

(2011) 10 BOM CK 0014

In the Bombay High Court

Case No : Appeal From Order No. 18 of 2011

Maria Augusta Fatima Celia De Azaredo Silveira and Smt.
Maria Fatima Ivete De Azaredo Silveira

APPELLANT

Vs

Mrs. Verodiana Vas e Azaredo and Others

RESPONDENT

Date of Decision : 11-10-2011

Acts Referred:

Citation : (2011) 10 BOM CK 0014

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

Bench : Single Bench

Advocate : V. A. Lawande, for the Appellant; J. P. Mulgaonkar, Advocate for Respondent Nos. 2 and 3, Shri Zeller D Souza, Advocate for Respondent Nos. 7 and 8, for the Respondent

Final Decision : Dismissed

Judgement

F.M. Reis, J.—Heard Shri V. A. Lawande, learned Counsel appearing for the appellants, Shri J. P. Mulgaonkar, learned Counsel appearing for respondent nos. 2 and 3 and Shri Zeller D'Souza, learned Counsel appearing for respondent nos. 7 and 8. The above appeal challenges the order dated 14.01.2011 passed by the learned Civil Judge Senior Division, Vasco, in Regular Civil Suit No. 81/2010 whereby the application for temporary injunction filed by the appellants at Exhibit 4 in the said suit came to be dismissed. The appellants filed the suit alleging inter-alia that there exists specific properties as mentioned at para 1 of the plaint which are referred to as the suit properties. It is further their case that the said properties were originally belonged to Mr. Joaquim Antonio Camilo Adolfo de Azaredo and Ana Etelvina Luiza Xavier e Azaredo who expired on 4/7/1898 and 29/5/1925 respectively. It is further their case that upon the death of said Joaquim Antonio Camilo Adolfo de Azaredo there were inventory proceedings which were initiated to partition the properties left behind by the said deceased and that the properties mentioned at para 6 of the plaint came to be allotted to his wife namely Ana Etelvina Luiza Xavier e Azaredo. It is further

their case that the remaining properties were allotted in a manner as specified at paras 7, 8 and 9 of the plaint. It is further their case that after the death of the said Ana Etelvina Luiza Xavier e Azaredo in the year 1925, an inventory proceedings were initiated by one of the sons by name Bernardino Filipe Azaredo, wherein all the heirs were parties to the said proceedings. After complying with the requisite formalities under the law, the properties of the said deceased came to be allotted. At para 17 of the plaint, it was contended by the appellants that the third son Bernardino Filipe Azaredo was allotted the specific properties mentioned therein. The remaining allotment of the properties to the heirs have also been specified in the plaint.

2. It is further their case that one Joaquim Santana de Azaredo, son of Joaquim Antonio Camilo Adolfo de Azaredo had executed a Will on 28.10.1948 bequeathing all his properties in favour of his nephews Joao Manuel Custodio Azaredo and Adolfo Xavier Miranda de Azaredo. It is further their case that the said Joaquim Santana de Azaredo expired as a bachelor on 08.11.1948 immediately after executing the Will dated 28.10.1948 without any ascendants and descendants. It is further their case that the Will dated 28.10.1948 executed by said Joaquim Santana de Azaredo is illegal and bad in law inasmuch as the said Will could not have disposed of more than his legitimate. It is further their case that the said Joao Manuel Custodio Azaredo expired on 11.04.1952 without leaving any ascendants and descendant however the respondent no.1 claims to have married him on the basis of a fraudulent marriage certificate of the year 1953 wherein the alleged marriage of the said Joao Manuel Azaredo and Verodiana Vaz of the year 1948 has been registered. It is further their case that the alleged marriage of the respondent no.1 and Joao Manuel Azaredo was not registered during his life time. It is further their case that in the year 1953, the respondent no.1 by misrepresentation that she is the wife of said Joao Manuel Custodio Azaredo and by fraudulent means obtained the registration of an alleged marriage fraudulently claiming that she has married to Joao Manuel Azaredo in the year 1948 which came to be registered in the year 1953.

3. It is further their case that respondent no.1 by engaging fraudulent means and misrepresentation, executed a public deed dated 04.07.1956, declaring that prior to her marriage she had given birth to her daughter who was given the name of Fatima Visitacao Jesinha Vaz, who was born on 27.02.1943. It is further the contention of the appellants that the birth of the respondent no.2 was registered in the office of Civil Registration in Mormugao under Registration No.112 as a birth being from unknown parents and that she was registered as an illegitimate daughter of unknown parents. The respondent no.2 married to respondent no.3 in the year 1961 in the church at Old Goa and the certificate discloses that she was a daughter of unknown father. It is further contention of the appellants that respondent no.2 in collusion with respondent no.1 by employing fraudulent means and indulging in misrepresentation once again got her birth registered in the year 1963 i.e. on 18.10.1963 illegally and fraudulently claiming that respondent no.2 is the daughter of Joao Manuel de Azaredo. It is

further case of the appellants that the said registration of the year 1963 was done deceptively by entering the name Joao Manuel Custodio Azaredo, as the father of respondent no.2. It is further their case that respondent no.2 is not the daughter of Joao Manuel Custodio Azaredo and that the entire registration of the respondent no.2 is vitiated and the same is bad in law.

