

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO. 47 OF 2017**

Smt. Magdaline Fernandes & 25 Ors. ... Appellants
Versus
Shri Abel Costa Campos De Oliveira
alias Abel Costa Campos & Another ... Respondents

Shri Somnath B. Karpe, Advocate for the Appellants.
Shri Dhaval D. Zaveri, Advocate for the Respondent No. 1.

Coram : C.V. BHADANG, J.**Date : 4th SEPTEMBER 2018****ORAL ORDER:**

The appellants, who are the original defendants are challenging the judgment and decree dated 07.10.2015, passed by the learned District Judge in Regular Civil Appeal No. 168/2010. By the impugned judgment, the learned District Judge, while allowing the appeal, has restored Special Civil Suit No. 160/1991/A, filed by the respondents/plaintiffs. The learned District Judge has set aside the order dated 05.03.2008, by which, the learned Senior Civil Judge had dismissed the suit as abated.

2. The brief facts are that the respondents had filed the aforesaid suit for injunction, both mandatory and prohibitory, mesne profits and declaration that the gift deed of the year 1978 is ab initio void. It appears that the issues were framed in the

suit on 22.08.1997 and thereafter, the suit was kept on the sine die list. Subsequently, on 24.02.1999, notices were issued to the parties, however, the suit came to be dismissed for default on 07.10.1999. On 30.12.2000, the respondents filed an application for restoration of the suit accompanied by an application for condonation of delay, which was registered as CMA No. 46/2000/A. It appears that the respondents brought to the notice of the Court that some of the respondents had already expired. Hence, there were as many as seven applications being applications at Exhibit 8, 13, 21, 24, 25, 26 and 36 filed for bringing the legal representatives of the various defendants on record. The learned Trial Court by an order dated 22.01.2008 found that although, the respondents have made out sufficient cause to justify their absence and the delay caused in filing the application for restoration of the suit, deserves to be condoned, the respondents have not shown any sufficient cause to condone the delay caused in filing the application to bring the legal representatives of the deceased on record. In that view of the matter, the learned Trial Court, while restoring the suit, had dismissed the applications at Exhibit 8, 13, 21, 24, 25, 26 and 36.

3. It appears that subsequently the learned Trial Court took up the earlier application (Exhibit 30 in CMA No. 45/2000),

which was treated as Exhibit-5 in the suit filed by the petitioners for dismissal of the suit as abated. The learned Trial Court by an order dated 05.03.2008, allowed the said application (Exhibit-5) and dismissed the suit as abated. Feeling aggrieved, the respondents filed an appeal before the learned District Judge, which has been allowed and the suit has been restored to the file. The learned District Judge has passed the following order:

"The appeal is allowed.

The impugned order dated 05/03/2008 in Special Civil Suit No. 160/91/A of the then Civil Judge Senior Division at Panaji at Exhibit-5, is quashed and set aside.

The Special Civil Suit No. 160/91/A stands restored for decision in accordance with law.

All the questions are kept open and the plaintiff would be at liberty for taking steps for bringing on record the legal heirs of the deceased defendants, in accordance with law. The application at Exhibit 5 will also be decided, after giving the plaintiff the opportunity to file the reply therein.

The parties are given the date for appearing before the ld. Civil Judge Senior Division, "A" Court at Panaji on 3/11/2015 at 10.00 a.m.

Decree to be drawn accordingly."

Feeling aggrieved, the appellants are before this Court.

4. I have heard Shri Karpe, the learned Counsel for the appellants and Shri Zaveri, the learned Counsel for the respondent no. 1. With the assistance of the learned Counsel for the parties, I have gone through the record.

5. The only contention raised on behalf of the appellants is that the respondents have not challenged the order dated 22.01.2008 and thus, it was not open for the learned District Judge to have restored the suit, with a direction to decide the application for bringing the legal representatives on record. Except this, there is no other contention raised.

6. On the contrary, it is submitted by Shri Zaveri, the learned Counsel for the respondent no. 1 that the order dated 22.01.2008 could be challenged in the regular appeal, filed against the order dismissing the suit as abated. Reliance is placed on Section 105 of CPC and the decision of the Supreme Court in the case of **Satyadhyan Ghosal Vs. Deorajin Debi, 1960 AIR(SC) 941**. The learned Counsel has taken me through the appeal memo in order to submit that indeed, there was a challenge raised to the order dated 22.01.2008.

7. I have carefully considered the circumstances and the submissions made and I do not find that any case for interference is made out. The learned Counsel for the respondent no. 1 is right in contending that the appellant could have challenged the order dated 22.01.2008 in an appeal, challenging the final order, dismissing the suit as abated. Section 105 of CPC provides that where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. In that view of the matter, the contention as raised on behalf of the appellants cannot be accepted.

In such circumstances, the appeal is dismissed, with no order as to costs. The rival contentions of the parties, are left open.

C.V. BHADANG, J.

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