

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO.18 OF 2021

WITH

**STAMP NUMBER (APPLN.) NO.725 OF 2020 (F), STAMP
NUMBER MAIN NO.723 OF 2020 (F), STAMP NUMBER MAIN
NO.724 OF 2020 (F), MISC.CIVIL APPLICATION NO.26 OF
2021 (F), STAMP NUMBER (APPLN.) NO.1445 OF 2020 (F)**

APPEAL FROM ORDER NO.18 OF 2021

NIRMALA FATIMA PINTO E COSTA
FRIAS, THR. POA, JOSE ELRICH DA
COSTA FRIAS AND 8 ORS ... APPELLANTS

Versus

CHERYL MAVIS BRAGANZA (DEC) THR.
HER LRS. AND 15 ORS ... RESPONDENTS

WITH

MISC.CIVIL APPLICATION NO.26 OF 2021 (F)

IN

APPEAL FROM ORDER NO.18 OF 2021

NIRMALA FATIMA PINTO E COSTA FRIAS
AND 8 ORS. ... APPLICANTS

Versus

CHERYL MAVIS BRAGANZA (DEC) THR.
LRS. AND 15 ORS. ... RESPONDENTS

WITH

STAMP NUMBER MAIN NO.723 OF 2020 (F)

EVANGELINA M. DE G. DA COSTA FRIAS
E C. GOMES, REP. BY POA APPELLANT
NO. 3 AND 5 ORS. ... PETITIONER

Versus

CHERYL MAVIS BRAGANZA
AND 18 ORS. ... RESPONDENT

**WITH
STAMP NUMBER (APPLN.) NO.1445 OF 2020 (F)
IN
STAMP NUMBER MAIN NO.723 OF 2020 (F)**

EVANGELINA M. DE G. DA COSTA FRIAS
E C. GOMES, REP. BY POA APPELLANT
NO. 3 AND 5 ORS. ... APPLICANT
Versus
CHERYL MAVIS BRAGANZA (DEC) THR.
LRS. AND 21 ORS. ... RESPONDENT

**WITH
STAMP NUMBER (APPLN.) NO.725 OF 2020 (F)
IN
STAMP NUMBER MAIN NO.724 OF 2020 (F)**

MARIA FILOMENA MENEZES E COSTA
FRIAS AND 2 ORS. ... APPLICANT
Versus
CHERYL MAVIS BRAGANZA (DEC) THR.
LRS. AND 21 ORS. ... RESPONDENT

**WITH
STAMP NUMBER MAIN NO.724 OF 2020 (F)**

MARIA FILOMENA MENEZES E COSTA
FRIAS AND 2 ORS. ... PETITIONER
Versus
CHERYL MAVIS BRAGANZA (DEC) THR.
LRS. AND 21 ORS. ... RESPONDENT

**WITH
STAMP NUMBER (APPLN.) NO.725 OF 2020 (F)
IN
STAMP NUMBER MAIN NO.724 OF 2020 (F)**

MARIA FILOMENA MENEZES E COSTA
FRIAS AND 2 ORS. ... APPLICANT
Versus
CHERYL MAVIS BRAGANZA (DEC) THR.
LRS. AND 21 ORS. ... RESPONDENT

Mr. S. M. Singbal, Advocate for the Appellants in AO No.18 of 2021.

Mr. F.E. Noronha, Advocate for Respondent No. 1(d) in AO No.18 of 2021.

Mr. S. Coutinho, Advocate for Appellant in STM-723/2020 F.

Mr. Ryan Menezes, Ms Gina Almeida, Mr Nigel Fernandes and Ms Stephanie C.C. Alvares, Advocates for Applicants in STA -725-2020 F.

CORAM: BHARAT P. DESHPANDE,J.

DATED : 3rd August, 2023

ORAL ORDER:

1. Heard Mr. S. M. Singbal, learned Counsel for the Appellants in AO No.18 of 2021, Mr. F. E. Noronha, Advocate for Respondent No. 1(d) in AO No.18 of 2021, Mr. S. Coutinho, Advocate for Appellant in STM-723/2020 F and Mr. Ryan Menezes, Ms Gina Almeida, Mr Nigel Fernandes and Ms Stephanie C.C. Alvares, Advocates for Applicants in STA -725-2020 F.

2. All these matters are taken up for final disposal at the stage of admission itself with the consent of the learned Counsel appearing for the respective parties. The impugned order is the subject matter of challenge in all these proceedings. Therefore, all matters are taken up together for disposal.

