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Decided on : 07.03.2019

Duration: Days Months Years
01 02 01

**IN THE COURT OF ADHOC DISTRICT JUDGE-1, FTC-I, SOUTH
GOA, MARGAO.**

(Before: Shri Cholu Gauns, Adhoc District Judge-1, FTC-I, South
Goa, Margao)

CNR No: GASG010000112018

Regular Civil Appeal No.1/2018.

1. Mrs. Shamshad Mustak Bepari,
major, 44 years old, housewife,
and her husband.
 2. Mr. Mustak Ahmad Bepari,
major, 58 years old, businessman,
both residing at H.No.80,
Don Joao, Mercedes,
Ilhas, Goa.
- .. Appellants.

Vs.

1. Mr. Sheikh Mohd. Shabir Malik Bepari,
major, business, married and his
wife.
 2. Mr. Nasima Bepari,
major, housewife, both residing at
Malik Bldg., 1st floor, Khareband,
Margao, Salcete, Goa.
 3. Mr. Sheikh Bilawar Ahmed Bepari,
major, businessman and his wife.
 4. Mrs. Kaushar Bepari,
major, housewife, both
residing at Malik Bldg.,
2nd floor, Khareband, Margao,
Salcete, Goa.
 5. Mr. Sheikh Mohamad Iqbal Bepari,
major, married, and his wife,
both residing at Malik Bldg.,
2nd floor, Khareband, Margao,
Salcete, Goa.
 6. Shaikh Mohammed Imtiyaz Bepari,
major, residing at Malik Bldg.,
2nd floor, Khareband, Margao,
Salcete, Goa.
 7. Smt. Khairun Nisa Bepari,
also known as Khairun Chowdhary,
major, housewife and her husband.
 8. Mr. Nazir Ahmad Chowdhary,
major, both residing at
Flat No.547/548, Block -C,
near Maruti Temple,
Davorlim, Housing Board,
Margao, Salcete, Goa.
 9. Mrs. Rehana Ismail Bepari,
major, married, housewife, and
her husband.
 10. Mr. Ismail Bepari,
major, both residing at
H.No.111/1, Curpa Waddo,
Cortalim, Goa.
- ... Respondents.

Appellants represented by Learned Advocate Shri T. D'Costa.

Respondent nos.1,2 , 5 to 8 represented by Learned Advocate Shri J. Serrao.

Respondent nos. 3,4,9 and 10 absent.

J U D G M E N T

(Delivered on this the 7th day of the month of March, of the year, 2019)

1. This is an appeal filed against the Judgment, Order and Decree dated 30th November, 2017, passed by the Civil Judge, Junior Division, Margao in Regular Civil Suit No.340/2011/F.

2. Brief facts of the plaintiffs case are that the plaintiffs and the defendants are the heirs of late Sheikh Malik Lalasab Bepari and Mrs. Aishabi Maliksab Bepari. Said Sheikh Maloik Lalasab Bepari expired on 14.09.1990. Mrs. Aishabi Maliksab Bepari filed an Inventory proceedings No.83/1990/A as a Moiety holder. The defendant No.6 is the son of Sheik Lalasab and was born on 01.09.1973. At the time of initiation of the Inventory proceedings, he was minor. Since defendant no.6 was minor, the Inventory should have been proceeded as the Orphanological inventory but it went as an Inventory among major, as the Administrator concealed adolescence of defendant no.6. The said Inventory proceedings came to be disposed on 30.04.1991. The assets have been allotted as shown in the Exhibit 20. The said properties listed in the list of assets are undervalued. No appraiser was appointed to value the properties. None of the plaintiffs have been paid the owelty

amount. There is no demand made within the time limited for receiving the owelty money. There are no receipts from the plaintiffs as required under the law. No summons were issued to the plaintiffs. Their Wakalatnama was taken by the defendant no.1, on the ground that the same were required to be filed in the Tenancy Case filed against the Goa Metals of Margao. The properties were auctioned however no intimation of auction was given nor the plaintiffs participated in the auction. For all the above reasons the Inventory proceedings is null and void and non-est as per Article 1427 of Portuguese Civil Procedure Code. Hence the suit.

