

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEALS NO.139 & 140 OF 2004****SECOND APPEAL NO.139 OF 2004**

1. Shri. Egidio Joaquim Fernandes,
(since deceased),
represented by his legal heirs:
 - 1a) Shri. Agapito Hilrio Fernandes,
Flat No.4, 10th Floor,
New Sai Niketan, 'A' Wing,
345 Mount Road, Mazagaon,
Mumbai – 400 010.
 - 1b) Smt. Elsa Diana Fernandes,
(since deceased),
 - 1(b)a) Shri. Ralph Fernandes,
son of late Elsa Diana Fernandes,
major of age,
resident of Flat No.4, 10th Floor,
New Sai Niketan, 'A' Wing,
345 Mount Road, Mazagaon,
Mumbai – 400 010.
 - 1c) Shri. Wellington J. Fernandes,
(since deceased, bachelor);
 - 1d) Shri. Suraja V. Fernandes,
H. No.20, Pimplafoll,
Velim-Salcete, Goa.
 - 1e) Smt. Riva Fernandes,
H. No.20, Pimplafoll,
Velim-Salcete, Goa.
 - 1f) Kum. Suzan M. Fernandes,
H. No.20, Pimplafoll,

Velim-Salcete, Goa.

2. Smt. Marcelina Fernandes,
resident of Velim,
(since deceased),
3. Shri. Basiano Juliao Caeiro,
(since deceased through legal
representatives);
- 3a) Mrs. Briyan Caeiro Almeida,
daughter of late Bassiano Juliao
Caeiro, age 39 years, married
and her husband.
- 3b) Mr. Dilip Almeida,
age 46 years, married;

Both residents of H. No.1132,
Madicotto, Cuncolim,
Salcete, Goa.

.... Appellants

V/s.

- | | |
|---|---|
| 1. Smt. Melasquina Colaco,
widow, resident of Velim. |) Dropped as per
) Order dated
) 29/03/03 |
| 2. Shri. Anacleto Gregorio R.
Fernandes and his wife; |)
)
) |
| 3. Smt. Rubertina Andrade |) |
| 4. (Smt. Robertina Fernandes,) since deceased
and her husband; | |
| 5. Shri. Irineo Fernandes,
(since deceased); | |
| 5a) Mrs. Judy Moraes, | |

daughter of late Irineu Fernandes,
major of age, married
and her husband;

5b) Mr. Shakespear Moraes,
major of age, married,

5c) Mrs. Meena D'Souza,
daughter of late Irineu Fernandes,
major of age, married
and her husband;

5d) Mr. Charlie D'Souza,
major of age, married;

5e) Mr. Noel Francis Fernandes,
son of late Irineu Fernandes,
major of age, married
and his wife;

5f) Mrs. Meera Fernandes,
major of age, married,

All residents of H. No.345,
Velim, Vaz Vaddo, Ambelim,
Salcete, Goa, and presently
residing at Flat No.B-29,
4th Floor, Sapana Valley,
Pajifond, Margao, Goa.

- | | |
|---|------------------|
| 6. Smt. Olga Fernandes and her husband; |) |
| |) |
| |) Dropped as per |
| 7. Shri. Cipriano Salvador Miranda, |) order dated |
| Both residents of Dandora, |) 29.03.03 |
| Cuncolim. |) |
| 8. Shri. Agnelo Basilio Lourdes Fernandes and his wife; | |

9. Kum. Melicia Patrociana Barbara
Morais, (deceased);

9a) Arron Fernandes,
major of age, married;

9b) Julie Fernandes,
wife of Arron Fernandes,
major of age;

9c) Kennedy Fernandes,
major of age, married;

9d) Flida Fernandes,
wife of Kennedy Fernandes,
major of age, married;

9e) Jovina Fernandes,
wife of Manuel D'Costa,
major of age, married,

9f) Manuel D'Costa,
major of age, married;
All residents of Vaz Vaddo,
Ambelim, P.O. Velim-Goa.

