

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 42 OF 2022
WITH
CIVIL APPLICATION NO. 50 OF 2022

1. Mrs. Saozinha Maria Do Ceu, Antanasio Piedade Lopes, d/o. Late Damaso Francisco Xavier Elesbao Barreto Lopes, w/o Mr. Eustaquio Alcasoas, Age 61 years, Indian National, Represented through her constituted Power of Attorney, Mr. Eustaquio Alcasosa, Duly constituted vide Power of Attorney dated 14.08.19.

2. Mr. Eustaquio Alcasoas, s/o Late Leao Pedro Francisco Alcasoas, Age 69 years, Married, Indian National, Both residents of H. No. 138, Opposite Cansaulim Panchayat, Cansaulim, Goa.

3. Mrs. Jenifer Eslinda Aspuiqueta Lopes Furtado, d/o late Damaso Francisco Xavier Elesbao Barreto Lopes, w/o. Mr. Eli Eufemio Antonio Francisco Jose De Menezes Furtado, Age 56 years, Indian National, Represented through her constituted Power of Attorney Mr. Eli Eufemia Antonio Francisco Jose De Menezes Furtado, duly constituted vide Power of Attorney dated 09-08-2019.

4. Mr. Eli Eufemio Antinio Francisco Jose De Menezes Furtado, s/o late Ivo Minguel Francisco Furtado, Age 55 years, married, Indian National, Both residents of Madhuban 2, Flat No. G/4, Opposite St. Inez Church, Panaji, Goa.

5. Mrs. Ivette Maria Do Rosario Lopes, d/o late Damaso Francisco Xavier Elesbao Barreto Lopes, w/o. Mr. Caetano Marcelino Filipe Dias, Age 54 years, Indian National, Represented through her constituted Power of Attorney Mr. Caetano Marcelino Filipe Dias, Duly constituted vide Power of

Attorney dated 09.08.2019.

6. Mr Caetano Marcelino Filipe Dias, s/o. Late Luis Constancio Francisco Dias, Age 61 years, Married, Indian National, Both residents of H. No. 117, Band, St. Cruz, Goa.

7. Mrs. Maria Fatima Francisca Lopes E Fernandes, d/o late Damaso Francisco Xavier Elesbao Barreto Lopes, w/o. Mr. Erol Ancieto Egidio Fernandes, Age 51 years, Indian National, represented through her constituted Power of Attorney Mr. Erol Ancieto Egidio Fernandes, son of late Francisco Xavier Cirilo Lourenco Egidio Fernandes, duly constituted vide Power of Attorney dated 10.08.2019.

8. Mr. Erol Ancieto Egidio Fernandes, son of late Francisco Xavier Cirilo Lourenco Egidio Fernandes, Age 60 years, Indian National, Both residents of H. No. 140, Cotto Chandor, Salcete, Goa.

... Appellants

V e r s u s

1. Antonio Jose Macario Lopes @ Antonio J. M. Lopes, s/o. Late Damaso Francisco Xavier Elesbao Barreto Lopes, Age 58 years, Indian National.

2. Mrs. Sunita Lopes, D/o. Jose Vaz, w/o. Mr. Antonio Jose Marcario Lopes @ Antonio J. M. Lopes, Age 55 years, Indian National, Both resident of H. No. 513, P-4 Portais, Verem, Bardez, Goa.

3. Mrs. Maria de Jesus Lopes e Barreto, d/o late Damaso Francisco Xavier Elesbao Barreto Lopes, w/o. Antonio Barbosa Barreto, Age 60 years, Indian National.

4. Mr. Antonio Barbosa Barreto, s/o. Late Alvarinho Barbosa Barreto, Age 61 years, Indian National, Both residents of H. No. 60, Copel Waddo, Sernabatim, Colva, Salcete Goa.

...Respondents

Mr. J. E. Coelho Pereira, Senior Advocate *with Mr. Sagar Rivankar and Mr. V. Korgaonkar, Advocates for the Appellants.*

Ms. Neha Shiroadkar, Advocate *for Respondent No.1.*

Mr. Gustavo Monteiro, Advocate *for Respondent No.2.*

CORAM: PRAKASH D. NAIK, J
DATED: 4th SEPTEMBER 2023

JUDGMENT

1. The Appellant has challenged the Order dated 20.09.2021 passed by District Judge-1, Mapusa, dismissing Regular Civil Appeal No. 104 of 2019 on the ground of maintainability and Decree dated 25.05.2017 passed by Civil Judge, Senior Division in Inventory Proceeding No. 536/2016/C.

