

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.566 OF 2017

Mrs. Antonieta B. Fernandes,
Aged about 62 years,
Indian National, R/o. Flat No.1/C,
Ground Floor,
River Heights Bldg., Adarsh
Nagar, Airport road Chicalim Goa. ... Petitioner

Versus

Smt. Ana Paula do Rego e
Mendes,
D/o. late Walter Fernandes,
Aged about 52 years, married,
R/o.E-220, Wallinda bldg.,
M.G. Road, Panaji, Goa. ...Respondent

Shri S.S. Kantak, Senior Advocate with Shri P. Talaulikar,
Advocate for the petitioner.

Shri E.O. Mendes, Advocate for the respondent.

CORAM: NUTAN D. SARDESSAI, J.

RESERVED ON : 22nd June, 2018.

**PRONOUNCED 9th July, 2018.
ON :**

JUDGMENT:-

1. Heard forthwith with the consent of the learned Advocate for the parties.
2. Rule.

3. Shri E.O. Mendes, learned Advocate waives service of notice on behalf of the respondent.

4. The petition takes exception to the order dated 11/05/2017 passed by the Senior Civil Judge, Vasco in the Special Inventory proceedings No. 2 of 2008 pursuant to which she disposed off the Inventory Proceedings based on the final chart of the partition and which in turn was based on an alleged illegal auction held on 09/01/2006.

5. Heard Shri S. Kantak, learned Senior Advocate on behalf of the petitioner who submitted that the auction itself was vitiated which was conducted by the Nazir of the Court and not the Court and the Nazir had done so as per the dictates of the Advocate for the respondent. The chart of partition had to be drawn by the Court but actually it was drawn by the Advocate for the respondent. He invited attention to the Minutes of the auction and submitted that although it opened with the expression "as per order", there was no such order passed by the Court and which auction came to be held by the Nazir and not by the Court who proceeded with the auction proceedings. A record was also made in the minutes that the Court had declared but without indicating how when the action was

conducted fully by the Nazir of the Court. The Minutes of Auction so drawn were totally contrary to law when it required that the auction was to be presided over by the Court.

6. Shri S.S. Kantak, learned Senior Advocate next invited attention to the application / objection filed to the said auction, the reply filed on behalf of the respondent and their rejoinder and upon hearing the parties, the Trial Court had passed the order allowing the application and setting aside the auction. This order was challenged in appeal at the instance of the respondent and the learned District Court by the Judgment dated 05/12/2016 set aside the order and remitted the file to the Trial Court with the directions to decide the application afresh and after considering all the contentions raised by the parties. The remand order was specific despite which the learned Trial Court by an order dated 07/03/2017 dismissed the objections raised by the petitioner without assigning any reasons and without considering the case set out by the petitioner.

7. It was the further contention of Shri S. Kantak, learned Senior Advocate that they had objected to the final chart of partition dated 06/05/2017 and yet the learned Trial Judge by

the impugned order dated 11/05/2017 and inspite of the petitioner not being duly represented by an Advocate and contrary to the records of the Court that the matter was listed for arguments proceeded to pass the impugned order. He next invited attention to the affidavit filed on behalf of the respondent wherein there was due reference to the worth of the suit property being ₹3 crores, conceded that the Judge had sent the file to the Nazir Section and directed them to report for the auction proceedings to be done by the Nazir, the proceedings being conducted by the Nazir amongst others. The property which was worth ₹3 crores was taken in auction by the respondent for a paltry sum of ₹47,00,000/-. The Presiding Officer had not conducted the auction but merely signed the Minutes of Auction drawn in her absence. The chart of partition was drawn by the respondent No.1 and not by the Court and objections to the chart were not permitted to be filed. He next adverted to Article 1411 and 1412 of the Family Laws and pressed for quashing of the impugned order.

8. Shri E.O. Mendes, learned Advocate for the respondent submitted that from the tenor of the petition it was apparent that the petitioner was alleging fraud against the staff, the

Advocate for the respondent and the Presiding Judge and for which a suit had to be filed and it was not open to the petitioner to make an issue in the present petition. He made a reference to the petition and the reply besides the Roznama dated 11/05/2017 and raised an issue how the petitioner could make a grievance that they were absent on that date i.e. 11/05/2017. The case urged on behalf of the petitioner was false and even there was no basis in their plea that the Minutes of the Auction were drawn by the Nazir and not by the Court. The remedy available to the petitioner was by way of proceedings under the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012. He placed reliance in **Rajni Rani and another v/s. Khairati Lal and others** [(2015) 2 SCC 682] and pressed for the dismissal of the petition.