4. It is further their case that in view of the said fraudulent document, the respondent nos. 1 and 2 are claiming right of inheritance of said Joaquim Santana Azaredo but from the said fraudulent document such right would also devolved upon the appellants herein. It is further their case that they came to know about the fraudulent acts of respondent nos. 1 and 2 only when they sought for Deed of Relinquishment from the appellants and on other such grounds which are more specifically stated in the plaint, the appellants filed the suit. On the basis of such pleadings, the appellants have prayed inter-alia for a declaration that the respondent no.2 is not the daughter of Joao Manuel Custodio Azaredo and, therefore, cannot claim any right to the inheritance left behind by the said deceased and for a declaration that the said Will dated 28.10.1948 is bad, illegal and, therefore, liable to be quashed and set aside. The remaining consequential reliefs have also been sought to declare the Deed of Qualification of heirs dated 17.02.1951 as illegal.

5. The respondent nos. 1 and 2 filed their written statement disputing the claim put forward by the appellants. It is their contention that the appellants, her brothers and sister as also the other members of the family of Bernardino Filipe de Azaredo including the now deceased parents of the appellants were always aware of the marriage of the respondent no.1 with said Joao Manuel Custodio Azaredo in the year 1948. It is further their case that they were married on 07.09.1948 at Belgaum and denied the allegations that the respondent no.1 was not married to the said Joao Manuel Custodio Azaredo. The said respondents also claim that Joao Manuel Custodio Azaredo and his brother were entitled to the inheritance of their uncle Joaquim Santana de Azaredo. The contention that the Will is null and void has also been disputed. The remaining contents of the plaint have been disputed by the said respondents in the written statement and reiterated the fact that the respondent no.2 was the daughter of said Joao Manuel Custodio Azaredo and was living in the household to the knowledge of the appellants and prayed that the suit be dismissed. The remaining respondents have essentially raised the similar contentions in their respective written statements.

6. The learned Judge after hearing the parties and on perusal of records has come to the conclusion that the appellants have failed to make out a prima facie case in their favour and that there is no irreparable loss which was occasioned to the appellants and further no balance of convenience was in favour of the appellants and consequently dismissed the application for temporary injunction by the impugned order.

7. Shri V. A. Lawande, learned Counsel appearing for the appellants has assailed

the impugned order and pointed out that though the appellants have minutely disclosed the fraud committed by respondent nos. 1 and 2 in executing the document since the year 1948 itself discloses that such fraudulent acts by no stretch of imagination can create any right of inheritance to the estate of the said deceased Joao Manuel Custodio Azaredo. The learned Counsel further pointed out that the registration of birth of respondent no.2 in the year 1963 is on the basis of an order passed by the Civil Judge Senior Division, Margao and such order according to the learned Counsel has been obtained by respondent nos.1 and 2 by fraud and misrepresentation of the facts. The learned Counsel further pointed out that respondent no.2 did not even choose to initiate any proceedings during the life time of said Joao Manuel Custodio Azaredo to claim that she is his daughter and as such this attitude of respondent no.2 itself is sufficient to show that the respondent no.2 has acted in fraudulent manner. The learned Counsel further pointed out that though the parents of the appellants were parties to the Deed of Partition executed in the year 1971 nevertheless the stipulations made therein are on the basis of misrepresentation made by respondent nos. 1 and 2. The learned Counsel further pointed out that the learned Judge has totally failed to consider the submissions advanced by the appellants whilst passing the impugned order and as such misconstrued the submissions advanced by the appellants and as such has come to an erroneous conclusion that the appellants have failed to establish a prima facie case in their favour. The learned Counsel further pointed out that considering the fraud committed by respondent nos. 1 and 2 in fabricating the document that they are entitled to the inheritance of the deceased Joao Manuel Custodio Azaredo, grave and irreparable injury shall occasion to the rights and interest of the appellants over the suit properties which otherwise devolve upon the appellants. The learned Counsel further submitted that on perusal of records, the learned Judge ought to have come to the conclusion that the appellants are entitled to the temporary injunction as prayed for.