2. Vide Order dated 02.02.2022, notice was issued to the Respondents for final disposal on the following substantial questions of law :

(i) Whether the Appellate Court was justified in holding in the impugned order that the appellants will have to file a suit as per Article 1427 of the Portuguese Civil Procedure Code, when admittedly the said provision stands repealed under Section 460 of the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012, which has come into force in September 2016 and under Section 451 of the aforesaid Act an Appeal on behalf of the appellants would certainly lie before the Appellate Court, akin to an Appeal under Section 96 of the Code of Civil Procedure, 1908 ?

(ii) Whether the First Appellate Court has violated the mandate of Order 41 Rule 31 of the Code of Civil Procedure, 1908 in proceeding to decide the Appeal without formulating the points for determination and in fact, proceeding to decide the Appeal in disregard to the said provisions ?

3. The brief facts necessary for deciding the issues involved in this Appeal are as under :

(i) The Respondent no.1 applied for instituting Inventory Proceedings upon the death of Damaso Francisco Xavier Elesbao Barreto Lopes and his wife Lia Atanasia Liberata Lopes Costa alias Lia Liberata Costa Lopes.

(ii) The application was preferred under Article 1369 of Portuguese Civil Procedure Code by contending that the Inventariado no.1 is the deceased father who expired on 24.05.2010. Inventariado no. 2 is deceased mother who expired on 21.02.2011. They expired intestate without any Will or disposition of their assets, including movable and immovable properties situated at Reis-Magos and Nerul, Bardez, Goa. They resided at H. No. 513, P-4, Portais, Verem, Bardez, Goa, along with the applicant and left behind interested parties mentioned therein as their only heirs and legal representatives. Antonio Jose Macario Lopes @ Antonio J. M. Lopes, is the son of the deceased and is married to Sunita Lopes, both

residents of H. No. 513, P-4, Portais, Verem, Bardez, Goa. The applicant being the only son of the deceased, who last resided, that they and the only person capable of administering the affairs of the assets of the deceased and the Applicant be appointed as Head of the Family to administer the assets and conduct the proceedings valued at Rs.5,00,00,000/-. The application was filed on 09.11.2016.

(iii) The learned Senior Judge 'C' Court, Mapusa, vide Judgment dated 25.05.2017, decreed that the Final Chart of Allotment/Partition filed at Exhibit 10 in the Inventory Proceedings is confirmed and made absolute and consequently the share stands allotted to the respective parties in the Inventory Proceedings instituted upon the death of deceased named therein, wherein the applicant was appointed as Cabeça de Casal.

(iv) The Appellants preferred Regular Civil Appeal No. 104/2019 under Section 451 of The Goa Succession, Special Notaries and Inventory Proceedings Act, 2012, challenging Order dated 25.05.2017.

(v) The learned District Judge vide Order dated 20.09.2021, dismissed the Appeal on the ground of maintainability. It was observed that as per Article 1427 of the Portuguese Civil Procedure Code, the rescission of judicial partition confirmed by Judgment,

becomes final for want of appeal, may be applied for only when there had been preterition or omission in joining any of the co-heirs and it is found that other parties acted with fraud and bad faith whether such malicious conduct is in respect of preterition or as to how the partition was prepared. The rescission on the grounds mentioned in clause 1, may be obtained by filing appeal or revision, that founded at clause 2 by way of suit, ordinary or summary as per the value. The Court held that when there is a omission in joining co-heirs, the rescission of judicial partition can be only by way of suit.

4. Learned Senior Advocate Mr. J. E. Coelho Pereira, appearing for the Appellant submitted as under :

(i) The impugned Order dated 20.09.2021 as well as order dated 25.05.2017 are contrary to law and deserves to be set aside.

(ii) The provisions of Portuguese Civil Procedure Code would not apply in the present proceedings and the learned Judge has committed an error in law by invoking the said provisions and dismissing the Appeal preferred by the Appellant on the ground of maintainability.

(iii) The findings of the learned Judge that the Appellants will have to file a suit as per Article 1427 is not tenable in law. Article

1427 of Portuguese Civil Code stands repealed vide Section 460 of the Goa Successions Act, 2012, which has come into force in September 2016.

(iv) In view of applicability of the Goa Succession Act, which has come into force before the Inventory Proceedings were initiated by the Respondents, the learned Judge ought not to have invoked Article 1427 of the Portuguese Civil Procedure Code.

(v) Section 460 of the Goa Succession Act relates to repeal and savings and provides that from the date of coming into force of this Act, all provisions of the laws in force at present corresponding to any of the provisions of this Act shall stand repealed.

