

(2021) 10 BOM CK 0007

In the Bombay High Court

Case No : Appeal From Order No. 5 Of 2019

Franciso Savio Gaspar Noel Da Lima Leito @ Gaspar Noel Da Lima Leitao (Dec.) Thr. Lrs **APPELLANT**

Vs

Eric Jose De Lima Leitao Ad 8 Others **RESPONDENT**

Date of Decision : 01-10-2021

Acts Referred:

Goa Succession, Special Notaries And Inventory Proceeding Act, 2012, — Section 371, 400, 400(1), 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 451(2)

Citation : (2021) 10 BOM CK 0007

Hon'ble Judges : Manish Pitale, J

Bench : Single Bench

Advocate : Sudin Usgaonkar, Vinita Palyenkar, C. A. Coutinho, B. Khandeparkar

Final Decision : Partly Allowed

Judgement

Manish Pitale, J

1. The appellants in this appeal filed under section 451(2) of the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012, have challenged an order dated 7/1/2019 passed by the Court of Adhoc Senior Civil Judge, Vasco-da Gama, in Special Inventory Proceedings No.4/2010/A, whereby an application filed under section 402 of the aforesaid Act has been dismissed.

2. The brief facts of the present case are that- the respondent no.1 initiated the aforesaid inventory proceedings under the then applicable Family Laws of Goa, Daman and Diu, upon the death of the mother of respondent no.1. The respondent no.1 was appointed as Head of Family in the said proceedings initiated on 7/9/2010. He filed a list of assets on 23/4/2020, including properties at four locations. On 20/7/2012, the appellants being the legal heirs of the brother of respondent no.1 filed their objections to the aforesaid list, marked as Exhibit 41. The appellant sought exclusion of part of a property at "Marautanga" (Item no.4) in the list of assets as also the property at "Guloi" (Item no.5a) in the aforesaid list and similarly, exclusion of parts of

properties at "Ponderachixira"(Item 5b) and "Camarali Nomoxi" (Item no.5c). Apart from this, the appellants sought inclusion of some assets in the list.

3. The respondent no.3 in the present appeal filed objections. Apart from seeking inclusion of certain properties, she specifically sought inclusion of a house called "Villa Lima Leitao" along with the plot thereunder in the list of assets. Similarly, objections were filed by the respondent no.6 seeking inclusion of a property called "Fondient". The respondent no.1 filed replies to such objections and thereupon an inquiry was directed into the objections raised by the parties. On 4/1/2016, the Court passed an order specifically recording that the objections raised by the respondent no.3 at (Exhibit 44-D) and the one raised by the respondent no.6 at (Exhibit 45-D) were being disposed of by the said order. The Court referred to the objections of the appellant and thereafter passed an order allowing the prayer made on behalf of respondent nos.3 to 6 at Exhibit 44D and 45D. It was specifically recorded that the residential house "Villa Lima Leitao" along with plot of land in the property known as "Carvatem" stood included in the list of assets. It is significant that the said order did not deal with or dispose of the objections specifically raised on behalf of the appellant at Exhibit 41.

4. The respondent no.1 challenged the said order dated 4/1/2016 by filing Miscellaneous Civil Appeal No. 74 of 2017. Admittedly, the said appeal was dismissed as it was not pursued. It is also relevant that the aforesaid Act of 2012 came into force in the year 2016 and further inventory proceedings were to be undertaken under the said Act.

5. Pursuant to the order dated 4/1/2016 passed by the Court, on 6/3/2018, the respondent no.1 filed a revised list of assets, calling it draft revised list of assets. Objections were raised on behalf of the appellants as well as other respondents. But, thereafter, on 12/3/2018, the respondent no.1 filed a fresh draft revised list of assets. The respondent no.1 also filed a pursis on 25/4/2018 stating that the said draft revised list of assets was in terms of the order dated 4/1/2016 passed by the Court and that he did not possess any documents pertaining to the assets mentioned in the list.

