
(2014) 07 BOM CK 0029

In the Bombay High Court

Case No : Appeal from Order No. 98 of 2008

Nirmala Vasant Dessai

APPELLANT

Vs

Tulsi Sadananda Dessai

RESPONDENT

Date of Decision : 02-07-2014

Acts Referred:

Citation : (2016) 1 ALLMR 279 : (2014) 6 BomCR 423 : (2015) 4 MhLj 730

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

Bench : Single Bench

Advocate : Iftikhar Agha, Advocate for the Appellant; V. Menezes, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

F.M. Reis, J.—Heard Mr. I. Agha, learned counsel appearing for the appellants and Mr. V. Menezes, learned counsel appearing for the respondent.

2. Admit. Heard forthwith with the consent of the learned counsel.

3. The learned counsel appearing for the respondent waives service.

4. The above appeal challenges an order dated 18.06.2008 whereby the objections raised by the appellants to the validity of the Will dated 18.09.1991 came to be dismissed.

5. Mr. Agha, learned counsel appearing for the appellants in support of his submissions has pointed out that the Will executed by the surviving spouse of a specific properties is a nullity in terms of Article 2177 of the Portuguese Civil Code. The learned counsel further pointed out that the said surviving spouse had bequeathed specific properties of the couple when such properties were not allotted to her. The learned counsel further pointed out that in terms of Article 2177 of the Portuguese Civil Code, such Will is a nullity and consequently the learned Judge was not justified to pass the impugned order and come to the conclusion that it lacks jurisdiction to examine the said aspect. The learned

counsel further pointed out that the objections were raised to the production of the Will by the Cabeça de Casal and as such the learned Judge has erroneously rejected the objections without examining that the Will produced by the Cabeça de Casal was in fact a nullity. The learned counsel further pointed out that the properties bequeathed by the Will are otherwise part of the inheritance of the deceased and belonging to the couple and as such the impugned order passed by the learned Judge deserves to be quashed and set aside.

6. On the other hand, Mr. V. Menezes, learned counsel appearing for the respondent has pointed out that the stage to examine the validity or otherwise of the Will has not yet reached and consequently the examination of the validity of the Will is itself premature. The learned counsel further pointed out that on perusal of the Will what has been bequeathed are different shares in the properties and as such according to him the values of such shares would have to be examined to ascertain whether they fit into the disposal quota of the testator. The learned counsel further pointed out that even otherwise even assuming the specific properties mentioned in the Will could not have been bequeathed nevertheless, the intention of the testator would have to be ascertained to find out whether it could be read down to be the disposal quota of the testator. The learned counsel further pointed out that as the learned Trial Judge has not examined the matter in the said direction, it would be appropriate to call upon the learned Judge to examine the objections raised by the appellants afresh.

7. I have carefully considered the submissions of the learned counsel and I have also gone through the records. The findings of the learned Judge that the Inventory Court has no jurisdiction to examine the validity or otherwise of the Will produced in such proceedings cannot be accepted. When a party desires that he be qualified as a legatee of the deceased in terms of Article 1375 of the Portuguese Civil Procedure Code, he is always entitled to file an application along with the evidence he wants to rely upon to establish such aspect. In case of dispute, the procedure provided in Article 1374 of the Portuguese CPC would have to be followed. Even in case such dispute has not been decided, even when the chart of partition is being finalized, if any dispute with that regard is raised in view of any Will executed by the deceased such question can also be decided in terms of Article 1414 of the Portuguese Civil Procedure Code. When larger investigation is required to decide the dispute, the parties can be permitted to pursue ordinary remedies. These provisions themselves disclose that the findings of the learned Judge in the impugned order that this dispute cannot be decided by the Inventory Court cannot be sustained and are erroneous.

8. It is not in dispute that the Will which was produced by the Cabeça de Casal came to be executed by the surviving spouse. Though the matter was being argued by the learned counsel appearing for the appellants in the context of Article 2177 of the Portuguese Civil Code nevertheless, I find that the validity of such Will would also have to be examined in terms of Article 1766 of the Portuguese Civil Code. Article 1766 of the Portuguese Civil Code reads thus :

Article 1766.-(Prohibition for disposition of the properties of the spouses) Those married as per the custom of the country shall not, under penalty of nullity, dispose of certain and specific properties of the couple, except if the said properties have been allotted to them in partition, or are not included in the communion, or if the disposition has been made by one of the spouses in favour of the other, or if the other spouse has given consent by authentic form.

9. Considering the said provisions of law, I find that the learned Judge was not justified to reject the objections of the appellants on the spacious ground that such exercise cannot be carried out by the Inventory Court.

The contention of Mr. V. Menezes, learned counsel appearing for the respondent that the Will can be read down to mean "the disposal quota" is also a matter which the learned Judge would have to examine after hearing the parties in accordance with law.

10. For the aforesaid reasons, I find that the impugned order passed by the learned Civil Judge Senior Division, Margao, cannot be sustained and deserves to be quashed and set aside.

11. In view of the above, I pass the following :

ORDER

(i) The appeal is partly allowed.

(ii) The impugned order dated 18.06.2008 is quashed and set aside.

(iii) The learned Judge is directed to decide the objections filed by the appellants dated 23.09.2002 at Exhibit 18 afresh in the light of the observations made herein above after hearing the parties in accordance with law.

(iv) Parties to appear before the Inventory Court on 19.08.2014 at 10.00 a.m.

(v) The appeal stands disposed of accordingly with no order as to costs.