(vi) Section 451 of the Goa Succession Act relates to the appeals and it is specified that an appeal from the final order made in the inventory proceedings shall lie to the competent Court depending upon the value of the assets and such appeal shall be deemed to be an appeal under Section 96 of the Code of Civil Procedure. The provision also makes it clear that an appeal from order shall lie from every order other than merely administrative order made in inventory proceeding to the competent Court depending upon the value given to the assets, at the time the order is made and the appeal

shall be deemed to be appeal under Section 104 of the Code of Civil Procedure.

(vii) The Respondent had hurriedly filed the Inventory Proceedings and omitted to array the Appellants and Respondent nos. 3 and 4 as interested parties deliberately and in the Inventory Proceedings which indicate that Respondent nos. 1 and 2 got the valuable suit properties allotted to them.

(viii) The first Appellate Court violated mandate of Order 41 Rule 31 of the Code of Civil Procedure, 1908, in proceeding to decide the appeal without formulating the points for determination and proceeded to decide the appeal in disregard to the said provisions.

(ix) The appeal involves substantial question of law, whether the Appellate Court was justified in holding that the Appellants will have to file a suit as per Article 1427 of the Portuguese Civil Procedure Code, when admittedly, the said provision stands repealed under Section 460 of the Goa Succession, Special Notaries and Inventory Proceedings Act, 2012, which has come into force in September 2016 and under Section 451 of the said Act an Appeal would lie before the Appellate Court, akin to an Appeal under Section 96 of the Code of Civil Procedure, 1908.

(x) The partition in Inventory Proceedings has not become final. Appeal is a continuation of proceedings of original Court.

(xi) Impugned Order dated 25.05.2017 cannot be said to be final Order as it would become final in the event it is not challenged in appeal. Even applying Section 448 of Goa Succession Act, the Appellant is not required to file suit challenging the impugned Order.

5. Mr. J. E. Coelho Pereira, relied upon the following decisions :

(i) **Shankar Balwant Lokhande (Dead) By Lrs. vs. Chandrakant Shankar Lokhande & anr.**¹

(ii) **Miss Reshma Sadanand Vete & anr. vs. Mrs. Kamal Krishnarao Khalap & Ors.**²

(iii) **United India Insurance Co.Ltd. vs. Rajendra Singh & Ors.**³

(iv) **Malluru Mallappa (Dead) Through Legal Representatives vs. Kuruvathappa & Ors.**⁴

(v) **Gurudas B. Velip vs. Gopal Molu Gaokar, Appeal from Order no. 27 of 2007 dated 13th August, 2010.**

(vi) **Santosh Hazari vs. Purushottam Tiwari**⁵

1 (1995) 3 SCC 413

2 Writ Petition No. 89 of 2005 of this Court decided on 01.07.2014

3 (2000) 3 SCC 581

4 (2020) 4 SCC 313

5 (2001) 3 SCC 179

6. Learned Advocate for Respondent no.2, Mr. Monteiro submitted that there is no infirmity in the impugned Order. The Appellant is required to file a suit for rescission of judicial partition. The specific provision of law would prevail. Merely on the ground that the appellate authority has invoked the provisions of Portuguese Civil Procedure Code and in the event the procedure provided in the applicable Act makes a provision for filing suit, the impugned Order cannot be set aside. Even Section 448 of the Goa Succession Act provides a suit for rescission of the judicial partition is required to be filed where there is preterition or non-joinder of parties and if it is found that the parties have acted fraudulently or malafide. Article 771 of the Portuguese Civil Procedure Code provides the categories in which the appeal or revision would lie. The Appellants could not have preferred an appeal challenging the Order passed in Inventory Proceedings.

7. Learned Advocate Mr. Monteiro has relied upon the following decisions :

(i) G. Amalorpavam & Ors. vs. R. C. Diocese of Madurai & Ors.⁶

(ii) Mrs. Bharti Parkar vs. Mr. Vilas Mahadev Pilankar & Ors.⁷

⁶ [2006] 2 SCR 899

⁷ MCA No. 926 of this Court decided on 22.12.2015

(iii) Mr. Felix Milagrese Reverdo & Ors. vs. Mrs. Piedade Costa & Ors.⁸

(iv) Ram Sunder Ram vs. Union of India & Ors.⁹

(v) Commercial Tax Officer, Rajasthan vs. M/s. Binani Cement Ltd. & Anr.¹⁰

(vi) B. Premanand & Ors. vs. Mohan Koikal & Ors.¹¹

8. Learned Advocate for Respondent No.1 submitted that if fraud is alleged or grievance is of non-joinder of parties, suit is the remedy. Section 448 of the Goa Succession Act is analogous to Article 1427 of Portuguese Civil Procedure Code.

