

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 502 OF 2018**

1. Mr. Jaganath Vinayak Shet Manerkar,
Major of age,
Indian National and his wife,
2. Mrs. Medini Manerkar,
Major of age, Indian National,
both resident of House no. unknown
Ansabhat,
Mapusa, Bardez, Goa. ... Petitioners

V e r s u s

1. Vallabh Saanand Bondre,
Son of Sadanand Bondre,
Major of age, Indian National,
Resident of Bazarpeth,
Mauswada, Pernem, Goa. ... Respondent

Shri Sudin Usgaonkar, Senior Advocate with Adv. Kissan Padgaonkar for the
Petitioner.

Shri F. E. Noronha, Advocate with Advocate Ms. N. Dias for the
Respondent.

CORAM: C. V. BHADANG, J.
Reserved on: 8/03/2019.
Pronounced on: 1/04/2019.

ORDER:

By this petition, the petitioners, interested party nos.1 and 2 are

challenging the judgment and order dated 20/2/2018 passed by the learned Adhoc District Judge at Mapusa in Misc. Civil Appeal no.74/2017. By the impugned judgment, the learned District Judge has allowed an application (Exhibit 86) filed by the respondent, Head of the Family, for discarding the Deed of Gift dated 20/3/1969.

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

That Inventory Proceedings No.230/97/E have been initiated on the death of Durgabai V. S. Manerkar, who died on 21/11/1965 Vinayak Manerkar, the husband of Durgabai pre- deceased her on 9/5/1949. In the said Inventory Proceedings the respondent is the Head of the Family. The petitioners produced a Gift Deed dated 20/3/1969 on record claiming that Shalini Manerkar, the daughter of Durgabai and her husband Yeshwant Pangam have executed the said Gift Deed in favour of the petitioner Jagannath Manerkar thereby gifting their 1/4th share in the estate in favour of Jagannath.

3. The respondent filed an application (Exhibit 86) for discarding the said Gift Deed on the ground that it is a fraudulent and bogus document. It was contended that no specific right or share or interest has ever crystallized in

favour of the donor Smt. Shalini Manerkar alias Shalini Pangam, on 20/3/1969 over the estate left by the Estate Lever Smt. Durgabhai Manerkar and thus the Gift Deed cannot be looked into. In short, according to the respondent the Gift Deed could not have been executed in respect of the undivided $\frac{1}{4}^{\text{th}}$ share. It was also contented that the Gift Deed does not pertain to any specific property involved the inventory.

4. The application was opposed on behalf of the petitioners. It was contended that the Gift Deed which is a registered document was produced before the Inventory Court on 19/4/2012 and thus the application (Exhibit 86) filed by the respondent is belated. It was contended that the properties which have been gifted form part of the disposal quota of the donors and after their death there is no question of their son i.e donors, son Ajit or daughter-in-law, Bharati having any right whatsoever in the suit properties. It was contended that Ajit Pangam and Bharati Pangam had filed their reply in the year 2012 which is at (Exhibit 53) where they have not disputed the Gift Deed and they have admitted that they do not have any right to the said properties involved in the inventory proceedings. On 10/2/2017, the respondent filed an additional statement on oath stating that both Ajit Pangam and Bharati Pangam have expired and they have left behind their son Dattaprasad A. Pangam married to Rupali, their other son Rudran A. Pangam

and one daughter Siddhi married to Mahesh Verekar. It was pointed out that Advocate Tilve had filed vakalatnama on behalf of the children of Ajit Pangam. On 15/3/2017 Advocate Tilve with permission of the Court withdrew his appearance in the presence of the parties and the children/grand children of Ajit Pangam have not been attending the inventory proceeding. It was denied the the Gift Deed could not be executed in respect of the undivided $\frac{1}{4}$ th share. It was also contended that the respondent in his capacity as the Head of the Family had no locus to challenge the Gift Deed.

