

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 846 OF 2018**

Shri John Yury Lobo, 48 years of age, son of
John Terry Lobo, r/o H. No. 56,
Camarcazana, Mapusa-Goa. Petitioner

Versus

1. Shri Gabriel Romao D'Souza, since
deceased, through legal heirs Leonard
Peter Theotónio D'Souza, s/o late John
Leonard D'Souza, major of age, r/o H.
No. 16/4, Camarcazana, Mapusa,
Bardez-Goa.
2. Shri Ramesh Bhikaji Mapxenkar, son of
late Bhikaji Mapxenkar, major of age, H.
No. 47/14, Near Forest Check Post,
Acoi, Ward No. 8, Mapusa-Goa. Respondents

Mr. Ashwin D. Bhobe, Advocate for the Petitioner.

Mr. Jayant P. Mulgaonkar, Advocate for Respondent No. 1.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 13th JUNE, 2019

PRONOUNCED ON: 3rd JULY, 2019

ORAL ORDER:

The challenge in this petition is to the order dated 14.02.2018, passed by the learned Senior Civil Judge at Bicholim in Special Civil Suit No. 22/2011/A. By the impugned order, an application dated 13.09.2017, filed by the petitioner (claiming to be the legal representative of the deceased plaintiff Gabriel Romao D'Souza), for recording evidence in Special Civil Suit No. 13/2016/A prior to taking up the inquiry in Special Civil

Suit No. 22/2011/A, has been dismissed.

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

That late Gabriel Romao D'Souza, filed Special Civil Suit No. 22/2011/A against Mr. Ramesh Bhikaji Mapxenkar, which is pending before the learned Senior Civil Judge at Bicholim. That is a suit filed for declaration that the Inventory Proceedings No. 5/2008/C and C.M.A. (Port) No. 15/2010/C initiated by the defendant, Mr. Ramesh Mapxenkar are bad in law and not binding on the plaintiff late Gabriel D'Souza. Late Gabriel D'Souza also sought some consequential reliefs in the said suit. Gabriel D'Souza expired on 17.11.2012 and respondent no. 1, Leonard D'Souza has been brought on record as his legal representative.

3. The petitioner filed an application in the said suit, purportedly under Order XXII, Rule 3 of Code, claiming to be the legal representative of Gabriel D'Souza on the basis of a Will dated 21.06.2006. Incidentally, respondent no. 1, Leonard D'Souza has been brought on record as legal representative of Gabriel D'Souza on the basis of a subsequent registered Will of Gabriel D'Souza dated 27.09.2011.

4. The learned Trial Court, by an order dated 17.04.2015 has directed an inquiry to be conducted in the matter, which order was challenged by the respondent no. 1, Leonard before this Court in Writ Petition No. 706/2015. This Court by an order dated 28.03.2016, dismissed the petition, thereby confirming the order passed by the Trial Court to hold an inquiry as to whether, the petitioner or the respondent no. 1, Leonard D'Souza is the legal representative of late Gabriel D'Souza. That inquiry is in progress.

5. Respondent no. 1, Leonard D'Souza and his wife Iryna D'Souza filed Special Civil Suit No. 47/2013/A, before the Senior Civil Judge at Mapusa, against the petitioner and his wife Ingrid Lobo, *inter alia* for a declaration that the Inventory Proceedings No. 72/2013/A before the Mapusa Court and the order dated 18.03.2013 passed therein, is null and void and for restraining the petitioner and his wife (defendants in the suit) from using the said order to their benefit. Special Civil Suit No. 47/2013/A has subsequently been transferred to the Court of Senior Civil Judge at Bicholim and has been registered as Special Civil Suit No. 13/2016/A.

6. The petitioner filed an application on 13.09.2017 in Special Civil Suit No. 22/2011/A, to first record evidence in Special Civil Suit No. 13/2016/A, prior to proceeding with the inquiry in Special Civil Suit No. 22/2011/A. This is on the ground that the decision in Special Civil Suit No. 13/2016/A, in which, the petitioner has lodged a counterclaim, would finally decide the issue as to who is the legal representative of late Gabriel D'Souza.

7. The application was opposed on behalf of the respondent no. 1 on the ground that the reliefs claimed in both the suits are different and the inquiry in the suit to decide whether, the petitioner can get himself substituted as legal representative of Gabriel D'Souza is pending. It was pointed out that Ramesh Mapxenkar is not a party to the other suit.

8. The learned Trial Court by an order dated 14.02.2018 has dismissed the application. Hence, this petition.

9. I have heard Mr. Bhobe, the learned Counsel for the petitioner and Mr. Mulgaonkar, the learned Counsel for the respondent no. 1. With the assistance of the learned Counsel for the parties, I have gone through the record.