9. After the liberation of Goa, the Constitution of India was amended by 12th Amendment and thereby Goa, Daman and Diu became part of the Union of India having status of Union Territory administered by the President through delegate known as “Administrator”. Goa, Daman and Diu (Administration) Ordinance 1962 was promulgated and Section 4 provides that all laws in force immediately before the appointed date in Goa Daman and Diu or any part thereof shall continue to be in force therein until amended or repealed by a competent legislature or other competent authority.

⁸ WP No. 804 of 2011 of this Court decided on 21.12.2011

⁹ [2007] 8 SCR 292

¹⁰ [2014] 3 SCR 1

¹¹ [2011] 3 SCR 932

Goa Daman and Diu (Administration) Act, 1962, was passed on 27.03.1962. Section 5 of the said Act provided that all laws in force immediately before the appointed date in Goa, Daman and Diu or any part thereof, shall continue to be in force therein until amended or repealed by a competent authority. Sub-section (2) of Section 5 gives power to the Central Government to adopt or modify by order such existing laws within two years from the appointed date and Section 6 empowered the Central Government to extend by Notification with whatever restrictions or modification of laws in force in the Union territory of Goa, Daman and Diu. Accordingly, Goa, Daman and Diu (Extension of Code of Civil Procedure and the Arbitration) Act, 1965, was passed. This Act provides for extension of Code of Civil Procedure, 1908 and Arbitration Act, 1940 to the Union Territory of Goa, Daman and Diu. Section 3 of the Act provides that Code of Civil Procedure as in force in the territories to which they generally extend are extended to and shall be in force in Goa, Daman and Diu. Section 4 provides that so much of any law in force in Goa, Daman and Diu, corresponding to Civil Procedure Code, 1908 or any part of the said Code or Act as the case may be shall stand repealed as from the coming into force of this Act in Goa, Daman and Diu. Section 5 of the said Act, relates to Rules of construction. Section 5(2) contemplates that for the purpose of facilitating the application in the case of Goa, Daman and Diu of the Civil Procedure Code, any Court or other

authority may construe it in such a manner not affecting the substance as may be necessary or proper to adapt to the matter before the Court or other authority.

10. The Petitioner challenged the Order dated 25.05.2017 by preferring an appeal under Section 451 of Goa Succession Special Notaries and Inventory Proceedings Act, 2012. The learned District Judge dismissed the said appeal on the ground that Article 1427 of the Portuguese Civil Procedure Code provides the remedy of filing a suit and the appeal is not maintainable. The learned Judge has referred to certain decisions of this Court and dismissed the appeal on the ground that Article 1427 specifically provides the remedy when there is a omission in joining heirs.

11. Some of the relevant provisions of Portuguese Civil Procedure Code which are required to be referred to for adjudicating the issues involved in this Petition are as follows :

“Article 1427 : The rescission of judicial partition confirmed by judgment, become final for want of appeal, may be applied for only:

1. When any of the conditions mentioned in the Article 771 are satisfied:
2. When there had been preterition or omission in joining any of the co-heirs and it is found that other parties acted with fraud and bad faith, whether such malicious conduct is in respect of the preterition, or as

how the partition was prepared.

The rescission on the grounds mentioned in clause 1, may be obtained by filing appeal or revision; that founded on clause 2 by way of suit, ordinary or summary, as per the value.

Sole Paragraph: A suit for rescission or suit for amendment referred to in this Article and in the preceding, shall be the appendant of the inventory.”

“Article 1435 : In the inventories of the value up to 10,000\$00 the regime of appeals from summary suits shall be applied. In the inventories of superior value, the following shall be observed:

- a) The appeal preferred against the order putting an end to the proceedings, shall be forwarded immediately and in the same proceedings; and along with it other appeals preferred against previous orders, if any, shall be forwarded.
- b) The appeal preferred against the order excluding from the proceedings any heir, or excluding or removing anybody from the office of the administrator, guardian, curator, or member of the family council, shall be forwarded immediately, but in separate, along with all the appeals preferred against previous orders.
- c) The appeals preferred against other orders till the end of the description of properties shall be forwarded to the superior court along with separate from the principal file, when the description is finalised.
- d) The appeals preferred from subsequent orders up to the presentation of the file to pass order directing as to how the partition should be effected shall be forwarded to the superior court jointly and in separate from the principal file, when the file is at the stage of drawing the form of partition.
- e) The appeals preferred from the order directing how the partition should be effected and of subsequent orders shall be forwarded in the same file, to the superior court,

along with the appeal filed against the judgement which homologates the partition.

