
(1984) 02 BOM CK 0064

In the Bombay High Court

Case No : Civil Revision Application No. 175 of 1983

Zacarias Durate Dmoingos Pereira

APPELLANT

Vs

Camilo Inacil Evaristo Pereira

RESPONDENT

Date of Decision : 23-02-1984

Acts Referred:

Arbitration Act, 1940 — Section 4

Citation : AIR 1984 Bom 295

Hon'ble Judges : G.D. Kamat, J

Bench : Single Bench

Advocate : Tamba, for the Appellant; F. Colaco, for the Respondent

Judgement

1. Once Inventory proceedings are determined by final order, what procedure is to be followed for execution of the final order of the Inventory is the moot question raised in this case: whether proceedings lie of under the Civil Procedure Code, 1908 or those Articles Procedure Code, 1908 or those Articles of Portuguese Civil P.C. outside Chapter XVII still govern such proceeding.

2. By the im;ugned Order dated 22nd November, 1983 the Civil Judge, Senior Division, Mapusa, in execution taken in Inventory No. 35|72 under Portuguese Civil P.C. directed the Bailiff to evict the petitioner and restore possession of the house to the respondent to whom it is allotted by the final order made in the Inventory.

3..... commenced before the Civil Judge, Mapusa. The final order in the said Inventory bears the date of 29th November. 1982. This final order represents the allotment of the assets of the late Tomas Pereira as made in the chart of partition and distribution of assets lefts left behind him.

4.Of the various assets described is the Item No. 115, a house situated at Saligao admittedly allotted to the respondent. It also transpires that the respondent had to deposit pay an welty amount (tormas) in the sum of Rupees 28,763,25 and some other interested party a further amount by way of owelty in

favour of the petitioner.

5. In 3rd February, 1983 the petitioner made an application for withdrawal and payment to him of the owelty money deposited by the respondent to which the respondent objected on the grounds that the petitioner is not entitled to such amount unless he restores the vacant possession of the house under the Item. No.115 to the respondent. It is an admitted fact that on the date when the inheritance opened, the house has since been in occupation of the petitioner. The petitioner however contended before the Judge that his withdrawal of the owelty money has nothing to do with his vacating the house in favour of the respondent and that these two are different unconnected matters.

6. About the same time, by his application dated 3rd February, 1983 the respondent prayed for possession of the said house (Item No. 115) in the same Inventory proceedings, thereby seeking to enforce the final order made in the Inventory as he was entitled to do by what that time having already deposited the owelty money.

7. The respondents contention not to allow the petitioner to withdraw the owelty amount failed before the Judge and he allowed the petitioner to withdraw the owelty money which the petitioner did in April, 1983.

8. The notice of execution filed by the respondent was served on Shri. V.B. Thali, the learned advocate who was representing the petitioner in the said Inventory proceedings. The said notice directed the petitioner to file his say in the matter of the execution making it returnable on 4th March, 1983. However, on 4th March 1983 Shri V.B. Thali, the petitioner in the Inventory filed a memo contending that this being a notice in an execution proceeding it ought to be served on the petitioner in person and not on him, although he had represented the petitioner in the Inventory. He sought to bring the attention of the Judge in the said memo that in the execution a party is required to be summoned personally. According to him what is required to be served on the parties is styled as "citacao" which is not same as "notificacao" which could be served on the Advocate. Whereas the first summon is equated to "citacao" which has to be served on the parties, "notificacao" can be equated to notice and can be served on the Advocate representing the party. According to him if execution is resorted to, Court is bound to issue "citacao".

9. However, on the same day, a little later the same Advocate on behalf of the petitioner presented another petition in the proceeding, averring that the assets left by the deceased father were worth some lakhs of rupees, out of which he has been allotted an insignificant sum of Rs. 44,681.56. That all the items have been auctioned in favour of the respondent and they are in his possession. That he has been continuously residing in the house which then stood allotted to the respondent and that he is fully aware that he has to vacate the said house in favour of the auctioned purchaser namely the respondent and he will do it on his own accord. But however he added that to vacate this house he has to secure

another modest dwelling and he can only do that after he gets the money. This, according to the petitioner was the moral aspect of the whole situation.

10. It is common ground between the parties that the petitioner presented another petition in the proceeding, averring that the assets left by the deceased father were worth some lakhs of rupees, out of which the has been allotted an insignificant which he has been allotted an insignificant sum of Rs. 44,681,56. .

