa
Carvalho,
aged 51 years.
Residents of E-349,
Dr. Wolfango da Silva Road,
Panjim Goa – 403 001.

3 Shri Bernardo Xavier de Carvalho,
son of late Joao de Deus Vasco
Carvalho,
aged 52 years and his wife,

4 Maria Perpetua Carvalho,
aged 52 years

Both residents of Proprietor,
Hotel Marva Heliodoro Salgado
Road,
Panaji, Goa – 403 001. …. Respondents

Shri Sudin Usgaonkar, Senior Advocate with Ms. Vinita Palyekar, Advocate for the Applicant.

Shri A.F. Diniz, Advocate for the Respondents No.1 & 2.

Shri R. Menezes and Ms. C. Rebeiro, Advocates for the Respondents no.3 & 4.

CORAM : NUTAN D. SARDESSAI, J.

Reserved on : 13th JANUARY, 2017

Pronounced on : 23rd FEBRUARY, 2017

JUDGMENT :

The applicant seeks the review of the order dated 1/10/2013 passed by this Court in the Appeal From Order No.66/2013 which arose from the order of the Trial Court i.e. of the Court of the Additional Senior Civil Judge, Panaji in the Inventory Proceedings no.70/2010 pursuant to which she had dropped the proceedings and this Court in appeal held that the order impugned cannot be faulted with and dismissed the appeal.

2. Shri S.M. Usgaonkar, learned Senior Counsel came to be heard on behalf of the petitioner who contended at the outset that the points urged before the learned Single Judge namely on Article 1370 of the Family Laws was not considered by the learned Single

Judge. His next plank of argument was that assuming without admitting that the applicant had received the amount, it was from the firm and not from the inheritance. He adverted to Article 2042 of the Family Laws to canvass the contention that it was not possible to urge that the receipt of the amount on retirement from the partnership did not amount to a renunciation. He next adverted to the application for initiating inventory proceedings in which the applicant had clearly averred that the deceased had left behind both movable as well as the immovable properties and that the objections were raised by the interested party that an area of 1223 sq. mts. was still available from the property owned by the deceased. He referred to the statement of the Cabeca de Casal on oath which made due reference to the purpose of the gift in favour of the applicant vis-a-vis the order passed by the Trial Court and submitted that the impugned order was vitiated by the errors apparent on the face of the record and called for a review.

3. Shri Sudin M. Usgaonkar, learned Senior Counsel for the applicant made due reference to the Deed of Gift dated 29/12/1972, the Deed of Partnership of Renunciation dated 1/09/1979 apart from the Deed of Retirement and Reconstitution as also the Will dated 2/06/1989 to canvass the contention that the learned Single Judge had not at all considered the case of the

applicant in its proper perspective and quite on the contrary wrapped up the case by rendering erroneous findings and without considering the principle grounds urged in the appeal. There was no basis for the Trial Court to drop the inventory proceedings and the learned Single Judge of this Court was not justified to dismiss the appeal without considering all the facets of the case reflecting an error in the order under review calling for a review. Therefore as a consequence thereof i.e. of the review, the order of the Trial Court had to be set aside and the matter directed to proceed for inquiry.

4. Shri A.F. Diniz, learned Advocate for the respondents no.1 & 2 contended that the conduct of the applicant was reflected from the reply and therefore it was not open to canvass that the points urged before the learned Single Judge of this Court were not considered by the then learned Single Judge. He too adverted to the statement of the Cabeca de Casal dated 13/09/2011 and that of the brother dated 29/01/2011 which was apparently not an objection to the statement of the Cabeca de Casal. Quite on the contrary he had indicated in his statement that the balance area belonged to Carvalho and it was not the case that the balance was available to the estate of the parents. He too adverted to the Partnership Deed between the father, mother and the daughter i.e.

the applicant and canvassed that the only statement available was that of the Cabeca de Casal that there were no assets left behind by the deceased. No objection was filed either by the applicant or the brother to the statement of the Cabeca de Casal and therefore no error was committed whatsoever by the Trial Court in passing the order nor by this Court in Appeal From Order as to justify any interference in review. He relied in **Kamlesh Verma V/s. Mayawati [(2013) 8 SCC 320]** and in **Laxmi Jairam Dhond V/s. Sushila D. Amonkar & Ors. [2006 (6) Bom. C.R. 259]** and submitted that the application for review was virtually a rehearing of the appeal under the guise of a review.

5. Article 1370 of the Family Laws dealing with the credit worthiness of the declarations of the administrator reads thus:

> "The declarations of the administrator, the initial and the subsequent as well are, deemed to be true until the contrary is proved, save when they are made in his own interest, or they relate to facts for which the law requires certain manner of proof or the agreement of all or of majority of the parties."