8. On the other hand, Shri J. P. Mulgaonkar, learned Counsel appearing for respondent nos. 2 and 3 has supported the impugned order. The learned Counsel has pointed out that the contentions advanced by the appellants are totally farfetched and according to him all the documents which are alleged to be fraudulent were executed in accordance with law as prevailing at the relevant time. The learned Counsel further submitted that the registration of the respondent no.2 in the year 1963 disclosing patrimony to Joao Manuel Custodio Azaredo has been effected in accordance with law after obtaining an order from the Civil Judge Senior Division, Salcete. The learned Counsel has taken me through the registration certificate and pointed out that there is an endorsement to that effect made in the said certificate to the effect that such entry has been made pursuant to the order of the Court. The learned Counsel further pointed out that the appellants are not entitled in law to challenge the said entry which is in accordance with law. Apart from that, the learned Counsel further submitted that the parents of the appellants were parties to the Deed of Partition of the

year 1971 which itself discloses that they had accepted respondent nos.1 and 2 as being the wife and daughter of said Joao Manuel Custodio Azaredo. The learned Counsel pointed out that the appellants have failed to establish a prima facie case in their favour and as such the question of interference in the impugned order does not arise. The learned Counsel further pointed out that the impugned order is passed in exercise of its discretion by the learned Judge and as such no interference is called for by this Court in the present appeal. The learned Counsel as such submitted that the appeal deserves to be rejected. The learned Counsel further pointed out that there is a Deed of Gift executed in the year 1973 in favour of both the brothers of the appellants. The learned Counsel as such submitted that there is no reason for any interference in the impugned order.

9. Shri Z. D'Souza, learned Counsel appearing for respondent nos. 7 and 8 has adopted the submissions advanced by the learned Counsel appearing for the respondent nos. 2 and 3.

10. Having heard the learned Counsel for the parties and on perusal of records, the first point to be considered is whether the Deed of Qualification of heirs executed in the year 1951 in respect of inheritance of said Joaquim Antonio Camilo de Azaredo can be considered to be null and void. There is no dispute that said Joaquim Azaredo was a bachelor and as such the question of claiming that there is legitimate which devolves upon the appellants does not arise at all. Once it is accepted that the said Joaquim Santana de Azaredo was a bachelor, he is free to dispose of his assets in a manner he is so desire. In the present case, it is not disputed that Joaquim Santana de Azaredo executed a Will in the year 1948 in favour of Joao Manuel Custodio Azaredo and Adolfo Xavier Miranda de Azaredo and as such on the basis of the said Will the said Joao and Adolfo can be qualified to be entitled to the estate of the said deceased Joaquim Santana de Azaredo. As such, the contention of the learned Counsel appearing for the appellants that the Deed of Qualification of heirs of the year 1951 is null and void prima facie cannot be accepted.

11. It is also material to note that on perusal of the said Deed executed at page 368 of the paper book, one finds that the said Joao Manuel Azaredo was one of the parties before the authority to execute the said document along with his wife who is respondent no.1 herein. This prima facie shows that the said Joao even during his lifetime accepted the respondent no.1 as his wife.

12. Dealing with next contention of the learned Counsel appearing for the appellants to the effect that the marriage of Joao Manuel Azaredo to respondent no.1 to be considered as fraudulent, I find from the records produced in the proceedings that there is a marriage certificate disclosing clearly that the said Joao Manuel married to respondent no.1 way back in the year 1948 in the church at Belgaum. This document prima facie cannot be considered to be fraudulent as they are from the official church marriage records. There is nothing on record to show prima facie that any misrepresentation and/or any fraud was committed

whilst executing the said document. Apart from that, from the fact that Joao Manuel accepted respondent no.1 as his wife while executing a public deed in the year 1951 falsifies the claim of the appellants to the effect that the said Joao Manuel never accepted respondent no.1 as his wife.

13. Dealing with the contention of learned Counsel appearing for the appellants doubting the correctness and authenticity of the document executed to claim that respondent no.2 is the daughter of Joao Manuel, I find that there is no dispute that in the public records of registration of birth in the year 1963, the records have been rectified pursuant to an order obtained from Civil Judge Senior Division, Salcete in the year 1963 confirming the patrimony of the said respondent no.1. The registration of birth in the records as they stand today discloses that respondent no.2 is the daughter of respondent no.1 and said Joao Manuel. Under Article 117 of the Portuguese Civil Code, no one is entitled to vindicate the status contrary to that resulting from the registration of birth, when the latter are confirmed by the living in such status, as well as no one is entitled to challenge such status. In the present case, there is specific averments by the respondents to the effect that the respondent no.2 was living with her parents during the life time. This aspect further establishes prima facie that the appellants cannot challenge the status of respondent no.2 when admittedly the birth has been registered. The appellants have chosen to claim that the order obtained from the Civil Judge Senior Division, Salcete in the year 1963 is fraudulent order but however the record reveals that the appellants have not taken any steps to produce the said order for perusal. On the contrary, the birth registration certificate produced on record clearly discloses that the endorsement has been carried out pursuant to an order obtained from the Civil Judge Senior Division, Salcete, in the year 1963. As such prima facie it cannot be accepted that order of the Civil Court obtained in the year 1963 can be considered to be a fraudulent order. The contention of Shri Lawande, learned Counsel appearing for the appellants to the effect that respondent no.2 chose to file the proceedings only after the death of Joao Manuel and not during the life time is misplaced. Under Article 133 of the Portuguese Civil Code, the suits by an illegitimate child for declaration of paternal or maternal filiations may be instituted only during the life time of the presumed parents, save in the following cases :