11. Although the impugned order disposes of the petitioners grievance regarding the summons being served on his advocate instead of himself, in the present revision application before me no grievance of this nature has been canvassed.

12. Shri S. R. Tamba, the learned advocate for the petitioner in this revision application has for the first time before the learned Civil Judge. According to him once the aforementioned Inventory proceedings are culminated in the making of the final order on 29th November, 1982 inasmuch as the Indian Civil Procedure Code. 1908 is in force, any execution of the order in Inventory must be filed under the Civil P.C., 1908. It is the contention of Shri Tamba that whatever application filed by the respondent on 3rd February, 1983 as an Execution under the Portuguese Civil P.C. the aforesaid proceeding under the said Code are without jurisdiction and therefore no order could be made in the said proceedings for enforcing the final order for obtaining recovery of the house from the petitioner.

13. At the outset it must be said that Shri Tamba, the learned advocate for the petitioner does not dispute that the Inventory proceedings commenced by the parties under the Portuguese Civil P.C. are not valid or without or jurisdiction, or that no such proceedings the after lie the extension of the Indian Civil P.C. and the various other Indian laws to the Union territory of Goa, Daman and Diu. On the contrary, according to him at a that part or body of the Portuguese Civil P.C. relating to Inventory proceedings as embodied in Chapter XVII has been saved and are in force in spite of the extension of the Indian Civil P.C. 1908 and proceedings for distribution and partition of the assets as a deceased would lie to the competent Civil Court on the death of any person under the said Chapter XVII of the Portuguese Civil Procedure Code. His only objection is that once the Inventory proceeding culminates or terminates into a final order, the execution if required for obtaining possession of an asset resort must be had to the Civil P.C. 1908 for there is no provision for execution of any order in that part or body of the Portuguese Civil P.C. relating to Inventory proceedings.

14. Shri Tamba however agrees that there is no decree made in an Inventory proceedings inasmuch as there is no plaintiff on one side and defendant on the other. But according to him any final order made in the Inventory proceedings is still liable to be executed under the provision of the Indian Civil P.C. although such execution may not fall under O. 21 of the Civil P.C. yet, an application ought to be filed under the Indian Civil P.C

15. To appreciate this whole controversy a reference must be made to the history

of Goa vis-a-vis the legislation after the liberation of this territory. The territories of Goa, Daman and Diu became part of India with effect from 20th December, 1961 by virtue of certain amendments of the Constitution of India after the said territories were annexed. Under Article 239 of the constitution of India, the Goa, Daman and Diu (Administration) Act No.1 of 1962 provided for continuance of all laws in force in these territories immediately before the appointed day (20-12-61) until amended or repealed by a competent Legislature or other competent authority. Sub-sec (23) (of Section 5) gave power to the Central Government to adapt or modify by order such existing law within two years from the appointed day. Section 6 empowered the Central Government to extend by notification with whatever restrictions or modification laws in force in the territory of Goa, Daman and Diu. The Goa, Daman and Diu (extension of the CPC and the Arbitration Act) Act, 1940 extended the CPC of 1908 and the Arbitration Act of 1940 to Goa, Daman and Diu. Section 4(1) of the Goa, Daman and Diu (Extension of the CPC and the Arbitration Act) Act, 1940 provided :

"4(1) So much of any law in force in Goa, Daman and Diu as corresponds to the Civil P.C. of 1908 shall stand repealed as from the coming into force of this Act in Goa, Daman and Diu.

Provided that the repeal shall not affect -

the previous operation of any law so repealed or anything duly done or suffered acquired, thereunder; or

any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed, or

16. Provided further that, subject to the proceeding proviso notifications published, declarations and rules made, places appointed, agreements filed, awards made or filed, scales prescribed, forms framed, appointments made and powers conferred under any law so repealed shall, so far as they are consistent with the said Code or as the case may be, the said Act have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under the said Code or the said Act and by the authority empowered thereby in such behalf.

17. In every law or notification passed or issued before the commencement of this any Act in which reference is made to or to any Chapter or Section or provision of any law hereby repealed, such reference shall, so far as may be practicable, be taken to be made to the said Code, or, as the case may be, to the said Act, or its corresponding part, order, section or rule.

