

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 808 OF 2010**

Mr. Tertuliano Renato da Silva,
Near Mangor Sports Club,
Mangor Hill,
Vasco da Gama, Goa.

..... Petitioner
(Cabeça de Casal/Respondent)

V e r s u s

Mr. Francisco Lourenco Beterncourt
Da Silva,
B/54, B-Block,
Sharn Soari Coop. Society Ltd.,
Margao, Goa.

..... Respondent
(Interested party/Appellant)

Shri A. F. Diniz, Advocate for the Petitioner.

Shri R. G. Ramani, Advocate with Advocate P. Kakodkar for the
Respondent.

CORAM: C. V. BHADANG, J.

DATE: 6th February, 2018.

JUDGMENT :

The challenge in this petition, under Article 227 of the Constitution of India is to the Judgment and order dated 26/7/2010 passed by the learned District Judge at Margao in Misc. Civil Appeal No.16/2010. By the impugned

judgment, the appeal filed by the respondent has been partly allowed, as a result of which the order dated 9/7/2009 refusing to delete certain items from the list of assets, passed by the Inventory Court, has been set aside.

2. The brief facts necessary for the disposal of the petition may be stated thus;

That Inventory Proceedings No.59/1991/II have been initiated on the death of Santano Silva who is the father of the petitioner and the respondent. The petitioner happens to be the Cabeça de Casal. The petitioner filed list of assets on 29/6/1996 and 16/11/1996. The respondent/interested party objected to the same. Specifically stated, the respondent sought deletion of item no.11 and 12 and item nos. 16 to 45 on the ground that the same did not belong to the estate leaver.

3. It appears that the Inventory Court recorded the evidence of the parties on the point of the finalization of the list of assets and by an order dated 9/7/2009 rejected the objections, thereby refusing to delete item nos.11 and 12 and 16 to 45 from the list of assets. This was challenged by the respondent before the learned District Judge. The learned District Judge framed the following points :

1. Whether the learned trial court rightly held that item nos. 11 and 12 form the estate of the estate

leaver?

2. Whether the learned trial court rights held that items nos. 16 to 45 form liability of the estate leaver?

3. Can an Inventory Court declare a Will null and void?

4. The learned District Judge answered all the points in the negative and proceeded to partly allow the appeal. The net result is that the item nos.11 and 12 and 16 to 46 stand deleted. Feeling aggrieved the petitioner is before this Court.

5. I have heard Shri Diniz, the learned counsel for the petitioner and Shri Ramani, the learned counsel for the respondent. With the assistance of the learned counsel for the parties, I have gone through the record and the order passed by the Inventory Court as well as that of the learned District Judge.

6. It is submitted by Shri Diniz, the learned counsel for the petitioner that in so far as item nos.11 and 12 are concerned, which consist of land survey nos.54/3 and 42/9 of village Varca, they are admittedly belonging to the Comunidade of Varca and are in the nature of a coconut grove. It is submitted that the deceased Santano Silva, was admittedly cultivating the land from the year 1935 onwards and was continuously in possession of the said land. In the year 1971, the land was auctioned in favour of one Pedro

Thomas. It is however, submitted that Pedro Thomas was never put into possession of the said land. Although the said land was auctioned in favour of the respondent in the year 1975 that was only on account of the fact that because of certain allegations made against the petitioner of having committed encroachment on the Comunidade land, the petitioner was not entitled to bid at the auction. It is pointed out that the respondent has also admitted in his evidence that he was the tenant of the land through his father i.e. the deceased Santano Silva. It is thus submitted that the respondent has also admitted that the possession of the land was with his father i.e. the Estate leaver. He, therefore, submits that the property at item nos. 11 and 12 could not have been deleted.

7. It is submitted that the Will also records that the petitioner had renovated the old house and an additional portion has been constructed at his own cost in the year 1958, which forms the major portion of the said house. It is pointed out that the Will also records that major repairs of the said house were done by the petitioner. It is further pointed out that the Estate leaver in the Will dated 27/2/1986 has recorded that the petitioner had helped him to clear all the loans of the Goa Urban Cooperative Bank, Margao and also loans taken from different persons in order to support the family and has looked after him. It is submitted that the learned District Judge was in error in

ignoring the said material.