(1) In case the parents died during the minority of the children, because in such case, the latter have right to institute the suit even after the death of the parents, provided they do it before the expiry of four years from the date of their emancipation or majority.

Admittedly, the proceedings were filed within a period of four years after respondent no.2 attained majority. As such, the contention of Shri Lawande, learned Counsel appearing for the appellants that respondent no.2 was not entitled to file such proceedings cannot be accepted. Another contention advanced by learned Counsel appearing for the appellants that such declaration of paternal filiation can be obtained only in case when there is any writing of the

father in terms of Article 130 of the Portuguese Civil Code cannot be accepted. Article 130(2) of the Portuguese Civil Code clearly provides even in case the child is found living in such status can also claim such filiation. Apart from that, as already noted herein above, the order passed by the learned Judge in the year 1963 has not been produced by the appellants and it is not possible at this stage prima facie to consider any illegality in the said order. In any event, admittedly, there is no challenge to the said order made by the appellants herein.

14. On perusal of the impugned order, I find that the learned Judge has rightly considered the evidence on record and has come to the conclusion that prima facie the appellants have failed to establish any case in their favour. Though it was not correct on the part of the learned Judge not to specify the decisions relied upon by the appellants in the impugned order, as it is well established that any judgments relied upon by the party specially of this Court or the Apex Court have to be referred by the learned Judge and consider in the circumstances of the case whether they are applicable or not. The learned Judge should have ensured that any judgment of this Court or the Apex Court relied upon by the party is considered while passing the impugned order.

15. The learned Counsel appearing for the appellants has relied upon the judgment of the Apex Court reported in Jagdish Chander Sachdeva Vs. Royal Bombay Yacht Club and Others, . The ratio of the said judgment is not applicable to the facts and circumstances of the present case as considering the material adduced in the present case, the learned Trial Judge has come to the conclusion that the appellants have failed to establish a prima facie case in their favour. The judgment of the Apex Court reported in 2010(1) SCC page 562 in the case of Geo-Group Communication Inc. V/s IOL Broadband Ltd., to meet the contention of the respondents that there is an admission on the part of the appellants is not applicable to the facts of the present case. The recitals in the Deed of Partition in the year 1971 clearly prima facie disclose that the parents of the appellants have accepted the respondent nos. 1 and 2 as being entitled to the inheritance of the deceased Joao Manuel. There is no case made out prima facie to claim any misrepresentation as alleged by the appellants. Another judgment relied upon by the learned Counsel appearing for the appellants is reported in M. Gurudas and Others Vs. Rasaranjan and Others, . The facts of the said case are in respect of adoption which was created under the provisions of Hindu law which is not applicable to the facts of the present case. In the present case, the paternal or maternal filiation can be established under the provisions of Article 130 of the Portuguese Civil Code. Prima facie the records reveal that such filiation has been obtained in accordance with law as prevailing at the relevant time.

16. The Apex Court in the judgment reported in 1990 (supplement) SCC page 727 in the case of Wander Ltd., and another V/s Antox India P. Ltd., has held at para 14 thus :

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate Court will not interfere with

the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below if the one reached by that Court was reasonably possible on the material. The appellate Court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion. After referring to these principles Gajendragadkar, J in *Printers (Mysore) Private Ltd., V/s Pothan Joseph* : (SCR 721)

".....These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. V. Jhanaton* "..... the law as to the reversal by a Court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case"."

The appellate judgment does not seem to defer to this principle.

17. Considering the said judgment of the Apex Court, I find that there is no irregularities committed by the Trial Judge in the exercise of its discretion in refusing the application for temporary injunction. The learned Counsel for the appellants was unable to point any material which has not been considered which would in any way vitiate prima facie findings arrived at by the learned Trial Judge. As such, I find no merit in the above appeal and consequently the same stands dismissed. It is made clear that the findings arrived at herein above are only prima facie findings and the learned Judge shall not be influenced by any such findings while disposing of the suit on merits. In view of the above, the appeal stands dismissed.