

(2013) 08 BOM CK 0265
In the Bombay High Court
Case No : Writ Petition No. 352 of 2005

Mary Dias and Another

APPELLANT

Vs

Pedro Machado (D) and Others

RESPONDENT

Date of Decision : 12-08-2013

Acts Referred:

Citation : (2014) 2 ALLMR 362

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

Bench : Single Bench

Judgement

F.M. Reis, J.—Heard Shri Diniz, learned Counsel appearing for the Petitioners and Shri Sudin Usgaonkar, learned Counsel appearing for the Respondents. The above Petition, inter alia, seeks for a writ of certiorari or any other writ direction under Article 226 and 227 of the Constitution of India to quash and set aside the impugned Order dated 27.09.2004, passed by the learned Ad-hoc Addl. District Judge, Panaji, in Misc. Civil Appeal No. 63/2002 along with the chart of partition.

2. Briefly, the facts of the case are that Inventory Proceedings were initiated upon the death of Paulo Bartholomeu Mendes, wherein the Petitioners were made interested parties in view of a Deed of Gift dated 23.07.1980 executed by one of the daughters of the said deceased in favour of the Petitioner No. 1 in respect of her share in the undivided estate of the deceased. In the course of such proceedings, an auction came to be held on 05.10.1999 which the Petitioners contend was without drawing any final list of assets. An objection to that effect was raised and by an Order dated 29.04.2002, the allotment was homologated. Being aggrieved by the said Homologation of the Partition, the Petitioners preferred an appeal before the learned District Judge, challenging the final chart of partition. The Appeal came to be dismissed on 27.09.2004 by the learned District Judge and, as such, the Petitioners have preferred the above Writ Petition.

3. Shri A.F. Diniz, learned Counsel appearing for the Petitioners, has assailed the impugned Judgment on following grounds. It is the contention of Shri Diniz, learned Counsel appearing for the Petitioners, that the auction was held by the

learned Trial Judge without finalising the list of asset. Learned Counsel further pointed out that there was no description carried out by the learned Judge and, as such, there was grave injustice to the Petitioners. Learned Counsel further pointed out that the auction proceedings were conducted by the learned Judge on the basis of the list of assets submitted by the Cabeca de Casal and, according to him, the item numbers in the last list of assets do not correspondent with the items which have been auctioned by the interested parties. Learned Counsel has taken me through the list of assets and pointed out that grave injustice has resulted to the Petitioners. Learned Counsel further pointed out that the Respondents were being represented by a Power of Attorney and, according to him, there were no powers given to such Attorney to take part in the said auction. Learned Counsel further pointed out that as a bid was given to one of the items by the said Power of Attorney on behalf of the Respondents, the bid itself is not valid and, as such, the learned Judge has erroneously accepted the bid given by the said Power of Attorney. Learned Counsel further pointed out that this aspect was objected by the Respondents and by an Order dated 13.09.2000, the said objections raised by the Petitioners came to be rejected. The learned Counsel further pointed out that whilst filing the Appeal against the final Homologation of Partition, the petitioners have raised a ground to the effect that the said Power of Attorney was not authorized to bid at the said auction. Learned Counsel has taken me through the impugned Order passed by the Lower Appellate Court and pointed out that the learned Judge has failed to consider such aspect on the ground that the Petitioners had not challenged the said Order dated 13.09.2000 immediately after the said Order was passed. Learned Counsel further pointed out that the learned Judge was not justified to refuse to consider the said ground as, according to him, there is no bar for the Petitioners to challenge the findings in the said Order as a ground of Appeal whilst challenging the final Homologation of the Partition. Learned Counsel further pointed out that as the description was not done in terms of the provisions of the Portuguese Civil Procedure Code, the learned Trial Judge was not justified to hold an auction on the basis of a truncated list of asset. Learned Counsel further pointed out that there was mis-apprehension with regard to the property which was being auctioned and, as such, the learned Judge was not justified to pass the impugned Judgment and dismiss the Appeal filed by the Petitioners. Learned Counsel further pointed out that as the list of assets was not finalised nor any description was done in the said proceedings, and there was no compliance of Article 1319 of the Portuguese CPC and, as such, the whole auction proceedings came to be vitiated. Learned Counsel has also taken me through the impugned Order and pointed out that the learned Judge has erroneously considered the material on record and has dismissed the Appeal filed by the Petitioners on untenable grounds. Learned Counsel as such submits that the impugned Judgment deserves to be quashed and set aside.