6. The appellants filed objections to the said draft revised list of assets dated 25/4/2018 marked as Exhibit 131, wherein it was specifically stated that the details of the source of title ought to be brought on record concerning revised list of assets at items nos.2 to 8. By order dated 20/7/2018, the said objection at Exhibit 131 raised on behalf of the appellant was dismissed by the Court on the ground that the said objection had already been dealt with by the aforesaid order dated 4/1/2016. It is a matter of record that neither the order dated 4/1/2016, nor the aforesaid order dated 20/7/2018 passed by the Court were ever challenged by the appellants.

7. It is at this stage that on 19/11/2018 the appellants filed the application under section 402 of the aforesaid Act, which provides for deletion of assets listed in the preliminary list. In this application, the appellant specifically sought deletion

of item nos. 4, 5(a),(b),(c), 6 and 8 from the aforesaid list. This specifically included the house property and plot at "Carvatem", which had been included in the list of assets as per the order dated 4/1/2016.

8. The respondent no.1 filed reply to the said application, opposing the same on the ground that it was hit by res judicata in view of the order dated 4/1/2016, passed by the Court, which was admittedly never challenged by the appellant.

9. The Court passed the impugned order on 7/1/2019, rejecting the said application filed under section 402 of the aforesaid Act marked as Exhibit 141. The Court held in the impugned order that the appellants had failed to challenge the order dated 4/1/2016, whereby the property at Carvatem" was included in the list of assets and having failed to challenge the said order, the appellant could not be permitted to seek exclusion of properties by filing the application under section 402 of the aforesaid Act. In effect, the contention based on the principle of res judicata was accepted. Apart from this, the Court referred to section 400 of the Act and held that since objections under section 400 of the Act were supposed to be raised within 30 days of the submission of the list of assets by the Head of the Family, the same limitation would apply to the application filed under section 402 of the Act. On these twin grounds the aforesaid application filed by the appellants, under section 402 of the Act stood dismissed.

10. Aggrieved by the same, the appellants have filed the present appeal.

11. Mr. Sudin Usgaonkar, learned Senior Counsel appearing with Ms. Vinita Palyekar, for the appellants submitted that both the grounds on which the Court below passed the impugned order were unsustainable. By referring to section 400 to section 411 of the aforesaid Act, it was submitted that under the said scheme, there was a clear distinction between the nature of objections raised under section 400 of the Act and the prayer for deletion made under section 402 thereof. It was submitted that the limitation applicable to the objections to be raised under section 400 of the Act could not be applied to an application filed under section 402 of the Act for deletion of the assets and that the Court below had committed a clear error of law in holding otherwise. On the question of res judicata, being made applicable to the said application filed under section 402 of the Act, it was submitted that the cause of action for filing such an application arose only after the order dated 4/1/2016 was passed including the property at "Carvatem" and other properties in the list of assets. In respect of the order dated 20/7/2018, passed by the Court dismissing the application at Exhibit 131, it was submitted that the said application merely stated that specific properties could not have even included in the list of assets in the absence of details of the source of title. Such an application, was not an application under section 402 of the Act for deletion of the assets and therefore, dismissal of the said application could also not operate as res judicata in the present case.

12. By referring to the earlier applicable law i.e. Family laws of Goa, Daman and Diu, it was submitted that even if the application under section 402 of the said

Act filed on behalf of the appellants could be relatable to Article 1383 pertaining to exclusion of properties, the cause of action for seeking exclusion of properties at "Carvatem" had not arisen when the application at Exhibit 41 was filed. It was further submitted that the respondents could not be heard to say that because the property at "Carvatem" was included by the order dated 4/1/2016, the contention of the appellants for exclusion of the same had been rejected by implication. It was submitted that such a contention was not available either under the scheme of the Family laws of Goa, Daman and Diu or under the provisions of the Act of 2012 brought into force in the year 2016. It was further brought to the notice of this Court that even otherwise, the order dated 4/1/2016, specifically disposed of objections raised on behalf of respondent nos.3 and 6 at Exhibit 44D and 45D and that the objections raised on behalf of the appellants at Exhibit 41 were neither considered nor decided.