3. The defendants contested the suit by filing their written statement. Their case is that the plaintiffs have no locus standi to challenge the Inventory proceedings as they were parties and were paid their respective shares in the Inventory proceedings. The suit is barred by limitation. The suit is also bad for non joinder of the parties as spouses of the defendant no.5 and 6 are not joined in the suit. The Inventory proceedings cannot be declared null and void, even if there is some lapse in the procedure. It may be voidable at the instance of the defendant no.6, who was the minor at the time of initiating the Inventory proceedings. He can challenge it after attaining the majority, if the Judgment works out against his interest. The defendant no.6 is satisfied with the Judgment passed in the Inventory proceedings and he chose not to challenge it. The value of the properties is correctly shown and was accepted by all the parties. The moneys were paid to all the parties by moiety holder. The Inventory Proceedings were completed with consensus

and mutual understanding by appointing single Advocate Mr. A.P. Braganza from Mapusa. Said Advocate Braganza waived services on behalf of the parties whom he was representing and as such there is no question of issuing notices. The owelty money was paid in cash to the plaintiff no.1 in presence of plaintiff no.2 soon after the licitation and as such is not reflected in the Inventory proceedings. They denied fraud, suppression or misrepresentation of any sort in initiating and obtaining the Judgment in the Inventory proceedings and prayed to dismiss the suit.

4. Based on the pleadings of the parties the following issues were framed:

I S S U E S

1. Whether the plaintiffs prove that Inventory proceeding No.83/2009/A conducted before the Court of Senior Civil Judge, Margao is null and void and non-est against the defendants?
2. Whether the defendants prove that this suit is barred by limitation?
3. Whether the defendants prove that this suit being for a declaration is bad for non joinder of necessary parties?
4. What relief? What order?

5. The Trial Court in its Judgment combined all three issues for discussion and answered the issue No.1 in the negative and issue no's.2 and 3 in the affirmative and dismissed the suit.

6. Arguments heard. Ld. Advocate Shri T. D'Costa argued on behalf of the appellants and Ld. Advocate Shri J. Serrao with

Advocate Miss V. Gurav argued on behalf of the respondent Nos. 1,2, 5 to 8. Learned Advocate for the appellants also filed written synopsis.

7. Learned Advocate T. D'Costa submitted that under Article 1371 (i) of the Portuguese Civil Code notices have to be served personally to the heirs. This did not happen in the Inventory proceedings and as such everything that took place thereafter becomes null and void. At the time of initiating the Inventory proceedings the defendant no.6 was minor. Therefore the Inventory should have been instituted as Orphanological Inventory under Article 2064 however, the Inventory proceeded as an Inventory amongst majors, which is a material irregularity rendering entire proceedings null and void. The Cabeça de Casal in her statement on oath declared the defendant no.6 as major when actually he was minor at the time of initiation of the Inventory proceedings. This is a false statement amounting to fraud. The Cabeça de Casal has not described all the assets of inheritance with necessary particulars as stipulated in Article 1377 and also concealed some properties of the estate leavers. Advocate A.P. Braganza represented other interested parties in auction however no intimation was given to the appellants of the auction as such they cannot participate and bid in the auction.

8. Learned Advocate J. Serrao submitted that the plaintiffs wishes the Court to declare the Judgment in Inventory Proceedings null and void merely because procedure prescribed under the

provisions of law has not been followed. It is no where plaintiffs case that the Court which passed the Judgment in Inventory proceedings lacks jurisdiction to pass the Judgment. If at all there is a breach of procedure then the Judgment and decree is voidable and not a nullity. In support learned Advocate relied on the decision of the Supreme Court Judgment in case of **Rafiq Bibi Vs. Sayyad Waliuddin (2003) AIR (SCW) 4332** and in the matter of **Bishnudeo Narain and another Vs. Seogeni Rai and Jagernath, 1951 AIR SC 280**. He further submitted that the main ground for asking declaration of the Judgment null and void is because the defendant no.6 was minor when the Inventory proceedings were initiated. The defendant no.6 has attained majority long back and it was for him to get the judgment set aside on the ground of minority within 3 years period after attaining the majority. The defendant no.6 is satisfied with the Judgment. The plaintiffs who were duly represented and have been allotted their shares in the Inventory have no locus standi to challenge the Judgment. The Inventory was concluded in the year, 1991. The plaintiffs were parties to the Inventory. They were represented by an Advocate of their choice from the time of initiation till conclusion of the Inventory. They filed the suit in the year, 2012 after 21 years from the date of the Judgment and as such barred by limitation. The suit is also bad for non joinder of necessary parties as the spouses of the defendant nos.5 and 6 are not parties to the suit.