18. Sub-section (1) of Section 1 provides that the Act shall come into force on such date as the Central Government may by notification in the official Gazette appoint. Accordingly, by notification No. S.O. 1597 dated May 24, 1966 published in the Gazette of India, dated June 10, 1966, the Central Government has appointed the 15th June, 1966 as the date on and from which the Civil P.C. 1908

and the Arbitration Act, 1940 came into force in the territory of Goa, Daman and Diu".

19. It is needless to point out that once the civil P.C. 1908 and the Arbitration Act, 1940 came into force as from 15th June, 1966 all suits and executions were filed under the Civil P.C. 1908 with the result that the Portuguese of Civil P.C. corresponding to the provisions of the Indian Civil P.C. stood repealed.

20. Various suits and proceedings were pending in various courts on the date when the Civil P.C. (hereinafter called the Indian Code) was brought into force in this territory. From time to time complex and diverse problems arose before the Courts and the matters even reached the Supreme Court. Although a reference has been made to various authorities, namely Jose Da Costa and Another Vs. Bascora Sadasiva Sinai Narcornim and Others, , Narhari Sivram Shet Narvekar v. Pannalal Augusto De Piedade barreto v. Antonic Vicente Da Fonseca, as also Justiniano Augusto De Piedade Barreto Vs. Antonio Vicente Da Fonseca and Others, na Maria Cristina De Souza Sodder and Others Vs. Amria Zurana Pereira Pinto and Others, for the purpose of disposal of the point involved in this revision of application it is not necessary to refer to all the aforementioned authorities, because in those authorities it is clear that the proceedings were pending in one Court or the other when the Indian code was brought into force in this territory on 15th June, 1966.

21. As mentioned earlier Shri Tamba does not challenge that Chapter XVII of the Portuguese Civil P.C. stands repealed. On the contrary, according to him Chapter XVII very much survives and proceedings for distribution and partition of the assets even after the extension of the Indian Code (in) the Inventory proceedings shall be governed by Chapter XVII of the Portuguese Civil P.C. It is not out of the place however to usefully refer to the decision of the Supreme Court as reported in Maria Cristina De Souza Sodder and Others Vs. Amria Zurana Pereira Pinto and Others, , as the this authorities finally settles one of the major controversies. The question that arose in that case is as to the forum for appeals and revisions in the matter of orders passed by the Civil Courts in suits and proceedings pending on the date when the Indian Code has been extended to the territory of Goa, Daman and Diu and reading the provisions of the Goa. Daman and Diu Civil Courts Act, the forum for appeals and revisions shall be governed by the forum spoken of under the Portuguese Civil P.C.

22. The parties thereafter brought to my attention three more authorities of the Court of the Judicial Commissioner. The Judicial Commissioner, Shri Tito de Menezes by his Order dated the 27th March, 1980 in various Civil Appeals (including Apelações and Agravos), Review Application, held that Inventory proceedings as contained in Chapter XVII vide Arts. 1369 to 1447 of the Portuguese Civil P.C. are not analogous to any proceedings under the Indian Code and Succession Act. He held that there is no part of the Indian Code which can correspond to that part of the Portuguese Civil P.C. which lays down the proceedings for Inventory and, therefore, he went further to rule that Section 4

of the CPC and Arbitration Act) Act 1965 does not repeal that part of the Portuguese Civil P.C. which governs Inventory proceedings. A copy of this order is found in the proceedings in civil Appeal NO. 32|B|1981 (treated as Misc. Civil Appeal - Agravos Appeal No. 1|77). However, the matter did not rest there and in several batch of appeals, Apelacoes and Agravos then pending another piquant situation arose before the then Acting Judicial Commissioner, Shri K.M. Mishra. By his order dated 19th Feb., 1981 in the aforementioned batch of matters, while referring to the order of the Judicial Commissioner)supra referred to) to dated 27th March, 1980, he reiterated that chapter relating to Inventory in the Portuguese Civil P.C. is not repealed by the extension of the Indian Code, but held that any appeal or revision against any order in Inventory is governed by provisions of section 104 read with O. 14 and O. 43 of the Indian Civil P.c. In holding so he usefully referred to the authority of the Supreme Court in Maria Cristina De Souza Sodder and Others Vs. Amria Zurana Pereira Pinto and Others, referred to supra.