13. It was further emphasised that under section 402 of the Act, an application was required to be considered and disposed of after recording of evidence and that the Court below committed a grave error in observing that the appellants had failed to produce any documentary evidence in respect of the property of which exclusion was sought. An opportunity was required to be given for recording of evidence and that the Court below erred in dismissing the application without affording such an opportunity. On this basis, it was submitted that the impugned order deserved to be set aside and that the Court below ought to be directed to consider afresh the application at Exhibit 141, filed on behalf of the appellant under section 402 of the said Act by following the mandate of the said provision.

14. On the other hand, Mr. B. Khandeparkar, the learned counsel appearing for the respondent nos.3 to 6 submitted that the Court below was justified in rejecting the application by applying the principle of res judicata. It was submitted that when the very dispute now sought to be raised had been decided by the Court below, while passing order dated 4/1/2016 and the subsequent order dated 20/7/2018, which were admittedly never challenged by the appellants, the subsequent application filed under section 402 of the Act at Exhibit 141 was hit by the principle of res judicata. In support of the said contention, the learned counsel relied upon the Judgment of the Hon'ble Supreme Court in the case of Canara Bank Vs. N. G. Subbaraya Setty & anr. 2018 16 SCC 228.

15. Mr. C. Coutinho, the learned counsel appearing for the respondent no.1 also contended that the application filed on behalf of the appellant under section 402 of the Act was hit by the principle of res judicata and, therefore, the appeal deserved to be dismissed. On the question of limitation of 30 days being applicable to section 402 of the said Act, the counsel appearing for the respondent no.1 as well as the respondent nos.3 to 6 fairly submitted that the said aspect required further examination and that the Court below appeared to have jumped to a conclusion without considering the entirety of the scheme

under the said Act.

16. Heard the learned counsel for the rival parties and perused the material on record. Before considering the rival contentions, it would be appropriate to refer to the relevant provisions of the said Act. Section 400 of the said Act provides for objections that can be raised to the list of assets submitted by the Head of the Family. It is specifically provided under sub section (1) of section 400 of the said Act and that such objections are to be raised within 30 days of the date on which the head of the family submits the list of assets. The dispute that arises when such objections are raised, has to be decided summarily and when it is found that it cannot be decided summarily and a detailed inquiry is to be held, the parties are directed to file a suit in respect of the disputed asset or liability and the inventory is to proceed in respect of the remaining assets and liabilities.

17. Section 402 of the Act specifically pertains to deletion of assets listed in the preliminary list. As opposed to the necessity of conducting a summary inquiry under section 400 of the said Act, under section 402, an application is to be decided after hearing the head of the family or the person who has listed the assets and most significantly, after recording of evidence. There is a clear distinction between the two proceedings contemplated under section 400 and section 402 of the said Act. This would be further clear from a perusal of the aforesaid two provisions, which read as under:

"400. Objections to the list of assets and other objections. - (1) Within 30 days from the date the head of the family submits the list of assets, the parties may raise the following objections:-

(a) that all assets have not been listed;

(b) that the head of the family or the donee denies the existence of the assets in his possession;

(c) that the head of the family or the donee denies his duties or obligation to collate;

(d) that the head of the family or the donee disputes that he has received assets which are attributed to have been received by him.

(2) Any party may, at any time after the expiry of 30 days, raise objection that all the assets have not been listed, provided such party satisfies the Court that he acquired knowledge of the existence of the properties only within the last 30 days before the presentation of the objection. But failure to raise such objection shall not deprive the party from seeking additional partition as provided in section 371.

(3) Where an objection has been raised that all assets and liabilities have not been listed, notice of the objection shall be given to the head of the family or the donee and they shall be called upon to list out the assets or liabilities left out or to give their say.

(4) Where the head of the family or donee who has been served with notice of the objections admits the existence of the assets or liabilities and acknowledges that they belong to the inheritance but requires time to list them, he may apply for time for the said purpose.

(5) Where the head of the family or the donee denies the existence of the assets or liabilities or declares that they do not belong to the inheritance, the court shall hold a summary inquiry as deemed necessary and decide whether the assets or liabilities should be listed.

(6) Where the dispute cannot be decided summarily and it is necessary to hold a detailed inquiry, the parties shall be directed to file a suit, if they so desire, in respect of the disputed asset or liability and the inventory shall proceed in the respect of the remaining assets and liabilities.

