

Vinita

**IN THE HIGH COURT OF BOMBAY AT GOA.
WRIT PETITION NO.116 OF 2022.**

HUGH FERNANDES AND ANR ...Petitioners.
VS
BLANCHE BERNADETTE
FERNANDES DULY CONSTITUTED
ATTORNEY ANGELO PAIS @ ANDRE
F. ANGELO AND 10 ORS ...Respondents.

Mr. Dinesh Naik and Ms. Prashila Zalba, Advocates for the petitioners.

Mr. John A Lobo, Advocate for the respondents.

CORAM: SANDEEP K. SHINDE, J.
Reserved on: 28th June, 2022.
Pronounced on: 4th July, 2022

ORDER.:

1. Heard finally with the consent of the learned counsel for the respective parties.

2. This petition under Article 227 of the Constitution of India, questions the legality of order dated 24.2.2022 passed by the Civil Judge, Senior Division Mapusa, dismissing the petitioner's application for recasting/framing additional issues in Regular Civil Suit No.166/2017/C/A instituted by the respondent no.1.

3. Briefly stated the facts of the case are that :

Respondent no.1 filed Regular Civil Suit No.166/2017/C/A before the Civil Judge, Senior Division Mapusa against the petitioners herein amongst the others who are the original defendant nos. 1 and 2, challenging the judgment and decree dated 18.2.2008 passed in Inventory proceedings no.132/2004/F/E.

4. The plaintiff's case is that the suit property described in paragraph 1 of the plaint was originally belonged to her grandparents-in-law Mr. Luis Xavier Fernandes and his wife namely Rosa Maria Fernandes, who were original owners and occupants of the suit property. Mr. Luis and Ms. Rosa expired in 1964 and 1965 respectively, leaving behind Mr. Angelo Fernandes and his wife, both expired in 1989 and 2000. Mr. Angelo Fernandes and his wife Mrs. Edultruds Fernandes gave birth to two children namely Mr. Luis Fernandes and Mr. Wallace Fernandes. The said, Wallace Fernandes was married to the plaintiff. Out of the wedlock son was born, who is defendant no.3 in the suit and his wife as defendant no. 4. The plaintiff

thereafter married to a British National, defendant no. 5.

5. Plaintiff's case is that Mr. Wallace Fernandes her husband died in Mumbai on 22.9.1992 and upon his death, he left behind his only son who is defendant no. 3 married to defendant no. 4. The plaintiff would therefore claim half share in the property of late, Wallace Fernandes, being his widow.

6. It is her case that in the Inventory Proceedings the defendant nos. 1 and 2 by indicating the plaintiff's husband died in the status of the bachelor, has played fraud, although she was married and had a son i.e defendant no. 3 married to defendant no. 4.

7. In the aforestated facts and circumstances, the respondent no.1/plaintiff, instituted the suit to declare that the final judgment dated 8.2.2008 passed in Inventory Proceedings no. 132/2004/F/E by the Court of Civil Judge Junior Division allotting the suit property to the defendant no.1, be declared null and void.

8. The defendant no. 1 resisted the suit claim and denied that Mr. Wallace Fernandes was married to the plaintiff. It was further contended that presuming the plaintiff had married to Mr. Wallace Fernandes the said purported marriage was not performed under the law of Communion of Assets, applicable to the State of Goa and the purported marriage certificate dated 19.4.2016 annexed to the plaint by the plaintiff is a fabricated document. Further denied that Wallace Fernandes has left behind his sole and universal heir Mrs. Blanche Fernandes (plaintiff) and his only son defendant no.3. It is further denied that the plaintiff is the widow and half sharer of moiety holder of, Wallace Fernandes.

9. Having regard to the material proposition of facts pleaded, by the parties, the learned Trial Court settled the following issues:-

- 1) Whether the plaintiff proves that the judgment passed in the inventory proceedings no.132/2004/F/E is null and void?
- 2) Whether the plaintiffs prove that this court has jurisdiction to direct the Revenue Authority to delete the name from the Record of rights?

- 3) Whether the defendant proves that the suit is bad for non Joinder of necessary parties?
- 4) Whether the suit is barred by law?
- 5) What relief? What order?