23. From the aforesaid two decisions, it is clear that Inventory proceedings would still lie under the Portuguese Civil P.c. and if a person is aggrieved by any order interlocutory or final made in Inventory , an appeal (Agravos or Apelacao) or revision, as the case may be, depending upon the nature of the order, would lie under the nature of the order , would lie under and shall be governed by the Indian Code. However yet another situation arose before the Hon'ble Acting Judicial Commissioner , Dr. G.F. Couto, in Civil Revision Application number 86|1981 in yet another different circumstance . The parties involved in the Civil Revision Application and what is more in the same Inventory , but however on a different point. In the said Revision Application the present petition had contended that inasmuch as there is no prohibition under Order 21 for a defaulter auction purchaser from taking part in a fresh auction ordered by the Court, the prohibitions contained in Article 904 of the Portuguese Civil P.C. stands repealed. The auction held in this very Inventory in his favour once having been annulled as he failed to deposit the monies for the items bidding by him within time , he was precluded from bidding at the fresh auction under Article 904 of the Portuguese Civil P.C. The point canvassed by the petition in the said Revision was that the Article 904 of the Portuguese Civil P.C. stood repealed, prohibit the defaulter auction purchaser from bidding at the fresh auction the prohibition as contained in Article 904 of the Portuguese Civil P.C. cannot be made applicable. The Acting Judicial Commissioner Dr. G. F. Couto as he then was and who has since been elevated to the Bench of this High Court held that the auction in the Inventory proceedings cannot be equated to auction under Order 21 and although the prohibition contained in Article 904 of the Portuguese Civil P.c. is not found in the part of body of the Code relating to Inventory proceedings, yet such prohibition would stand as against the petitioners and the petitioner did not succeed before him in the said revision application . for applicability the petitioner in the said fresh auction, the learned Judge held that those Articles relating to auction although outside Chapter XVII of the Portuguese Civil P.C. yet

nevertheless such provisions are applicable with necessary modifications and alterations as may be required by the very nature of the Inventory proceedings and he further held that to that extent those Articles outside Chapter XVII will become a special law applicable to Inventory proceedings , with the result that the he repelled the contention of the petitioner in the said revision.

24. Shri Tamba, the learned advocate for the petitioner although in the case for the before the Civil Judge only limited his submission that the notice ought to have been served personally on the petitioner and not on the Advocate the attract is on an entirely different ground.

25. According to him the execution filed by the application dated 3rd February, 1983 under Portuguese Civil P.c. (for short Portuguese Code) is null and void and without jurisdiction and hence the impugned order made on 22nd hence the impugned order made on 22nd November 1983 directing the Bailiff to evict the petitioner and restore is a nullity which ought to be set aside in this revision.

26. To appreciate his point, it is necessary to record the common ground between the parties.

27. Both the counsel are in agreement that or giving effect to the allotment made in the Inventory proceedings once the final order has been made, execution application is required to be filed. They further that the body of the Portuguese Civil P.c. relating to Inventory Proceedings namely chapter XVII vide Articles 1369 to 1447 there is no provision regarding filing of the execution for the purposes of enforcement of the order so made. They also agreement the execution of various orders, final or otherwise are contained in provisions other than Articles 1369 to 1447. The difference is whereas Shri Tamba, the learned advocate for the petitioner contends that as long as there is no specific provision relating to execution in the Chapter governing Inventory proceedings and as long as there is a provision for execution under the Indian Code, the proceedings for execution ought to be filed under the Indian Code, Dr. Colaco, the learned counsel for the respondent submits that once it is held that that body of the Portuguese Civil P.C. relating to Inventory proceedings is still in force for the purposes of execution of the orders, the execution ought to be filed under the provisions available under the Portuguese Civil P.C. itself, although such provisions are outside those Articles or Chapter XVII of the Portuguese Code.

28. Considering the argument of the learned counsel for the petitioner, it must be not said that the Inventory proceedings are not a suit and they are a distinct and separate proceedings from a suit as understood under the Civil P.c. It is no doubt true that under the Indian Civil P.C. "suits" has not been defined but there are parties opposing each other. Unlike a suit where there is a plaintiff on one side and defendant in the other, in Inventory proceedings all are only interested parties and either they are heirs or legal representatives or beneficiaries under gift or legatees under a Will. Once it is held that there is no decree passed in Inventory proceedings cannot be execution is required to be filed under the

Indian civil P.c. According to him once the remedy execution is available under the Indian Code, the various Articles contained in the Portuguese Civil P.c. relating execution stand repealed.