5. The learned trial court by an order dated 14/6/2017 dismissed the application (Exhibit D-86) on the ground that Shalini Pangam and Yeshwant Pangam upon the death of their parents had already inherited the rights in the property and $\frac{1}{4}$ th the share having already devolved on Shalini and Yeshwant Parab by operation of law the Gift Deed was valid. The learned trial court also noticed that the Gift Deed was never challenged before any competent court.

6. Feeling aggrieved, the respondents challenged the same before the learned District Judge in Misc. Civil Appeal no.74/2007. The learned District Judge by the impugned judgment dated 20/2/018 has set aside the order passed by the Inventory Court and has also allowed the application (Exhibit

D-86). The learned District Judge has noticed that the inheritance is undivisible and unless “it is finalized in proper proceeding and partition effected, no person is entitled to dispose off his/her share till the inventory is held”. The learned District Judge has found that admittedly there was no inventory held to the estate of late Durgabai Manerkar prior to 20/3/1969 and, as such, the share of Shalini and Yeshwant Pangam having not materialized on the date of the gift deed, the disposal of such undivided share by the interested party in an indivisible estate is not permissible in law. In short, the learned District Judge has found that it is not permissible to gift an indivisible and future share.

7. I have heard Shri Usgaonkar, the learned Senior Counsel for the petitioners and Shri Noronha, the learned counsel for the respondent. Perused record.

8. Shri Usgaonkar, the learned Senior Counsel for the petitioners, has submitted that there is no prohibition in law for an interested party gifting away his undivided share in the inheritance and this does not in any way impinge upon the inheritance being indivisible. It is submitted that the donors had already inherited the share upon the death of Durgabai and, as such, the undivided share in the property cannot be said to be a future share

within the meaning of Article 1453 of the Portuguese Civil Code, 1867 (Code, for short). It is submitted that the learned District Judge was in error in holding that the gift of an undivided share was not permissible. It is submitted that the share of the donor cannot be characterized as a future asset in as much as, on the death of Durgabai, the share was already crystallized, except the fact that it was not separated by metes and bounds.

9. On behalf of the petitioners, reliance is placed, on the decision of the Supreme Court, in the case of **Syscon Consultants P. Ltd Vs. Ms. Primella Sanitary Prod. P. Ltd and others**, AIR 2016 SC 4564 and the judgment of this Court, in the case of **Shri Shrihari Vidhyadhar Upadhye and others Vs. Shri Prashant Vidhyadhar Upadhye (First Appeal No.91 of 2014** decided on 9/12/2014).

10. Mr. Noronha, the learned counsel for the respondent on the contrary has supported the impugned judgment. It is submitted that the Gift Deed by which the donor claims that she has a right of $\frac{1}{4}$ th share in the estate left by her mother, Durgabai and the donor freely grants to donee the right that she has to the estate, such a gift is not permissible in law. It is submitted that the gift can only be made of asset and that too, a present asset. It is contended that the gift of future asset is prohibited under Article 1453 of the Code. It is

submitted that under Article 1452 of the Code a gift is a transfer of assets and not of rights. The learned counsel has made a distinction between the assets and rights. It is submitted that inheritance can comprise, both of assets as well as rights and obligations and a gift can only be made in respect of assets and that too, present assets and not future assets. In short, it is contended that an undivided share in the inheritance is not an asset and it will crystallize into an asset only after the completion of the inventory and after the share is separated by metes and bounds. It is submitted that the provisions of the Transfer of the Property Act are also to similar effect. The learned counsel has referred to section 6 (a) and section 122 of the Transfer of Property Act, 1882 in order to submit that gift can only be in respect of existing movable or immovable property. It is contended that no prejudice would be caused to the petitioners even if the gift deed is discarded or excluded, as the petitioners can “still join hands with the heirs of the donor and obtain the same result”. Reliance is also placed on Article 2015 of the Code, in order to point out the nature of the inheritance. It is submitted that none of the co heirs can alienate his share, although indetermine, to the prejudice of the option which belongs to his co heirs, and no co heir can divide the inheritance at his discretion without the agreement and concurrence of the other co heirs and without undergoing the legal procedure of partition.