10. The petitioners/defendant nos.1 and 2 moved an application Exh.32 dated 16.3.2021 praying that additional issues be framed, to the effect that;

“1a Whether the plaintiffs proves that she has right and share in the suit property under the prevailing laws in the State of Goa?”

11. The learned Judge after hearing the parties rejected the application vide order 24.2.2022, holding that, issue sought to be reframed is implicit in issue no.1, itself and hence there was no need to frame an additional issue.

12. Feeling aggrieved and dissatisfied by the said order, this petition is preferred.

13. Heard learned counsel for the parties.

14. The scheme of Order 14 CPC dealing with the settlement of issues, shows that an issue arises when a material proposition of facts or law is affirmed by one party and denied by the other. Rule 1(2) of order 14 provides that material propositions are those propositions of law or facts, which a plaintiff must allege in order to show a right to sue or a defendant must allege, in order to constitute his defence. Whereas, Rule 1(3) provides that each material proposition affirmed by one party and denied by the other, shall form the subject of a distinct issue. Rule 1(4) provides issues are of two kinds i.e issues of facts and issues of law.

15. In the case of *Makhan Lal Bangal Vs anas Bhunia (2001) 2 SCC 652* election petitioner, had alleged eleven corrupt practices, all of serious nature. On all these corrupt practices, one issue was framed, as to “whether respondent no.1, and/or his election agent was guilty of corrupt practices as alleged in the petition”. The Apex Court in this judgment analysed the scheme of Order 14 dealing with the settlement of the issues and held that;

- i. The stage of framing the issues is an important one inasmuch as, on that day the scope of the trial is determined by laying the path on which the trial shall proceed excluding diversions and departures therefrom;
- ii. the correct decision of civil lis largely depends on the correct framing of issues;
- iii. each material proposition affirmed by one party and denied by the other, should form the subject of a distinct issue;
- iv. an obligation is cast on the court to read the plaint and the written statement, if any and then determine, with the assistance of the counsel for the parties, the material propositions of the facts or of law on which parties are at variance;
- v. the evidence shall be confined to issues and pleadings;
- vi. no evidence on controversies not covered by the issues and the pleadings shall normally be admitted;
- vii. the object of the issue is to tie down the evidence and the arguments and decision to a particular question, so that there may not be any doubt on what the dispute is;
- viii. the judgment, proceedings issue wise would be able to tell precisely how the dispute is to be decided.

16. Thus, grant of the relief claimed in the plaint is consequential to the determination for the issues. So also, the evidence to be led in the suit is guided by the issues and not by the pleadings, as evident from Order 18 Rule 3 of the CPC.

17. In the case at hand, the trial Court has framed an omnibus issue with respect to the relief claimed, in violation of order 14 Rule 1 (3) which requires distinct issues are to be framed on each material proposition affirmed by one party and denied by the other. Herein the defendant no.1 denied that Mr. Wallace Fernandes was married to the plaintiff and also questioned validity of her marriage, that she was married to Mr. Wallace. Furthermore, he has questioned the validity of the purported marriage certificate dated 19.4.2016 and, also denied that the plaintiff is the widow and half sharer of moiety holder of Wallace Fernandes. Thus, in consideration of the material proposition of facts pleaded by the plaintiff and denied by the defendant and the law enunciated by the Supreme Court in the case of *Makhan Lal Bangal* (supra), the learned trial Court ought not to have declined to

frame additional issue as sought by the defendants. Thus to say, that, the learned trial Court shall read the plaint and the written statement and then determine with the assistance of the counsel for the parties the material propositions of facts or of law on which the parties are at variance. That being the case, Petition is allowed and made absolute in terms of prayer clause 'a', which reads as under:

“the impugned order dated 24/02/2022 in the Regular Civil Suit No. 166/2017 of the Ld. Civil Judge, Senior Division, at Mapusa, Goa rejecting the application for recasting of the issue/framing of additional issue be quashed and set aside.”

18. In the result, application below Exhibit 33 is allowed.

SANDEEP K. SHINDE, J.

VINITA VIKAS NAIK Digitally signed by VINITA VIKAS NAIK
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