

IN THE HIGH COURT OF BOMBAY AT GOA.**APPEAL FROM ORDER NO. 64 OF 2016.**

Dr. Ratnaraje Thar., ... Appellant.

Versus

Smt. Asharaje Rane and 2 ors. ... Respondents.

Mr. J. E. Coelho Pereira, Senior Advocate with Ms. Andrea Rodricks and Ms. Sujai Nayak, Advocates for the appellant.

Mr. D. Pangam, Mr. Parishit Sawant and Mr. L. Fernandes, Advocates for the respondents.

Coram:-PRITHVIRAJ K. CHAVAN,J.

Reserved on:- 17th July, 2017.

Pronounced on:1st August, 2017.

ORDER:

The challenge in this appeal is to an order dated 5.8.2016 passed by the Senior Civil Judge "A" Court Bicholim Goa, in Special Inventory No.8/2015/A wherein he kept the Inventory Proceedings in abeyance till the disposal of the Testamentary Suit No.123/2014 pending before the Principal Seat of Bombay High Court.

2. The appellant has initiated Inventory Proceedings wherein respondent no.1, mother of the appellant has been appointed as an Administratrix on 1.4.2015 by the Inventory Court. On 17.6.2015, objections were filed by respondent no.1 by contending that Probate Proceedings are pending at the Bombay High Court and, therefore, Inventory is not maintainable. It is also inter alia, contended by respondent no.1 that since the deceased was born in Gwalior and expired in Mumbai, estate left by the

deceased would be governed by Hindu Law and not by Portuguese Civil Code.

3. In reply, the appellant took a stand that scope of Probate Proceedings are limited, testing the genuineness of the Will and mere pendency of the said Probate Proceedings would not warrant keeping the Inventory Proceedings in abeyance. The appellant has placed reliance on Articles 1374 and 2009 of the Portuguese Civil Code to contend that the respondents had not objected the territorial jurisdiction of the Inventory Court within statutory period of 10 days and, therefore, Inventory Court had jurisdiction to proceed with the Inventory Proceedings and decide all questions except the question of genuineness of the Will.

4. After considering the respective submissions of the learned Counsel, the learned Inventory Court, by the impugned order kept the Inventory Proceedings in abeyance till the decision of the Testamentary Suit No.123/2014 pending before the Principal Seat at High Court, Bombay. The Inventory Court inter alia, directed the parties to place on record the outcome of Testamentary Suit as soon as High Court pronounces its verdict.

5. I have heard Mr. J. E. Coelho Pereria, learned Senior Counsel appearing for the appellant and Mr. D. Pangam, learned Counsel appearing for the respondents.

6. It is submitted by the learned Senior Counsel appearing for the appellant that the Probate Proceedings which are filed at the Principal Seat of Bombay High Court are necessarily under the provisions of the Indian Succession Act. Major part of the assets is situated in the State of Goa except one flat which is situated at Bombay. There can be no dispute as regards inheritance and transmissions and inheritances as provided in Article 2009 in Civil Procedure Code in Goa. There is also no dispute as in a Probate Proceedings, what is required to be decided is the question of genuineness and authenticity of the Will. The contention of the learned Senior Counsel for the appellant is that the Inventory Court has failed to exercise jurisdiction vested in it by the law by refraining from pronouncing on the other objections. The learned Senior Counsel has raised a few questions in ground no.VIII of the Memo of Appeal, as rightly so, except clause no.(c) wherein only the High Court of Bombay would decide the question of genuineness of the Will. There is also no doubt that the Inventory Court is empowered to consider the legality as to bequeath and no other Court.

