

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO 37 OF 2019**

TERSEE M. FERNANDES
AND 2 ORS.,

..... APPELLANTS

VS

BALTAZAR DAS NEVES
FERNANDES AND 2 ORS.,

..... RESPONDENTS

Mr. Galileo F. Teles, Advocate for the Appellants.

Mr. M. D. Costa, Senior Advocate with Ms. K. Betquecar, Advocate for the Respondent no.1.

Mr. F. E. Noronha, Advocate for the Respondents no.2 and 3.

CORAM: M. S. SONAK, J.

DATE : 6th July, 2021.

ORDER:

Heard Mr. G. Teles, the learned counsel for the appellants, Mr. M.D. D'Costa, the learned Senior Advocate who appears with Ms. K. Betquecar, for the respondent no.1 and Mr. F. E. Noronha, the learned counsel for the respondent nos. 2 and 3.

2. This is an Appeal Against Order dated 5/3/20219 made by the learned Senior Civil Judge at Margao (Inventory Court) disposing of the appellants' application at Exhibit B-1 for re-opening of the inventory proceedings and for re-auctioning of the assets of the inventory proceeding at Exhibit 19.

3. Mr. Teles, the learned counsel for the appellants at the outset points out that there was an error on the part of the appellants in relying on the decision in **Vilas Atmaram Bandodkar vs. Atmaram P. Bandodkar 2010 Goa L. R. 175**, since this decision stands reversed by the Hon'ble Apex Court in **Baburao Karekar and anr. Vs. Vilas Atmaram Bandodkar (2015) 12 SCC 659**. Mr. Teles, however, submits that even in terms of the decision of the Hon'ble Apex Court, owelty amount or at least the prescribed percentage has to be deposited within three days from the date of demand. He points out that the time period of three days is to be assessed based on what is set out in the decision of the Hon'ble Supreme Court in **Baburao Karekar (supra)**.

4. Mr. Teles submits that in the present case the auction was held on 7/7/2001 and the chart based on the auction was prepared on 11/7/2001. He submits that till date the auction purchasers have not paid any percentage of the owelty amount. He submits that in the year 2015, the appellants required the auction purchasers to deposit such amount. But the auction purchasers resisted the same by urging that the demand was too late. He submits that till date, no portion of the owelty amount has been deposited by the auction purchasers and therefore, going by the ruling in **Baburao Karekar (supra)** as also the legal position, a re-auction will have to be held by reopening the inventory

proceedings.

5. Mr. M. B. D'Costa, the learned Senior Advocate and Mr. F.E. Noronha in unisim point out that the time for depositing commences from the date of demand. They point out that by reference to the roznama that a specific notice was issued to the father of the appellants requiring him to raise a demand. That such notice was ultimately served by substituted service on 7/7/2001. They point out that even after 11/7/2001 despite opportunity, no demand was raised by the father of the appellants. Mr. Noronha points out that in the year 2015, the appellants straightaway applied for setting aside of the auction without making any demand. He points out that the respondent nos.2 and 3 specifically applied to the Inventory Court for deposit of the amount, from which it is quite clear that there was no resistance to the deposit. Mr. D'Costa and Mr. Noronha submit that even now, the respondents are most eager to deposit the amount and, that too, with interest as is specified under the law. They, therefore, submits that there is no error with the view taken by the inventory Court and this appeal may be dismissed.

6. The rival contentions now fall for my consideration:

7. From the perusal of the material on record it does appear that the appellants are trying to take undue advantage of the situation. The situation was

brought about because the father of the appellants despite opportunity in the month of July 2001, failed to raise a demand as was required under the law. The record indicates that on 22/6/2001 the inventory Court had made an ore regarding issue of demand notice to Jose Luis Fernandes which was made returnable on 7/7/2001. The said Jose Luis Fernandes is the father of the appellants and the appellants claim through late Jose Luis Fernandes.

8. The record indicates that there was difficulty in effecting service upon late Jose Luis Fernandes and, therefore, service was ultimately effected by way of pasting on the door i.e. substituted service. Thereafter, on 9/7/2001, 10/7/2001 and even on 11/7/2001 late Jose Luis Fernandes remained absent as a result of which the final schedule of partition was drawn and the proceedings were also closed. At all this stages, late Jose Luis Fernandes had the opportunity to raise the demand, but for reasons best known, no such demand was not raised.

9. Even after 11/7/2001, despite opportunities, no such demand was raised. Only in the year 2015, the present appellants claim through late Jose Luis Fernandes applied for setting aside the auction. This application was made almost 14 years after the final schedule of partition was drawn and the inventory proceedings were closed. The only ground urged for setting aside was that there was a failure to deposit the prescribed owelty amount. There is nothing on

record to indicate that the present appellant raised a demand at any time in the interregnum between 11/7/2001 and the year 2015 and that despite such demand there was failure on the part of any of the respondents to pay or deposit the prescribed percentage of the owelty amount.

10. Mr. Noronha has pointed out that the respondent nos.2 and 3 actually applied to the inventory Court for liberty to deposit the prescribed rates of the owelty amount. He submitted that till date, the application is pending since no orders were made thereon.

11. From the aforesaid, it cannot be said that there was unreasonable resistance on the part of respondents to deposit the prescribed percentage of the owelty despite notice of demand. Till date, there is no notice of demand and, therefore, the consequences set out in Article 1417 (C) of the Portuguese Civil Procedure Code, at least prima facie cannot be said to be instituted. Be that as it may, in the peculiar facts of the present case, there is merit in the submission of the learned counsel for the respondents that at least prima facie, the appellants are trying to take advantage of the situation of their own creation and based thereon, the appellants are attempting to reopen the proceedings which had attained finality way back on 11/7/2001. Since this cannot be permitted, this appeal is required to be dismissed.

12. Another reasons for dismissal of the appeal is the statements made by the learned counsel for the respondents, that the respondents, will deposit the prescribed percentage of the owelty amounts before the Inventory Court together with interest thereon at the prescribed rate, within a maximum period of four weeks from today without waiting for any formal orders from the Inventory Court. The Inventory Court to accept such deposit and to proceed further in accordance with law. According to me, such deposit together with interest will, to some extent, grant benefit to the appellants herein as well.

13. The learned Inventory Court has considered the submissions made on behalf of the present appellants. The Inventory Court, has quite correctly observed that the material on record indicates the conduct of the parties and has drawn the correct inference from their conduct. The inventory Court has quite rightly observed that none of the parties had any serious objection for the allotment and, therefore, there was no cause made out for reopening the inventory proceedings at this point of time.

14. The appeal is accordingly dismissed with the aforesaid liberty. The Inventory Court, to now proceed in accordance with law and even dispose of the

Execution proceedings as expeditiously as possible.

15. All concerned to act on authenticated copy of this order.

M. S. SONAK, J.

Ap/-

MARIA
AURA
PEREIRA
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by MARIA AURA
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Date: 2021.07.07
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