4. Shri Sudin Usgaonkar, learned Counsel appearing for the Respondents, has supported the impugned Judgment. The learned Counsel has pointed out that the

question of now raising the contention that the properties were not described as sought to be contended, are totally disbelieved. Learned Counsel has taken me through the proceedings before the Inventory Court and pointed out that such objections were in fact raised by the Petitioners which came to be rejected by the learned Trial Court. Learned Counsel further pointed out that the Orders of the learned Trial Court were challenged by the Petitioners by two revisions before this Court in Civil Revision Application No. 123 of 2000, wherein, the said contention raised by the Petitioners came to be rejected. Learned Counsel further pointed out that once this Court has come to the conclusion that the auction process with regard to the list of assets has been correctly conducted, the question of the Petitioners now re-opening the said issues do not arise. Learned Counsel has taken me through the Order of this Court whilst disposing of the Civil Revision Application dated 09.06.2000 and pointed out that the learned Lower Appellate Court has also recorded the fact that in the grounds of the revision filed by the Petitioners, there was a specific ground raised by the Petitioners to the effect that the Power of Attorney was not authorised to take part in the auction on behalf of the Respondents. Learned Counsel further pointed out that as all the contentions raised by the Petitioners have been concluded in view of the Order passed by this Court in the said Civil Revision Application, it is not open to the Petitioners to raise the said contentions again. Learned Counsel further pointed out that in terms of the provisions of the Portuguese Civil Procedure Code, it was incumbent upon the Petitioners to challenge the said Order dated 13.09.2000 immediately after such Order was passed. Learned Counsel further points out that the failure on the part of the Petitioners to challenge the said Order has become final and, according to him, the question of challenging the said Order in the Appeal preferred by the Petitioners challenging the final Homologation of the Partition, would not arise. Learned Counsel further pointed out that this Court has held that an Appeal against an Order passed by the Inventory Court is appeal-able u/s 104 of the Civil Procedure Code. Learned Counsel further pointed out that as no Appeal has been preferred by the Petitioners in terms of the provisions of Section 104 of the Civil Procedure Code, the Petitioners are now precluded from challenging the said Order. Learned Counsel further pointed out that it is not open to the Petitioners to challenge the findings in the said Order dated 13.09.2000 whilst preferring an Appeal challenging the final Homologation of the Partition, Learned Counsel further pointed out that the said Order having become final, the Petitioners are not entitled to challenge the findings therein in the Appeal preferred by the Petitioners. Learned Counsel has taken me through the impugned Order passed by the learned Lower Appellate Court and pointed out that the learned Judge has rightly rejected the said contention as the Petitioners had not challenged the said Order. Learned Counsel further pointed out that the question of invoking the provisions of Section 105 would not arise as, according to him, it is not open to the Petitioners to challenge the said Orders at the time of final homologation of the Partition. Learned Counsel in support of his submissions has relied upon the Judgment of the learned Single Judge of this Court dated 12.04.2001 passed in

Appeal From Order No. 16 of 2000 in the case of Shri Krishna Mhalu Pai Raikar & Ors. vs. Shri Hari Mhalu Pai Raikar, 2000 (2) GLT 479 in the case of Aruna Devi N. Gaeskwad & Ors. vs. Sanjita Udaisingh Rane & anr. and Zacarias Durate Dmoingos Pereira Vs. Camilo Inacil Evaristo Pereira, . The learned Counsel as such submits that the above Petition deserves to be rejected.

5. I have carefully considered the submissions of the learned Counsel. I have also gone through the records. Dealing with the contention of Shri Diniz, learned Counsel appearing for the Petitioners, to the effect that the auction proceedings were conducted by the learned Trial Judge on the basis of the truncated list of assets, I find that it is not open to the Petitioners to now challenge the manner in which the auction was held in view of the Order passed by this Court whilst disposing of Civil Revision Application No. 123/2000. This Court has found that the said contentions could not be considered as the Petitioners had not raised such objections at the relevant time. Apart from that, on going through the Minutes of the Auction Proceedings with the assistance of the learned Counsel appearing for both the parties, I find that the Petitioners have taken part in the auction proceedings and no grievance was raised by the Petitioners at that stage. Considering that both the parties have submitted their bid without any demeanor to that effect, I find that the said contention of Shri Diniz, learned Counsel appearing for the Respondents, at this stage, cannot be accepted. Once this Court has come to the conclusion that the said contention is not available to the Petitioners, I find that the attempt of Shri Diniz, learned Counsel appearing for the Petitioners, to assail the said proceedings at this stage would not arise and, consequently, the said submissions of Shri Diniz, stands rejected.