9. I have duly considered arguments and material on record. The short point that arises for my determination is whether:

(a) Judgment in Inventory Proceedings NO. 83 OF 1990 is Nullity?

Ans: No.

(b) whether trial court erred in dismissing suit?

Ans. No.

10. I shall deal with the issues first and accordingly answer the points for determination based on the answers to issues.

11. **Issue No.1:** This issue requires the plaintiffs to prove that the Inventory Proceeding No.83/90/A is null and void. The plaintiffs assailed the Judgment in the Inventory Proceedings on several counts. The prime ground is the "minority of the defendant no.6". The defendant no.6 Mr. Shaikh Mohammed Imtiyaz Bepari was born on 01.09.1973. The Inventory Proceedings No.83/1990/A was initiated on 17.12.1990. As on this date the defendant no.6 falls short of three months to complete 18 years and as such, fact that he was minor on 17.12.1990 is proved.

12. Article 2064 lays down that if any heir is minor, there shall always be Inventory proceedings and it shall be completed within 60 days. Article 2065 lays down that among the majors, Judicial Inventory Proceedings may take place, only if applied by co-heirs. Article 2071 lays down that if the co-heir is minor administrator shall take recourse to the Inventory, in accordance with Articles 157 and 189.

13. The close reading of the Article 2064 and 2065 reveals that there is a difference of procedure in two Inventory proceedings. If any heir is minor than the Inventory is compulsory. In case of Inventory among majors, Inventory is optional. In case the Inventory among minors it has to be completed within 60 days and the Cabeça de Casal has to follow the recourse of the inventory proceedings in accordance with Article 157 and 189. The preceding two Articles prescribes checks and protection to the minor heir to secure his best interest in the inventory. Except difference in procedure in two inventories, the jurisdiction to try both, Orphanological and inventory among majors is in the same Court. It is not disputed and otherwise settled position of law that the trial court has jurisdiction to try impugned Inventory proceedings. The plaintiffs complaint is only that the trial court did not follow mandatory procedure in trying said inventory. There is no complaint by the plaintiff that the trial court otherwise lacked jurisdiction in trying inventory.

14. The recourse to Article 157 and 189 were mandatory in case of Orphanological Inventory which was not taken in the impugned inventory. Thus there is violation of set procedure. However, therefore it does not follow that the Inventory is a nullity. As rightly submitted by learned Advocate J Serrao it would have been nullity provided minor had chosen to avoid it within prescribed period of three years after attaining majority. The minor i.e. defendant no.6 has not challenged Inventory proceedings. He is very much satisfied with it, rather in the written statement he expressly stated

that he has no grievances. He is convinced that his interest has been protected in the Judgment and as such IP cannot be declared nullity on this ground.

15. At this state it is apt to reproduce the Constitutional Bench judgment of the Supreme Court, in case of **Bishundeo Narain and another Vs. Seogeni Rai and Jagernath**, relied by Ld. Advocate J. Serrao. In this case a mandatory provisions of sub rule (1) of Order 32, Rule 7, which provides that no next friend or guardian for the minor in the suit shall without leave of the Court, expressly recorded in the proceeding, entered into an agreement or compromise on behalf of minor with reference to the suit for which he acts as a next friend or guardian, was ignored. The Apex Court held, in such case, resultant agreement or compromise is not to be held a nullity. It is only voidable. Therefore, it is good unless minor chose to avoid it. It follows that the decree or the order based on the agreement is also good, unless the minor chooses to challenge it.

16. The principle of the above Judgment squarely applies to the facts of the case. Being so the inventory cannot be declared nullity on the ground of minority of defendant no.6.

17. Second ground on which the Inventory is asked to be declared as null and void is non issue and service of summons. The plaintiff complaint of service of summons is three fold (a) non issue of initial

summons, (b) non service of summons for licitation and (c) non service of the final judgment in the Inventory proceedings.

18. Article 1371 makes a provision of service of initial summons. The relevant part of it states that summons for the purpose of Inventory proceeding shall be issued to the Public Prosecutor, to the heirs, to their spouses, to the donees etc. Paragraph 1 of the said Article lays down that the lack of service of summons to the heirs etc., is subject to the regime of lack of service of summons to the defendants.

19. The summons is the beginning of the case. It signals the issue that needs to be adjudicated in the proceedings. It is a document i.e. an order made by the Court informing interested/rival parties that some proceedings have been initiated for which they are required to appear in the Court on the given date, time and place. It is a matter of common knowledge that the appearance, or an act in or to any Court required or authorised by law to be made or done by a party in such Court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent or by a pleader appearing or acting on his behalf.