7. The question would be whether the Inventory Court without going into the question of genuineness of the Will can proceed with the Inventory Proceedings even, if the estate leaver had his domicile in Goa as well as all the immovable properties left

behind are situated within the jurisdiction of the Court of Bicholim at Goa. The learned Senior Counsel for the appellant has placed reliance on a case law reported in **2005(SCC) Online Bom 457 in the case of Sondur Rajini Vs. Sondur Gopal**. It is a petition filed by the wife seeking a decree of judicial separation as well as custody of minor children and for maintenance. The respondent husband after marriage at Bangalore resided in Sweden. Couple left abroad and purchased their own house at Stockholm. They were also blessed with children. The respondent/husband thereafter went to Australia but on losing his job came back to India with his children. Wife filed a petition seeking decree and other reliefs. The respondent raised objection to the maintainability of the petition that parties are citizen of Sweden and not domiciled in India. It was observed that respondent's letter showed that he never had intention to permanently settle in Australia. There was nothing on record to show that he had ever given up his domicile of origin i.e India, therefore it is held by this Court that Family Court in Mumbai has jurisdiction to entertain the petition.

8. The High Court, after considering the judgment of the High Court and the Apex Court and also having considered the Indian and English Private International Law, culled out following broad principles:-

- a) *Every person must have a personal law, and accordingly every one must have a domicile. The law attributes to every person at birth a domicile, which is called domicile of origin. This prevails until a new domicile, which is*

called a domicile of choice, has been acquired by the fact of residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely.

- (b) A domicile of origin continues and does not get divested until a domicile of choice is acquired by conscious act. By merely leaving ones own country, even permanently, such person will not in the eye of law lose his domicile until he acquires a new one.*
- (c) For acquiring a domicile of choice one must not only give up a country/domicile of his origin but he must make up his mind to stay for an indefinite period where he desires to acquire a domicile of choice.*
- (d) The intention to acquire a new domicile must be manifest and carried into execution. The two constituent elements that are necessary for the existence of domicile law are : (i) a residence of a particular kind; and (ii) an intention of a particular kind. There must be a factum and there must be the animus.*
- (e) The onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon one who asserts that the domicile of origin has been lost.*
- (f) In order to determine a domicile of a person at a particular time, the course of his conduct and facts and circumstances before and after that time are relevant. Therefore, the petitions involving an issue of domicile, before decreeing such petition seeking reliefs under H.M. Act, it is necessary to carefully enquire into the question of domicile.*
- (g) It must be established that an individual, who claims change of his domicile of origin, has voluntarily fixed the habitation of himself and his family in a new country and not for a mere special or temporary purpose but with a present intention of making it his permanent home.*
- (h) The fact of residing in a country other than that of his domicile of origin even with the intention of continuing to reside there for long time, is not sufficient. A residence is a mere physical fact, and means no more than personal presence in a locality. If he claims that he acquired a new domicile at a particular time, he must prove that he had formed the intention of making his permanent home in that country and of continuing to reside there permanently.*
- (i) Citizenship and domicile represent two different conceptions Citizenship has reference to political status of a person and domicile to his civil rights. A person may*

have one nationality and different domicile.

- (j) *A domicile of a married woman does not follow that of her husband. She is capable of having, an independent domicile.*
- (k) *If the domicile of origin is displaced as a result of the acquisition of a domicile of choice, the domicile of origin is merely placed in abeyance for the time being. It remains in the background ever ready to revive and to fasten upon the propositus immediately he abandons his domicile of choice."*

9. The question as to whether the deceased intended to domicile in the State of Goa or otherwise would be decided during the trial. This aspect according to my view cannot be gone into at this stage.

10. The learned Senior Counsel also relied upon Judgment of this Court in ***Appeal from Order No. 82/2009 with XOB 02/2010*** in the case of ***Sgn. Ldn. A. P. Fernandes, Vs Annette Blunt Finch and others.*** Paragraph nos.11, 12 and 14 can be reproduced for advantage:-

