

(2017) 02 BOM CK 0197
In the Bombay High Court
Case No : 60 of 2016

Mr. Tarzan Da Costa, Son Vs Mario Cornelio Francisco?De Souza

Date of Decision : 17-02-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 11](#),
[Order 39Rule 1](#), [Order 39Rule 2](#) - Res Judicata

Citation : (2017) 02 BOM CK 0197

Hon'ble Judges : Nutan D Sardessai

Bench : SINGLE BENCH

Advocate : Tarzan Da Costa, J E Coelho Pereira, V Korgaonkar

Final Decision : Dismissed

Judgement

1. Heard Shri T. Da Costa, appellant no. 1 in person and also on behalf of the other appellants and Shri J. E. Coelho Pereira, learned Senior Advocate for the respondents.
2. Admit.
3. Shri V. Korgaonkar, learned Advocate waives notice on behalf of the respondents.
4. It was the contention of Shri T. Da Costa, that the Cabeça de Casal has not listed all the immovable properties in the Inventory Proceedings which were initially initiated in 1945 on the death of Rosa Joaquina Luis De Souza and subsequently in the proceedings continued thereafter on the demise of her husband Emidio Simao Ismael de Souza in 1974. The Cabeça de Casal had during the pendency of the Inventory Proceedings executed the Deed of Relinquishment and Gift dated 24.01.1975 renouncing her share in the property of her father Emidio Simao Ismael de Souza. The Deed of Assignment and Transfer was executed by Maria Teresa De Souza, sister of the Cabeça de Casal on 21.10.1976 ceding her right to the estate of her father in favour of her brother Mario Cornelio Francisco De Souza i.e. Inventariado. His son Ernesto

Agnelo De Souza had executed the Deed of Assignment on 10.1.1979 in favour of her brother Fausto De Souza who during his life time sold 2/3rd of his share by the Deed of Sale dated 25.9.2006 to one Natalina Fernandes. The other brother Mario had purchased from Natalina by the Deed of Sale dated 12.10.2006 the 2/3rd share of Fausto De Souza earlier sold to her and therefore Mario was sole and exclusive owner of the entire properties. The said Mario had expired on 16.6.2007 while Fausto had expired on 20.10.2007.

5. An application was filed by Maria, the Cabeça de Casal as a precautionary measure under Sections 405 and 406 of the Portuguese Civil Code on account of the acts of interference by the respondents. Shri T. Da Costa, further submitted that an FIR was registered against the respondents upon the locker being found empty on opening and therefore an application was filed for temporary injunction which however came to be dismissed by the order under challenge. No list of assets was filed by the respondents. There was error in the impugned order and therefore, the appeal had to be allowed quashing the order under challenge. He relied in *Madan Lal Khuteta Vs Badri Narayan*, (AIR 1988 Rajasthan 61) and *Mrs. Connie Miranda Vs. Antonio Joaquim Gracias*, (2010(6) ALL MR 226).

6. Shri J. E. Coelho Pereira, learned Senior Advocate submitted that no injunction was sought against the Cabeça de Casal. An application for removal of the Cabeça de Casal was rejected and even an earlier application for injunction was rejected. The immovable properties too had not been listed in terms of Article 1380 of the Portuguese Civil Code. There was no order passed for the removal of the Cabeça de Casal till date. There was no reference in the application for injunction to any transactions of sale since the rejection of the earlier application for injunction till the present application came to be filed for the stated reliefs. No ground has been made out for interference with the impugned order and hence the appeal was liable for dismissal. He relied in *Stayadhyan Ghosal and others Vs. Smt. Deorajin Debi and another* (AIR 1960 SCC 941) and *Arjun Singh Vs. Mohindra Kumar*, (AIR 1964 SCC 993).

7. Shri T. Da Costa, laboriously charted out the family tree before embarking on his submissions relevant to the present appeal. However such an exercise was not at all warranted and therefore no reference whatsoever is made to the family history and the family tree to which he had made a detailed reference in his opening arguments on behalf of the appellants. There was no particular dispute of the fact that the applicant was appointed as a Cabeça de Casal in the proceedings at large before the Inventory Court and being the respondent herein. It is a matter of record that the appellant no.1 herein as an interested party had sought for the relief of temporary injunction by his application dated 6.5.2016 alleging that the Cabeça de Casal had given her statement on oath but had not filed the list of assets for more than 5 years after her appointment as such and that she failed to do so even after the directions were issued to her by the Inventory Court compelling the appellant no.1 to disclose the assets and estate left behind by the deceased. He had alleged in their application for

injunction that the Cabeça de Casal was mala fide delaying the hearing on the immovable properties belonging to the deceased in order to enter into deals with the third parties, brokers, builders and real estate developers and on that premise had claimed the relief of injunction to restrain the Cabeça de Casal her agents, servants, family members servants from alienating, interfering with, encumbering, selling and /or entering into deals with the third parties, brokers, builders and real estate etc with respect to the mentioned properties.