8. It is pointed out that the respondent had filed two civil suits namely Regular Civil Suit no.287/1988 against the Comundiade of Varca and others and Regular Civil Suit No.208/1987 against the Rural Development Agency and others. It is submitted that the respondent had also filed an application before the Mamaltdar of Salcete, bearing Case No. JM-III/TNC/85/94 for declaration as a tenant which was dismissed in February 2001. Thus the respondent cannot seek deletion of item nos.11 and 12 on the ground that the land was auctioned by the Comunidade personally in his favour. It is further submitted that the list filed by the Cabeça de Casal carries presumptive value. It is submitted that once the deceased was in possession as a tenant right from the year 1935 i.e prior to 1961 in view of the section 4, 5 and 8 of the Tenancy Act, the deceased would be a deemed tenant. It is pointed out that although the coconut grove were included in the lands governed by the Tenancy Act in the year 1968, it would relate back to the coming into force of the Tenancy Act. It is submitted that the trial court has given a finding that the deceased was in possession of the suit land which has not been disturbed by the Appellate Court. It is submitted that under section 402 of the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 (Act, for short) a party can succeed in getting an item deleted only on showing that,

such a party is a owner of the property which the respondent has not shown.

9. In so far as the active and passive debts listed at serial nos.16 to 45 are concerned, it is submitted that the relevant documents including the promissory notes are there on record which would show that the petitioner had incurred expenses over improvement of the residential house and, as such, the learned District Judge was in error in deleting the items at serial nos.16 to 45.

Except these, there are no other contentions raised. He, therefore, submitted that the petition be allowed.

10. On the contrary it is submitted by Shri Ramani, the learned counsel for the respondent that R.C.S no.287/88 was withdrawn, while the other suit being R.C.S no.208/87 was decreed. In so far as the application for declaration filed before the Mamlatdar is concerned, it was dismissed for want of jurisdiction. It is submitted that there is no finding on merits recorded by the learned Mamlatdar negating the claim of the respondent being the tenant of the suit land. The learned counsel has pointed out that the respondent has filed a fresh application for declaration in the year 2015 bearing no.415/2015/II (old), which is pending before the Mamlatdar. It is submitted that in any event there is material on record to show that the land

was auctioned in the interregnum in favour of Pedro Thomas and thereafter in the name of the respondent. It is submitted that the Inventory Court cannot go into this question which is required to be decided by the Mamlatdar. It is submitted that the deceased has sworn an affidavit in R.C.S. No.208/1987/A confirming that the respondent was in possession and enjoyment of the property bearing survey nos.54/3 and 42/9 as a tenant.

11. In so far as the item nos.16 to 45 are concerned, it is pointed out that it has come in the evidence of the petitioner that he had not taken the consent of the respondent while effecting the repairs/improvements and he has no documents to show as to what were the actual expenses incurred on the improvements/repairs and what was the exact amount of the debt of the Estate leaver which was paid by the petitioner. It is submitted that the learned District Judge has considered the aspect of the recitals in the Will in para 11 onwards and has rightly come to the conclusion that once the deceased has bequeathed the property to the petitioner in consideration of the loans paid and the improvements made, the expenses incurred on the improvements/repairs and the repayment of the loan cannot be listed. It is submitted that in para 12 of the judgment, the learned District Judge, has rightly come to the conclusion that the repairs are carried out to the house which according to the petitioner is bequeathed to him under the Will and

therefore the petitioner would not be entitled to list the expenses on improvements.

12. In reply it is submitted by Shri Diniz, the learned counsel for the petitioner that the respondent is challenging the Will. It is submitted that in the event of there being reduction of the Will, i.e., if the Will is restricted to the disposable quota available to the Estate leaver, the expenses incurred on the improvements/repairs will have to be taken into consideration on a pro rata basis. He submits that the promissory notes are on record at Exhibit 40 (colly.) and the fact that the petitioner was in possession of the promissory notes would be sufficient to hold that the petitioner had repaid the debts, inasmuch as the creditors would return the promissory notes (letras) only when the debts are paid.