6. The only aspect to be considered is whether the Petitioners would be entitled to challenge the findings in the Order dated 13.09.2000 wherein a ground was raised that the Power of Attorney who had submitted a bid on behalf of the Respondents was not authorized to submit such bid. It is further the contention of Shri Diniz, learned Counsel appearing for the Petitioners that such bid was by an unauthorized bid and the acceptance of such bidder is not sustainable in law.

7. Shri Usgaonkar, learned Counsel appearing for the Respondents, has joined issue on that count and pointed out that the Petitioners have no locus standi to raise such contention. Without going into the rival contentions raised by both the parties on merits with regard to the said contention of the Petitioners, at the outset, it would be appropriate to consider whether the Petitioners are entitled to challenge the findings in the Order dated 13.09.2000 while assailing the final homologation of the Partition in the Appeal before the Lower Appellate Court. In this connection, Shri Usgaonkar, learned Counsel appearing for the Respondents, is justified to contend that the Appeals preferred against such Orders in the Inventory Proceedings are to be considered in terms of Section 104 of the Civil Procedure Code. Section 104 of the CPC reads thus:

104. Orders from which appeal lies.--(1) An Appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by

any law for the time being in force, from no other orders:--

[(ff) an order u/s 35-A;]

[(ffa) an order u/s 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may;]

(g) an order u/s 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

[provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.]

(2) No appeal shall lie from any order passed in appeal under this section.

8. On plain reading of the said provision, the appeals are maintainable as they are provided in any other law for the time being in force. It is not in dispute that the learned Single Judge of this Court in the case of Zacarias Duarte Domingos Pereira vs. Camilo Inacio Evaristo Pereira (supra) has held that the provisions of the Portuguese CPC which deal with the Inventory Proceedings have been saved as there are no corresponding provisions in the Indian CPC 1908. In this connection, it would be appropriate to note that the regime of appeals against the Orders in the Inventory Proceedings are provided under Article 1435 of the Portuguese Civil Procedure Code.

9. Article 1435(a) and (d) of the said Portuguese CPC provides thus:

a) The Appeal preferred against the order putting an end to the proceedings, shall be forwarded immediately and in the same proceedings; and alongwith it other appeals preferred against previous orders, if any, shall be forwarded.

d) The appeals preferred from subsequent orders up to the presentation of the file to pass order directing as to how the partition should be effected, shall be forwarded to the superior court jointly and in separate from the principal file, when the file is at the stage of drawing the form of partition.

Article 1435(e) of the said Portuguese CPC provides thus:

(e) The appeals preferred from the order directing how the partition should be effected and of subsequent orders shall be forwarded in the same file, to the superior court, alongwith the appeal filed against the judgment which homologates the partition.

On plain perusal of the said provisions, what transpires is that any appeal which is filed before the final homologation of the Partition, can also be decided at the time when the appeal challenging the final homologation of the Partition is considered by the Appellate Court. The said provisions clearly provide that even though an appeal can be filed during the pendency of the said proceedings nevertheless the same can be considered at the time when the challenge is made against the final homologation of the Partition. It would be pertinent to note the procedure provided in filing appeals in terms of the provisions of Article 687 of the Portuguese CPC which, inter alia, requires that such Appeals be filed by way of an application indicating the desire to prefer an Appeal and such application is to be filed in the office of the Court which pronounced the decision. Such procedure is no longer in force. The learned Single Judge of this Court in the case of Aruna Devi N. Gaeskwad & Ors. vs. Sanjita Udaisingh Rane & anr. (supra), observed at paras 27 and 28 thus:

27. What emerges from the above discussions is that though the inventory proceedings are to be conducted in the court of first instance in terms of the provisions relating thereto comprised under Portuguese Civil Procedure Code, read with Portuguese Civil Code, and that the right of appeal being vested right accrued under the repealed Code is also protected, but the procedure to be followed to pursue the remedy of appeal is not saved and a new forum as available under CPC is provided for enforcement of such vested right of appeal. The appeals against orders passed in the inventory proceedings are to be preferred and filed and dealt with as the appeals under the Code of Civil Procedure.