It was the contention of Shri S.M. Usgaonkar, learned Senior Counsel that this Court had not considered the saving provision while dealing with the interpretation of Article 1370 in the factual matrix. It would not be out of context to refer to the proceedings since the learned advocates referred to the proceedings before the Inventory Court to buttress their respective submissions and the

findings rendered by this Court while deciding the Appeal From Order No.66/2013. The application for initiating the inventory proceedings dated **22/09/2010** was initiated at the instance of the applicant herself in which she had pleaded that the deceased had left behind both movable as well as immovable properties and which were required to be partitioned between the heirs. Objections were filed on behalf of the interested party to the application for initiating inventory proceedings on 29/01/2011 at the instance of the applicant in which they had categorically stated that the deceased owned a landed property admeasuring 5481 sq. mts. at Panaji of which he had sold an area of 2113 sq. mts., reserved an area of 822 sq. mts. as an open space and sold an area of 1323 sq. mts. to Joe Mathias leaving behind an area of 1223 sq. mts. It was also clearly asserted in these objections that though this area of 1223 sq. mts. was remaining after the sale with the said inventariate/deceased, nonetheless it was the asset of Carvalho Real Estates and Developers, a partnership firm and besides the applicant had been provided for with her due share at the time of her marriage which she had not disclosed nor disclosed the movable and immovable properties left behind by the deceased and in those circumstances had sought for the dismissal of the inventory proceedings.

6. The Cabeca de Casal had filed his statement on 13/09/2011 in which he had enlisted the issues arising out of the marriage of the deceased to Maria Carvalho, referred to the Gift Deed dated 29/12/1973 duly registered with the Sub-Registrar pursuant to which the deceased alongwith his wife had gifted to the applicant herein, their daughter, 1/14th undivided share of the property "Addicao do palmar JAPAO" bearing distinct land registration number and matriz number. It was also revealed in the statement of the Cabeca de Casal that the deceased parents alongwith the applicant had formed a partnership under the name and style M/s. Carvalho Real Estates in which they had brought in their respective shares as an asset of the firm. The applicant had after her marriage and on account of disputes decided to opt out of the partnership and on payment of ₹35,00,000/- and consequently a Deed of Retirement and Reconstitution of Partnership was executed on 10/02/1989 by virtue of which ₹35,00,000/- were paid to the applicant.

7. The whole idea of gifting the property to her and making her a partner in the firm and effecting the payment by way of retirement was to compensate her with the share in the estate of the couple in full and final settlement of what the deceased would have given to her by way of inheritance. Materially the Cabeca de

Casal had certified to the best of his knowledge that the claim of the applicant was restricted to the amount of ₹35,00,000/-, that the applicant had no further claim in the estate of the deceased and to the best of his knowledge, the deceased had not left any other assets whatsoever or there was no estate or inheritance to be inventoried or portioned and prayed that the proceedings be closed. There was no dispute of the fact that no objections were filed by the applicant before the Trial Court despite the statement of her brother dated 29/01/2011 disclosing that no assets were left behind by their parents, since deceased, and in the face of a clear assertion that the balance area belonged to the partnership of Carvalho and there was no estate left behind by their parents.

8. The Deed of Gift dated 29/12/1973 to which a pertinent reference was made by Shri S.M. Usgaonkar, learned Senior Counsel for the applicant and Shri A.F. Diniz, learned Counsel for the respondents reveals that the parents of the applicant had gifted to her 1/14th part of the property named "Japao" situated at Panaji City bearing the distinct land registration number and matriz number having an area of 5481 sq. mts. and with distinct boundaries. The Deed of Partnership dated 2/04/1974 was entered into between the parents and the applicant by virtue of which they were desirous of carrying on the business in the real estate and

had contributed the landed property owned by them as their capital in the business of the firm which would be the stock in trade of the partnership business. In other words, consequent upon the execution of the Partnership Deed read with the annexure thereof was the property "Japao" brought in as a capital of the partnership alongwith the specific share earlier gifted in favour of the applicant. Therefore it does not lie anywhere for the applicant to canvass that it formed a part of the estate of her parents when it was brought into the stock in trade and asset of the partnership firm.

9. The Deed of Retirement and Reconstitution dated 10th February 1989 was executed between the parents of the applicant, her two brothers, the applicant herself and Joe Mathias pursuant to which the partners including the applicant herein as partners of M/s. Carvalho Real Estates had entered into an agreement with Joe Mathias who agreed to purchase a part of the vacant land belonging to the said firm M/s. Carvalho Real Estates and the applicant herein had voluntarily expressed her intention to retire from the firm with the concurrence of her husband as the confirming party and she would stand released of all the loans, liabilities and other obligations due from the firm to any person and surrender her rights, title and interests in the **assets of the property**. This Deed rather substantiates the case of the

respondents that the property in question was an asset of the firm and that the applicant who had brought in her share in the corpus of the firm had no further right in the property.

10. Shri S.M. Usgaonkar, learned Senior Counsel for the applicant also adverted to the Will dated 2/06/1989 executed by the late father of the applicant and the respondents. This Will rather substantiates the case of the respondents that the partners of the firm of M/s. Carvalho Real Estates including her late father had agreed to make the payment of the amount of ₹35,00,000/- to her and that her claim would be restricted to the said amount and she would have no further claim in the estate of the declarant. This too militates against the contention of Shri S.M. Usgaonkar, learned Senior Counsel that the amount of ₹35,00,000/- received by the applicant was not in full and final settlement of her claim or that she, still had an interest in the property which she claimed to be that of the deceased, however forming a part of the property of the firm M/s. Carvalho Real Estates.