10. Kum. Assucena Fernandes,)
resident of Quelmoroda,)
Velim.)

11. Shri. Melvin Mazarelo,)
bachelor, major,)
Quelmoroda, Velim.)

12. Shri. Denis Mazarelo,)
Quelmoroda, Velim.)

13. Shri. Iriton Mazarelo,)
Quelmoroda, Velim.)All dropped as
per order dated

- | | |
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| 14. Smt. Irena Mazarelo Almeida
and her husband; |)29.03.03 passed
)on Exbt. 7/D |
| 15. Shri. Socorro Almeida. |) |
| |) |
| 16. Kum. Goretty Mazarelo,
major; |) |
| |) |
| 17. Shri. Clero Mazarelo,
since major; |) |
| |) |
| 18. Shri. Venus Mazarelo,
since major; |) |
| |) |
| 19. Shri. Godfrey Mazarelo,
since major; |) |
| |) |
| 20. Shri. Felix Mazarelo,
since major; |) |
| |) |
| 21. Shri. Edwin Mazarelo,
since major; |) |
| |) |
| All residents of Quelmoroda,
Velim. |) |
| |) |
| 22. Shri. Inacio Fernandes alias
Ignacius J. Alegres Fernandes,
resident of Goan Society Bldg.
1 st Floor, Flat No.16,
23, Tadvadi, Bombay 400002. |) |
| |) |
| 23. Kum. Zelia Colaco,
resident of Velim. |) All dropped as
) per order dated
) 29.3.03 passed on |
| 24. Smt. Alzira Fernandes
and her husband; |) Exhbt. 7/D |
| |) |
| 25. Shri. Procedio Almeida,
Both residents of Quelmoroda, |) |

- Velim.)
)
 26. Shri. Gonsaga Fernandes)
 and his wife;)
 27. Smt. Elsa Miranda;)
)
 Both residents of Velim (Baga).)
)
 28. Smt. Flocia Fernandes and)
 her husband;)
)
 29. Shri. Franco Gomes,)
 resident of Panzorcone,)
 Cuncolim.)
)
 30. Smt. Felinia Fernandes) All dropped as
 alias Fatima Luiza Fernandes,) per order dated
 widow, resident of Velim.) 29.3.03 passed on
) Exhbt. 7/D
 31. Jossie Borges,)
 since major;)
)
 32. Smt. Valegrina Fernandes)
 and her husband;)
)
 33. Shri. Lourencinho Da Silva;)
)
 Both residents of 571,)
 Dr. Lisboa House,)
 1st Floor, Girgaum,)
 Bombay – 400 002)
)
 34. Smt. Domentina Fernandes)
 alias Dometildes Fernandes)
 and her husband;)
)
 35. Smt. Lourenco Da Costa,)
 resident of Tolecantao Velim.) Respondents.

AND
SECOND APPEAL NO.140 OF 2004

- 1 Smt. Marcelina Fernandes,
(since deceased)
- 2 Shri Agapito Hilario Fernandes
Flat No.4, 10th floor,
New Sai Niketan “A” Wing,
345 Mount Road, Mazagaon,
Mumbai 400 010.
- 3 Smt. Elsa Diana Fernandes
(since deceased)
- 3(a) Shri Ralph Fernandes,
son of late Elsa Dianna
Fernandes, major of age,
resident of Flat No.4, 10th Floor,
New Sai Niketan, “A” Wing,
345 Mount Road, Mazagaon,
Mumbai 400 010.
- 4 Shri Wellington J. Fernandes
(since deceased)
- 5 Shri Suraja V. Fernandes
H.No.20, Pimplafoll,
Velim-Salcete, Goa.
- 6 Smt. Riva Fernandes e Caeiro,
resident of H.No.22,
Milliana Wado, Cuncolim, Goa.
- 7 Kum. Suzan M. Fernandes,
H.No.20, Pimplafoll, Velim,
Salcete, Goa.

- 8 Shri Basiano Juliao Caeiro,
resident of H.No.22,
Miliana Wado, Cuncolim.

.... Appellants

V/s

- 1 Shri Agnelo Basilio Lourdes
Fernandes and his wife,
- 2 Smt. Melicia Patrocina Barbara
Moraes (since deceased)
- 2(a) Arron Fernandes
Major of age, married.
- 2(b) Julie Fernandes
Wife of Arron Fernandes,
Major of age.
- 2(c) Kennedy Fernandes,
Major of age, married.
- 2(d) Flida Fernandes
Wife of Kennedy Fernandes,
Major of age, married.
- 2(e) Jovina Fernandes
Wife of Manuel D'Costa
Major of age, married.
- 2(f) Manuel D'Costa
Major of age, married.

All residents of Vaz Vaddo,
Ambelim, P.O. Velim-Goa.