Sole paragraph: What is provided in Article 735 is saved.”

“Article 771 : Grounds for Revision - Review of any decision which has become res-judicata may be applied for only on any one of the following grounds:-

1. When it is shown by a judgment passed in a criminal case and which has become res-judicata that the judgment sought to be reviewed was passed by bribe, graft, corruption or embezzlement;
2. When the forgery of a document or of a judicial act on which the judgement was based is alleged and this issue was not considered in the proceedings in which the decision was or when by a final judgment or order a court holds that the depositions or reports of experts, which have determined the decision are false;
3. When a new document is produced which was neither in the possession nor known to the party and such document by itself is sufficient to destroy the evidence on which the decision is based;
4. When the admission, withdrawal or compromise on which the judgment is based is revoked or there is a valid ground for revoking the same;
5. When the admission, withdrawal or transaction referred to in article 298 and following is null and void on account of insufficiency of powers of attorney or insufficiency of the power of the attorney except where the judgment of homologation has been notified personally to the donor of the power of attorney.

6. When the proceedings went ex-parte and the party was not summoned or service of summons was null.

7. When judgment is contrary to another judgment which constituted res-judicata and the party proves that he had no knowledge of the judgment during the pendency of the proceedings.”

12. The learned Judge has erroneously invoked the provisions of the Portuguese Civil Procedure Code when it stands repealed by the Act brought in force post liberation.

13. Goa Succession Act came into force on 19.09.2016. It was brought into force to consolidate and amend the law of intestate and testimony succession, notarial law and the laws relating to partition of an inheritance.

14. Section 460 of the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012, reads thus :

“Section 460 - **Repeal and Savings.**- (1) On and from the date of coming into force of this Act, all provisions of the laws in force at present corresponding to any of the provisions of this Act shall stand repealed.

(2) Notwithstanding such repeal,-

(a) anything duly done or suffered or any right, privilege, obligation or liability acquired, accrued or incurred or any penalty, forfeiture or punishment incurred under any law so repealed shall be deemed to have been done, suffered, acquired, accrued or

incurred, as the case may be, under the corresponding provisions of this Act;

(b) any fee, duty, charges, fine, etc. payable under any law so repealed or any books, forms, etc. in use of under any law so repealed shall, to the extent permissible and expedient, continue to be payable or used, as the case may be, till new fees, duties, charges, fines, books, forms, etc. are prescribed or fixed, as the case may be, under the provisions of this Act.

(3) All proceedings pending under the repealed laws before any court in the State of Goa, as on the date of the coming into force of this Act, shall be continued in terms of the procedure provided in this Act.”

15. From the aforesaid provision, it is evident that on and from the date of coming into force of this Act, all provisions of the laws in force corresponding to any of the provisions of this Act, shall stand repealed.

16. Section 451 of the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 reads as follows :

“Section 451 - Appeals. - (1) An appeal from the final order made in the inventory proceeding shall lie to the competent Court depending upon the value of the assets and such appeal shall be deemed to be an appeal under section 96 of the Code of Civil Procedure, 1908 (5 of 1908).

(2) An appeal from order shall lie from every order, other than a merely administrative order, made in inventory proceeding to the competent court depending upon the

value given to the assets at the time the order is made and appeal shall be deemed to be an appeal under section 104 of the Code of Civil Procedure, 1908 (5 of 1908).”

17. As per the aforesaid provision, the appeal from the final order made in the Inventory Proceedings shall lie to the competent Court depending upon the value of assets and such appeal shall be deemed to be an appeal under Section 96 of the Code of Civil Procedure, 1908. An Appeal from Order shall lie from every order other than merely administrative order made in Inventory Proceedings to the competent Court depending upon the value given to the assets at the time the order is made and appeal shall be deemed to be an appeal under Section 104 of the Code of Civil Procedure, 1908.

18. Section 448 of the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012, reads as follows :

“Section 448 - Rescission of partition.-

(A) Suit for rescission:

(1) A suit for rescission of the judicial partition which has become final, may be filed where there is preterition or non joinder of any of the co-heirs and if it is found that the other parties fraudulently or malafide, whether the malicious conduct relates to the preterition or to the partition.

(B) Application for review:

(2) Rescission of a judicial partition may be obtained by filing a review application in the same court in the following circumstances:-

(a) When it is proved in criminal proceeding, resulting in a conviction which has become final, that the order which is sought to be reviewed was passed by giving of bribe, corruption or influence;

(b) When a judgement and order of conviction which has become final is produced wherein it was held that the depositions or declarations of the experts, which might have affected the order that is sought to be reviewed, are false.

