

Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.497 OF 2022

Suchita Vasudev Kamath And 4 Ors.

...Petitioners

Versus

Swati Ganesh Kamath And Anr.

...Respondents

Mr. Ashwin D. Bhobe, Advocate *for the Petitioners.*

Mr. Rama Rivankar, Advocate *for the Respondents No.1 and 2.*

CORAM: G. S. KULKARNI

Date: 23rd November 2022

P.C.

Heard learned counsel for the parties in this petition.

2. The challenge in this petition is to the Judgment and order dated 02.08.2022 passed by the learned Senior Civil Judge, "A' Court, Ponda Goa whereby the Court has rejected the joint request of the plaintiff and defendant to record "compromise of the suit" as arrived between the parties and as contained in the Consent Terms dated 14.06.2022 placed on record before the trial Court.

3. Mr Bhobe, learned counsel for the petitioner has made extensive submissions. His first submission assailing the impugned order is to the effect that the impugned order would not satisfy the test of law as the provisions of Order XXIII Rule 3 of CPC would ordain. His next submission is that the order proceeds on surmises and conjectures, insofar as it observes that there is collusion between the parties, in filing the suit when the suit is a partition suit involving the members of the family. It is also his submission that merely because immediately after the filing of the suit, the parties had approached the trial court with consent terms, would not mean that there is some collusion between the parties. It is hence his submission that there is no basis whatsoever on record so as to enable the learned trial Judge to make such observation, that there is collusion between the parties. It is further submitted that the nature of the collusion itself has not been set out, as there is none.

4. Mr. Bhobe, would next submit that the finding of the learned Trial Judge in the impugned order that the intention of the parties/motive is to avoid registration and evade stamp duty, is also not correct. In this context he has drawn the Court's attention to the proviso (c) of Article 44 of Schedule 1(A) of the [Goa Amendment to Indian Stamp Act, 1899] to submit that the

compromise decree is required to be stamped, if the law so requires also considering the provision of Section 17(A)(2)(vi) of the Registration Act, 1908. It is his contention that hence the observations of the learned trial Judge in this context are also not tenable.

5. The next submission of Mr. Bhobe is to the effect that the observation of the Court that no property is being allotted to plaintiff no.1 and therefore her right is sought to be extinguished in the properties only by reserving the usufruct in her favour, is also not a correct finding. In this context it is submitted that plaintiff no. 1 is 81 years of age and by her own volition she has accepted the said position. He submits that it is nobody's case that the plaintiff no.1 would be made to suffer and is being treated with any illegality by virtue of such consent terms. It is on these contentions it is urged that the impugned order is required to be set aside and the compromise be recorded before this Court.

6. On the other hand, learned counsel for the respondent would support the contentions as urged on behalf of the petitioner. He would also submit that the learned Trial Judge has proceeded merely on surmises and conjectures in passing the

impugned order.

7. In my opinion there is much substance in the contentions as advanced by the learned counsel for parties. The suit in question is a partition suit. There is nothing in law that would preclude the parties in arriving at a compromise on the suit, even being a partition suit. When the Court is confronted with a compromise in writing being presented by the parties, it would be the duty of the Court to examine whether any fraud is being played on the Court or there is any illegality in the consent terms so as to prevent such consent terms being converted into a decree of the Court. The Court needs to carefully examine the consent terms, and if necessary, is not powerless to examine and record the statement of the parties, before accepting the consent terms. In the present case, it needs to be observed that the observation of the learned trial Judge is that there is a collusion between the parties. Prima facie, such findings as recorded by the learned trial Judge appear to be without any basis/materials on record. There are no acceptable reasons as set out by the learned trial Judge to make such observation, that there is collusion between the parties. In the present circumstances prima facie, the applicability of any issue of collusion may not arise, and even if it so arises it would be the duty of the Court to examine the same as per law and

consider whether any party to the suit and more particularly the petitioners intend to make any illegal gain or resort to any illegality by taking recourse to the proceedings before the Court. It is only when the parties are abusing the process of law so as to obtain illegal benefit and/or disadvantage over the other party or for any like reasons, a conclusion on collusion could have been recorded. However, this does not appear to be a situation in the present facts as it is not the case of any of the respondents/defendants that there there is some collusion between the petitioners/plaintiffs on one hand or any other respondents/defendants or that the consent terms are not acceptable to any of the respondents/defendants on the ground that there be any collusion between any of the parties. Thus it is quite surprising as to how in the absence of any material the learned trial Judge suo motu on a mere suspicion, considered the issue of collusion and decided the same against the parties.

8. Insofar as the observations of the Court in regard to plaintiff no.1 is concerned, the position is law is well settled that it is always available to the person to either forego/waive completely or partially his/her legal rights. In the present context, plaintiff no.1 has accepted the arrangement of the fixed deposit and to have the usufruct on the immovable properties as agreed

in the consent terms. It appears that the learned trial Judge before recording the findings in regard to plaintiff no.1 has not resorted to any inquiry, as to whether the consent terms in any manner are prejudicial to the plaintiff no.1/petitioner no.1, by calling upon petitioner no.1 to remain present in the Court and satisfying that it is petitioner no.1's case that the consent terms are infact prejudicial to her. Such exercise was required to be undertaken before recording the observations that the compromise between the peititoners/plaintiffs to such extent was not legal and acceptable.

9. Having heard learned counsel for the parties and having perused the record and the impugned order, it is clear that parties have agreed to compromise the suit as set out in the consent terms. This set into motion the necessary procedure required to be applied by the Court in terms as to what Order XXIII Rule 3 would provide. Such exercise as the said provision would mandate has not been undertaken by the trial Court. In these circumstances, the trial Court would be required to undertake such exercise including if so necessary, examining any of the parties or calling for affidavits to verify the acceptability of the consent terms, so as to come to an appropriate conclusion as to whether the agreement or compromise is not hit by the

stipulation as contained in the “Explanation” below the proviso to Rule 3 of Order XXIII.

10. In view of the above discussion the impugned order is required to be set aside. It is accordingly set aside. The parties are relegated to the trial Court to be heard on the compromise to be recorded between the parties as per the provisions of Order XXIII Rule 3. They shall all appear and remain present before the learned Trial Judge on 30.11.2022 at 10:00 AM. The learned Trial Judge shall hear the parties and pass appropriate orders in accordance with law as expeditiously as possible and in any event before 09.12.2022.

11. All contentions of parties are expressly kept open.

12. Disposed of in the above terms. No costs.

G. S. KULKARNI, J

MARIA SUZANA
REBELLO

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