- 3 Smt. Robertina Fernandes
(since deceased) and her husband
- 4 Shri Irineu Fernandes
(since deceased)
- 4(a) Mrs. Judy Moraes
Daughter of late Irineu Fernandes,
major of age, married and her
husband.
- 4(b) Mr. Shakespear Moraes,
Major of age, married.
- 4(c) Mrs. Meena D'Souza
Daughter of late Irineu Fernandes,
Major of age, married and her
husband.
- 4(d) Mr. Charlie D'Souza
Major of age, married.
- 4(e) Mr. Noel Francis Fernandes
Son of late Irineu Fernandes,
major of age, married and his
wife.
- 4(f) Mrs. Meera Fernandes
Major of age, married.

All residents of H.No.345,
Velim, Vaz Vaddo, Ambelim,
Salcete, Goa.
And presently residing at flat
No.B-29, 4th Floor, Sapana Valley,

Pajifond, Margao, Goa.

.... Respondents

Shri Sudesh Usgaonkar, Advocate for the Appellants.

Shri M.P. Almeida, Advocate for the Respondents.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 4th December, 2019

ORAL JUDGMENT:

Introduction:

A common ancestor dies, leaving behind two branches of successors—one through his first wife and the other through second wife. His death opens succession. The first batch takes out inventory proceedings. About a couple of immovable properties, the second branch pleads exclusive possession, both under ouster and a mortgage with possession. First, the Inventory Court declares the properties as litigious but decides on their apportionment. The second branch sues for a declaration that those items of properties belong to it; the first branch sues for recovery of possession. Both before the Trial Court and before the First Appellate Court, the second branch loses. So these second appeals.

Factual Background:

2. One Avelino Fernandes was the family's common ancestor. During his lifetime, he married Santana and had three children: one son and two

daughters. When his first wife, Santana, died, he married Escolastica Caeiro. Through her, he had one son and one daughter. Avelino Fernandes died in 1945; his first wife in 1911; and second wife in 1965. Indeed, the children of the Second Branch as well as those of the First Branch, later, married and had their own children.

3. Soon after the death of Avelino and his two wives, the two branches, that is the children of Avelino Fernandes wanted the properties partitioned. In 1967, the First Branch initiated Inventory Proceedings No.21045/1967. Initially, it did not show the suit property (three items of immovable property) in the inventory. But later, in 1972, through a supplementary list the First Branch made these properties a part of the inventory. Then, the Second Branch, the appellants, objected to it. According to them, the property, as the appellants' counsel puts it, lies beyond the common ancestors' inheritance.

4. Initially, the Inventory Court rejected the Second Branch's plea. But soon thereafter, the Second Branch filed Suit No.6 of 1974. Amongst other things, it claimed exclusive right, title, and possession over the suit property on the grounds that the Second Branch ousted the First Branch from the property. Then, the Second Branch produced the plaint before the Inventory Court. According to the Second Branch, then the Inventory Court

revised its earlier orders and held that these three items were litigious. At any rate, the Court proceeded with the adjudication. In fact, in the inventario proceedings, the First Branch bid the litigious properties in the auction held on 14.02.1977. In the partition that followed, based on the auction, the three items were allotted to the First Branch, and this partition was covered by a decree, dated 22.12.1978, recorded at Folio 332 of the Inventario No.21045/67. The decree has become final.

5. The members of the First Branch on the one hand and those of the Second Branch on the other have a common interest; within each branch there is no conflict of interest, to be explicit. Therefore, instead of referring to them individually, I refer to the children and the grandchildren through the first marriage as the First Branch and those through the second marriage as the Second Branch. True, even pending the litigation, some have died, and some have been added as a result. But I am referring to the branches compendiously.

Procedural Background:

6. To enforce the decree, dated 22 December 1978, the first Branch filed Special Suit No.6 of 79. In 1982, the Trial Court clubbed both the suits—SCS No.6 of 1974 and SCS No.6 of 1979—and allowed the parties to lead common evidence. Eventually, through separate judgments, it decided both

the suits. To be specific, through judgment, dated 30.3.1996, it dismissed SCS No.6 of 1974 filed by the Second Branch, and on the same day, through another judgment, it allowed SCS No.6 of 1979 filed by the First Branch.