11. I have considered the rival circumstances and the submissions made. The donor Shalini Manerkar, is the sister of donee, Jagannath Manerkar, the petitioner no.1. By the Deed of Gift dated 20/3/1969, the donor as heir of her late mother Durgabai Manerkar has gifted the right to 1/4th of the estate left by her.

It can thus be seen that essentially by the said Gift Deed Shalini Manerkar along with her husband has gifted the undivided 1/4th right to the estate left by Durgabai. It is not in dispute that Shalini has inherited 1/4th share of the estate left by Durgabai. The only question is whether an undivided right or a share can be gifted by one of the co heirs in favour of the other. I do not see any prohibition to do so.

12. Article 1452 of the Code defines a contract of gift and says that a gift is a contract whereby any person transfers to another gratuitously one part or the totality of his “present assets”. Article 1453 on which strong reliance is placed on behalf of the respondent reads thus:

“ Nullity of gift of future assets- A gift cannot include future assets.

Sole paragraph- Future assets means those which are not in the possession of the donor, or to which he or she

is not entitled to at the time of the gift.

It can thus clearly be seen that the only prohibition which can be gathered from Article 1453 is that a gift cannot be made in respect of “a future asset”. The sole paragraph appended to the Article 1453 of the Code makes it explicit as to what is meant by future assets. In terms of the said sole para future assets means those which are not in possession of the donors in this case were which he or she is not entitled to, at the time of the gift. It cannot be accepted that the donors in this case were was not entitled to the 1/4th share at the time when the Gift Deed was made. The fact that said 1/4th share or a right was not separated by metes and bounds does not mean that the donee is not entitled to the said share or the asset. The undivided share in the inheritance cannot be said to be a future asset as is contended on behalf of the respondent. The contention on behalf of the respondent that an undivided share in the inheritance is a future asset to my mind is misconceived and cannot be accepted.

13. The contention based on Article 2015 which is in pari materia with section 16 of the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 (Act, for short), also cannot be accepted.

Article 2015 of the Code reads thus:

Indivisibility of the inheritance prior to partition- Where many persons are entitled simultaneously to the same

inheritance, their right shall be indivisible both in respect of possession as well as ownership, as long as the partition has not been effected.

(Corresponds to Section 16 of the Goa Succession, Special Notaries and Inventory Proceedings Act, 2012).

14. It is difficult to accept as to how on the basis of the said Article can it be said that the gift of an undivided share or right in the inheritance cannot be gifted away. It is significant to note that by virtue of the said Gift Deed, neither any specific property nor a specific divided share of the inheritance has been gifted to the petitioner no.1. The Gift Deed essentially pertains to 1/4th undivided right in the inheritance. The contention of the learned counsel for the respondent based on a distinction being made between a right and an asset also to my mind cannot be accepted. One fourth right in the inheritance is the same as 1/4th share in the inheritance, which as indicated earlier, cannot be a future asset. The Gift Deed has no effect of dividing the inheritance and the inheritance continues to be indivisible even after the 1/4th right in the inheritance is gifted by Shanlini to the petitioner no.1.

15. The prohibition is only against a co heir transferring a specific asset/item out of the inheritance or a specified divided share, (for example such as, from the eastern or the western side) in favour of the other co heirs. In my considered view none of the provisions on which reliance is placed on

behalf of the respondent prohibit the transfer of an undivided share or a right in the inheritance. The learned District Judge in my considered view is not right in holding that it is not permissible to gift an undivided share. The learned District Judge is right, however, in saying that such a gift cannot be in respect of a future asset. However, what the learned District Judge has misconstrued is that an undivided share or right in the inheritance cannot be said to be a future asset. In that view of the matter, the impugned judgment cannot be sustained. The petition is accordingly allowed. The impugned judgment and order is hereby set aside. The application Exhibit 86 is hereby dismissed. It is however, made clear that this Court has only examined the validity of the Gift Deed in the context of the challenge that it pertains to a future asset or an undivided share. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

Ap/