20. Exhibit-9 is a wakalatnama of Advocate A.P. Braganza from Mapusa. This Wakalatnama is signed by both the plaintiffs appointing Advocate A P Braganza to appear in the court and conduct Inventory proceedings on their behalf. In the evidence this

wakalatnama was shown to PW1. Upon perusing the wakalatnama, PW1 admitted his signature and the signature of the plaintiff no.2 on the wakalatnama. He also admitted that they have engaged Advocate A.P. Braganza to appear, represent, act and do other acts on their behalf in the Inventory Proceeding. Above admissions were extracted in his cross examination done on 23.08.2017. In his further cross examination done on 21.09.2017, Pw1 stated that he did not know Advocate A.P. Braganza prior to 1995. Id. Advocate for the plaintiffs has filed an application stating that there is an error in recording the evidence of Pw1 as regards his statement wherein he admitted having engaged services of Advocate Braganza in the Inventory proceeding No.83/90/A and other statements which are mentioned in the application. The statement reproduced herein above is clear and unambiguous. It was recorded in the presence of Advocate of the plaintiff. No correction was sought on the said day nor immediately thereafter on the next hearing. I did not find any error in recording the evidence of Pw1 as sought to be projected by Id. Advocate D'Costa.

21. As rightly pointed out by Id. Advocate D'Costa this wakalatnama is not registered, duly stamped, punched and cancelled. As regards date of filing, the month and year is mentioned, but date on which it was filed is missing. The Court endorsement "file" which is normally endorsed by court on the face of the document when any document is filed, is also not seen. It also does not bear the signature of Advocate A.P. Braganza.

22. I have verified the record and found that the Roznama history of the day 03.01.1991 shows that the said wakalatnama was filed on 03.01.1991, which is the first hearing in the Inventory proceeding. The Roznama history of the day 03.01.1991 further records that on 03.01,1991 both plaintiff's appointed Advocate A.P. Braganza to appear and conduct inventory on their behalf in the trial court. The Roznama further reveals that the said wakalatnama is duly exhibited and is given running "Exhibit-9". Although the date is missing on the Wakalatnama, the Roznama proves that it was filed on 03.01.1991. it is true that some details are missing in the wakalatnama, however they are trivial in nature and are not fatal. At the cost of repetition I would repeat that the purpose of issuing summons is to notify parties of the initiation of some proceedings and requiring them to appear in the court at the given time, place and day. The admissions of PW1 when read with the Roznama history proves that the plaintiffs had a full knowledge of the initiation of the Inventory proceedings as well as of the date, time and place of appearance and as such they engaged the services of Advocate A.P. Braganza who as instructed filed wakalatnama on their behalf and appeared for them on the first hearing that took place on 03.01.1991. In this situation issuance of initial summons is mere formality and as such non issue of the summons is of no legal consequences and certainly does not render inventory nullity.

23. The plaintiffs also complaint of lack of notices of licitation. It is submitted that the appellants did not participate in the licitation as no summons or intimation of auction was given to the plaintiffs.

Article 2127 provides that before partition there shall be licitation, after all the parties are summoned which shall take place among the parties only, as if it is a case of an auction. It has been held herein above that the plaintiffs have engaged the services of Advocate A. P. Braganza. It is found from the records that the said Advocate has endorsed his 'no objection' on the chart of allotment which followed the licitation that took place on 24.04.1991. In this licitation it is recorded in the roznama of the day 24.04.1991 that Advocate A.P. Braganza was present for the heirs of the deceased (which includes the plaintiffs), auction was held, report of the auction prepared and the matter was posted for partition. It is evident from the above that the plaintiffs Advocate A.P. Braganza actively participated in the auction representing the plaintiffs and other heirs of the estate leavers. The contention of the plaintiffs that no notices of licitation was served on them cannot be upheld.

24. The plaintiff also complaint of want of notice of final judgment. Article 1372 lays down that the heirs who are not treated ex-parte shall be notified of the final Judgment. In the suit inventory the final Judgment was passed on 30.04.1991. The record clearly shows that on this day the plaintiffs were represented in the inventory by their Advocate A.P. Braganza. The contention that plaintiff's were not notified of the Judgment therefore also cannot be upheld. There is sufficient compliance of Article 1372. The inventory cannot be declared nullity on the ground of non issue or non service of summons discussed herein above.