13. I have carefully considered the rival circumstances and the submissions made.

14. Firstly, it would necessary to consider the issue of deletion of Item nos.11 and 12 which respectively are lands bearing survey nos.42/9 and 54/3 belonging to Comunidade of Varca.

15. According to the petitioner, the said properties were in possession of the deceased right from the year 1935 as his father was the auction holder/bidder of the said properties. It is claimed that the deceased could not bid for the auction in the year 1971 and thereafter as there were certain allegations of the deceased having committed encroachment in some other lands of the Comunidade. On the contrary, it is the case of the respondent that he is the auction holder from the year 1971 onwards in his own right and as such, the two lands cannot be listed.

16. The learned District Judge after considering the evidence has come to the conclusion that indisputably the respondent/interested party was the auction holder from the year 1971 to 1978 and although the deceased/estate leaver was the highest bidder from the year 1935 to 1965 his rights to the property came to an end.

17. It can thus be seen that on one hand the petitioner has relied upon the claim of the respondent that he was a tenant through his father i.e the estate leaver and certain provisions of the Tenancy Act in order to claim that the deceased would be a deemed tenant by virtue of the provisions of the Act and has further relied upon the dismissal of the application for declaration filed by the respondent, on the contrary, the respondent has relied upon the

Affidavit sworn by the deceased on 30/6/1988 before the Civil Court in which the deceased had acknowledged that the respondent was in possession and enjoyment of the property as a tenant. In my considered view such a dispute involving a finding as to tenancy could not be gone into in an inventory proceedings which are essentially summary proceedings of a non adversarial nature. It is trite that under the provisions of the Tenancy Act, it is only the Mamlatdar who can deal with such an issue of tenancy. Shri Diniz, the learned counsel for the petitioner submitted that the Inventory Court can only look into the possessory title without deciding the issue of tenancy. In my considered view the submission cannot be accepted. As noticed earlier, essentially the issue is whether the deceased/estate leaver was the tenant/auction purchaser of the property from the Comundiade or whether the respondent in his own right was the auction holder from the year 1971 to 1978 as a tenant. Such an issue has to be decided by the Mamlatdar under the provisions of the Tenancy Act. There is also the question about the effect of the dismissal of the earlier application filed by the respondent for declaration. Here again, while the petitioner claims that the respondent cannot now claim to be the tenant in view of the dismissal of his application by the Mamlatdar by order dated 27/2/200, it is contended on behalf of the respondent that the said application was dismissed for want of jurisdiction and not on merits. What needs to be impressed is that the issue not only

involves a claim of tenancy, but also intricate and disputed questions of facts and law which can only be gone into by the Mamlatdar. It can thus be seen that the issue has to be left to be decided by the learned Mamlatdar who is the competent authority under the Tenancy Act. In my considered view the Inventory court would be ill equipped and would ill afford to dwell on or to determine any such issue.

18. The contention based on section 402 of the Act of 2012 also cannot be accepted. Section 402 of the Act would apply where the particular property is sought to be listed as being owned by the deceased/Estate Leaver in which a co heir/interested party claims that he is the exclusive owner and therefore, seeks deletion. Here is a case where the properties at item nos.11 and 12 are sought to be listed on the ground that the deceased was the lessee/tenant of the land from the Comundiade. It cannot be accepted that such an item can be deleted only on the co heir showing ownership in himself. If the contention of Mr. Diniz is accepted, it would lead to a situation where although the cabeca de casal can list a property on the ground that deceased/estate leaver was a tenant of certain property, however, if the co heir seeks its deletion he has to demonstrate ownership of the property in himself. Such a construction in my considered view cannot be placed on section 402. The contention that the list filed by the cabeca de casal has a presumptive value also cannot take the case

of the petitioner any further. This is because it is a rebuttal presumption and that is why when deletion of certain items is sought by the co heir/interested party, the Inventory Court is expected to conduct an inquiry and then decide the issue. For the reasons as aforesaid no exception can be taken to the deletion of item nos. 11 and 12 from the lists of assets.

