

(1998) 08 BOM CK 0015

In the Bombay High Court

Case No : Appeal from Order No. 17 of 1998

Jose Antonio Philip and Others

APPELLANT

Vs

Joao Luis Laurente Dos and Others

RESPONDENT

Date of Decision : 31-08-1998

Acts Referred:

Citation : (1999) 101 BOMLR 501

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Judgement

R.M.S. Khandeparkar, J.—This is an Appeal against Order dated 10th December, 1997, passed by Comarca Judge of Salcete and Quepem in Inventory Proceedings No. 30 of 1988. By the impugned Order, the Comarca Judge has dismissed the application filed by the Appellants in the said Inventory Proceedings for consideration of the deed of gift dated 28th February, 1985, to be null and void and not enforceable.

2. The facts on brief relevant for the decision in the present Appeal are that the Appellant No. 1 and the Respondents Nos. 1, 3 and 5 are the heirs of one Jose Antonio Pascoal dos Milagres who expired on 3rd February, 1968. The Appellant No. 2 and the remaining Respondents are the respective spouses of the said Appellant No. 1 and the said Respondents respectively. Consequent to the death of the said Jose Miranda, the Inventory Proceedings No. 30 of 1988 were initiated in the Court of Civil Judge, Senior Division at Quepem. In the said proceedings, widow of late Jose Miranda was appointed as "the Cabeça de Casal". However, she also expired on 16th January, 1995. On her death, the first Respondent, namely Shri Joao Miranda was appointed as "the Cabeça de Casal" in the said proceedings. In the course of statement by the Respondent No. 1 in his capacity as "the Cabeça de Casal" recorded on 9th August, 1995, the Respondent No. 1 disclosed about a deed of gift in his favour by his mother and the widow of the said Jose Miranda in respect of half of her share in three of the properties left behind by the said Jose Miranda and his widow. The Appellants objected to the

said deed of gift on the ground that the same was null and void being gift of the specific properties by a donor to whom the properties mentioned in the deed were not yet allotted in the Inventory Proceedings. The said objection was dismissed by the Trial Court by the impugned Order and hence the present Appeal.

3. While assailing the impugned Order, Shri J.E. Coelho Pereira, learned Senior Advocate appearing for the Appellants submitted that for all purposes the properties reflected in the deed of gift as the subject-matter of the gift were forming part of the estate left behind by the said Jose Miranda and, therefore, the Comarca Judge ought to have considered that Dominga Maria Miranda, the donor, could not have, in law, gifted the said properties inasmuch as in terms of Article 2177 of the Portuguese Civil Code a co-owner cannot dispose of specifically any portion of the common property without same being assigned to him or her, as the case may be, in partition. Considering the fact that upon the death of Jose Miranda, and the fact that the three properties mentioned in the gift deed formed part of the estate left behind by the said Jose Miranda and that the estate of Jose Miranda had not been partitioned and the said property having not yet assigned exclusively in favour of the donor mentioned in the gift deed, the same could not have been gifted away by the mother of the Respondent No. 1. The Comarca Judge having not considered this important aspect of the case, has acted with material irregularity while dismissing the objection raised by the Appellants which justifies the interference by this Court in the impugned Order. According to the learned Advocate, the Inventory Proceedings having not been concluded, and the partition of the assets left behind by Jose Miranda has not been finalised. It was not known at the time of the execution of the gift deed whether the properties mentioned in the gift deed would be allotted in favour of the donor or not. Even today, the Inventory Proceedings have not been finalised. He further submitted that though the gift is stated to be of a disposable share, on proper reading of the gift deed as a whole, it is clear that what has been sought to be gifted under the gift deed are specific three properties and, that too, when the donor is not in exclusive possession and ownership thereof. According to the learned Advocate, the Comarca Judge erred in applying the provisions contained in Articles 1493, 1494 and 1784 of the Portuguese Civil Code to the matter in issue.

4. Shri M.P. Almeida, learned Advocate on the other hand submitted that the gift deed is in respect of a disposable quota of the donor Dominga Maria Ida Dias e Miranda, the mother of the Respondent No. 1 and it does not gift away any specific property thereunder. According to the learned Advocate, proper reading of the deed would show that the donor has specifically stated that what was being gifted therein was the entire disposable quota of the donor. The reference to three properties in Clause (e) of the deed only clarifies that such disposable quota would include the undivided half share of the ownership of the donor in the said properties along with other properties belonging to the donor and it cannot be interpreted to mean that the gift is only of those three properties in their

entirety. Without prejudice to this submission, the learned Advocate submitted that in case the Court finds that Clause (e) of the said deed amounts to gift of three specific properties, then Court can certainly hold that Clause (e) of the deed to be void but not the entire gift deed. The learned Advocate fairly considered that under the law in force in the State, a co-owner cannot gift any specific area from the property in co-ownership.

