

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO.45 OF 2019**

1. Dr. Rajendra Tamba,
son of late Dr. Manohar Krishna
Porobo Tamba,
aged 66 years, residing at B-16-A,
Law Campala Colony,
Miramar, Panaji-Goa and anr. Appellants

V e r s u s

1. Mrs. Rita alias Anjali Vijay Talaulikar,
daughter of late Dr. Manohar Krishna
Porobo Tamba,
wife of Dr. Vijay Talaulikar,
residing at 2nd Bairro,
St. Cruz, Tiswadi-Goa and 4 others. Respondents

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

Shri Charlton M. D'Souza, Advocate for the Respondents.

CORAM: C. V. BHADANG, J.

Date: 18th September, 2019.

ORDER:

The challenge in this appeal is to the order dated 9/7/2019 (below Exhibit D-25) passed by the learned Senior Civil Judge, Panaji in Inventory Proceedings No.97/2014/B. By the impugned order, application Exhibit D-25 filed by the appellants for deciding the validity of the Will dated 11/2/2015 executed by Shrimati Manohar Tamba has in fact been allowed and

the matter is fixed for inquiry, as regards the validity of the said Will. The contention on behalf of the appellant, however, is that there is no inquiry which is required for determining the validity of the Will in as much as, a widow cannot dispose of her disposable quota by executing a Will after the death of her husband. In other words, according to the appellants, the validity of the Will has to be decided as a pure question of law, which does not require any inquiry.

2. The brief facts are that, the aforesaid inventory proceedings have been initiated on the death of Dr. Manohar Krishna Porobo Tamba, who expired on 5/10/2014, in which the appellant no.1 is appointed as the Head of the Family (HoF). The appellant no.1 filed his statement on Oath as well as list of assets, to which the objections have been filed by the interested parties. During the pendency of the inventory proceedings Smt. Shrimati Manohar Tamba, the widow of Dr. Manohar Tamba expired on 21/8/2016. On 20/7/2017 the interested parties disclosed that the deceased Shrimati Manohar Tamba had executed a Will dated 11/2/2015 in favour of the present respondent no.3. It is in these circumstances that the appellants filed application exhibit D-25 for deciding the “substantive validity of the Will as a preliminary question of law”. It was contended that the Will is executed in violation of the various provisions of law providing for indivisibility of the

inheritance and assets of the matrimonial communion. It was contended that the issue ought to be decided as a pure question of law, which does not require recording of any evidence or inquiry. A perusal of the application shows that the appellant reserved their right to press for other objections, in case the Will is found to be valid under the substantive law.

3. The application was opposed by the interested parties. It was denied that the aforesaid issue can be decided as a preliminary issue as a pure question of law not requiring any evidence or inquiry.

4. As noticed earlier the Inventory Court has allowed the application, however, at the same time has fixed the matter for inquiry on the validity of the Will.

5. I have heard Mr. Noronha, the learned counsel for the appellant and Mr. D'Souza, the learned counsel for the respondent nos.1, 2 and 3. With the assistance of the learned counsel for the parties, I have gone through the record.

6. Mr. Noronha, the learned counsel for the appellant has submitted that Dr. Manohar and Smt. Tamba were married under the regime of communion

of assets and such communion continued even after the death of one of the spouses, as the moiety share of the deceased husband has been inherited by the heirs who are the interested parties. It is thus submitted that even after the death of the husband, the widow cannot execute a Will in respect of the property which is part of such communion, not even regarding the disposable quota. The learned counsel has strenuously urged that during the subsistence of the marriage and the life time of the spouses, stringent conditions apply in so far as execution of the Will. The learned counsel submitted that in the event such spouses intend to make a disposition of their share by Will, there has to be two simultaneous deeds executed by each of the spouses with a separate document requiring consent of each of the spouses, for such disposition by the other. It is submitted that in as much as the said communion subsists even after the death of one of the spouse, the widow in the present case could not be executed the Will in favour of the respondent no.3. The learned counsel has taken me through the impugned order in order to submit that the Inventory Court has misdirected itself and misconceived the objection. The learned counsel submitted that the Inventory Court mistook the objection raised by the appellant. It is submitted that the objection was not that the disposition by the Will is in excess of the disposable quota. He urged that the objection essentially is that the widow was not authorized to execute any Will after the death of her husband, unless

and until the property of the communion is separated by metes and bounds. For this purpose, the learned counsel has placed strong reliance on Article 1766 of the Portuguese Civil Code (the Code, for short) which corresponds to section 219 of the **Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 (Act, for short)**. The learned counsel has placed reliance on three decisions namely, (i) Judgment of Portuguese Supreme Court in “Boletim Official do Ministerio da Jusica' (Official Gazette of the Law Ministry, year 5, No.27, Lisbon, March 1945) (ii) Judgment of the Portuguese Supreme Court in “Boletim do Ministerio do Justica” (Official Gazette of the Law Ministry, No.3, Lisbon, 3rd November 1947) and (iii) Hereditary In-division (Boletim Do Ministerio Da Ivstica- May 1948) of the Judicial Division of Lagos.