The period of limitation to file a review on both the above grounds is 30 days reckoned from the date on which the order on the basis of which the review is filed had become final.

(3) The review application may be filed in the very same court which passed the order, within 30 days from the date on which the party has secured the document, or acquired knowledge of the fact which is the basis for the review, on the following grounds:

(a) When a decision is based on a false document or judicial act and this issue was not considered in the proceeding when the decision was given;

(b) When a new document is produced, which was not in the possession or power of the party or the party did not know about the existence and such document is itself sufficient to cancel the evidence on which the decision is based;

(c) When the admission, withdrawal or compromise on which the judgement is based, is revoked or there is a valid ground for revoking the same;

(d) When the admission, withdrawal or compromise is null, due to lack of mandate or insufficiency of powers of the attorney, unless the order homologating or ratifying the partition has already been personally served on the principal;

(e) When the inventory proceeded by default and the party was not served with summon or the summon is null;

(f) When the judgement is contrary to another

judgement which constitutes res judicata and the party proves that he had no knowledge of the judgement during the pendency of the proceeding.

(4) Where the rescission is sought on the basis of a document, the plaint or the review petition, as the case may be, shall be accompanied by the respective certified copy.”

19. Mr. Coelho Pereira submitted that even interpreting Section 448 of the Goa Succession Act, suit can be filed for rescission of judicial partition which has become final, may be filed where there is preterition or non-joinder of any of the co-heirs and if it is found that the parties acted fraudulently or malafide. Appeal is continuation of proceedings. It cannot be said that impugned partition has become final in terms of Section 448 of the Act.

20. Article 1427 cannot be applied in the present case. Article 1427 is in respect of order which is final for want of appeal. Goa Succession Act came into force on 19.09.2016. Application for Inventory was filed on 09.11.2016. Section 460 of Goa Succession Act provides that all provisions of the laws in force corresponding to any of the provisions of Goa Succession Act shall stand repealed.

21. Article 1435 of Portuguese Civil Procedure Code provides that in the inventories of value upto 10,000\$00, the regime of appeals from summary suits shall be applied.

22. Section 451 of the Goa Succession Act provides an appeal from final order made in inventory proceedings to the competent Court depending upon the value of the assets. Appeal from Order shall lie against every order except administrative order to competent court upon value of assets. Section 448 of Goa Succession Act provides that suit for rescission of the judicial partition which has become final may be filed where there is preterition or non-joinder of any of the co-heirs and if it is found that the parties have acted fraudulently or malafide and the conduct is malicious.

23. The Appellant preferred First Appeal no. 104/2019 against Order dated 25.05.2017 passed in Inventory Proceedings No. 536/2016/C by learned Civil Judge, Senior Division on the ground that impugned Order was passed without making Appellant nos. 1, 3, 5 and 7 and Respondent no.3 who are daughters/heirs of late Mr. Damaso Francisco Xavier Elesbao Barreto Lopes married to late Mrs. Lia Atanasia Liberata Lopes Costa @ Lia Liberta Costa Lopes and their respective spouses as parties to the said proceedings. The impugned Order dated 25.05.2017 was obtained by Respondent no.1 by playing fraud on Inventory Court by suppressing the existence of the legal heirs of late Mr. Damaso Francis Xavier Lopes.

24. Although the Appellants preferred appeal under Section 451 of Goa Succession Act, challenging the Order dated 25.05.2017, the first

Appellate Court considered the objection of Respondents about maintainability of Appeal by referring to Article 1427 of Portuguese Civil Procedure Code. It was held that by the aforesaid provision, when there is an omission in joining of co-heirs, the recession of the judicial partition can be only by way of a suit. The Court relied on decision in the case of **Gurudas Velip vs. Shri Gopal Mulgaonkar** (supra). It is further observed that Article 1427 specifically provides the remedy when there is an omission in joining heirs. Hence, appeal is not maintainable. The learned Judge did not refer to provisions of Goa Succession Act.

25. The first Appellate Court has invoked the repealed provisions of Portuguese Civil Procedure Code ignoring the provisions of Goa Succession Act. The Court did not consider Sections 460, 448 and 451 of Goa Succession Act. Section 451 of the Act provides Appeal from final Order made in Inventory Proceedings. Sections 448 of Goa Succession Act provides that suit for recession of judicial partition which has become final may be filed where there is preterition or non-joinder of any co-heir and if it is found that the other parties acted fraudulently or malafide whether the malicious conduct relates to the preterition or to the partition. In terms of this provision, it cannot be said that the judicial partition has become final. The words final order referred to in Section 451 of the Goa Succession Act would mean the final Judgment or Order in Inventory

Proceedings. In the present case vide Judgment dated 25.05.2017, the final chart of allotment/partition filed at exhibit 10 in the Inventory Proceedings was confirmed and made absolute and consequently the share stands allotted to the respective parties in the Inventory Proceedings instituted upon the death of deceased and wherein Applicant therein was appointed as Cabeça de Casal. Hence, Appeal under Section 451 of Goa succession Act is maintainable.