7. If we confine ourselves to the suit filed by Second Branch, the Second Branch filed Appeal No.15 of 1997. The Principal District Court of South Goa, at Margao, allowed the appeal; it set aside the judgment, dated 30.3.1996, and remanded the matter. On remand, through its judgment, dated 23.1.2003, the Trial Court restored the original judgment and decree; it has reiterated its earlier verdict. Once again, the Second Branch filed Regular Civil Appeal No.36 of 2003, but that was dismissed in July 2004. So, the Second Branch filed Second Appeal No.140 of 2004.

8. When we trace the RCS No.6 of 1979, the Trial Court decreed it on 30.3.1996. Then the Second Branch filed Regular Civil Appeal No.15 of 1997. As was the case with the other suit, the Appellate Court, through its judgment dated 17.10.2002, set aside the judgment and remanded the matter. Once again, the Trial Court, through its judgment dated 23.1.2003, reiterated its earlier stand and returned the same verdict. Aggrieved, the Second Branch filed Regular Civil Appeal No.36 of 2003. On its dismissal in July 2004, it has filed Second Appeal No.139 of 2004.

9. That is how we have two Second Appeals: SA No.139 of 2004 and

SA No.140 of 2004 before this Court.

Questions of Fact and Questions of Law:

10. Indeed, as we are in the Second Appeal, in both the cases, we need not burden ourselves with the questions of fact. Nor should we analyse the facts in depth. The factual controversy in both the cases, in a conspectus, reveals that there was a common ancestor and that common ancestor possessed certain properties. On his death, the succession opened. The First Branch claimed share in all the properties, but the Second Branch asserted that it had excluded the First Branch from enjoying three items. Thus, by ouster it gained exclusive possession of those three items. In this background, we will appreciate the rival submissions.

11. In these second appeals, we ought to be focusing on the substantial questions of law. The record reveals, and the counsel for both the parties agree, that the substantial questions of law the Court framed earlier was confined only to the dispute in Special Civil Suit No.6 of 1979, that is First Branch's suit: ouster and its consequences. About the dispute raised in Special Civil Suit No.6 of 1974, no substantial questions of law are framed. I, therefore, frame the following substantial questions of law:

In Second Appeal No.139 of 2004:

12. The First Branch secured a decree from the Inventory Court, and

that decree allotted the three items to its share. Based on that declaration, the First Branch wanted to recover the property from the Second Branch. For that purpose, it did not lay execution; instead, it filed an original suit. Does a suit lie under CPC to enforce a decree under Portuguese Civil Code?

In Second Appeal No.140 of 2004:

(a) The Second Branch has filed the suit for a declaration that they own and possess three items of immovable property to the exclusion of the First Branch. To support this assertion, they plead both ouster of the co-owner and assignment of mortgage with possession. Can the plaintiff take two contradictory or even inconsistent pleas about his title?

(b) The Second Branch maintains that the First Branch has admitted ouster in its written statement. To get over the admitted ouster, the First Branch inducted a tenant, but the Second Branch, through judicial process, evicted that tenant. Do these instances affect the First Branch's rights in a partition or in their recovering possession?

Submissions:

Appellants:

13. Shri S. Usgoankar, the learned counsel for the appellants in both the appeals, has submitted elaborately both on facts and also on what he perceives to be questions of law. First, I will focus on Second Appeal

No.139 of 2004. Essentially, Shri Usgaonkar has raised three contentions:

(i) That by open, unconcealed acts and by asserting its exclusive possession, the Second Branch has ousted the First Branch from the joined family property. And that ouster stands admitted in the First Branch's written statement: that the First Branch had been deprived of all the benefits of the properties for the last 15 years.

(ii) That belatedly the First Branch tried to re-establish the right over the property through a proxy; they tried to induct a tenant in the agricultural property. But treating him as a trespasser, Second Branch took out legal proceedings and evicted him.

(iii) (a) In 1938, Avelino Fernandes, the common ancestor, along with his surviving second wife, borrowed Rs.1000/- from his son-in-law and executed a composite document, termed ante-nuptial agreement, acknowledging the mortgage and undertaking to repay the amount. In this context, Shri Usgaonkar has submitted that the mortgage was usufructuary and the possession remained with the son-in-law. The mortgage has never been redeemed.

