
(2008) 01 BOM CK 0144
In the Bombay High Court
Case No : Appeal From Order No. 66 of 2007

Denis Mazarello

APPELLANT

Vs

Iriton Mazarello and Others

RESPONDENT

Date of Decision : 17-01-2008

Acts Referred:

Citation : (2008) 2 BomCR 755 : (2008) 3 MhLj 319

Hon'ble Judges : Britto N.A., J

Bench : Single Bench

Advocate : M.S. Usgaonkar and Sudesh Usgaonkar, for the Appellant; Anthony D'Silva, for the Respondent

Final Decision : Allowed

Judgement

Britto N.A., J.—Admit. By consent heard forthwith.

2. Heard Shri Usgaonkar, the learned Senior Counsel on behalf of the appellant/applicant in Special Inventory Proceedings No. 74/2005/A and Shri Anthony D'Silva, the learned Counsel on behalf of respondents No. 1 to 6.

3. Inventory Proceedings were initiated by the appellant/applicant Denis Mazarello upon the death of his parents Shri Inacinho Mazarello and Smt. Annuciacao Mazarello, who left behind seven sons and three daughters. Respondent No. 1, Iriton Mazarello, now represented by learned Advocate Shri D'Silva, was appointed as the Administrator on 26/07/2006 and by application dated 26/07/2006, the said Administrator enlisted two properties surveyed under No. 376/10 and 384/4 of Velim Village, being immovable properties. Apparently, none of the other interested parties filed any application for exclusion of the said two properties as contemplated by Article 1383 of the Civil Procedure Code, 1939. Learned Advocate Shri Silva has drawn my attention to the application dated 12/03/2007 as an application for exclusion of the said two properties. In my view, the said application cannot be considered as an application for exclusion of the said two properties belonging to the inheritance.

4. In the absence of any application for exclusion of the said two properties enlisted by the Administrator by his application dated 26/07/2006, the learned Civil Judge, Senior Division was not at all justified in excluding the said properties.

5. As far as the third property bearing Survey No. 360/7 of Village Velim is concerned, the appellant/applicant brought to the notice of the Court that the Administrator had not enlisted the aforesaid property. Admittedly, the Administrator, pursuant to the said application, enlisted third property surveyed under No. 360/7 by his application dated 17/01/2007. Counsel on behalf of respondent No. 1, Iriton Mazarello submits that if at all the Administrator enlisted the said property, he did the same pursuant to the order of the learned Civil Judge Senior Division, Margao. However, the learned Counsel on behalf of respondent No. 1, Iriton Mazarello was unable to point out to the date of the order of the learned Civil Judge Senior Division except to some reference in the impugned order.

6. In my view, the Administrator having not challenged the said order and having complied with the same cannot now make any grievance about the same.

7. Article 1380 of the said CPC provides that:

Where there is complaint about lack of description of the properties, notice shall be given to the Administrator or to the donee to describe the properties or give their say.

If one who has been served with the notice, admits the existence of the properties and acknowledges that they belong to the inheritance, but is unable to describe them at once, he may apply that time be granted for the purpose of description.

In the event he denies the existence of the properties or declares that they do not belong to the inheritance, the judge shall invite the parties to lead the evidence they desire, hold the enquiry he deems necessary and finally decide whether the properties should be described.

Where the dispute cannot be summarily decided in terms of the above, because there is necessity of a larger investigation, the parties shall be directed to pursue ordinary remedy, and the inventory shall proceed in respect of other properties.

Sole paragraph: The failure to file the reply within time, the notice having been served in person, amounts, for all purposes, to an admission of the existence of the properties and of, " the duty to describe them.

8. To repeat, the respondent No. 1 Iriton Mazarello, who was the Administrator, when complaint was made about lack of description, promptly described the third property without murmur or demur and without challenging the order by which he was required to enlist the same and therefore now cannot be permitted to contend that the said property was required to be excluded. There is nothing in

his application dated 17/01/2007 to suggest that the additional description was done by him pursuant to the order of the Court.

9. Earned Counsel on behalf of Administrator/respondent No. 1 also relied upon the case of (Mario Antonio Mascarenhas v. Fernando Mascarenhas and Ors.) 2001(1) G.L.T. 296. Earned Counsel on behalf of respondent No. 1, relying on the same, contends that the said third property was gifted to all the sons and the gift was accepted and acted upon and the daughters had relinquished their rights to the said third property.

10. In my view the above decision which was rendered with reference to Article 2107 of the Civil Code, 1867 has no application to the facts of the case. In that case all the predicates of the aforesaid article were fulfilled. According to the Administrator, himself, as seen from his application (at page 45 of paper book) the applicant/appellant was instrumental in getting a large plot from the said property than the other brothers. There is silence as regards the sisters. The third property was required to be listed for the purpose of calculation of half and for equality of the partition as contemplated by Article 2098 of the Civil Code, 1867.

11. In the light of the above discussion, the appeal deserves to succeed. The impugned order is hereby set aside. The learned trial Court is directed to expedite the disposal of the inventory proceedings as expeditiously as possible and in any event within a period of one year.