3. The learned Counsel Shri F. E. Noronha appearing for the original plaintiff would submit that suit is filed for declaring the partition by metes and bounds as null and void for the simple reason that the plaintiff was not included in the Inventory Proceedings though she is one of the legal heirs of the estate leaver. The Inventory Proceeding No.217/2004/A stands concluded wherein husband of plaintiff i.e. original defendant No.1 was a party. The main contention of Mr Noronha appearing for the plaintiff that since the plaintiff being wife of the co-owner or sharer of the properties left by the estate leaver, her exclusion from the Inventory Proceedings is fatal to the entire partition and therefore, she filed the suit against her husband and other co-heirs for the declaration. Similarly, since there was a threat of disposal of the properties allotted to different shareholders, the plaintiff filed an injunction application praying therein that all the defendants including her husband shall be restrained from transferring and/or mortgaging the suit properties I to IV as described in the plaint. He submits that the issue needs consideration at the stage of trial and therefore the Trial Court has rightly granted injunction.

4. The learned Counsel appearing for the applicant/petitioner strongly contended that the plaintiff married defendant No.2 under separation of assets that too in Canada and thereafter they separated by a decree of divorce on 11/07/1993. The learned Counsel for the

applicants pointed out that in the said divorce itself the properties between the plaintiff and defendant No.1 were partitioned.

5. Rival contentions fall for consideration.

6. The plaintiff filed a civil suit in the year 2009 itself praying as follows:

“a. Rescinds and cancel the partition dated 19/08/2006 in Inventory Proceedings No.217/2004/A.

b. Partition by metes and bounds of the 1/12th share of the plaintiff of Suit properties I, suit properties II, Suit flats III, suit flats IV and movable assets of the estate of Jose Jeronimo Luis Higinio Joao Antonio Otolino de Graca Santana Frias e Costa and Ana Margarida Preciosa Constantino Lobo de Frias e Costa and pending the suit, restrain the defendants from transferring in any manner whatsoever or mortgaging the same.”

7. The contents of the plaint clearly goes to show that the suit properties described in the plaint were originally belonging to Jose Jeronimo Luis Higinio Joao Antonio Otolino de Graca Santana Frias e Costa and Ana Margarida Preciosa Constantino Lobo de Frias e Costa. According to the plaint, in all 31 properties were left by the deceased couple which was inherited by the plaintiff along with the defendants. It is further contended that inventory proceedings were initiated in Goa in the year 2004 bearing Inventory Proceedings No.217/2004/A. The plaintiff was not made party to the said proceedings. Admittedly, defendant No.1 i.e. the husband of plaintiff was one of the interested parties in the said Inventory Proceedings. A Memorandum of

Understanding was filed by the interested parties for the purpose of division/allotment and partition of the assets left by the estate leaver. Accordingly, all the properties were partitioned by metes and bounds.

8. The plaintiff in the suit claimed 1/12th share in the suit properties I to IV and also movable assets of the estate of Jose Jeronimo Luis Higinio Joao Antonio Otolino de Graca Santana Frias e Costa and Ana Margarida Preciosa Constantino Lobo de Frias e Costa which is found in prayer clause 'b' of the suit.

9. The husband of the plaintiff i.e. defendant No.1 contested the suit by filing his written statement wherein he raised the preliminary objection to the legal status of the plaintiff to file such suit claiming right in the properties of the estate leaver. It is a specific case of defendant No.1 that their marriage was solemnized in Canada, and governed by the principles of total separation of assets under Article 53, No.2 of the Portuguese Civil Code, 1966 and subsidiary of separation of assets with communion of only assets acquired by onerous title. Accordingly, defendant No.1 pleaded that the plaintiff never had any right or title to inheritance, shares of her late parents-in-law or any part thereof.

10. Mr Noronha, appearing for the plaintiff, pointed out that subsequently defendant No.1 filed an affidavit-in-rejoinder specifically claiming that the contents of such a written statement were false and

he never instructed his Power of Attorney to include such contents. In the sur-rejoinder, defendant No.1 explained that his marriage with the plaintiff was under communion of assets and not under the separation of properties.

11. Mr Singbal, appearing for one of the applicants, submits that an attempt was made by defendant No.1 to file amendment to the written statement by withdrawing the clear admissions and that such attempt on the part of defendant No.1 was rejected by the Trial Court by a separate order.