8. This application came to be disposed off by the order under challenge. Earlier the same interested parties had sought for the relief of injunction and precautionary measures in terms of Order XXXIX Rule 1 and 2 of CPC and under Articles 405 and 406 of the Portuguese Civil Code alleging that the Cabeça de Casal had deliberately delayed the description of the assets of the estate as she wanted to dispose off the properties to the third parties and accordingly sought indulgence of the Court by an application for the relief of temporary injunction dated 18.11.2013. This application came to be disposed off by the trial Court holding that no sufficient cause had been shown by the Interested parties and therefore there was no necessity to grant the application for temporary injunction and precautionary measures under Order XXXIX Rule 1 ad 2 of CPC and Under Articles 405 and 406 of the Portuguese Civil Code. Since then i.e 4.7.2014 till the subsequent application came to be filed, the interested parties did not at all show any acts carried out by the Cabeça de Casal to cause an alarm and precipitate the application for injunction and precautionary measures. Rather it contained an omnibus statement that the Cabeça de Casal was deliberately not divulging the properties belonging to the deceased and that there was every possibility that she would enter into deals with third parties, brokers, builders and real estate developers which would put him to grave injuries, irreparable loss and prejudice without in any manner spelling out any single transaction or incident from the disposal of the injunction application in 2014 till the present application came to be filed as to justify being secured with the equitable relief of injunction.

9. In *Madan Lal Khuteta* (supra), the learned Single Judge of the Rajasthan High Court held that a second application for temporary injunction was not barred by the principle of *res judicata*. However, such an application could be considered only if new facts and circumstances were prayed. This judgment on the face of the record would militate against the the case of the appellants inasmuch as he had not brought out any new facts or circumstances on record which would weigh with the trial Court to secure him with the relief of injunction on a fresh cause of action and thereby bar his application on the principle of *res judicata*.

10. In *Satyadhyan Ghosal* (supra), the Hon''ble Apex Court held at paragraphs 7 and 8 thus:- 7. The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter-whether on a question of fact or on a question of law- has been decided between two parties in one suit or proceeding and the decision

is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct. 8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again?

11. In Arjun Singh (supra), a three Judge Bench of the Hon'ble Apex Court referred to the judgment in Satyadhyan Ghosal(supra) where it was held thus:- "The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter-whether on a question of fact or on a question of law-has been decided between two parties in one suit or proceeding and the decision is final either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again..... The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

12. These judgments would apply on all fours to the present case inasmuch as the interested parties/appellants had invoke the jurisdiction of the Inventory Court once again to seek the equitable relief of injunction without any change in the facts and circumstances and therefore the principle of res-judicata would apply between the two stages in the same litigation.

13. Moreover the learned Trial Court was seized of the fact that prior to the application under consideration, there were two more temporary injunction applications, one filed by the Cabeça de Casal on 26.6.2008 which was dismissed and the second dated 18.11.2013 filed by the interested parties in respect of the same properties and dismissed by the order dated 4.7.2014. The learned Trial Court for that matter was equally seized of the fact that the application at large before her was in respect of the same properties which were so far not listed in the list of assets. It needs reckoning that despite the allegations against the

Cabeca de Casal that she would enter into third parties arrangements to purchase the properties left behind by the deceased, no attempts whatsoever were made at the instance of the interested parties for her removal as the Cabeca de Casal.

14. In *Connie Miranda* (supra), a learned Single Judge of this Court (F. M. Reis, J) held that the inventory Court has powers to take such measures for the purpose of protecting the assets of the deceased during the pendency of the inventory proceedings when there is just apprehension that the immovable properties of the estate may be lost. This judgment too does not in any manner support the contention of Shri T. Da Costa, who has failed to carve out any case for the grant of injunction much less to show any anomaly or illegality in the order passed by the Inventory Court to justify interference in the appeal.

15. Besides, the learned Trial Court had clearly recorded in the impugned order that though the interested party i.e appellant no.1 had vehemently argued about the apprehension on the disposal or alienation of the immovable properties by the Cabeca de Casal, nothing was produced by him on record in support of his contention at the time of deciding the interim relief or at the time of hearing of the temporary injunction application and that his apprehension was not all well founded. The learned Trial Court therefore had not at all committed any error in withholding the relief of injunction sought for by the interested parties, the appellant no.1 herein.

16. In view thereof, there is no merit in this appeal which is hereby dismissed.