

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.105 OF 2018

WITH

WRIT PETITION NO.106 OF 2018

WITH

WRIT PETITION NO.107 OF 2018

WITH

WRIT PETITION NO.108 OF 2018

AND

WRIT PETITION NO.109 OF 2018

1 Mr. Augusto T. D'Souza,
69 years of age,
Resident of H. No.G52, Gaulem
Bhat, Chimbhel
Ilhas Goa.

2 Mrs. Ana D'Souza, ... Petitioners
Wife of Augusto T. D'Souza
64 years of age,
Resident of H. No.G52, Gaulem
Bhat, Chimbhel
Ilhas Goa.

versus

1 Caetan D'Souza, (since deceased),
through his legal representative
Ms. Felicia Pinto,
Daughter of later Minguel
Francisco Pinto,
Major of age, Spinster
Residing at H.No.(not known)
Prabhawado, Goltim,
Divar- Tiswadi, Goa.

- 2 Maria Antonio Rosario,
(Since Deceased)
 - 3 Augustinho Carvalho,
(since deceased)
through his legal representatives
 - 3a Mr. Romaldo Carvalho,
Major in age,
residing at H.No. (not known)
Chimbel, Ilhas – Goa.
 - 3b Miss Reina Carvalho,
Major in age,
residing at H. No.(not known)
Chimbel, Ilhas – Goa.
 - 3c Mr. Roy Carvalho,
Major in age,
residing at H. No.(not known)
Chimbel, Ilhas – Goa.
 - 4 Estefania Carvalho,
(since deceased)
 - 4a Mrs. Socorrina Carvalho,
Wife of Romaldo Carvalho,
Major in age,
Resident at H. No. (not known)
Gaulem Bhat,
Chimbel, Ilhas- Goa.
 - 4b Mrs. Rupali Carvallo,
wife of Roy Carvalho,
Major in age,
residing at H. No.(not known)
Chimbel, Ilhas – Goa.
- ... Respondents

Shri A.D. Bhobe, Advocate for the petitioners.

Shri M. B. D'Costa, Senior Advocate with Ms. K. Betquekar,

Advocate for the Respondents.

CORAM : Nutan D. Sardessai, J.

RESERVED ON : 26th February, 2018.

PRONOUNCED ON : 08th March, 2018.

JUDGMENT:

1. Shri A.D. Bhobe, learned Advocate came to be heard on behalf of the petitioners and Shri M. B. D'Costa, learned Senior Advocate on behalf of the the Respondents.

2. Rule. Heard forthwith with the consent of the learned Counsels. The learned Counsel appearing for the respondents waives service.

3. This petition takes exception to the Order dated 01/12/2012 passed by the Adhoc District Judge, FTC, Panaji pursuant to which the District Court was pleased to dismiss the issue/point on the maintainability of the appeal filed by the respondent Nos.1 and 2 under Order XLIII Rule 1 (r) C.P.C. against the order dated 13/05/2015 passed by C.J.J.D., 'D' Court, Panaji.

4. Heard Shri A.D. Bhobe, learned Advocate for the petitioners who contended that the Civil Judge had dismissed the application of the respondents under Order XXXIX Rule 2A C.P.C. and they preferred an appeal under Section 104 r/w. Order XLIII Rule 1(r) CPC. A plea was raised by the petitioners that the appeal was not maintainable. The High Court in exercise of its powers under Section 122 CPC had amended Order XLIII Rule 1(r) CPC which excluded the orders passed under Order XXXIX Rule 2A CPC from the ambit of appealable orders in terms of Order XLIII rule 1(r) CPC. The appeal as such was not maintainable. It was his contention that even assuming without admitting that in terms of Section 104 Rule 1(h) CPC the appeal was held maintainable, however the application under Order XXXIX Rule 2A CPC having been dismissed, the respondent Nos.1 and 2 could not invoke the appellate jurisdiction of the District Court in terms of Section 104 Rule 1(h) CPC. He next adverted to the impugned order passed by the District Court and Section 16 of the Code of Civil Procedure (Amendment) Act, 2002 dealing with repeal and savings and submitted that it did not assist

the respondents case in any way. Besides, the view taken by the learned District Court that Section 16 was not brought to the attention of this Court while deciding the Writ Petition No.30 of 2010 was not appropriate. The learned District Court was totally in error to hold that the appeal was maintainable and to disallow their objections and which order was liable to be interfered with in this petition being in exercise of jurisdiction lacking in the District Court.

