

IN THE HIGH COURT OF BOMBAY AT GOA**Appeal From Order No.65 of 2019**

Shri Narisinha R. Agrahar,
@ Shetty, S/O Lt.
Ramchandra N. Agrahar @
Shetty, age 60 years,
C/O Above Salker Medical Store,
Salker Building,
Vasco da Goa, Goa
(registered address)

..... Appellant

V e r s u s

1. Mr. Subray Venkatesh Shetty,
S/o Venkatesha Shetty,
major in age,
and his wife,
2. Smt. Mukta Subray Shetty,
w/o Subrey Shetty,
major in age,
3. Mr. Prashant Shamba Shetty,
S/O Shamba Shettye, major in age,
and his wife
4. Smt. Sucheta Prashant Shetty,
w/o Prashant Shetty,
major in age,
All residents of Rukmani Vihar,
1st floor, Flat no.A1, Opp.
Fire Brigade station Mundvel,
Vasco da Gama, Goa.
5. Mr. Anthony Cedric Dias,
S/o. Lt. Albert Dias,
Major in age, married,
and his wife;
6. Mrs. Cedric Dias,
w/o Anthony Cedric,
major in age,
both resident of IB-1,
“Prime Villas” Miraton Gardens,

Chicalim, Mormugao Taluka,
(registered addresses)

..... Respondents

Mr. Menino Pereira, Advocate for the Appellant.

Mr. C. A. Coutinho, Advocate for the Respondent nos. 1 to 4.

Ms. Nisha R. Asukar, Advocate for the Respondent nos. 5 and 6.

CORAM: DAMA SESHADRI NAIDU, J.

Date: 15th March 2021.

Order:

The appellant is the plaintiff in Special Civil Suit No.21/2016/B before the Civil Judge, Senior Division, Vasco. The respondents are the defendants. The appellant has filed that suit seeking as many as 20 reliefs. In that suit, he has also applied for interim relief: (i) a direction to the respondents to pay to the appellant the rents they are collecting from the tenants or to deposit them before the Court; (ii) to deposit the sale proceeds respondent nos. 1 to 4 received by selling a piece of property to the respondent nos.5 and 6. Through an order dated 29/6/2019, the trial Court dismissed that interim application. Aggrieved, the appellant has filed this Appeal From Order.

2. To appreciate the facts of this case, we must refer to another suit the appellant has filed earlier.

3. In 2011, the appellant filed Regular Civil Suit No.2/2011/A before the Civil Judge, Senior Division, Vasco, against respondent nos.1 to 4. In that suit, the appellant challenged the Will the owner of the property allegedly executed in favour of respondent nos.1 and 3. That suit was dismissed on 5/3/2014. Aggrieved, the appellant filed Regular Civil Appeal No.132/2014 before the District Judge, South Goa, Margao, who dismissed that First Appeal on 29/1/2021. Of course, the learned counsel for the appellant now informs me that he has instructions to file a Second Appeal.

4. When the appellant filed Special Civil Suit No.21/2016/B, out of which this Appeal From Order arises, the respondents objected to the

maintainability of the suit. To have the plaint rejected, they applied under Order 7 Rule 11, read with Order 2 Rule 2, of C.P.C. Then, through an order dated 16/11/2018, the trial Court refused to reject the plaint. And that order seems to have become final.

5. In the above factual background, Shri Pereira, the learned counsel for the appellant, has submitted that the trial Court has improperly exercised its discretion and has wholly misunderstood the appellant's case. The learned counsel has also submitted that the trial Court has gone beyond its jurisdiction by ignoring its previous order, dated 16/11/2018, in the application filed by the very respondents for rejection of the plaint.

6. During the arguments, I have queried with the learned counsel about the properties covered by the Will. To be precise, I wanted to know whether the rent-yielding properties and the property already sold to respondents no.5 and 6 have been covered by the Will. The learned counsel responded by saying that the Will only covered the business, but not the properties *per se*. In other words, the appellant's counsel contends that the respondents, without prejudice, may have become legatees to the right of carrying on the business, but the properties in which business is carried have not been bequeathed.

7. Then, I have further queried whether the appellant has raised in the first suit any plea on this count: that only the business has been bequeathed but not the properties housing that business. The learned counsel has fairly submitted that the appellant has not pleaded so. But he has added that the appellant has come to know about that later, and that can be the subject matter of the present suit. In the end, the learned counsel has also pointed out that the appellant still has a statutory second appeal for his rescue. Until the litigation in the first suit attains finality, no finding even concerning the properties should be treated as having attained finality.

8. The appellant's counsel has, therefore, urged the Court to allow this Appeal from order. Otherwise, according to the learned counsel, if the

appellant succeeds in the end, he will be without a remedy to recover the rents and the sale proceeds.