28. Once it is clear that the forum of appeal is either High Court or District Court for lodging the appeals against the orders passed in the inventory proceedings and the same are to be dealt with in accordance with the provisions of Code of Civil Procedure, the rules contained in Order 41 and Order 43 would automatically be attracted and applicable to such appeals....

10. Section 105 of the Civil Procedure Code, inter alia, provides that save as otherwise expressly provided, no Appeal shall lie from any Order made by a Court in the exercise of its original or appellate jurisdiction but where a Decree is appealed from any error, defect or irregularity in any order effecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal.

11. Order 43 Rule 1-A further provides that when any order is made under this Code against a party and thereupon any Judgment is pronounced against such party and a Decree is drawn, such party may in an appeal against the Decree contend that such Order should not have been made and the Judgment should not have been pronounced. Thus, when an error or irregularity in an interlocutory Orders passed in the proceedings affects the final decision on merits, a party aggrieved is entitled to challenge those orders whilst preferring an Appeal challenging the final decision. Most of the orders referred to in Order

43 Rule 1 of the Civil Procedure Code, do not determine the substantive rights of the parties. But, however, the consequences of the Orders passed in the course of the Inventory Proceedings are totally different. In such Orders substantive right of the parties are also adjudicated. Even in cases in which the Orders fall within the provisions of Section 104 of the Civil Procedure Code, the party against whom such Orders have been passed, is not bound to prefer an Appeal against such Orders immediately but he can always assail the irregularity or error therein affecting the final decision as a ground of objection in the memorandum of Appeal whilst challenging the final Judgment passed in the suit. The provisions of Section 105 of CPC applies to an order i.e. appealable as well as non-appealable order and as such the said provisions allow an appealable order which is not appealed from to be made subject of appeal in any appeal from the final decision in the suit. As such, the said provisions enable the parties to set forth any error, defect or irregularity in any order effecting the decision of the case as a ground of objection in the memorandum of appeal. The words "affecting the decision of the case" in Section 105 of the CPC means affecting the decision of the case on its merits. In this connection, the Apex Court in the Judgment reported in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, , has observed at paras 10 and 13 thus:

10. Dealing with this objection the Privy Council observed:

We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication.

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13. There can be little doubt about the salutary effect of the rule as laid down in the above cases on the administration of justice. The very fact that in future litigation it will not be open to either of the parties to challenge the correctness of the decision on a matter finally decided in a past litigation makes it important that in the earlier litigation the decision must be final in the strict sense of the term. When a court has decided the matter it is certainly final as regards that

court. Should it always be treated as final in later stages of the proceeding in a higher court which had not considered it at all merely on the ground that no appeal lay or no appeal was preferred? As was pointed out by the Privy Council in *Moheshur Singhs Case*³ the effect of the rule that at every stage of the litigation a decision not appealed from must be held to be finally decided even in respect of the superior courts, will put on every litigant against whom an interlocutory order is decided, the burden of running to the higher courts for redress of the grievances, even though it may very well be that though the interlocutory order is against him, the final order will be in his favour and so it may not be necessary for him to go to the appeal court at all. Apart from the inevitable delay in the progress of the litigation that such a rule would cause, the interests of the other party to the litigation would also generally suffer by such repeated recourse to the higher courts in respect of every interlocutory order alleged to have been wrongly made. It is in recognition of the importance of preventing this mischief that the legislature included in the CPC from the very beginning a provision that in an appeal from a decree it will be open to a party to challenge the correctness of any interlocutory order which had not been appealed from but which has affected the decision of the case.

12. Considering the ratio laid down by Apex Court in the said Judgment and in view of the provisions of Article 1435 of the Portuguese Civil Procedure Code, read with the provisions of Section 104, 105 and Order 43 of the Civil Procedure Code, and taking note of the fact that the learned Single Judge of this Court has held that an appeal against the orders passed in the inventory proceedings are to be dealt with in accordance with the provisions of the Code of Civil Procedure, 1908, I find that there can be no doubt that an interlocutory Order passed during the course of the Inventory Proceedings which has not been challenged by a party against whom such Order was passed, can challenge the error or irregularity therein affecting the decision in the proceedings whilst preferring an Appeal against the final decision putting an end to the Inventory Proceedings. Article 1435(a) of the Portuguese CPC clearly provides that all appeals which have been preferred can be sent to the superior Court along with the Appeal putting an end to the proceedings. This itself shows that such Appeals against interlocutory Orders in Inventory Proceedings can be decided along with the challenge to the final Order homologating the proceedings.