(iii b) To elaborate, Shri Usgaonkar has also submitted that the son-in-law has assigned his right in the mortgage to the Second Branch. So, as long as the mortgage remained unredeemed, the First Branch could not have

sought any declaration, much less any recovery, of possession, for the possession, technically, remained with the son-in-law or his assignee—the Second Branch. In the alternative, Shri Usgaonkar has also contended that if at all the First Branch wanted to claim any right over the property, first it should redeem the property: it should repay the debt contracted in 1978 and thereafter claim its rights in the joint family property.

In SA No.139 of 2004:

14. In SA No.139 of 2004, Shri Usgaonkar has contended that the Civil Court has no jurisdiction to execute a decree passed by the Inventory Court. He has drawn my attention to paragraph 15 of the First Branch's plaint in Suit No.6 of 1974. According to him, once the inventory Court has declared the property litigious in terms of Article 1380 of Portuguese Civil Code, there ought to be, first, adjudication about the nature of the litigious property.

15. Shri Usgaonkar has also contended that post-independence, the Portuguese Code has survived as a complete Code. It has efficacious provisions for execution of the orders passed under that Code. In other words, the Inventory Court could as well execute its orders and, therefore, by implication the Civil Court's jurisdiction or the Common Law remedy stands barred.

16. On the question of the First Batch's maintaining a suit to enforce the Inventory Court's order, the learned counsel has relied on *Zacarias Durate Domingos Pereira v. Camilo Inacio Evaristo Pereira*¹.

Respondents:

In SA No.140 of 2004:

17. On the other hand, Shri Mario Pinto Almeida, the learned counsel for the respondent First Batch, has vehemently denied that the First Branch ever admitted the other Branch's exclusive right over the property, much less ouster. He has submitted that the First Branch, indeed, pleaded in the written statement that it was not getting the lease proceeds for the last 15 years. It does not, according to him, mean that it had been dispossessed or deprived of its right to have a share in the property. About the alleged tenant and his eviction, Shri Almeida has submitted that the First Branch has never been a party to the alleged proceedings of eviction and, therefore, its outcome never affects it.

18. About the alleged mortgage, Shri Almeida has, first, denied there existed any mortgage, usufructuary or otherwise. He also, next, denied that the Second Branch's son-in-law has ever assigned his rights, if any, in the alleged mortgage to the Second Branch. At any rate, he finally contends that

¹ AIR 1984 Bombay 295

if there was any mortgage and the other Branch, as an assignee, has any right to recover the money, it stands barred by limitation. Shri Almeida has urged this Court to dismiss the Second Appeal. He stresses that the Second Branch has failed to establish any question of law, leave alone substantial questions of law.

In SA No.139 of 2004:

19. Shri Almeida has submitted that the Inventory Court did mark certain properties as litigious, but it has not omitted them from adjudication. To elaborate, he has submitted that the Inventory Court proceeded with the matter, considered all the items in the inventory, including the suit property; and passed orders. The only safeguard in that adjudication was that the findings on the litigious properties must be subject to the outcome of the civil suit initiated by the Second Branch. So, according to him, Article 1380 does not apply.

20. Shri Almeida, in the alternative, has contended that the decree of the Inventory Court has never been challenged. Suit No.6 of 1974, he stresses, is on a different cause of action. So long as the primary order—that of the Inventory Court—remains unchallenged, the Second Branch cannot be heard saying otherwise.

21. On the maintainability of the civil suit, the learned counsel for the

First Batch contends that *Zacarias Durate Domingos Pereira* is under Order 21 of CPC; it does not apply to the facts of this case. According to him, the First Batch has taken recourse to Section 9 of CPC, instead. Thus, he asserts that the civil suit is maintainable.

22. Heard Shri Sudesh Usgaonkar, the learned counsel for the appellants; and Shri Mario Pinto Almeida, the learned counsel for the respondents.

Discussion:

23. Let us begin our discussion, first, on the substantial questions of law in both the appeals.

(a) Can the plaintiff take two contradictory or even inconsistent pleas about his title: ouster and mortgage with possession?

24. Neither the plaintiff nor the defendant can take contradictory pleas, but they both can take inconsistent pleas—which are essentially alternative pleas. Granted, the plaintiff does not enjoy the same latitude as the defendant does on inconsistent pleas. If the plaintiff's inconsistent or alternative pleas embarrass the trial, the court can put him to election. We need not dwell deep into this tumultuous area of legal reasoning. Let us deal with the ouster, instead.