25. The third ground on which Judgment in the Inventory is sought to be declared as null and void is the conduct of the Administrator in not describing the assets of inheritance as per law and concealing some of the properties from the list of assets.

26. Article 1377 prescribes mode of describing the properties in the list of assets by giving all the particulars necessary for their identification. It requires to indicate Land Registration number and a description number of the properties and other particulars. Article 1379 provides that once list of the properties have been submitted the file shall be made available for examination for 48 hours to each of the heirs who has appointed the Advocate etc. During the period of inspection the Advocates or the Public Prosecutor etc may complain lack of description of the properties. This can be done by application till the time of examination. Thereafter the procedure prescribed under Article 1380 is to be followed. Under this Article if there is a complaint about lack of description of the properties notice is given to the administrator for their say. Upon receipt of the say if administrator admits existence of the properties that belongs to inheritance he can apply for the time and do the listing and in case he denies the existence of the properties then the Judge shall invite the parties to lead the evidence, hold inquiry and finally decide whether the properties should be listed/described or not.

27. Therefore, in case of concealment or exclusion of the properties the remedy of the heir is to follow the mandatory procedure prescribed by Article 1380 of the Code. The record does

not show, the plaintiffs has availed benefit of Article 1380 and as such the Inventory cannot faulted on this ground.

28. Another ground for seeking declaration to declare the Inventory null and void is that no proper valuation was done of the list of assets.

29. I have verified the records. The Roznama dated 14.3.191 records that one Shri Govind Dessai is appointed as valuer. At Exhibit 13 is the undertaking by the valuer Shri Govind Dessai stating that he has accepted his appointment as Commissioner/Valuer and he will undertake his job properly and consciously in the Inventory proceedings. The Roznama dated 27.3.1991 further records that the valuer return the commission duly evaluated and accordingly, the Court directed Clerk to prepare the description of assets. The above material proves that valuation to the assets was done by the valuer/Commissioner appointed by the Court for the purpose of valuing the assets. The record does not disclose objection by any parties to the proceedings to the valuation done by the Commissioner. In view of the above contention of the plaintiff that there was no proper valuation in the Inventory cannot be upheld.

30. It can be seen from the above that none of the grounds projected by the plaintiffs to declare Inventory null and void are proved. Being so, I decide issue no.1 as not proved by the plaintiffs.

31. **Issue No.2:** In the suit the plaintiffs has prayed to declare the Inventory proceeding No.83/1990/A null and void. The suit is therefore declaratory suit and is governed by Article 58 of Limitation Act, 1963. This Article prescribes a period of 3 years to obtain a declaration from the time when the right to sue first accrues.

32. The Judgment in the Inventory proceedings was pronounced on 30th April, 1991. The plaintiffs were parties to the Inventory proceedings. They were represented in the proceeding by their Advocate Shri A.P. Braganza. Through this Advocate they actively participated in the entire proceedings from start to finish. If at all the Inventory Proceedings has infringed their rights, they ought to have filed the suit within 3 years period from the date of the Judgment. The three years period of limitation prescribed by Article 58 actually starts from the date of Judgment and once period starts running it runs through its full course and never stops. The suit filed after lapse of 21 years from the date of the Judgment is hopelessly barred by limitation. I answer this issue in the affirmative as proved by the defendants.

33. **Issue No.3:** It is defendants case that suit is bad for non joinder of necessary parties. In the written statement in paragraph 3, the defendants grounded plea of non joinder of parties, stating that the suit is bad for non joinder of necessary parties as the spouses of defendant nos.5 and 6 are not joined in the suit. The above pleadings clearly identifies omitted parties parties as well as indicates their status vis-a-vis with the defendant nos.5 and 6. Since

the omitted parties are the spouses of defendant no's 5 and 6, their rights and interests in the subject matter of inventory automatically gets established. Viewed thus the presence of spouses of defendant nos.5 and 6 were necessary for complete adjudication of the controversy in the suit. The plaintiffs however, did not take any steps to make them parties in the suit. Being so, the suit is also bad for non joinder of parties. This issue is answered in the affirmative as proved by the defendants.

34. I did not find any error in the judgment of the trial Court. I answer both the points no.1 and 2 are in the negative and pass the following:

ORDER

The Appeal stands dismissed.

Parties to bear the respective costs.

Decree to be drawn.

Proceedings closed.

(Cholu Gauns)

Adhoc District Judge-1,
FTC-I, South Goa,
M A R G A O.

Sg/-