5. Upon hearing the learned Advocates for the parties and on perusal of the records, it is seen that the points for consideration which arise in the present Appeal are:

(i) Whether the gift deed in question is in respect of only disposable quota of the donor or it is in respect of specific properties claimed to be belonging to the donor?

(ii) Whether the part of the gift deed which relates to the gift of specific properties is severable from the remaining part of the gift deed dealing with the gift of disposable quota?

6. The Trial Court placing reliance upon the provisions contained under Articles 1784 and 1789 as well as Articles 1493 and 1494 of Portuguese Civil Code, has rejected the objection raised by the Appellants.

7. In order to appreciate the rival contentions of the parties, it would be necessary to peruse the deed of gift which is the subject-matter of the dispute. The said gift deed is dated 28th February, 1985 and apparently was executed by the mother of the Respondent No. 1. The donee under the gift deed is the Respondent No. 1. The recital portion of the gift deed discloses that the donor therein is legally entitled to various properties an account of being widow of her deceased husband Jose Miranda and that the estate of the couple had not been partitioned and had remained in joint and common with her and her two sons and that the daughters had received dowry at the time of their marriages. It further discloses that the donor was desirous of benefitting the Respondent No. 1 to the extent possible having looked after her and being provided for with her needs and requirements. The deed further witnesses to the effect that the donor out of natural love and affection has gifted her entire disposable share on half (quota dispositively) with reservation of life time usufruct in her favour. The Clause (e) of the deed, however, specifically states that the donor and donee covenant and agree that the gift therein made includes amongst others, the three properties described in the said deed, namely, property by name "Deulacodil Molla" bearing Land Registration No. 10101, of Book 29, Matriz No. 9 and Survey No. 36/1, from property Madari or Patem bearing Land Registration No. 13355, Matriz No. 241 and Survey No. 120/1 and the property Mixto Madari bearing Matriz No. 242; Land Registration No. 1354 of old series and survey No. 120/1, the total area of three plots being 40,000 sq. metres or thereabout. Thus, though the gift deed primarily mentions that the gift thereunder is of entire disposable share of the donor, in the same deed in the Clause (e) thereof it is specified that

the gift is in relation to three specified properties having specific area, described under the said Clause.

8. It is thus clear that in the first part of the gift deed what sought to be gifted was the entire disposable quota of the donor. Moreover, in the later part of the deed it has been specifically stated in Clause (e) that the gift would include three disposable properties admeasuring 40,000 sq. metres in area. Simultaneously, it has also been made clear in the gift deed itself that the properties which are the subject-matter of the gift deed were originally belonging to the deceased husband of the donor by name Jose Miranda, and that on the death of the said Jose Miranda, the estate left behind by him was yet to be partitioned and was being enjoyed jointly and in common by the donor along with her two sons at the time of execution of the gift deed. In other words, the properties which were made subject-matter of the gift deed continued to be the part of the estate left behind by said Jose Miranda. The said properties were not yet allotted in favour of any person including the donor and the partition of the estate left behind by Jose Miranda including the said properties was yet to be done and finalised at the time of execution of the said gift deed. Therefore, it is apparent that at the time of execution of the gift deed, the donor mentioned therein had no exclusive right to the three properties specifically mentioned in Clause (e) of the said deed.

9. Article 2177 of the said Code provides that a co-owner cannot dispose of specifically any portion of the common property without the same being assigned or allotted in partition to him. Thus, it prohibits the alienation of a property in the form of a gift by any person unless the said property exclusively belongs to the donor. In other words, a gift can be of a property or any share in a property which exclusively belongs to the donor. In case of a property which is owned by a person along with some other person or persons, it would be a case of co-ownership of the property and in such a case, considering the provisions contained in Article 2177 of the Portuguese Civil Code, the co-owner would not be entitled to dispose of either the entire property or any specific portion of such a property unless and until the share of such a co-owner in the property is allotted, partitioned and separated in loco.

10. As already stated above, in the case in hand, the facts disclose that the Clause (e) of the deed of gift was in respect of three specific properties while the said three properties continued to be part of the estate left behind by the deceased Jose Miranda and the partition of his estate was yet to be finalised. It is, therefore, clear that on the day the gift deed was executed, the donor was not entitled to own the said three properties exclusively for herself and for the same reason, considering the provisions contained in above referred Article of Portuguese Civil Code, the mother of the Respondent No. 1 could not have gifted the said three properties in favour of the Respondent No. 1 by the said gift deed. The donor in the said gift deed having chosen to gift the three specific properties, which formed part of the estate left behind by late Jose Miranda, has clearly acted in contravention of provisions of Article 2177 of the Portuguese Civil Code

and for the same reason, the said Clause (e) of the said gift deed is ex facie bad in law and null and void.