25. In *P. Lakshmi Reddy v. L. Lakshmi Reddy*², the Supreme Court has held that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. What should be made out is the co-owner in possessing ousting the co-owner not in possession. It is in the face of the proposition that ‘the possession of one co-heir is considered, in law, as the possession of all the co-heirs.’ When one co-heir is found to be in possession of the properties, it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secretly hostile animus on his own part, in derogation of the other co-heir's title. It is a settled rule of law that as between co-heirs, there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.”

26. In *Bhubaneshwar Prasad Narain Singh v. Sidheswar Mukherjee*³, the Supreme Court has further held that even if one co-owner were in actual possession, it must be held that the other co-owner was in constructive possession through the co-owner in actual possession, for ‘under the law possession of one co-sharer is possession of all the co-sharers’. Here, the

² AIR 1957 SC 314

³ (1971) 1 SCC 556

property is agricultural land; it is cultivated by a tenant, who has been paying lease or rent. The Second Branch has been collecting the rent. The First Branch pleads that that the other Branch has not been paying it the rent for the last fifteen years. The question is, does this amount to ouster? I am afraid, it does not. A person not getting the rent or not asking for the rent by itself does not amount to his losing possession or getting ousted. Instead, let us assume the party not in possession demands, through a notice, a share in the proceeds, say rent. Besides refusing to pay the rent, the other party, in reply, asserts that it is the exclusive owner. With this adverse assertion on record, if the party excluded from sharing the revenue takes no action for the prescriptive period, then it may amount to ouster. Here, we see no such eventuality. So the courts below have rightly rejected the Second Branch's plea of ouster.

27. Now, the second question.

(b) Do the alleged admission in the written statement and the eviction of the tenant allegedly set up by the First Branch affect its rights in the partition or in its recovering possession?

28. To answer the first question, I have already explained the alleged admission in the written statement; it amounts to no admission at all. Now, we may discuss the tenant's eviction.

29. Besides the Second Branch's tenant remaining in possession, the Frist Branch allegedly inducted another tenant, so they can recover or reclaim possession. But the Second Branch has evicted him through due process. Before the court of law, the Second Branch has pleaded that the third party is a trespasser. And the trial court accepted it and ordered his eviction in some other suit. Curiously, the First Branch was not a party to that suit. Nor has, at least, that tenant or trespasser pleaded that he had been inducted by the First Branch. I hasten to add that even such a plea by that third party does not bind the First Branch, though. That he was inducted by the First Branch was the assertion advanced by the Second Branch; it is self-serving. Once the First Branch was not a party to those eviction proceedings, it is mere idle talk to discuss the First Branch's role in the third party's induction or attempt to possession.

30. Now, we will answer the substantial question of law in SA No.139 of 2004. That question can be divided into subtopics:

- (a) Can the Inventory Court deal with litigious property?
- (b) To enforce an Inventory Court's order, does a civil suit lie?

31. I may first take up the issue of litigious property. True, Article 1380 of the Code deals with the steps to be taken when "lack of description of properties is complained of." According to this Article, if there is a

complaint about the lack of property description, the Inventory Court will notify the administrator or the donee, asking him to describe the property or give his “say.” The notice served, the person concerned may admit the existence of the property and acknowledge that it belongs to the inheritance. But if he is unable to describe the property at once, he may apply for time to describe them later.

32. If the person who received the notice denies the existence of the property or declares that it does not belong to the inheritance, the judge shall invite the parties to lead the evidence they desire, hold the enquiry he deems necessary, and finally decide whether the property should be described. All this happens under summary adjudication. But the later part of the Article prescribes the procedure if the issue cannot be decided summarily. That part reads:

Where the dispute cannot be summarily decided in terms above, because there is necessity of a larger investigation, the parties shall be directed to pursue ordinary remedy, and the inventory shall proceed in respect of other properties.

Sole paragraph: The failure to file the reply within time, the notice having been served in person, amounts, for all purposes, to an admission of the existence of the properties and of the duty to describe them.

33. Seen from the above extract, sometimes the Court cannot summarily decide the dispute because it may require a more detailed

investigation. Then, the Inventory Court will direct the parties to pursue ordinary remedy. And it will proceed only with the other properties.