26. It is also pertinent to note that while deciding the appeal preferred by the Appellants, the mandate of Order 40 Rule 31 of Civil Procedure Code, was not followed and points for determination were not formulated.

27. In the case of **G. Amalorpavam & Ors. vs. R. C. Diocese of Madurai & Ors.** (supra), the Court referred to Order 41 Rule 31 of Civil Procedure Code and observed that non-compliance with the provisions may not vitiate the judgment and make it wholly void and may be ignored if there is substantial compliance with it. However, it is desirable that appellate Court shall comply with the requirements of Order 41 Rule 31 of Civil Procedure Code.

28. In the case of **Malluru Mallappa (Dead) vs. Kuruvathappa & Ors.** (supra), it was observed that the appeal is a continuation of the proceedings of the original court. Ordinarily, the

appellate jurisdiction involves a rehearing on law as well as on fact and is invoked by an aggrieved person.

29. In the case of **Felix Milagrese Reveredo & Ors. vs. Piedade Costa & Ors.** (supra) passed by this Court, the challenge was to the Order passed by the Civil Judge in Inventory Proceedings whereby the application preferred by the Petitioners to re-open the Inventory Proceedings on the ground that they are interested parties in the inheritance were not made parties and the other interested parties have fraudulently effected partition of the inheritance of the estate leavers. Reference was made to Article 771 and Article 1427 of Portuguese Civil Procedure Code and it was observed that Article 1427 provides that when there had been preterition or omission in joining any of the co-heirs and it is found that the other parties have acted with fraud and bad faith, the remedy of such person is to file a suit. It is pertinent to note that Goa Succession Act was not in force at the time of the said decision.

30. In the case of **Ram Sunder Ram vs. Union of India & Ors.** (supra), it was held that merely a reference was made to a wrong provision of law, that by itself does not vitiate the exercise of power by the authority so long as power does exist and traceable to the source available in law. The decision is relied upon by the learned Counsel for the Respondent to contend that merely because the

learned District Judge has invoked Article 1427 of the Portuguese Civil Procedure Code, the Order would not vitiate.

31. In the case of **Commercial Tax Officer, Rajasthan vs. M/s. Binani Cement Ltd. & anr.** (supra), it was held that where a statute contains both a general provision as well as specific provision, the latter must prevail where a general statute and a specific statute relating to the same subject matter cannot be reconciled. The special or specific statute ordinarily will control.

32. In the case of **B. Premanand & Ors. vs. Mohan Koikal & Ors.** (supra), it was held that mere hardship to the parties cannot be a ground to excuse them from initiating appropriate proceedings. In the present case, suit was required to be filed and the appeal was rightly dismissed.

33. In the case of **Gurudas Velip vs. Gopal Gaokar** (supra), the Court has allowed the application for setting aside Judgment and Decree passed in Inventory Proceeding by relying upon Article 771 of the Portuguese Civil Procedure Code. This Court held that the ground on which the rescission of the partition has been sought on the ground of fraud and hence suit is required to be filed as per Article 1427 of Portuguese Civil Procedure Code.

34. In the case of **Santosh Hazari vs. Purushottam Tiwari** (supra), it is observed that, the word substantial as qualifying 'question of law' means of having substance, essential, real of sound worth, important or considerable.

35. In the case of **Bharti Parkar vs. Vilas Pilankar & Ors. (Misc. Civil Application no. 926 of 2013 dated 22.12.2015)**, the reference was placed before Full Bench to determine the question as to whether First Appeal needs to be filed from a final order passed in Inventory Proceedings. If Civil Procedure Code is to be made applicable, to the appeals from Inventory Proceedings, whether a First Appeal is to be filed from a final order in Inventory Proceedings and whether thereafter Second Appeal would follow. It was observed that in terms of the rights and the procedure to be followed in the Inventory Proceedings, the regime of appeals against the orders passed in the Inventory Proceedings are governed by Article 1435 of Portuguese Civil Procedure Code. Appeals can be preferred at various stages of the Inventory Proceedings. The provisions of Portuguese Civil Procedure Code which is a law for the time being in force provides for an appeal against an order passed in Inventory Proceedings. Any appeal preferred against the orders passed in Inventory Proceedings at different stages of proceedings, excluding final judgment homologating inventory proceedings would lie in terms of Section 104 of the Civil Procedure Code. In all cases in