- 11. *In the present case, it is not in dispute that the parents of the Appellants who were the estate leavers were domiciled and belong to the State of Goa and their succession is governed by the law of succession as provided in the provisions of the said Civil Code.*
- 12. *The Treaties by Dr. Cunha Gonsalves on Civil Code, whilst dealing with the provisions of Article 24 of the Code, in Vol.1 at page 704, has observed as translated thus :
"In modern times, a strong trend has set in towards unity of succession and of the national law of the deceased. Because succession, does not involve only the question of the capacity of the estate leaver and of the heirs, but also derives, in a large measure, from family relations, legitimate succession being based almost exclusively on relationship. The Institute of International Law in the 7th*

of its famous Oxford Rules, voted that "succession or an inheritance, considered as one unit, as regards the determination of the persons called to succeed, the ambit of their rights, to the disposable portion and the legitime, to the validity of testamentary conditions, should be regulated by the laws of the States to which the deceased belongs or alternatively (where the nationality is not known) by the law of domicile, whatever the nature or location of the assets." So also, the 4th Conference of Hague in 1904, a Bill of a treaty on successions and wills, was partially voted, starting by affirming the unity of succession, comprising movables and immoveables, and applying the national law of the deceased to the rights of the heirs, to the share of legitime, to representation etc."

14. The jurist Joao Batista Machado whilst referring to the Private International law and dealing with the aspect of unity of succession has observed at page 435 as translated thus :

"On the other hand, only the system of unity of succession is in conformity with the view of the material law, inspired by the Roman principle of universality of succession, and guarantees unity of succession (that is, the devolution of the entire inheritance according to the same rules) which this principle postulates. Besides, the person of the estate leaver, the interests and, therefore, the real or hypothetical will of the person whose inheritance is at issue, and so also the interests of the family are elements of prime importance in the chapter of successions upon death.

(emphasis supplied).

Now, all these elements point decisively to the inclusion of succession on death within the ambit of personal law."

11. It is observed by this Court that in the said case parents of the appellants were admittedly from Goa and were governed by Law of Succession as in the State. Hence, succession of the estate leaver in that case would have to be examined in terms of provisions of Civil Procedure Code. Such issue indeed can be decided by the Inventory Court, however, that will further subject to decision of the Testamentary Suit in the Bombay High Court. The ratio can be

accordingly distinguished.

12. Shri Pangam, learned Counsel appearing for the respondents vehemently urged that since the matter is seized of in the Bombay High Court and the present Inventory Proceedings are filed only to circumvent the Probate Proceedings before the High Court, there is no sufficient ground to interfere with the impugned order. He stressed that the observations of the Bombay High Court which would be made in the Probate Proceedings will have direct bearing on the Inventory Proceedings. According to the learned Counsel for the respondents, even if the Bombay High Court holds the Will to be valid or otherwise, in either case, it will have bearing over the Inventory Proceedings. In support, the learned Counsel placed reliance on judgment dated 4.1.2017 of the Orissa High Court in case of **Ashok Kumar Ray Vs Smt. Reba Biswas and others, reported in AIR, 2017 Ori 48**. It would be apposite to refer to paragraphs 7, 8, and 9 which reads thus:-

7. *Before proceeding further, it is apt to refer to the decision of this Court in the case of [Jagojoti Bose and another v. Baruruchi Bose and others](#), AIR 1970 Orisa 28. In Jagojoti Bose (supra), the disputed property belongs to one Haricharan Bose. He had three sons. On 10.10.1946, he executed a Will in respect of the disputed property in favour of defendant nos.4 and 5. Thus he divested the plaintiff-another son from inheritance under the Will. On 30.10.1958, the plaintiff instituted a suit for partition claiming 1/3rd interest. Defendants 4 and 5 filed written statement claiming the entire property to themselves on the strength of the Will. On 12.9.1960, defendants 4 and 5 filed an*