5. Shri M.B. D'Costa, learned Senior Counsel for the respondents submitted at the outset that the judgment in **Ramdas Phadte v/s. Shankar Naguash Naik** and another (Writ Petition No.30 of 2010) was by concession holding that an order passed under Order XXXIX Rule 2A CPC as amended was not appealable. There was no discussion on the predicates of Order XLIII Rule 1(r) CPC and hence, it was not binding on this Court. His next plank of argument was that the right of appeal was a substantive right unlike the power of the High Court in terms of Section 122 of CPC which allowed it to make Rules regulating their own procedure and the procedure of the Civil Court subject

to their superintendence. The right to appeal which inheres in a party is a substantive right, cannot be taken away by Rules which at the most can regulate the procedure in terms of Section 122 CPC. His next contention was that in terms of Section 16 of the Code of Civil Procedure (Amendment) Act, 2002 dealing with the repeal and savings, in case the amendment was inconsistent with the principal Act, it shall not stand repealed. He placed reliance in **Madhuri Prabhakar Patole v/s. Aruna Satishchandra Gaikwad** [2008 (3) Mh.L.J. 447] in support of his case. The right of appeal which was provided in terms of Order XLIII Rule 1(r) of the principal Act provided for an appeal against an order made under Order XXXIX Rule 2A CPC. The notification of the High Court issued in 2009 also provided for an appeal against such order. The amendment in the Rules extended to the State of Goa would be hit by Section 16 of the CPC (Amendment) Act, 2002 and therefore the learned District Court had not committed any error in holding on its jurisdiction and dismissing the objection to the maintainability of the appeal raised by the petitioners. The petition had therefore to be dismissed.

6. Order XLIII Rule 1 CPC deals with the appeals from Orders and in terms of Rule 1(r) an order under Rule 1, Rule 2, Rule 2A, Rule 4 or Rule 10 of Order XXXIX were appealable. The Bombay High Court in exercise of its powers under Section 122 CPC made an amendment to Rule 1(r) of Order XLIII in supercession of the existing amendment made on 01/10/1983 and by virtue of which Rule 2A was also included in sub-Rule (r) being an appealable order. However, the position as far as Goa is concerned is different inasmuch as pursuant to the Notification issued by the High Court of judicature at Bombay dated 10/02/1987, Order XLIII Rule 1 clause (r) would include an order under Rule 1, Rule 2, Rule 3 Rule 10 or Rule 11 of Order XXXIX thereby clearly excluding an order under Rule 2A from the purview of an appealable order. These Rule continued to be in force and applicable to the State of Goa till date.

7. Section 104 CPC deals with the orders from which appeal lies and the category of orders from which an appeal would lie. Section 104 (1)(h) CPC provides for an appeal against an order under any of the provisions of this Code

imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in the execution of a decree. In normal circumstances such an appeal would have lain if there was a positive order passed by the trial Court holding the petitioner guilty of contempt. Such however is not the position inasmuch as the Trial Court held that no contempt was proved on inquiry and dismissed the application for their prosecution for willful contempt under Order XXXIX Rule 2 A CPC. In view thereof and on its bare reading, an appeal in terms of Section 104 1(h) CPC would positively not lie before the District Court which came to be seized of the jurisdiction on the filing of the appeal by the Respondent Nos.1 and 2.

8. Section 16 of the Code of Civil Procedure (Amendment) Act, 2002 deals with the repeal and savings and reads thus :

“Any amendment made, or any provision inserted in the principal Act by a State Legislature or High Court before the commencement of this Act shall, except in so far as such amendment or provisions

are consistent with the principal Act as amended by this Act, stand repealed.”

In other words an amendment made or any provision inserted in the principal Act by the High Court before the amendment of this Act shall stand repealed if it is inconsistent with the principal Act. The interpretation therefore sought to be given to Section 16 by Shri M.B. D'Costa, learned Senior Counsel is with respect not proper.

9. In **Madhuri** (supra), a suit was filed against her for declaration and injunction with an application for temporary injunction. She filed an application under Section 9-A CPC and contended that the said Court had no jurisdiction to try the suit and to decide the issue of jurisdiction first. The Trial court decided the preliminary issue in favour of the respondents giving rise to a revision at the instance of the petitioner. The learned Single Judge while deciding the petition held that Section 9-A CPC as applicable to the State of Maharashtra stood repealed by Section 32 of the Code of Civil Procedure (Amendment) Act, 1999 and Section 16 of the Code of Civil Procedure (Amendment) Act, 2002. A

point was canvassed before the learned Single Judge as his Hon'ble Lordship then was, that the view expressed in the said petition was not correct, there was in fact no inconsistency or collision between Section 9-A and the Central (Amendment) Act, 2002 and that Section 9-A CPC was in addition or supplemental to the relevant provision of the Code and as such it could not be said that the said provision stood repealed. The learned Single Judge as his Hon'ble Lordship then was found that Section 9-A was not inconsistent with the Central Act and that the judgment in Writ Petition required an indepth consideration and directed the Registry to place the matter before the Hon'ble Chief Justice for seeking a direction for referring the matter to a larger Bench.