12. The learned Counsel for the applicants would submit that sur-rejoinder filed by the defendants which is contrary to the pleadings in his written statement cannot be accepted as such sur-rejoinder was not taken on record by the Trial Court.

13. First of all, it is clear from the record that the husband of the plaintiff/defendant No.1 in his written statement clearly denied the right of plaintiff to claim any share in the properties of the deceased. Such pleading stands till date and the attempt to amend it has been negated by the Trial Court on the ground that admissions cannot be permitted to be withdrawn by way of amendment.

14. The entire plaint would clearly go to show that the plaintiff is claiming right in the property of the deceased through her husband i.e. defendant No.1 who is admittedly one of the legal heirs. When the

inventory proceedings were filed in the in the year 2004, the couple were already separated by a decree of divorce passed by Canadian Court, a copy of which is already placed on record. Perusal of these documents show that the properties between the said couple were divided and separated. There is no reference to the properties of the defendant No.1 which he inherited in Goa; however if read with the written statement filed by defendant No.1, it shows that his marriage with the plaintiff was under separation of assets. Documents coupled with the pleadings would show that the Inventory Proceedings were filed in the year 2004 itself whereas the plaintiff and defendant No.1 executed a Divorce Deed on 11/07/1993 wherein assets of the couple were partitioned amongst themselves.

15. By the impugned order, the learned Trial Court granted injunction with regard to all the properties including that of defendant No.1. The plaint is clearly silent as to whether the allotment in favour of defendant No.1 is also incorrect and that he got less share. The plaintiff is admittedly claiming a right through her ex-husband and therefore the properties allotted to defendant No.1 could have been at the most claimed by her on the basis of marriage.

16. Granting injunction thereby restraining other defendants from enjoying their properties though partitioned by metes and bounds, considered to be an error on the part of the learned Trial Court since the fact remains that these properties were partitioned and separated in

the year 2004 itself. As such no *prima facie* case is made out by the plaintiff as far as properties allotted to other defendants except defendant No.1.

correction carried
out as per order
dated 24/08/2023 in
AO No.18/2021.
sd/-

17. Mr. Singbal has pointed out that in the inventory proceedings *Flat No.S3-2,S3-4 mentioned in Item No.23(A),Flat No.R3-7 and R3-8 mentioned in Item No.23(b)* defendant No.1 received item No.31/as per his share which reads thus

“Item No.31

Property known as “ZUSE BHAT”, admeasuring 10,605 sq.mts., surveyed under No.40, Sub-Division No.10, situated in the Village Paliem, Taluka and Sub-District of Bardez, District of North Goa, described in the Land Registration Office under No.14345 96V Book No.37 New, enrolled in the Revenue Office for Matriz Predial under No.47 of the 3rd Circumscription and bounded on the North by Village Bastora, on the south by Village road, on the East by property bearing Survey No.40/10A and on the West by property bearing survey No.40/9. The said property being valued at Rupees One Lakh only.

Valued by the valuer for Rs.1,50,000=00

correction carried
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sd/-

18. Thus, it is clear that whatever the plaintiff allegedly claimed as a *Flat No.S3-2,S3-4 mentioned in Item No.23(A),Flat No.R3-7 and R3-8 mentioned in Item No.23(b)* right in the properties, can be restricted only to item No.31/and not beyond it. The learned Trial Court failed to consider this aspect and more so when there are no pleadings about the inventory itself being null and void. The question whether plaintiff ought to have been shown as interested party in the inventory proceedings, could be decided on the basis of evidence. However, the other defendants who are already enjoying their properties separately and as per their share allotted in the inventory could not have been restrained.

19. The only *prima facie* material the plaintiff could show in the present matter is the properties allotted to her husband i.e. defendant No.1.

20. Having said so, the impugned order needs to be modified to the effect that the injunction restraining transfer or creating any mortgage Flat No.S3-2,S3-4 mentioned in Item No.23(A),Flat No.R3-7 and R3-8 mentioned in Item No.23(b) is restricted only to Item No.31/ i.e. the properties allotted to defendant No.1 in the Inventory Proceedings. With these observations, all the above proceedings could be disposed of.

ORDER

1. The impugned order stands modified to the effect that the Flat No.S3-2,S3-4 mentioned in Item No.23(A),Flat No.R3-7 and R3-8 mentioned in Item No.23(b) restraint on transferring and/or mortgaging is restricted to Item No.31/ i.e. the properties allotted in favour of original defendant No.1.
2. Parties shall bear their own costs.

BHARAT P. DESHPANDE, J.

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