(7) Where the head of the family or the donee fails to give his reply on the date fixed therefor, it shall be presumed that he admits the existence of the assets or liabilities and the duty to list them.

(8) (a) Where the head of the family or the conferee denies the existence of the assets in his possession or the duty to describe them or to collate or he dispute as to the assets which have been received by him, the disputes shall be decided summarily by the court.

(b) The provisions of sub-section (6) shall be applicable to this sub-section.

(c) Where the dispute cannot be decided in the inventory proceeding, the head of the family or the donee shall not receive the assets allotted to him without furnishing a security corresponding to the value of the disputed assets.

402- Deletion of assets listed in the preliminary list-Where any co-heir or a third party claims ownership of any of the assets listed in the inventory and applied for their removal from the list of assets of the inheritance, the dispute shall be decided, after hearing the head of the family, or the person who has listed the assets, and after recording of evidence."

18. It is also significant that while a specific limitation of 30 days is provided under section 400 of the said Act, there is no such limitation specified under section 402 thereof. A proper reading of both the provisions in the entire scheme under the said Act would show that the limitation of 30 days specified under section 400 of the said Act cannot be read into section 402 thereof. The Court below has held that the said limitation would apply even to an application under section 402 of the said Act for deletion of an asset, without analysing the entire scheme of the said Act and without appreciating the distinction in the wordings in the aforesaid two provisions.

19. It is evident from section 409 of the Act, pertaining to valuation, that where no objections have been raised as regards the list of assets or the objections raised have been already decided, the Court shall order that the assets be valued

as on the date of the opening of the inheritance and for that purpose appoint a valuer. Section 411 of the said Act provides for final list of assets and specifically states that the Court shall fix a date for submission of final list of assets and liability after the valuation is finalised. The aforesaid provisions clearly show that the exercise of valuation can be undertaken after the objections have been decided, which would include an application under section 402 of the said Act, for deletion of assets from the preliminary list and further that final list of assets and liabilities would be submitted only after the valuation is finalised.

20. Thus, in the facts of the present case it becomes evident that since the process of valuation is yet to be finalised, the final list of assets and liabilities cannot be submitted and that the application under section 402 of the said Act ought to have been considered by the Court below.

21. On the question of applicability of the principle of *res judicata*, it would be appropriate to refer to the judgment in the case of *Canara Bank Vs. N. G. Subbaraya Setty and anr* (supra), on which the learned counsel for the respondent nos. 3 to 6 has placed much reliance. In the said judgment, the Hon'ble Supreme Court has referred to Roman law, as also Ancient Indian law to emphasise that once a party has had an opportunity to contest a dispute and it has suffered an order, which has attained finality, such a party cannot be permitted to re-agitate the same issue. It has been held that the underlying public interest in that regard is that there should be finality in litigation and that a party should not be twice vexed in the same matter. To permit otherwise, would amount to an abuse of the process of the Court.

22. There can be no quarrel with the said proposition, as it reiterates the position of law in so far as the principle of *res judicata* is concerned. But, the question in the present case is, as to whether the said principle would apply in the facts and circumstances of the present case to hold that the application filed by the appellants under section 402 of the said Act at Exhibit 141 would be hit by the said principle of *res judicata*, for the reason that the earlier orders dated 4/1/2016 and 20/7/2018 were never challenged by the appellants and they had attained finality.

23. The principle of *res judicata* would certainly apply if it is found that the issue decided in the aforesaid two orders was substantially the same, as was sought to be agitated in the application filed under section 402 of the aforesaid Act. A perusal of the order dated 4/1/2016 would show that it specifically dealt with the applications/objections filed by respondent nos. 3 and 6 at Exhibit 44D and 45D. These were objections raised by the said respondents for inclusion and exclusion of certain properties as per the preliminary list of assets filed by the respondent no.1 - head of the family. It is significant that the appellants had also filed such an application/objection at Exhibit 41, seeking exclusion of parts of certain properties from the list of assets. The order dated 4/1/2016, allowed the applications/objections at Exhibit 44D and 45D filed by the respondent nos.3 to 6. Although, a reference was made to the stand taken by the appellants in the

context of their application/objection under Exhibit 41, but there was neither any discussion on the same nor was the said exhibit 41 decided or disposed of by the order dated 4/1/2016.