19. This takes me to the item nos 16 to 45. They comprise broadly of three categories. Item nos 16, 17 and 18 are in respect of the improvements made/maintenance of the old portion of the house. Item no.19 to 45 except item nos. 25 and 26 relate to the repayment of the debts of the Estate leaver. Item no.25 is about expenses of Rs.2000/- on the medical treatment of the mother of the petitioner and the respondent while item no.26 is of Rs.3000/- towards funeral expenses of the deceased. Before proceeding to consider the issue it may be mentioned that the deceased estate leaver died on 24/3/1989, while his widow (the mother of the petitioner and the respondent) died on 10/1/1975. In so far as item nos. 16 to 18 are concerned which are expenses towards improvement they together make up to Rs.58,000/-. It has come in the evidence of the petitioner that he had not taken the consent of the respondent while effecting the repairs/improvements. This would be relevant inasmuch as the expenses at item no.18 are said to be incurred in the year 1994 i.e. after the death of the estate leaver. Even so far as item nos. 16 and

17 are concerned, there are no particulars as to when these expenses are incurred except that in item no.17 it is claimed that the maintenance was done every three years.

20. Coming to the item nos.19 onwards (except item nos 25 and 26), it is contended that the promissory notes (letras) were produced at Exhibit 40 which would suggest that the petitioner had paid the said debts whereupon the creditors had returned the original documents. Before proceeding to consider the said contention it may be mentioned that the learned District Judge has directed deletion of these items on the ground that in lieu of the repayment of debts the deceased had bequeathed the residential house in favour of the petitioner and therefore, now the petitioner cannot claim listing of item nos. 19 onwards. Be that as it may, a perusal of the evidence of the petitioner shows that certain amount (as represented in Exhibit C-40 colly) was paid in the year 1965. He however, could not remember even by approximation how much amount was paid. No receipt was issued at the time when the loan was repaid . At this stage it may be mentioned that except the promissory notes (letras) there are no receipts produced on record evidencing the repayment of the debts by the petitioner. In the further part of the cross examination the petitioner has stated that he has no evidence to show that he paid the amount in respect of the promissory note dated 30/4/1959 (Exhibit

C-4 colly). The evidence of the petitioner would show that certain loans were repaid during the life time of Santano Silva while some debts were allegedly repaid after his death. The petitioner was shown a document dated 30/10/1958 (Exhibit C-40 colly). He claims that the said loan was paid by his father. He did not remember as to which loans were repaid during the life time of the father and which were repaid after the death of his father. He denied the suggestion that the loans were repaid by his father and not by him. He also could not state as to which of the documents i.e. promissory notes (letras) from Exhibit C-40 colly were collected during the life time of his father. He had not obtained any consent from the respondent while repaying the debts, after the death of the estate leaver. It can thus be seen that the evidence of the petitioner on the repayment of the debt is not specific and is too general to be accepted. Thus, merely because the petitioner was in possession of the promissory notes would not be sufficient to accept that it is the petitioner who repaid the loans. On behalf of the petitioner reliance is placed on the recitals in the Will to claim that the deceased had acknowledged in the Will that the petitioner had helped the deceased in clearing the loans of the Goa Urban Co operative Bank, Margao and some private loans in order to support the family. Even here, although there is a recital to that effect in the Will the details and the amount which the petitioner has repaid or helped the deceased to repay has not been set out in

the Will. For these reasons, I do not find that any exception can be taken to the order directing deletion of the various items as directed by the learned District Judge.

21. However, I find that item no.26 towards funeral expenses can be retained inasmuch as under section 405 of the Act the funeral expenses of the Estate leaver shall be paid by the inheritance. For the reasons aforesaid, the petition is partly allowed. The impugned order deleting the item nos.11 and 12 and 16 to 45 (except item no.26) is hereby confirmed. Item no.26 shall continue to be on the list of assets. It is made clear that the observations made herein are for the limited purpose of deciding the issue of finalization of the list of assets. Rule is partly made absolute in the aforesaid terms with no order as to costs.

C. V. BHADANG, J.

Ap/