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**(2010) 08 BOM CK 0052**  
**In the Bombay High Court**  
**Case No : Appeal From Order No. 27 of 2007**

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|------------------------------|----|------------|
| Gurudas B. Velip             | Vs | APPELLANT  |
| Gopal Malu Gaokar and Others |    | RESPONDENT |

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**Date of Decision :** 13-08-2010

**Acts Referred:**

**Citation :** (2010) 6 BomCR 122

**Hon'ble Judges :** Reis F.M., J

**Bench :** Single Bench

**Advocate :** R.G. Ramani, for the Appellant; M.P. Almeida, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Reis F.M., J.—The above appeal challenges the order dated 5th December, 2006, passed by the learned Civil Judge, Senior Division at Quepem, in Special Inventory Proceedings No. 9/2003/A, whereby the application filed by the Respondents at Exhibit 13 to set aside the judgment and Decree dated 10.7.2001 was allowed. In another application at Exhibit 20, to set aside the entire proceedings, was also allowed. The application for condonation of delay to file a review at Exhibit 25 also came to be allowed by the impugned order.

2. The brief facts of the case are that by judgment and Decree dated 10th July, 2001, the shares described in the Inventory Proceedings initiated upon the death of Narayan Gaokar and Smt. Abolem Narayan Gaonkar, were allotted as per the final schedule of partition drawn on the said day at Exhibit 10. Thereafter, an application was filed by the Respondent No. 2 on 29.9.2009 to set aside the said judgment and Decree whereby the properties were inter alia allotted to the Appellant herein. The said application was filed essentially on the ground that the Appellant had committed a fraud by concealing the names of the legal heirs/legal representatives left by the deceased and not citing them as interested parties in the proceedings. It was further disputed that the Appellant was the sole legal heir of the said deceased. The said application was objected by the Appellant.

The learned Judge by the impugned Order relying upon Article 771 of the Portuguese Code of Civil Procedure, set aside the final judgment passed in the said Inventory Proceedings.

3. The learned Counsel appearing for the Appellant has assailed the impugned judgment as, according to him, the applications itself were not maintainable as in view of the contentions raised in the said applications, the proper remedy for the Respondents was to file a suit and not to file an application as sought to be done by the Respondents herein. He further submitted that the provisions of Article 771 of the Portuguese CPC is not at all applicable to the facts and circumstances of the present case. He, accordingly, submitted that the impugned Order deserves to be quashed and set aside.

4. On the other hand, Shri M.P. Almeida, the learned Counsel appearing for the Respondents did not dispute that the applications filed by the Respondents was to set aside the final judgment passed in the Inventory Proceedings on the basis of fraud committed by the Appellant by not disclosing the names of the Respondents at the time of giving the statements on oath.

5. Having heard the learned Counsel and on perusal of the records, I find that the law in force envisages rescission of the partition which has become final for want of appeal only under Article No. 1427 of the Portuguese Code of Civil Procedure. Article 1427 of the Portuguese CPC provides that in cases of preterition or omission in joining any of the co-heirs it is found that other parties acted with fraud and bad faith, a suit is to be instituted to obtain such rescission of the partition.

6. In the present case, there is no dispute that the ground on which the rescission of the partition has been sought by the Respondents is on the basis that the Appellant has committed a fraud and acted in bad faith in not impleading the Respondents in the Inventory Proceedings. As such, the remedy of the Respondents in such circumstances, was to file a suit in accordance with the provisions of Article 1427 of the Portuguese Code of Civil Procedure. The question of invoking the provisions of Article 771 does not arise at all as the present application is based on the footing that the Appellant has committed a fraud in omitting to name the Respondents as interested parties in the Inventory Proceedings. As such, the impugned Order cannot be sustained.

7. In view of the above, the impugned order dated 5th December, 2006, is quashed and set aside. The applications filed by the Respondents are dismissed. The Respondents are at liberty to file a suit if so advised in accordance with law.

8. Appeal stands disposed of accordingly.