9. Shri S. Kantak, learned Senior Advocate for the petitioner submitted that Section 448 of the said Act was not applicable since it was never the case of the petitioner that fraud had been exercised but that the entire process of auction was not proper and the challenge was offered to the process of auction. The petitioner had canvassed their case in law and it was not their case of fraud. The judgment in **Rajani Rani**

(supra) was not at all applicable in the facts of the case. Last but not the least although the Advocate for the petitioner was not present before the Trial Court on 11/05/2017, the interested parties were present therefore the learned Judge could not have proceeded to make the impugned order as it did. The impugned order had therefore be quashed and set aside and the petition be allowed in their favour.

10. i would consider their submissions, the records of the case, the judgment in **Rajani Rani** (supra) apart from the provisions of the Act and decide the petition accordingly.

11. The petitioner had particularly raised an issue regarding the conduct of the auction by the Court and in that context a reading of the Minutes of Auction would assume significance. It indicates at the outset that “as per the order of the Court” auction of the assets left behind by the deceased was held **before** the Nazir of the Court of the Senior Civil Judge and the Bailiff. The respondent was not at all able to substantiate their case that any order was passed by the learned Trial Court authorising the Nazir of the Court to conduct the auction. A reading thereof further indicates that the Nazir had proceeded with the auction and despite the Nazir conducting the auction as

recorded in the said Minutes, it was recorded that the Court had declared the auction finalised. One fails to understand how the Court could have declared the auction finalised when the Minutes itself indicates that the auction was conducted by the Nazir of the Court and that the learned Trial Court was a mere signatory to it apart from the Advocate of the respondent, the Nazir and the Bailiff; the Advocate for the petitioner having refused to sign such Minutes being drawn contrary to law. Therefore, there is much force in the contention of Shri S. Kantak, learned Senior Advocate that the Minutes of Auction were totally contrary to law unlike the submission of Shri E.O. Mendes, learned Advocate for the respondent that it was a convention for the Nazir of the Court to carry out the auction as per the directions of the Court. It is however unfathomable how the Nazir of the Court could be authorised to conduct the auction and that too on a specious premise that it was the convention of the Court to do so and invariably the Court personally not conducting the auction. Such a contention is totally contrary to law and unacceptable by any stretch of the imagination.

12. Besides, it was not particularly in dispute that the

petitioner had filed objections to this process of auction by their application dated 16/08/2016, within a week of the conduct of the auction and in which it was clearly set out that the price agreed for the sale of the property was ₹3crores which was informed to the respondent. The petitioner had also maintained in their objection that time was sought but the learned Advocate appearing for the respondent objected to the adjournment and the Nazir alongwith the Advocate started typing the Minutes of the Auction as per the dictates of the Advocate for which the Advocate was constrained to refuse to sign the Minutes of Auction which were thereafter placed before the Trial Court for signature. The petitioner had otherwise asserted that the Presiding Judge was not present during the recording of the Minutes of the Auction and the same was done by the Advocate for the respondent and the Nazir and only thereafter the Minutes were signed by the Judge.

13. The Trial Court had considered the reply of the respondent where there was no particular dispute that the parties would try and see that the best price could be arranged for the property while at the same time admitting that the Court Officer i.e. the Nazir entrusted with the auction was dictated the

Minutes of the Auction to the Court typist and the auction proceedings was assisted by the Court Bailiff and the Advocate for the respondent. The petitioner had filed his rejoinder once again denying that the Court staff were authorised to conduct the auction, there was no such authorisation and that the auction should have been done in the presence of the Presiding Judge who had not conducted the auction nor authorised the Court staff to conduct the auction and on that ground alone the auction stood vitiated.

14. The Trial Judge further in his wisdom vide the order dated 17/09/2016 set aside the order passed on the auction on the premise that the Cabeça da Casal had not deposited the amount as required under Article 4112 and not on the grounds urged by the petitioner that the entire process of auction including drawing of the Minutes being contrary to law. The respondent herein had preferred an appeal and the learned Trial Judge by its Judgment dated 05/12/2016 had taken note of the fact that the objections raised by the petitioner herein were not considered by the Trial Court and ultimately partly allowed the appeal, quashed the order passed by the Senior Civil Judge and directed it to decide the application afresh after considering all

the contentions raised by the parties.