13. Shri Usgaonkar, learned Counsel appearing for the Respondents, has pointed out that only appeals which have been filed immediately after such orders were passed can be decided by the Appellate Court whilst deciding the challenge to the homologation of the Partition. The learned Counsel pointed out that as the Petitioners have not preferred such appeal in terms of the provisions of the Portuguese CPC the question of the Petitioners now challenging the Order would not be justified. As already referred to herein above, the procedure contemplated by the Portuguese CPC which allowed the parties to file an Appeal before the same Court do not survive as the Appeals against the Orders passed in the Inventory Proceedings are governed by the provisions applicable to appeals in

terms of the provisions of the Code of Civil Procedure, 1908. As such, the Petitioners were not in a position to file an appeal before the Inventory Court in accordance with the provisions provided in the Portuguese Civil Procedure Code. It is also to be noted that there is no procedure under Code of Civil Procedure, 1908, which contemplates filing of an Appeal before the Appellate Court and keeping it in abeyance until the final homologation of the partition is finalised by the Inventory Court. Hence, I find that though an Appeal might not have been filed before Inventory Court as such procedure no longer survives it does not preclude the Petitioners to challenge the said Orders as a ground of Appeal whilst challenging the final homologation of the partition.

14. Another contention raised by Shri Usgaonkar, learned Counsel appearing for the Respondents, is that the final Judgment passed in the Inventory proceedings is not a Decree. In support of such submissions, he has relied upon the observations of the learned Single Judge of this Court in the case of Zacarias Duarte Domingos Pereira vs. Camilo Inacio Evaristo Pereira (supra). The Judgment of the learned Single Judge was to consider whether the final Order in the Inventory Proceedings is a Decree which can be executed by following the procedure under Order 21 of the Civil Procedure Code. In that context, the learned Single Judge has held that it cannot be a Decree which was amenable to Order 21 of the Civil Procedure Code. In any event, it cannot be disputed that the final homologation of the Partition is a formal expression and/or conclusive determination of the rights and shares of the interested parties in the estate of the estate leaver. Considering the provisions of Section 104 of the CPC and reading Article 1435 of the Portuguese Civil Procedure Code, I have no doubt that a person who is aggrieved by an Order passed during the course of the Inventory Proceedings can challenge the findings therein which affect the final decision whilst challenging the final homologation of the Partition. As such, the learned Lower Appellate Court was not justified to come to the conclusion that merely because the Petitioners had not challenged the Order dated 13.09.2000 at the relevant time, the Petitioners were not entitled to raise such contention in the appeal before the learned Lower Appellate Court. In such circumstances, I find that the impugned Judgment to that extent cannot be sustained.

15. The submissions of Shri Diniz, learned Counsel appearing for the Petitioners and Shri Usgaonkar, learned Counsel appearing for the Respondents, on merits of the rival contentions raised by the petitioners to the effect that the Power of Attorney holder was not authorized to submit a bid in the Court auction is a matter which the learned Judge would have to reconsider after hearing the parties in accordance with law. All contentions of both the parties with regard to such contentions are left open. The remaining findings of the learned Lower Appellate Court in the impugned Judgment stands confirmed as no interference is called for in the said portion of the impugned Judgment. In view of the above, I pass the following:

ORDER

(i) The Petition is partly allowed.

(ii) Misc. Civil Appeal No. 63 of 2002 is restored to the file of the learned District Judge. The learned Judge shall proceed to consider the challenge by the Petitioners to the findings in the Order date 13.09.2000 only and decide the appeal afresh in the light of the observations made herein above after hearing the parties in accordance with law.

(iii) The parties are directed to appear before the learned District Judge on 10.12.2013 at 10.00 a.m.

(iv) Considering that the dispute is pending for quite sometime, the learned Judge shall expeditiously dispose of the said appeal.

(v) Rule is made absolute in the above terms.

(vi) Petition stands disposed of.