34. Here, the Second Branch could not produce the order passed by the Inventory Court to ascertain whether it mandated that the litigious property should be kept away from the inventory. At any rate, the Second Branch has relied on, what it terms, the admission by the First Branch in the written statement. And that admission reads:

“Immediately after this order, the plaintiff no.1 and her husband through the said attorney who is the defendant no.2 instituted a suit no.6 of 1974. And thereafter they appeared again in the said inventory proceedings with a third application stating that the suit was filed and producing a copy of the plaint thereof requested the Court to declare the same litigious. In view of this fact the learned Court declared that the same properties were litigious by order dated 18/06/1975 recorded at Folio 187 to 188.”

35. As rightly contended by the First Branch, from the pleadings, we cannot ascertain that the Inventory Court has kept these properties apart. On the contrary, it has proceeded with the adjudication and perhaps it has made that adjudication subject to the outcome of the Civil Suit. Therefore, we cannot definitively hold that Article 1380 presents a bar against the Inventory Court's order. If we analyse the Inventory Court's action, two things emerge:

(1) It has declared certain items of property litigious, but proceeded to adjudicate, making that adjudication subservient to the civil court's findings

to be rendered.

(2) Despite its declaring the properties litigious, it ignored its own order and proceeded to adjudicate. Thus, it may have contradicted itself.

36. The first course of action, I reckon, presents no problem. The second course of action does present a problem; in fact, it provides a cause of action to the person at whose behest the property is declared litigious. Here, Second Branch filed a civil suit and required the Inventory Court to declare three items of the property litigious. If at all the Inventory Court, after declaring them so, proceeded with adjudication, the Second Branch must have challenged the Inventory Court's order. It has not.

37. In any execution, the court cannot go beyond the decree or order. That is not possible here, either. In this backdrop, now the second question follows.

(b) To enforce an Inventory Court's order, does a civil suit lie?

38. To begin with, Section 9 of CPC empowers the civil court to try all suits of civil nature, except those the cognizance of which is either expressly or impliedly barred. In a sense, Section 9 provides a statutory recognition to the common law principle of *ubi jus ibi remedium*. If we scan CPC itself, there are provisions that bar suits: section 11; section 12; section 21-A; section 47 (1); section 144 (2); order 2, rule 2; order 9, rule 9; order

11, rule 21 (2); order 22, rule 9; order 23, rule 1(1); order 23, rule 1 (4); and order 23, rule 3-A.

39. And a statute may also contain express provisions barring the civil court's jurisdiction to entertain a suit. Sometimes, this statutory exclusion may be by implication. But the courts always begin with a presumption that the civil court does have jurisdiction to entertain all matters of civil nature. In *Ganga Bai v. Vijay Kumar*⁴, the Supreme Court has held that there is an inherent right in every person to bring a suit of a civil nature. And unless the suit is barred by statute, one may, at one's peril, bring the suit of one's choice. The expression "civil nature" is wider than the expression "civil proceeding". Its import is easy to be understood than to be explained. We can only grasp its meaning by excluding what is not of civil nature, rather than by labelling what is: anything that does not concern criminal, religious, or political questions may be termed questions of civil nature. Granted, the civil court's jurisdiction does not extend to all civil cases; there can be a bar—express or implied. Express bar is self-explanatory. Then, what is an implied bar.

40. In *Premier Automobiles v. Kamlekar*⁵, the Supreme Court has held thus: "a suit is said to be impliedly barred when it is barred by general

⁴ AIR 1974 SC 1126

⁵ (1976) 1 SCC 496)

principle of law. Where a particular statute provides a particular remedy in a particular forum in a particular way, the remedy must be sought in that forum and in that manner, and all other forums and modes of seeking it are excluded.”

41. In *Zacarias Durate Dmoingos Pereira*, this Court has held that “whenever any party is entitled to allotment in an Inventory, the execution being a continuation of the same proceeding, such an execution shall be governed by the procedure contained under the Portuguese Code itself, even though such a procedure is outside Chapter XVII.” True, Chapter XVII does not contain anything concerning execution. Instead, Article 457 of the Portuguese Civil Code provides for “enforcement of Order”. It is found in Chapter XLVIII, Miscellaneous. Once inventory proceedings conclude and the partition is made, the party to whom assets have been allotted may apply “in the inventory proceedings” that the assets be handed over to him. If the party in possession does not hand over the immovable assets, the court shall order delivery of possession; it removes the other person “from possession of the assets.” The provision, in fact, reads:

Enforcement of Order.— (1) After the final order of partition is made, any party to whom assets have been allotted, may apply in the inventory proceeding that such assets be handed over to him.

