

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.82 OF 2019**

Ramkrishna Vithal Naik & Anr.

....Appellants

VERSUS

Mandir Madhu Naik & Anr.

....Respondents

Shri A.D. Bhobe and Ms Annelise Fernandes, Advocates for the Appellants.

Shri I. Agha, Advocate for the Respondents.

Coram:- DAMA SESHADRI NAIDU, J.**Date:- 2 February 2021****ORAL ORDER :**

The appellants filed Regular Civil Suit No.79/2013/C before the Civil Judge, Junior Division, Ponda. They sought a declaration that the inventory proceedings concluded in 2005 had been vitiated by fraud. Consequently, they sought an injunction, as well. The suit was filed against two defendants, who are the respondents here.

2. The respondents are the sons of the first appellant's deceased brother. Through its judgment, dated 04.05.2018, the trial Court dismissed the suit. Aggrieved, the appellants filed the first appeal: Regular Civil Appeal No.71/2018, before the District Court-2, at Ponda. On 28.12.2018, the First Appellate Court dismissed the appeal, thus, affirming the trial Court's findings. Further aggrieved, the appellants have filed this Second Appeal.

3. In the Second Appeal, the appellants have framed as many as nine substantial questions of law. But fairly, Shri A.D. Bhobe, the learned counsel, has chosen three out of them as the substantial questions of law. They are these (reframed):

a. Have both the Courts below failed to consider that the Inventory Proceedings No. 48/2004/C instituted by Madhu V. Naik were a product of fraud and consequently were liable to be declared as void?

b. Have the Inventory Proceedings No. 48/2004/C been contrary to the provisions of the law?

c. The Appellate Court has concluded that the appellants ought to have complained against it if there had been any fraud. It has also held that by participating in the Inventory Proceedings No. 48/2004/C, they have acquiesced in them. Are the Appellate Court's conclusions erroneous, resulting in illegality?

4. In support of the above questions of law, Shri Bhobe, the appellants' counsel, has submitted that the appellants implicitly trusted their brother, to whom they had given their Wakalatnama. It was with an understanding that he would engage a counsel to defend their interests, besides his own. But he has played fraud. According to Shri Bhobe, though the appellants have pleaded elaborately about the fraud, both the Courts have misdirected themselves in not appreciating the element of fraud which is otherwise apparent. Therefore, he insists that the question of fraud provides a substantial question of law.

5. In the alternative, Shri Bhobe has submitted that even if the appellants were to assume, without conceding, that the fraud could not be established, there are other vitiating factors. To elaborate, he has submitted that inventory proceedings could conclude only when the respective parties to the proceedings get their moiety or royalty commensurate to their share. Admittedly, here the appellants established before the Courts below that the appellants had not been paid the royalty. And this aspect provides the second substantial question of law. According to him, both the courts below ought to have set aside the inventory proceedings and allowed the consequential relief, too.

6. In reply, Shri I. Agha, the learned counsel for the respondents has, first, contended that there are no substantial questions of law this

second appeal. Then, he has drawn my attention to the fact that the respondents did receive the royalty. And the respondents' plea on this count has been accepted by the Courts below. According to him, both the questions of fraud and royalty are questions of fact, not of law.

7. Heard Shri A.D. Bhobe, the learned counsel for the appellants; and Shri I. Agha, the learned counsel for the respondents.

8. Indeed, the element of fraud is a matter of fact. Making an allegation of fraud is easy and making it out is not. It is, of course, a well-known truism. Here, the appellants' efforts on that count have not met the judicial approval of both the Courts below. I reckon, the appellants' failure to establish that question of fact provides no question of law, much less a substantial question of law.

9. Once the appellants have authorised a particular counsel to defend them, they ought to take the consequences of that counsel's action. At no stage have they entertained any grievance against their counsel, who defended them. That counsel's introduction through their brother is of no consequence.

10. As to the royalty, it is indeed again a pure question of fact. On that count too, I see no substantial question of law arising.

Under these circumstances, I am unable to accept the appellants' contention that this Second Appeal raises any substantial question of law. As a result, I am constrained to dismiss the second appeal. I do so.

DAMA SESHADRI NAIDU, J.

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NITI K
HALDANKAR

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