

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

**SECOND APPEAL NO.114 OF 2012
WITH
STAMP NUMBER (APPLN.) NO.3488 OF 2018 (Filing No.)
IN
MISC. CIVIL APPLICATION NO.976 OF 2017
WITH
MISC. CIVIL APPLICATION NO.859 OF 2018
IN
STAMP NUMBER (APPLN.) NO.3488 OF 2018 (Filing No.)
WITH
MISC. CIVIL APPLICATION NO.860 OF 2018
IN
SECOND APPEAL NO.114 OF 2012
WITH
MISC. CIVIL APPLICATION NO.861 OF 2018
IN
MISC. CIVIL APPLICATION NO.976 OF 2017**

ROSADA JOSEFA D'SILVA E
BARRETTO (DEC) THR. HER
LRS. AND ORS.

... Appellants

Versus

JOAO XAVIER DE SILVA ALIAS
JOHN DE SILVA AND 12 ORS.

... Respondents

Mr. Ryan Menezes and Mr. Nigel Fernandes, Advocates for the
Appellants.

CORAM: M. S. SONAK, J.

DATED : 15th DECEMBER 2022

P.C.:

1. Heard Mr R. Menezes, learned counsel for the Appellants. Though some of the Respondents are served, they are neither present nor represented.
2. This Second Appeal was instituted in the year 2012. However, to date, the matter was not taken up for admission for want of service on all the Respondents. Even today, it is reported that the contesting Respondents who reside abroad are yet to be served.
3. Accordingly, on the previous date, it was clarified that the matter would be taken up for admission because if no substantial questions of law were to be involved in the Second Appeal, there was no point in spending additional time on effecting service on the unserved Respondents. More than ten years have elapsed in trying to serve all the Respondents to this appeal.
4. Mr Menezes, learned counsel for the Appellants, submitted that two Courts have not adequately examined the contentions about the Plaintiffs/legal representatives of late Joao Menino de Jesus de Silva (Joao) having already accepted their shares of the properties in the inventory proceedings instituted after the demise of late Joao. He submits that in terms of Article 2022 of the Portuguese Civil Code, once the share in the assets was already accepted, there was no question of any relinquishment or renunciation of such shares. He

submitted that Article 2022 of the Portuguese Civil Code does not contemplate either partial acceptance or renunciation.

5. Mr Menezes submitted that the trial Court did not even bother to frame any issue on this point though there were pleadings, and the Appellate Court, did not consider this issue though the same was referred to in the Appellate Court's judgment and decree.

6. Based on the above submissions, Mr Menezes proposed the following substantial questions of law:

(a) Whether the shares of the heirs of late Joao Menino de Jesus de Silva @ Joao Menino Jesus de Silva, who was married under the regime of communion of assets, having been determined and partitioned in Inventory Proceedings instituted upon his death, in 1954, his heirs could not have renounced their status his heirs, thereafter?

(b) Whether the Hon'ble Courts below erred in failing to frame and issue and/or examine and determine, whether the shares of the heirs of late Joao Menino de Jesus de Silva @ Joao Menino Jesus de Silva, who was married under the regime of communion of assets, having been determined and partitioned in Inventory Proceedings instituted upon his death, in 1954, his heirs could not have renounced their status his heirs, thereafter?

7. The Appellants are the original Plaintiffs, and the Respondents are the original Defendants in Regular Civil Suit No.277/2002/C. The entire, or, in any case, the substantial basis of the suit was that the

Notarial Deed of Assignment of Illiquid and Undivided Rights to Inheritance dated 01.02.2000 (Relinquishment deed) was null and void because Defendant No.1 got such document fraudulently executed from the Plaintiffs. Firstly, it was alleged that the Plaintiffs were given the impression that they were executing the Deed of Succession and not the Deed of Relinquishment. Secondly, it was pleaded that undue influence was exercised on the Plaintiffs. Finally, based mainly upon these pleadings, a declaration was sought to declare the Relinquishment Deed null and void.

8. The above plaint was instituted on or about 25.11.2002. After about six years, the plaint was amended, and para 19(k), upon which the above substantial questions of law are now urged, was introduced. Para 19(k) of the plaint reads as follows:-

"19(k). That the plaintiffs could not in law nor in fact assign or relinquish the rights to the inheritance of their father Joao Menino Jesus da Silva which was already partitioned in the Inventario Proceeding instituted in the year 1954."

