

IN THE HIGH COURT OF BOMBAY AT GOA
MISC.CIVIL APPLICATION 206 OF 2019
IN
MISC. CIVIL APPLICATION NO.755 OF 2018

Yeshwant Laxman Pai Raikar And Anr.,
Bandora, Ponda Goa Applicants

Versus

Laxman V. Singbal And 2 Ors.,
Near Almeida High School, Ponda Goa Respondents

Shri J. P. Mulgaonkar, Advocate for the applicants.

Shri V.P. Thali, Advocate for the respondents.

CORAM : NUTAN D. SARDESSAI,J.

Reserved on: 10th January,2020.

Pronounce on: 13th January,2020.

ORDER:

The applicants seek a recall / modification of the order dated 18/12/2018 passed by this Court by the application under consideration.

2. Heard Shri J. P. Mulgaonkar, learned Counsel on behalf of the applicants who submitted that an application was originally moved on behalf of the applicants to bring the legal representatives of the respondent no.1 on record. The respondent

nos.2 and 3 were the sons of the respondent no.1 who were brought on record, however the daughter who was also the proposed L.R. was not brought on record pursuant to the said order dated 18/12/2018. There was no singular dispute that she was a legal representative of her father i.e. the deceased respondent no.1. The Agreement of Assignment relied upon on behalf of the respondent nos.2 and 3 was open to challenge. The applicants had filed the appeal and had to decide who were the parties to the appeal being the dominus litus. This Agreement was not produced by the respondents in the suit although it was purportedly executed before the conclusion of the suit and by drawing of the decree by the learned Trial Court. The daughter of the late respondent no.1 i.e. the sister of the respondent nos.2 and 3 was also not a party before the Trial Court. The applicants would be seriously prejudiced in case the daughter was not made a party as a legal representative since there was every possibility that the Decree would be open to challenge at her instance. Assuming at the highest that the daughter had no rights in the suit property, no prejudice would occasion to the respondents in case she was joined as a party to the proceedings, as otherwise the appeal would be rendered incompetent if she was not brought

on record. The application had therefore to be allowed in the interest of justice by invoking the jurisdiction of this Court under Section 151 CrPC.

3. Shri V.P. Thali, learned Advocate submitted that an Agreement was entered into between the appellants and the respondent no.1 for the sale of the suit property on 01/08/2003. Both the parents of the respondent nos.2 and 3 had executed individual Wills on 17/05/2005 bequeathing their properties in their favour and also leaving the residue to be distributed in their favour. A suit for specific performance came to be filed by the respondents on 23/5/2006 while the Deed of Assignment on 17/04/2003. The suit was decreed on 31/08/2017 while the respondent no.1 expired on 02/10/2017 i.e. much after the decree. He too adverted to the Deed of Assignment and clauses (e) and (f) in particular and submitted that the property in question was assigned to the respondent nos.2 and 3 as they had paid consideration to the respondent no.1. MCA No.755 of 2019 to bring the legal representative on record was accordingly disposed off on 18/12/2018. The present application filed by the applicants was in the nature of a review in which no new arguments could be

raised which were not raised earlier. He place reliance on **Rajender Kumar and other v/s. Rambhai and others** [2007(15)SCC 513], invited attention to the Wills to show about even the residuary assignment being left in favour of the respondent nos.2 and 3 by their parents and submitted that no case whatsoever was made out to call for a modification of the order under challenge.

4. Shri J.P. Mulgaonkar, learned Advocate in reply submitted that the Wills were not produced by the respondents in the earlier application filed by them to bring the legal representatives of the respondent no.1 on record. In any event, it was not an application for review but one under Section 151 CPC invoking the jurisdiction of this Court.

5. i would consider the submissions of Shri J.P. Mulgaonkar, learned Advocate for the applicants and Shri V.P. thali, learned Advocate for the respondents and decide the application appropriately. There was no particular dispute as evident from the tenor of the application and the reply that the deceased respondent no 1 had also left behind a daughter on his death and

that she qualified as his legal representative. The question would be whether she was required to be brought on record looking to the Deed of Assignment produced by the respondent nos.2 and 3 which clearly reflected that the respondent no.1 had taken into account not only his failing health but also that the respondent nos.2 and 3 have taken an active part in the transaction of sale between the applicant and the respondent no.1 dated 01/08/2003 by giving monetary assistance and for which the first respondent had decided to assign his total right in the contract in favour of the second and third respondent in the proportion of 55:45%. It was as rightly submitted by Shri Thali, learned Advocate that this Deed executed by the respondent no.1 was in consideration of the fact that the respondent nos.2 and 3 had contributed towards the sale and which also finds due reflection in the clauses of the Assignment Deed that an amount of ₹17,05,000/- was contributed by the second respondent and an amount of ₹13,95,000/- was contributed by the third respondent.

6. Although this Deed of Assignment was relied upon on behalf of the respondents while opposing the application to bring the legal representatives on record, no reference whatsoever was

made to it nor any arguments canvassed on behalf of the applicants to substantiate their case that the Deed of Assignment in turn had no bearing on the proceedings and irrespective of such Assignment Deed, the daughter was still required to be brought on record as the legal representative of the deceased respondent no.1. A reading of the order under modification would clearly reflect that no arguments whatsoever were canvased on behalf of the applicants to oppose the said Assignment Deed or to show in what manner it could affect the right of the applicants to bring the daughter of the deceased respondent no.1 on record as the legal representative.

7. In any event, no doubt the applicants are the dominus litus in the appeal filed by them and can decide who are the parties required to contest the appeal. Nonetheless, on the face of this Deed of Assignment it cannot at all be countenanced on behalf of the applicants that the applicants would be seriously prejudiced in case the daughter is not made a legal representative of her deceased father. There is also no basis in the contention on behalf of the applicants that the appeal could be rendered incompetent in case she was not brought on record. Even considering that the

respondents had not produced the Wills on record, in the light of the fact that the Deed of Assignment did reflect the consideration contributed by the respondent nos.2 and 3, the daughter of the respondent nos.1 would not have any say in the sale transaction from which the suit had arisen and giving rise to a decree of specific performance in favour of the respondents. Moreover, although the applicants have been canvassing that they were invoking the inherent powers of this Court, the application by itself would indicate that they were seeking a recall or modification of the order under challenge which was in the nature of a review.

8. Considering the judgment in **Rajender Kumar**(supra), which clearly held at paragraph 6 what were the limitations on the exercise of the power of review being well settled and that the first and foremost requirement for entertaining a review petition was that the order, review of which was sought, suffers from any error apparent on the face of the order and permitting the order to stand would lead to failure of justice; in the absence of any such error, finality attained to the judgment/order cannot be disturbed. The applicants have otherwise failed to show in what

manner they would be prejudiced in case the order is not reviewed/ recalled or modified for the non-joinder of the daughter as the legal representative of the deceased respondent no.1.

9. i do not find any merit in the application which is accordingly dismissed.

NUTAN D. SARDESSAI,J.

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