15. The learned Senior Civil Judge by her order dated 07/03/2017 perfunctorily referred to the objections raised by the petitioner to recall / set aside the Minutes of Auction and without any justification went on to hold that the auction was held in the presence of the Advocate for the petitioner, that though present they had refused to sign the Minutes of Auction alongwith the petitioner and proceeded to hold that the auction was held as per law. The learned Judge without assigning any reasons and in an omnibus manner passed the order that the auction was held as per law without considering the objections raised by the petitioners and dismissed the objections of the petitioner as being devoid of merit. The petitioner had carried this order in appeal before the District Judge and despite inviting the attention of the Trial Court to its pendency, the learned Senior Judge had gone ahead with the proceedings to draw the final chart of partition.

16. The petitioner had raised objections to the final chart of partition on the premise that the Trial Court could not have proceeded with the auction as the property in question which could have fetched ₹3crores in the open market was auctioned

at a paltry sum of ₹47,00,000/-. The learned Judge by the impugned order still went ahead with the proceedings and on the basis of the final chart of partition confirmed the same ordering the assets to be allotted to the respondent and the petitioner and without assigning any reasons therefor. This is despite the record in the Roznama dated 11/05/2017 that the learned Advocate for the petitioner / interested parties was not present and that the interested parties alone were present in person. This record in the Roznama runs contrary to the history of the case herein which shows that the matter was listed before the Senior Civil Judge for arguments and not for orders as passed by it on the said date. The learned Trial Judge had finalised the chart of partition by the impugned order without even allowing the petitioner to file her objections and disposed of the Inventory Proceedings finally.

17. Section 448 deals with the rescission of partition and in which context a suit is maintainable for rescission of the judicial partition which has become final. In any event, this is not the remedy which the petitioner has sought to uphold the contention on behalf of the respondent that he ought to have filed the suit when he was alleging irregularity and illegality at

the instance of the Court staff to conduct the Minutes of the Auction contrary to the requirement of law. The question whether the Advocate for the respondent was at all instrumental in dictating the Minutes of Auction and proceedings which transpired before the Nazir is a matter which would have to be independently pursued by the petitioner in an appropriate proceedings but the fact remains that the Minutes of Auction by themselves show that it was conducted by the Nazir and the Bailiff of the Court and to which the learned Senior Civil Judge was not a party and had only affixed her signature to the proceedings which were admittedly not conducted in her presence.

18. Rajani Rani (supra), relied upon by Shri E.O. Mendes, learned Advocate for the respondent has no applicability in the facts of the present case.

19. Article 1411 provides the stage at which licitation is done and reads thus :

“The licitation shall take place if possible on the same day of the conference of the parties and immediately thereafter. It is lawful to withdraw the declaration of desire to offer a bid till the respective item is put to be, but in such an event any other

party shall be allowed to apply for licitation on the same item.”

20. Article 1412 contemplates the manner in which the licitation is done and reads thus:

“The licitation is an auction to which only heirs and the moiety holder spouse are admitted, except the cases where, in terms of proceeding Articles, the donee or the legatees should also be admitted. It may fall over the properties of inheritance which are not necessarily to be allotted to any particular party.

Each item shall be put to bid separately, except where all agree to form lots for that purpose, or where there are some which cannot be separated without inconvenience. Different parties, may, by agreement, offer a bid over the same item or lot so that it may be allotted to them in common in the partition.”

21. Article 1414 contained in Division V dealing with partition provides for the third examination and inspection of the file as also the order as to the manner how the partition is to be effected. While Article 1418 deals with the objection against

the chart. Looking to these predicates, it can also be said that the learned Judge had not adhered to them while proceeding with the matter and deciding as it did.

22. The impugned order which is patently illegal calls for an interference by this Court in exercise of its powers under Article 227 of the Constitution of India and in view thereof, i pass the following

O R D E R

Writ Petition is allowed and the impugned order dated 11/05/2017 is quashed and set aside.

NUTAN D. SARDESSAI J.

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