10. In **Madhuri** (supra), Their Lordships considered Section 9A CPC and Section 32 and 16 of the Amendment Acts of 1999 and 2002 respectively. Section 9A CPC was introduced by the State of Maharashtra initially in the year 1970 by the Amendment Act of 1970, however, Maharashtra Amendment Act of 1976 was repealed and Section 9-A was

again added in the Code in relation to its application in the State of Maharashtra by the Code of Civil Procedure (Maharashtra Amendment) Act, 1977 and reserved for the assent of the President and published in the Government Gazette on receipt of the assent of the President. It was contended on behalf of the respondents that due to Section 32 of the Central (Amendment) Act, 1999 and Section 16 of the Central (Amendment) Act, 2002, the provisions of Section 9-A stood repealed as it was inconsistent with the provision of Section 14 Rule 2 of the principal Act.

11. In **Madhuri Patole** (supra), considering the rival contentions Their Lordships proceeded to ascertain whether the provision of Section 9-A could be said to be inconsistent with the provision of Order XIV Rule 2 CPC and found that a bare reading of the said two provisions indicated that they were not operating in the same field and were required to be invoked at different stages. It was observed that Section 9A comes into play much earlier than the stage when suit is required to be dealt with by the provisions of Order XIV CPC. In that view of the matter and on considering the

judgment of the Apex Court in **Ramchandra Mawalal, Varanasi and Ors. v. State of UP and Ors.** [1984 (supp) SCC 28], the Division Bench found in the facts at large that there was no specific provision in the Central Act for dealing with the objection regarding jurisdiction of the Court, raised at the time of injunction application or receiver application and the State of Maharashtra had made the provision of Section 9-A and that it could not be said that it overlaps any of the provisions of the Central Act. In the ultimate it was held that considering the object of Section 9A CPC as well as the object of Order XIV, Rule 2 CPC and applying all the tests to determine as to whether there was any inconsistency between the two statutes, it was held that Section 9-A was not at all inconsistent or repugnant with the provisions of Order XIV, Rule 2 of the Central Act and on the contrary, it supported and supplemented the basic idea of Order XIV, Rule 2(2) and provided additional provision to further the cause which does not in any way damage or destroy the provision under Order XIV, Rule 2 of the Central Act. This judgment with respect does not at all support the contention of Shri M.B. D'Costa, learned Senior Counsel on

the matter of interpretation of Section 16 or to buttress a plea that the amendment to Order XLIII Rule 1(r) CPC introduced by the Amendment Act is inconsistent with the powers of the High Court to amend the Rules and provide appropriately.

12. Last but not the least **Ramdas Phadte** (supra), cannot be heard to be an order passed on concession even on reading of paragraph 5 thereof that the learned Counsel for the respondent No.1 had no objection. It does not in any manner indicate that the learned Counsel for the respondent No.1 had no objection to the finding of the learned Single Judge that no appeal lies against an order passed under Order XXXIX Rule 2A CPC as amended. The said petition challenged the order passed on an application filed under Order XXXIX Rule 2A CPC in which the Trial Court held against the petitioners under Order XXXIX Rule 2A CPC and struck off the defence under Order XXXIX Rule 11 CPC. The learned Judge had considered Order XLIII Rule 1(r) CPC and found that an order passed under Order XXXIX Rule 11 CPC was appealable while no appeal lay against the

order passed under Order XXXIX Rule 2A CPC. No doubt the learned Single Judge had not considered the savings and repeal clause contained in Section 16 of the Code of Civil Procedure (Amendment) Act, 2002 but that would not make such an order inapplicable or to say that it was made on concession.

13. Coming to the order under challenge the learned District Judge had considered the judgment in Ramdas Phadte (supra), but in her own wisdom proceeded to read into the order that the provision of repeal and savings clause of the Code of Civil Procedure (Amendment) Act of 2002 was not brought to the notice of the Hon'ble High Court at the time of the said decision. The learned District Judge further went on to record that the petition was dismissed as it was withdrawn with leave to file appropriate proceedings when the order does not indicate that the petition was withdrawn on behalf of the petitioner. There can be no dispute with the settled proposition that the right of appeal is a substantive right. However, the remedy is not lost to the respondents and therefore the contention on

behalf of the respondents that substantive right is taken away by the said amendment cannot stand the test of scrutiny. The learned District Judge therefore misinterpreted Section 16 of the repeal and savings clause of the Code of Civil Procedure (Amendment) Act, 2002 and in interpretation of the order in **Ramdas Phadte** (supra), and passed the order under challenge which is liable to be interfered with as being in excess of jurisdiction vested in the District Court. In view thereof, i pass following :

ORDER

The writ petitions are allowed and the impugned orders dismissing the preliminary objections to the maintainability of the appeals are quashed and set aside.

NUTAN D. SARDESSAI,J.