24. It is by the said order dated 4/1/2016 that the house property along with plot of land at Carvatem was included in the list of assets for the first time at the behest of respondent no.3. Thereafter, when the draft revised list of assets was placed on record, the appellants did move an application at Exhibit 131, stating that some of the properties, including the property at Carvatem, could not have been included in the absence of details of the source of title. The said application was dismissed by Court below, stating that such an objection was already dealt with in the order dated 4/1/2016. The approach of the Court was that since the inclusion of the property at Carvatem was granted by the order dated 4/1/2016, any contention on behalf of the appellants for exclusion of the same was rejected by implication and that therefore, no further orders were required in the matter. All these proceedings and orders are traceable to Articles 1379 and 1380 of the erstwhile Family Laws of Goa, Daman and Diu and section 400 of the said Act, which entail a summary enquiry.

25. It was for the first time on 19/11/2018 that the appellants moved the aforesaid application under section 402 of the Act, specifically seeking exclusion of the property at Carvatem from the list of assets. This application was required to be considered on the touch stone of section 402 of the Act, which specifies that such an application shall be disposed of after "hearing the head of the family and after recording of evidence." It is significant that the nature of power exercised under section 402 of the Act is distinct from the power exercised under section 400 thereof, because under section 400 of the Act, the Court exercises summary power and a detailed inquiry is not warranted. As against this, under section 402 of the Act, the Court is not only required to hear the head of the family or the person who has listed the assets but, evidence has to be recorded. Such a power was sought to be invoked by the appellants.

26. The aforesaid application was moved under section 402 of the Act and the appellant specifically referred to a partition deed pertaining to the property of which exclusion was sought and, in this light, the Court was enjoined to provide an opportunity to the appellants to produce necessary evidence on record. It is the case of the appellants that there are registered documents to show that the property of which they are seeking exclusion cannot be part of the list of assets.

27. The orders dated 4/1/2016 and 20/7/2018, were passed in a summary inquiry and there was no occasion to exercise the power now sought to be invoked on behalf of the appellant under section 402 of the said Act. Such an application was clearly maintainable because the final list of assets was yet to be submitted under section 411 of the said Act, for the reason that the valuation is admittedly yet to be finalised. Therefore, it cannot be said that the issue was already decided in the orders dated 4/1/2016 and 20/7/2018, which was sought to be agitated by the appellants by moving the application under section 402 of

the said Act at Exhibit 141. It is for this reason that the absence of challenge on the part of the appellants to the orders dated 4/1/2016 and 20/7/2018, would be of no consequence and the principle of *res judicata* cannot be invoked in the peculiar facts and circumstances of the present case, when appreciated in the backdrop of the scheme contemplated under sections 400 to 411 of the said Act.

28. This aspect of the matter was not properly appreciated by the Court below while passing the impugned order. It was necessary for a proper exercise of power under section 402 of the said Act that an opportunity ought to have been granted to the appellants to produce documentary and other evidence and after recording of evidence, the application at Exhibit 141 could have been decided. The concept of constructive *res judicata* sought to be raised on behalf of the respondents is also inapplicable for the reason that it cannot be said that the prayer specifically made in the application filed under section 402 of the said Act could be said to have been rejected by implication in view of order dated 4/1/2016 and 20/7/2018. As noted above, the aforesaid two orders were passed by exercising power of summary inquiry, which is distinct from the power to be exercised by the Court under section 402 of the said Act, which necessarily requires recording of evidence.

29. For the reasons stated above, it is evident that the impugned order is unsustainable and that the appellants ought to be granted opportunity to lead evidence in support of their application at exhibit 141. Accordingly, the appeal is partly allowed. The impugned order is quashed and set aside. The matter is remitted to the Court below with a direction to consider the application filed by the appellants at Exhibit 141 afresh and to dispose of the same after hearing the appellants as well as the respondents and after recording of evidence.