application for Probate of Will in the court of the learned District Judge, Cuttack. On 28.6.1961, a preliminary decree for partition was passed in favour of the plaintiff. On 28.11.1962, Probate of Will was granted after contest by the plaintiff. On 10.7.1964, the plaintiff filed an application for making final the preliminary decree for partition. Defendants 4 and 5 filed an objection to the same contending, inter alia, that the plaintiff had no title in the disputed property after probate was granted. The contention was negatived by the trial court. The same was challenged before this Court. This Court held that by preliminary decree the jural relationship amongst the parties inter se was finally decided and it was declared that the plaintiff had a one third interest in the disputed property. If the Probate of Will is allowed to vary the rights, a conclusion must be reached to the effect that the plaintiff is not entitled to the property. This would affect the very basis of the preliminary decree and the rights carved out. The juristic theory underlying the reason why this cannot be done is that defendants 4 and 5 could have pressed into service the Probate if they had been vigilant in time. They had taken the defence under the Will in the written statement. Thus their claim on the strength of the Will and the Probate subsequent to the preliminary decree is barred by the principle of res judicata, actual and constructive. It was open to the defendants 4 and 5 to get the partition suit stayed, proceed with the Probate proceeding pending in the court of the District Judge and, after obtaining the Probate, to set it up in defence in the partition suit. This was the only course available to them. When they failed to do so, they abandoned their right based on the Probate. By the time the Probate was granted, the rights of the parties on the basis of inheritance had already been worked out and the stage of setting up the Probate in defence had passed off. (Emphasis laid)

8. In *Nirmala Devi (supra)*, the question arose whether the probate proceeding could be clubbed with the suit. The apex Court held

that in the probate proceedings on the question of proof of the Will will have a direct impact on the suit. Only on this short ground and without expressing any opinion on the merits of the controversy between the parties, the apex Court directed the learned District Judge to make it convenient to dispose of the probate proceeding as well as suit. The same view was reiterated in [Balbir Singh Wasu v. Lakhbir Singh and others](#) (2005) 12 SCC 503.

9. *Reverting to the facts of the case and keeping in view the aforesaid principles, this Court finds that the suit schedule property is the subject-matter of dispute in the partition suit as well as probate proceeding. The jural relationship amongst the parties inter se is finally decided in the preliminary decree. The decision in the probate proceeding on the question of proof of 6'Will' will have a direct impact on the suit. The decision in the partition suit would also operate as res judicata in the probate proceeding. In such contingency, when both the proceedings are pending, the suit for partition shall remain stayed till disposal of probate proceeding.*

13. Shri Pangam, learned Counsel for the respondents has also urged that Section 375 of the Goa Succession Special Notaries and Inventory Proceeding Act, 2012(for short "Act, 2012") would not be applicable in view of the fact that the impugned order was passed on 5.8.2016 and the Act, 2012 came into force on the 90th day from the date of publication in the Official Gazette. Date of Publication of the Official Gazette was on 19.6.2016 i.e after passing of the impugned order. Thus, in view of Section 1(3) of the Act, 2012, this act was not in force on 5.8.2016.

14. Apart from that, I do not find any irregularity or illegality

committed by the Inventory Court keeping the proceedings in abeyance, in the light of the fact that the decision of Probate Proceedings on the question of proof of the Will, will have direct impact on the Inventory Proceeding. Since the appellant has already filed a caveat in the Bombay High Court, she is at liberty to approach the Principal Seat of Bombay for obtaining necessary orders to that effect. As a matter of fact, there would not be any prejudice to the appellant; rather it would be just and proper for the respective parties to wait till the decision of the Probate Proceedings. It is significant to note that the Inventory Court in Paragraph 5 of its order has specifically observed that after going through the copy of the Will produced on record it was noticed that it was the last Will of the deceased who had bequeathed his properties in favour of all the three children and his widow. It is important to note that the Probate Proceeding appears to have been instituted prior in point of time than the Inventory Proceedings.

15. In view of the forgoing discussions and in view of the ratio laid down by the Orissa High Court in the judgment of **Ashok Kumar Ray** (supra), there is no question of admission of the appeal. Consequently, it stands dismissed with no order as to costs.

PRITHVIRAJ K. CHAVAN,J.