10. The only contention raised on behalf of the petitioner is that the decision in Special Civil Suit No. 13/2016A, in which, there is a counterclaim by the petitioner and his wife would conclusively decide as to who is the legal representative of Gabriel D'Souza and in such circumstances, the inquiry for determination of legal representative of Gabriel D'Souza, being conducted in the earlier suit, namely Special Civil Suit No. 22/2011/A needs to be kept in abeyance. It is pointed out that while the respondent no. 1 is claiming to be a legal representative on the basis of the Will dated 27.09.2011, the claim of the petitioner is based on the Will dated 21.06.2006. It is submitted that in Special Civil Suit No. 22/2011/A there is a challenge to the Inventory Proceedings No. 5/2008/C and C.M.A. (Port) No. 15/2010/C and in Special Civil Suit No. 13/2016A, the challenge is to the Inventory Proceedings no. 72/2013/A. It is submitted that the holding of the inquiry in Special Civil Suit No. 22/2011/A would be futile and therefore, the Trial Court ought to have allowed the application dated 13.09.2017.

11. Mr. Bhole, the learned Counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case of **Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal AIR 1962 SCC 527**, in order to submit that such

an order can be passed by the Court in the exercise of its inherent powers under Section 151 of the Code of Civil Procedure (Code, for short).

12. Mr. Mulgaonkar, the learned Counsel for the respondent no. 1 has supported the impugned order. It is submitted that the petitioner is yet to be substituted as plaintiff in Special Civil Suit No. 22/2011/A and in absence thereof, cannot justifiably file the application as framed and filed. It is submitted that the defendant in Special Civil Suit No. 22/2011/A, namely, Ramesh Mapxenkar is neither a party in the subsequent suit, no case is made out for giving precedence to Special Civil Suit No. 13/2016/A, which is admittedly a subsequent suit.

Mr. Mulgaonkar, the learned Counsel for the respondent no. 1 has placed reliance on the decision of the Supreme Court in the case of **Mst. Deu & Others Vs. Laxmi Narayan & Others (1998) 8 SCC 701**.

13. I have considered the circumstances and the submissions made. The petitioner has not shown as to under what provision, the application dated 13.09.2017 is filed. The petitioner is yet to get himself substituted as plaintiff in the said

suit and the inquiry for determination of the legal representative of Gabriel D'Souza is pending before the Trial Court. Special Civil Suit No. 22/2011/A was filed by late Gabriel D'Souza against one Ramesh Mapxenkar, which is in respect of Inventory Proceedings No. 5/2008/C and C.M.A. (Port) No. 15/2010, while the subsequent suit filed by the respondent no. 1 and his wife against the petitioner and his wife Ingrid Lobo is in respect of Inventory Proceedings No. 72/2013/A. It is true that the petitioner and the respondent no. 1, Leonard D'Souza are claiming their right on the basis of two separate Wills of late Gabriel D'Souza. While the petitioner has based his claim on Will dated 21.06.2006, respondent no. 1, Leonard D'Souza is claiming to be the legal representative on the basis of the Will dated 27.09.2011. It is true that in the counterclaim filed by the petitioner in Special Civil Suit No. 13/2016/A, there is a challenge to Will dated 27.09.2011. However, that alone is not sufficient to keep the inquiry in the previous suit in abeyance and give precedence to the subsequent suit. At the cost of repetition, it is necessary to emphasize that the petitioner is not yet a formal party to Special Civil Suit No. 22/2011/A.

14. There cannot be any manner of dispute with the proposition that the inherent powers of the Court, which are

saved under Section 151 of the Code, can be exercised to make orders *ex debito justitiae*, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive [see para 43 of the judgment in the case of **Manohar Lal Chopra** (supra)]. Section 10 of the Code provides for stay of the subsequent suit, albeit, subject to the satisfaction of the condition as contemplated in the said Section.

15. In the present case, the petitioner is seeking inquiry in the previous suit being kept in abeyance (to which he is not yet a party), pending the hearing of the subsequently initiated suit, which is not permissible. It is not possible to accept that the reliefs as claimed by the petitioner could be granted under Section 151 of CPC. In my considered view, this is not a case where such powers can be exercised.

16. In the case of **Mst. Deu & Others** (supra), there was a partition suit, in which, the plaintiff had expired and one Laxminarayan, claiming himself to be the adopted son of the deceased plaintiff, on the basis of the registered deed of adoption had sought his substitution. The Supreme Court held

that in view of Section 16 of the Hindu Adoptions and Maintenance Act, the High Court had rightly directly substitution in the place of the plaintiff on the basis of the registered deed of adoption.

17. It is not necessary to go into the merits of the inquiry, which is pending in the suit as to who is the legal representative of late Gabriel D'Souza. It is for the learned Trial Court to proceed with the inquiry and to decide the same on its own merits and in accordance in law. No case for interference is made out. The petition is dismissed, with no order as to costs.

C. V. BHADANG, J.

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