11. The reference by the Trial Court to Article 1784 cannot be faulted with, but the reliance upon the Article 1789 to justify the rejection of the objection raised by the Appellant is misplaced. Article 1784 of the Portuguese Civil Code provides that legit means the portion of the properties that the testator cannot dispose of because it has been set apart by law for lineal descendants or ascendants and such portion consists of half of the properties of the testator save as provided in Clause (2) of Articles 1785 and 1787. Clause (2) of Articles 1785 provides that where the children are legitised by recognition after the marriage is contracted, their legit shall not exceed the legit of others unless 1/3rd calculated as per Clause 1 of Article 1785 and shall be paid only of the disposable portion of the inheritance and the dispositions or gifts made prior and subsequent to the legit by recognition to the detriment of such legit shall be in officious as per general rules, whereas Article 1787 provides that where the testator at the time of his death has only ascendants other than the mother and the father, the legit shall consist of 1/3rd of the properties of inheritance. Both these provisions are not at all quite relevant for the decision in the case in hand. As regards Article 1789, which is referred to by the Trial Court, the same provides that where the testator has gifted or disposed of more properties than he is permitted to dispose, the heirs may apply at the time of opening of the inheritance that the gift or disposition be reduced as provided under Articles 1493 and 1494. Article 1493 provides that the reduction of in officiously gifts shall start from testamentary gifts or legacies and it will extend to gifts inter vivos only if the legacies are not sufficient. Article 1494 provides that in case partial reduction of legacies is sufficient, the reduction shall be done pro-rata amongst the legatees, except where the testator has provided that for this purpose any of them should have preference or that any one is exempt from such burden. It is evident from reading of Article 1784 that it specifically provides that the disposable quota can be to the extent of half of the properties of the donor. The provisions contained in Article 1789 no doubt provide for reduction of disposition beyond the disposable quota. Moreover, proper reading of these Articles would show that the provisions contained in Article 1789 can be pressed into service only when the disposition exceeds the disposable quota in 50% of the assets of the donor. These provisions can be of no assistance in a case where the dispute relates to the right of an interested party in an Inventory Proceeding to dispose of specific properties when such specific properties are not yet been allotted in favour of such interested party in said Inventory Proceedings initiated upon the death of a person to whom such properties originally belonged to. In such cases, like the one under consideration, the Article relevant for the decision is Article 2177 r/w Article 1784 of the Portuguese Civil Code.

12. Once, it is clear that a donor is not entitled to dispose of the specific property in entirety by any gift deed, the point which now arises for consideration is whether the gift deed in question could be void in its entirety because Clause (e)

thereof is void as held above. As already seen above, Clause (e) of the deed specifically refers to three properties being subject-matter of the gift deed. The contention of the learned Advocate for the Respondents that it only clarifies that the disposable quota gifted by the donor would include half share of the ownership of the donor from the said three properties mentioned therein is devoid of substance. Moreover, the remaining portion of the deed of gift does not relate to any specific property and on the contrary, it clearly relates to the disposable quota of the donor. This remaining portion of the deed in other words, in no way is hit by any of the provisions of law relating to right of disposition of the property by a donor. Considering the fact that the portion of the deed comprising of Clause (e) is completely severable from the remaining portion of the deed of gift, the said remaining portion of the gift deed cannot be considered to be null and void merely because Clause (e) thereof is void. Being so, no fault can be found with the impugned Order to the extent it has rejected the objection of the Appellants as far as it relates to the extent of the gift deed excluding therefrom the said Clause (e) is concerned.

13. In this view of the matter, therefore, the Appeal partly succeeds. The impugned Order to the extent of rejection of the objection raised by the Appellant to the gift deed dated 28th February, 1985 executed by Mrs. Dominga Maria Dias alias Dominga Maria Dias e Miranda in favour of the Respondent No. 1 herein in respect of three specific properties mentioned under Clause (e) thereof is hereby set aside. The gift deed in question to the extent of Clause (e) thereof is held to be *ex facie* bad in law and, therefore, null and void and not enforceable and, therefore, cannot be considered for any purpose in the course of the partition left behind by late Josie Miranda. Moreover, the remaining portion of the said gift deed can certainly be considered in the course of partition of the estate left behind by late Jose Miranda. Order accordingly. There shall be no order as to costs.