9. As noted above, the substantial grievance articulated in the plaint was that the Relinquishment deed was a product of misrepresentation and undue influence. At least *prima facie*, the two contentions contradict one another. The pleadings are sketchy and bereft of material particulars. In any case, after making such serious allegations that were entirely personal to the Plaintiffs, the minimum

expected was that the Plaintiffs step into the witness box and attempt to make good such allegations.

10. However, after making such serious allegations, none of the Plaintiffs bothered to step into the witness box. Instead, on behalf of the Plaintiffs, one Danzil Oscar Dias, a duly constituted power of attorney (POA) of the Plaintiffs, deposed in the matter. This witness admitted that he was not present at or around the time when the impugned Relinquishment deed was executed. Therefore, the POA had no personal knowledge of the allegations on which the plaint was premised. Since no other witnesses were examined, the POA was incompetent to depose to the aspects of fraud, misrepresentation, and undue influence, which were entirely personal to the Plaintiffs, there was no evidence supporting the vague allegations in the plaint.

11. The two Courts relying on *Janki Vashdeo Bhojwani and another Vs Indusind Bank Ltd., and others*¹ dismissed the suit and the appeal which followed. Significantly, not even any question was proposed on the issue of any perversity in the finding of facts concurrently recorded by the two Courts. In any case, such findings are correct and warrant no interference. After making such serious allegations personal to the Plaintiffs, the Plaintiffs needed to have stepped into the witness box and deposed to such allegations.

12. The substantial questions of law now proposed do not arise in this matter. Firstly no such issue was framed before the trial Court,

¹ (2005) 2 SCC 217

possibly because the pleadings in para 19(k) were too sketchy to invite such an issue. Nothing on record indicates that the Plaintiffs applied for any recasting of issue based upon the plaintiff's pleadings in para 19(k). The entire thrust was on the allegations of misrepresentation and undue influence. Secondly, nothing is on record that the argument based on pleadings in para 19(k) was even urged before the trial Court. Therefore, the trial Court cannot be faulted for the alleged failure to consider this point.

13. However, the above point was raised before the First Appellate Court, which has considered and disposed of this point in para 18 of the judgment and decree dated 29.06.2011. Para 18 reads as follows:-

"18. Further reference is made to the provisions of Article 2009, Article 2018 and Article 2021 by learned Advocate Shri E. Ataide in the written arguments. It is the argument raised on this count that the plaintiffs and other heirs having accepted the inheritance by taking over the possession of the assets of said late Libania, for which there was no inventory proceeding, now there would not arise any question of relinquishment of the inheritance in view of Article 2009. However, as discussed earlier, the Will executed by late Libania has been clearly admitted by the only witness examined by the plaintiffs and it is also admitted that the said Will has not been challenged. Similarly, it is an admitted position that there was an inventory proceeding after the death of Joao Menino, to which the plaintiffs No.1 and 3 were parties. Hence, the arguments to this effect are also not acceptable. At the same time, it is seen that the provisions of Article 2018 and 2021 do not play any significant role in the present case, as it merely prescribes the mode and manner in which the estate can be accepted or repudiated. It is therefore, in view of all the

reasons discussed above, it is held that the plaintiffs have failed to prove that the said Deed of Assignment is null and void, being executed with the exercise of undue influence or by misrepresentation of facts by the defendants No.1 and 2 over the plaintiffs. Hence, the point No.1 is determined in the negative."

14. Mr Menezes, however, argues that the above discussion is in the context of Libania, the wife of Joao, and not in Joao's context. Apart from the fact that this is not borne out from para 18, even assuming the same is so, that would make no difference to the principle involved. If the contention is considered in the context of Libania, the wife of the late Joao, the consideration in the context of the late Joao could never have been different.

15. Besides, para 19(k) of the plaint vaguely speaks about inherited shares already being partitioned in the Inventario Proceeding instituted in 1954. However, no documentary or other evidence was produced supporting such pleadings. Article 2022 of the Portuguese Civil Code provides that it shall not be lawful for anyone to accept or renounce the inheritance in part, on terms or conditionally. However, in the absence of any evidence about acceptance or partial acceptance, the provisions of this Article would not apply. Consequently, the substantial questions of law now proposed would not even arise. Even assuming such a question would arise, the same would have to be decided against the Appellants.

16. This appeal is liable to be dismissed for the above reasons, and the same is hereby dismissed. The Misc. Civil Applications, if not already disposed of, would not survive the disposal of this appeal. Consequently, all the Misc. Civil Applications are also disposed of. Accordingly, there shall be no order for costs.

M. S. SONAK, J.