9. On the other hand, Shri Coutinho, the learned counsel for respondent nos.1 to 4, has strenuously opposed the appellant's submissions. He has contended that the order passed under Order 7 Rule 11 r/w Order 2 Rule 2 of C.P.C. hardly comes to the appellant's rescue. That order, according to him, was passed under a different factual background. As to the rent and the sale proceeds, Shri Coutinho insists that the properties squarely stand covered by the Will. And the concurrent findings in the appellant's first suit are in the respondents' favour. In the end, Shri Coutinho has submitted that the trial Court's exercise of discretion suffers from no legal infirmity, nor is it perverse. It is, in fact, just and reasonable.

10. Ms. Asukar, the learned counsel for respondent nos. 5 and 6, has adopted the arguments advanced by Shri Coutinho for the others respondents. She has, on her part, pleaded that respondent nos.5 and 6 are *bona fide* purchasers and that they cannot be made to suffer for whatever reasons.

11. Heard Shri Pereira, the learned counsel for the appellant; Shri Coutinho, the learned counsel for respondent nos.1 to 4; and Ms. Asukar, the learned counsel for respondent nos.5 and 6.

12. Indeed, the proprieties indisputably belonged to one Vithal Agrahar, who died issue-less when he was in his nineties. Incidentally, his wife pre-deceased him when she was in her mid-eighties. As he left behind considerable assets, succession opened up. Then, the question was whether he died testate or intestate. Respondent nos. 1 to 3 claimed that he had died testate. So the legatees claimed the estate of Vithal Agrahar.

13. On the other hand, the appellant, the son of Vithal Agrahar's younger brother, living in Karnataka, claims that he is one of successors to the estate of Agrahar. First, he filed a suit attacking the Will allegedly executed by Vithal Agrahar in favour of the respondents, who were serving or assisting him in his business. Of course, whether they are servants

simpliciter or relatives is a disputed question of fact; I am not going into it. Let us confine ourselves to the relief the appellant has sought in the temporary injunction application: he wanted the respondents to deposit the rents they have been collecting over certain properties and also deposit the sale proceeds of the property they had sold to respondent nos.5 and 6.

14. To provide a backdrop to the appellant's case, the learned counsel has submitted that the properties left by Vithal Agrahar were of three categories, (i) the properties covered by the Will; (ii) those uncovered by the Will; and (iii) those which still remain to be identified. Evidently, the properties from which remittance of rent and sale consideration are sought stand covered by the Will. Of course, the appellant has one contention: so long as the proceedings under the first suit have not attained finality, the trial Court ought not to have prejudged the appellant's right at an interim stage. For the earlier suit proceedings still remain inclusive; the appellant desires to file a second appeal against the concurrent findings.

15. The appellant has strenuously contented that the same trial Court at an earlier stage categorically held that the two suits are different and that one does not affect the other. That being so, the outcome of the first suit, which exclusively focused on the Will, should not have affected the appellant's right in the second suit. In other words, the interim relief ought to have been granted.

16. Indeed, as of now, the appellant has suffered concurrent findings vis-a-vis the Will. And these properties stand covered by that Will. True, the trial Court, earlier, rejected the respondents' application under Rule 11 of Order 7, read with Rule 2 of Order 2. It has ruled in the appellant's favour. That ruling concerns the maintainability of the suit, and for that purpose, the plaint alone matters. Therefore, it is not order on the merits of the rival contentions, nor can it be said that the order continues to bind even the same Court under all circumstances at all other stages—when the scope of adjudication varies.

17. Here, the appellant wanted the respondents to deposit the rents and the sale proceeds. The trial Court has, however, held that as the appellant has already suffered concurrent findings of the property, out of which both rents and the sale proceeds originate. *Prima facie*, the appellant has not established his case. The order, cryptic though, reads thus:

“13. The plaintiff himself has admitted that Vithal and his wife had made Wills in favour of defendant nos.1 and 3 to the exclusion of the plaintiff and same being upheld in the Regular Civil Suit No.2/2011 as such it cannot be held that the plaintiff has made out a prima facie case against the defendants with reference to the title of the suit property is concerned. It is admitted fact that the defendants are holding the property on the basis of the Wills executed by late Vithal and his wife and the documents have not been declared as null and void till date. The relief can be granted to the plaintiff only when all the material ingredients for grant of interim relief are fulfilled by the party approaching the court i.e prima facie case, the balance of convenience and irreparable loss likely to be caused to the plaintiff if the injunction is not allowed.

18. It is a matter of record that the appellant failed to secure any prohibitory injunction against the respondents in Special Civil Suit no.21/2016/B. There was no restraint against the respondents from dealing with the properties of late Vithal Agrahar, bequeathed to respondents 1 and 2. Therefore, under no circumstances can it be held that the appellant made out a case for temporary relief.

19. The above order, which is self-revealing, suffers from no legal infirmity. I, therefore, hold that the trial Court has exercised its discretion well within its limits, and by no stretch can I say that the order is perverse.

I, therefore, dismiss the Appeal From Order. At any rate, as a matter of abundant caution, I clarify that whatever observations I have made in this

disposition are strictly confined to this appeal, and it shall affect neither party in the suit.

DAMA SESHADRI NAIDU, J.

A.P./-

MARIA
AURA
PEREIRA

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by MARIA AURA
PEREIRA
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