which Agravo appeal lies in terms of Article 1435, clauses (a), (b), (c), (d) and (e) of the Portuguese Civil Procedure Code an Appeal from Order would lie in terms of Section 104 of Civil Procedure Code. The Appeal as provided under the provisions of the Portuguese Civil Procedure Code would be subject to an appeal provided in terms of Section 96 of Civil Procedure Code. Considering that the final Judgment/Order in the Inventory Proceedings has a status of a decree, such final judgments disposing of the Inventory Proceedings are appealable in terms of Section 96 of Civil Procedure Code. The final Judgment passed in Inventory Proceedings having a status of the decree is appealable in terms of Section 96 read with Order 41 of Civil Procedure Code. First Appeal would lie against a final judgment homologating the partition in the Inventory Proceedings under Section 96 of the Civil Procedure Code read with Civil Courts Act and thereafter right of Second Appeal would follow in terms of Section 100 of Civil Procedure Code. Appeals challenging the Orders under clauses (a) and (b) of Article 1435 of Portuguese Civil Procedure Code would not lie along with First Appeal challenging final judgment in Inventory Proceedings. Orders under clauses (c), (d) and (e) of Article 1435 of Portuguese Civil Procedure Code where no appeals were preferred earlier and which affect the final judgment in such proceedings can be challenged along with an appeal challenging the final judgment homologating the Inventory Proceedings. All other

orders passed in Inventory Proceedings can be challenged by filing Appeal from Order in terms of Section 104 of the Civil Procedure Code.

36. The aforesaid decision was delivered prior to operation of Goa Succession Act. The decision does not deal with scope of Article 1427 of Portuguese Civil Procedure Code.

37. The provisions of Goa Succession, Special Notaries and Inventory Proceeding Act, 2012, would prevail. The said Act came into force before the Respondent preferred inventory application. Hence, the provisions of the Goa Succession Act were applicable. Section 460 of Goa Succession Act repeals corresponding provisions of laws. Hence, Article 1427 of Portuguese Civil Procedure Code cannot be invoked. Section 451 of Goa Succession Act makes provision for preferring an appeal from the final Order made in the Inventory Proceedings and it also provides that such appeal would be appeal under Section 96 of Civil Procedure Code. It also provides that an Appeal from Order shall lie from every order made in Inventory Proceedings to the competent Court. There is distinction between the provisions of Portuguese Civil Procedure Code and Goa Succession Act relating to appeal. Section 448 of Goa Succession Act does not prevent the Appellant from challenging the impugned Judgment by preferring Appeal under Section 451 of the Goa

Succession Act. The decisions relied upon were decided prior to Goa Succession Act coming into force. Thus, the appeal preferred by the Appellants under Section 451 of the Goa Succession Act is maintainable. Thus the Appellate Court was not justified in holding in the impugned Order that the Appellants will have to file a suit as per Article 1427 of the Portuguese Civil Procedure Code, when the said provision stands repealed under Section 460 of the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012, which has come into force on 19.09.2016 and under Section 451 of the said Act an appeal by Appellants would lie before Appellate Court.

ORDER

(i) The impugned Order dated 20.09.2021 passed by District Judge-1. Mapusa, in Regular Civil Appeal No. 104 of 2019 is set aside.

(ii) The Regular Civil Appeal No. 104 of 2019 preferred by the Appellant is restored and the learned District Judge is directed to hear the appeal on merits and decide the same within a period of six months from 04.10.2023.

(iii) Parties shall appear before the learned District Judge, Mapusa in Regular Civil Appeal No. 104 of 2019 on 04.10.2023 at 10.00 a.m.

(iv) During the pendency of the Regular Civil Appeal No. 104 of 2019, Respondent nos. 1 and 2 are restrained from acting on Judgment and Decree dated 25.05.2017 passed by Civil Judge Senior Division in the Inventory Proceeding No. 536/2016/C.

(v) It is clarified that this Court has not expressed any views on the merits of the appeal.

(vi) The learned District Judge shall hear and decide the appeal on merits and in accordance with law.

38. Second Appeal and Civil Application No. 50 of 2022, stands disposed of.

PRAKASH D. NAIK, J.

ANDREZA PEREIRA Digitally signed by ANDREZA PEREIRA
Date: 2023.10.03 18:31:28 +05'30'