(2) If the party in possession fails to hand over immovable assets the delivery of possession shall be made by the court by removing such party from possession of the assets. With regard to movables, the

delivery of possession shall be made by the court by handing over such assets to such party.

(3) Where monies are payable, the court shall order the party to liable to pay, to deposit the amount due in the court within a reasonable period failing which the court shall proceed to attach the assets of the defaulting party and sell them in the public auction. The amount realized by such auction shall be paid to the party entitled to it. The balance, if any, shall be refunded to the defaulter.

(4) Any order, other than the final order, which is enforceable, shall be enforced in the manner set out in this section.

(5) The defaulting party shall bear the cost of the attachment and sale.

42. Interestingly, the very next Article, Article 458, declares that “inventory proceeding shall be summary proceeding and shall not be governed by the Code of Civil Procedure, 1908, unless specifically provided for.” So a decree secured in the inventory proceedings under the Portuguese Civil Code cannot be executed under Order 21 of CPC. The inventory proceedings are not proceedings in a suit, so the decree under those proceedings cannot be executed under Order 21, as if it were a decree under the CPC. But the Inventory Court is a competent judicial forum; it declares rights of the parties. And if those rights are executory, it provides for remedial mechanism for enforcing the declared rights, the provisions may have been, as with Article 457, cryptically worded.

43. So, indisputably, the Inventory Court has declared a right—a civil right, at that. That civil right entails the First Branch to certain benefits. So, to have those rights enforced—say getting possession of the immovable

property—the First Branch invoked Section 9 of CPC. For enforcing a decree under Order 21, that decree must have passed the test being a decree under CPC. But a right accruing under a statute, or common law, or judicial or quasi-judicial proceedings may reach a civil court under Section 9 for their fruition. We cannot equate Order 21 with Section 9 of CPC; nor can we read the shortcomings under Order 21 into the expansive, all embracing Section 9 of CPC. So *Zacarias Durate Dmoingos Pereira* does not apply here.

44. True, the First Branch could have the decree under the Inventory Proceedings enforced or executed, for example, under Article 457 of the Portuguese Civil Code. Instead, the First Branch has chosen the convoluted, time-consuming, masochistic mechanism of filing a fresh suit. This self-flagellation called the original proceeding is both tortuous and torturous. It has waded its way already through two adjudicatory echelons; now, it is at the third hurdle. So the method the First Branch has chosen has already inflicted avoidable pain on that Branch. By nonsuiting them at the stage of Second Appeal—without compelling causes—we must not inflict further pain. Granted, had the statute mandated thus, I would have had no option. But blissfully the statute has not done so.

45. Thus, on this ground, too, the appellant fails.

Mortgage and Its Consequences:

46. Of course, the Second Branch has argued about the mortgage, too. It is, in fact, a question of fact, requiring no answer in these second appeals. Yet, for the sake of completion, let me address that. The alleged mortgage was in 1938; the deed was styled as ante-nuptials agreement. It is said to be a customary arrangement amongst the Goan Christens, pre-independence.

47. I have gone through the document. In fact, the Second Branch has asserted that the document, a composite one, witnesses a usufructuary mortgage, but it has not. The recitals are otherwise. If ever, it is a simple mortgage. The Second Branch maintains that the mortgagee was the Second Branch's son-in-law and that he assigned his right in the mortgage to the very Second Branch. So the Second Branch alone is said to have continued to enjoy the properties, to this day. The Second Branch's contention in this regard is two-fold: First, it contends that so long as the property remains unredeemed, the First Branch cannot make it a part of the joint family property to be partitioned, for the First Branch has no subsisting right over that property. Second, in the alternative, it also maintains that if at all the First Branch wants to claim any right over the property, it must first get the property redeemed from the mortgagee's assignees, that is the Second Branch, and then stake a claim. I am afraid neither plea could be sustained.

48. First, as I have already noted, the mortgage, if ever, was not coupled with possession. So the possessory aspect fails. There was no evidence of its assignment, either. Second, if at all the mortgagee or the assignees have any right to recover the mortgage money, subject to limitation they have their legal options open, but neither can prevent it from being partitioned. I see no counter claim, too, on this count. Thus, this plea also fails.

Viewed from any angle, I see no merit in the second appeals, I accordingly dismissed them. No order on costs.

DAMA SESHADRI NAIDU, J.

NH/VN