11. Shri S.M. Usgaonkar, learned Senior Counsel for the applicant adverted to Article 2042 of the Family Laws which deals with the prohibition of agreement to renounce reading thus:

> "No one shall, not even by ante-nuptial contract, renounce the right to the succession of a living person, or alienate or charge the rights, which eventually might have to the inheritance of that person."

However recourse to Article 2042 would not aid the applicant inasmuch as the applicant willfully became a partner in the partnership firm alongwith her parents and had brought in her 1/7th share in the property gifted to her by her parents contributing to the assets of the firm and thereafter by the Deed of Retirement and Reconstitution she had taken an amount of ₹35,00,000/- and retired from the partnership without any further claim or right in the property, two parcels of which were sold by her father during his lifetime and the balance area was brought in as an asset of the firm. It cannot at all be heard at his instance that the applicant had renounced her right in the property at the time of retirement from the partnership when on her own showing she had brought her share in the property as an asset of the firm and there was no separate right to the property per se to bring in the applicability of Article 2042.

12. The learned Single Judge dealing with the Appeal From Order was seized of the fact that the brother of the applicant who was appointed as the Cabeca de Casal had made a statement on oath in terms of Article 1370 that no movable and immovable assets were

left behind by the deceased and that such a statement made by the Cabeca de Casal was not objected by the applicant by filing any objections. For that matter, the learned Single Judge had also considered the statement of her other brother dated 29/01/2011 in which he had disclosed that the deceased owned 5481 sq. mts. at Panaji and that after effecting the sales, an area of 1223 sq. mts. was remaining balance and being the asset of Carvalho Real Estates and Developers. The learned Single Judge was equally seized of the fact that pursuant to the Gift Deed dated 29/12/1973, 1/14th of the property was gifted to the applicant and she alongwith her parents had formed a partnership under the name and style of M/s. Carvalho Real Estates wherein each of them had brought their respective shares to the said property as an asset of the firm. For that matter it was also observed that after her marriage she had decided to opt out of the partnership firm on payment of ₹35,00,000/- and signed the Deed of Retirement and Reconstitution on 10/02/1989.

13. For that matter a reference was also made to the Will and testament of the parents in which they desired that the applicant's and her husband's entitlement to any claim be restricted to ₹35,00,000/- and that she would have no further claim in the estate of the deceased. In other words, the learned Single Judge

while deciding the Appeal From Order had considered all these aspects in a proper perspective and found that there was no merit in the contention on behalf of the applicant and therefore no fault could be found with the order passed by the Inventory Court and dismissed the appeal. The present application under the guise of a review has been virtually to reopen the entire case by adverting to the records though unsuccessfully at the instance of the applicant.

14. In **Laxmi Dhond** (supra), another learned Single Judge dealt with the question whether the Trial Court ought to have seen that the objections filed by the appellant were in terms of Article 1383 of the Civil Procedure Code applicable to the inventory proceedings and the question had to be decided after evidence was led and necessary information was obtained. In the brief facts the appellant had filed the inventory proceedings upon the death of late Jairam and in the midst of the proceedings, list of the assets were filed on 4/07/2003. Opposite parties were given an opportunity to file objections, filed on 6/03/2004 which were objected to by the Cabeca de Casal on the premise that they were not filed within specific time and that on such grounds as well as on merits the objections came to be rejected giving rise to the appeal. The learned Judge found on perusal of the records that the reply of the interested parties was filed at a belated stage and no sufficient

ground was made out. Furthermore the objections raised by the interested parties were seen to be without substantive supporting proof nor was there any cogent or tenable evidence produced on record to show how their objections to the item nos.2,5 & 6 survived and in that view of the matter held that the impugned order passed by the Lower Court was just, legal and proper brooking no interference.

15. In **Malthesh Gudda Pooja V/s. State of Karnataka & Ors. [(2011) 15 SCC 330]** the Apex Court held at para 20 as follows:

> "Necessarily therefore, when a Bench other than the Bench which rendered the judgment, is required to consider an application for review, there is every likelihood of some tendency on the part of a different bench to look at the matter slightly differently from the manner in which the authors of the judgment looked at it. Therefore the rule of consistency and finality of decisions, make it necessary that subject to circumstances which may make it impossible or impractical for the original bench to hear it, the review applications should be considered by the Judge or Judges who heard and decided the matter or if one of them is not available, at least by a bench consisting of the other Judge. It is only where both Judges are not available (due to the reasons mentioned above) the

> applications for review will have to be placed before some other bench as there is no alternative. But when the Judges or at least one of them, who rendered the judgment, continues to be members or member of the court and available to perform normal duties, all efforts should be made to place it before them. The said requirement should not be routinely dispensed with."

16. From the aforesaid discussion it is apparent that the application for review is rather an attempt by the applicant for rehearing which is not permissible. No case whatsoever has been made out for the review of the order passed by this Court and therefore the application is dismissed.

NUTAN D. SARDESSAI, J.

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