7. Mr. D'Souza, the learned counsel for the respondent has supported the impugned order. The learned counsel has submitted that Article 1763 permits a Will to be made by all those not expressly prohibited by law. It is submitted that as per Article 1764, the only disqualification for a person to make a Will is where the person is mentally unsound or is under 14 years of age. It is submitted that as per Article 1766, the prohibition as to disposition is only regarding “certain and specified properties” of the couple. Reliance is then placed on Article 1744 in order to submit that the persons obliged to reserve

the legitime may only dispose of the portion, which the law permits them to dispose of. It is submitted that the disposal-able quota can always be a subject matter of such disposition, where it is not pertaining to “certain or a specified property.” The learned counsel has then taken me through the Will dated 11/2/2015, in order to submit that Smt. Tamba has bequeathed her disposable quota in respect of all her property in which she has acquired rights on account of her marriage. It is submitted that the Will does not pertain to any specified portion or specific property and thus is valid.

8. I have carefully considered the rival submissions made.
9. The challenge on behalf of the appellant as noticed earlier is based on Article 1766 of the Code which corresponds to section 219 of the Act, which read thus:

Article 1766- Prohibition of disposition of the assets of spouses- Those married as per the custom of the country shall not, under penalty of nullity, dispose of certain and specific assets of the marital estate, except if the said assets have been allotted to them in partition, or are not included in the communion, or if the deposition has been made by one of the spouses in favour of the other, or if the other spouse has given consent by authentic form.”

10. Section 219 of the Act reads thus:

219. Restrictions on disposition of community assets.— A disposition of specific and determined properties by a person who is married under the regime of general community of assets is null and void, unless:—

- (a) the assets disposed of are allotted to him in a subsequent partition; or
- (b) they do not form part of the community; or
- (c) the disposition has been made by one of the spouses in favour of the other; or
- (d) the other spouse has in a document drawn by a Special Notary given consent to the said disposition.

(Emphasis supplied)

It can thus be seen that as per Article 1766 what is prohibited is disposition of “certain and specific assets of the martial estate’ except where said assets have been allotted to him or her in partition. Even under section 219 of the Act, what is prohibited is the disposition of “specific and determined properties” by a person who is married under the regime of general community of assets. It is not possible to find a prohibition for such disposition, when it is not pertaining to any specific assets or determined proprieties.

11. On behalf of the appellant reliance was placed on the English translation of the two judgments of the Portuguese Supreme Court and one of the Portuguese High Court which are in Portuguese. The learned counsel for the appellant has produced the English translation of the same across the bar. The said judgments by the foreign courts cannot be read as binding

precedents. However, even assuming it to be so, the observations which have been referred to by the learned counsel for the appellant do not come to the aid of the appellant in this case.

12. In the case of Judgment of the Portuguese Supreme Court “Boletim Oficial do Ministerio da Justica (Official Gazette of the Law Ministry, year 5, No.27, Lisbon, March 1945) dated 16/1/1945, it has been observed that upon dissolution of the marriage by the demise of one of the spouses, the communion of assets which prevailed between them ends (Article 1121 of the Civil Code) but continues between the surviving spouse and the children who represent the deceased and have the right to acquire his portion (Article 1123). The Court further found, with reference to Article 2177 that it clearly prohibits the disposition of a “specific part” and it has been held that the Court has to ascertain whether there is a transfer of a whole or on the contrary of a certain and determined part as stated by the appellant in that case.

13. Coming to the case decided in November 1947, reliance is placed on the following observations:

We have therefore, a case of co-ownership and one of the co-owners the widower, dispensed specifically in favour of the daughter Angelica, one part of the common

assets without the said part having been allotted to him in partition which Art. 2177 prohibits.

On the other hand, since the communion continues after the demise of one of the spouses, since Art. 1766 refers to future partition, the provisions of this Article have been violated in the same manner.

It is not a case, therefore, of exceptions to the provisions of Article 1766, because the latter foresees an undivided inheritance, a 'legal universality' a common estate, in which the moiety holder and the heirs only have a right to a hypothetical part of the estate.

In the undivided inheritance the testator is not owner of a part of the thing, because all the co-owners have the same right to any fraction thereof and this right which they have is a hypothetical part of the totality.

To remove, therefore, the property of the inheritance and try to bequeath the same on the ground of having a right in this property proportionate to the part which he has in the entire partition is a violation of the provisions of Art. 2177 and Art.1766, so long as it is not allotted in partition.”

It can thus be seen that even in this case there was disposition of one part of the communion of assets (a specified portion) without said part having been allotted to the testator, which is prohibited under Article 2177.

14. Even in the third decision what has been held is that in a marriage,

excepting the regime of absolute separation, there is communion of assets, but not joint title over “certain and determined objects”.

15. The appellant has been unable to point out any provision of law which prohibits the disposition by a Will, even of a undivided share, albeit, to the extent of the disposable quota. The appeal is without any merit and is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/