29. In opposing the submission of Mr. Tamba, Dr.. Coaco. The learned counsel for the respondent submits that under the Indian Civil P.C. execution proceedings when filed are entirely separate proceedings. Such proceedings are not even appended to the original suit. Even the court executing its own decree is not required to do so. The execution proceedings under the Indian Code are entirely has separate and the manner of its execution has been laid down under Order 21. According to Dr. Colaco. The execution application seeking to enforce the final the in the Inventory proceedings is to be filed in same file i. e. the Inventory itself in vide Article 90 . He further points out that there are several other Articles under the Portuguese Civil P.C. where execution proceedings are even required to be filed separately as and by way of appendage (apenco) to the original proceedings . It is his contention that inasmuch as in Inventory an application for execution is required to be filed in the Inventory itself although under Chapter XVII of the Portuguese Civil P.C. there is a no provision found else being where in the execution of orders, yet the provision found else where in the Portuguese Civil P.C. being so inter connected and inextricably mixed with the provisions outside Chapter XVII that by implication it must be held that such provisions of Chapter XVII that by implication it must be held that such provisions outside Chapter XVIIi of the Portuguese Civil P.C. cannot be deemed to have been repealed for the purpose of enforcing final orders made in Inventory proceedings. In the matter of interpretation on repeals, he invited my attention to the rule of interpretation referred to by the learned author Maxwell in his law relating to interpretation of Statues in dealing with retrospective operation of procedural law. The learned author says that :-

"But a new procedure would be presumably inapplicable where is application would prejudice rights established under the old or would rights involve a breach of faith between the parties."

30. Relying on this passage it was the contention of Dr. Colaco that if rights and proceedings are dealt with together the intention of the legislature is that old rights are to be determined by the old procedure and by the newly enforced provision dealing with the procedure to so enforced. He further submits that there are several matters of right involved in Chapter XVII along with the procedure and that they are inextricably mixed with various substances rights. According to him once the final order is made in Inventory proceedings, the right o of execution is substantive right and hence Portuguese Code will apply for execution of order in Inventory.

31. Dealing with the point vis-a-vis the procedure it must be accepted that the procedure, it must be accepted that there is no decree in the Inventory proceedings unlike in a suit. Under the Indian the Code what is sought to be execution is a decree made between, two parties or more than two parties. The

Inventory proceedings do not partake the character of a suit and, therefore, it cannot be held that for the purposes of executing a final order made in the Inventory the Indian Code. I am therefore unable to accept the contention of Shri Tamba, the learned advocate for the petitioner that in the matter of execution the final order in Inventory, an execution the application must be filed under the procedure of the Indian code.

32. Equally forceful is the next submission of Dr. Colaco when he says that the execution required to be filed is in the same Inventory and such an execution is not a separate proceeding.

33. In this connection it must be seen that in an execution proceeding under the Indian Code a decree is executed under Order 21. Even a pro forma is provided for such an execution. The proceedings are entirely separate right from its registration till its satisfaction. Such a proceeding is not appended to the original suit. However, it is filed in the same proceedings. It therefore cannot be conceived that one set of procedure will govern the Inventory till the final order and another set of procedure for execution in one and the same proceeding. Two procedures of this kind may even lead to undesirable result and create conflict of procedures.

34. Once it is held that that part of the Portuguese Civil P.C. dealing with Inventory proceedings survives and does execution of the final order arising under that part of the Portuguese Code, if a reference is required to be made to other Articles outside the aforementioned Chapter XVII of the Portuguese Civil P.C. it must be held that such Articles of the Portuguese civil P.C. shall be deemed to not have been repealed by the Extension Act of 1965. I am fortified in this view that I am taking by the judgement of Dr. G.f. Couto, the then Hon'ble Judicial Commissioner in Civil Revision Application No. 86/81 referred to supra wherein he held that by necessary implication Article 904 of the Portuguese Civil P.C. ought to be held as not repealed in making it applicable to Inventory proceedings. To sum, up it is clear that once the Inventory proceedings are culminated by a final order or to move an execution for obtaining the assets by the person to whom they are allotted such a proceeding will fall under those provisions of the Portuguese Civil P.C. which deal with execution and to that extent they are deemed not to have been repealed.

35. For all these various reasons I have to hold that whenever any party is entitled to allotment in an Inventory the execution being a continuation of the same proceeding, such an execution shall be governed by the procedure contained under the Portuguese Code itself, even though such a procedure is outside Chapter XVII. In view of the matter nothing survives in this revision application.

36. By the impugned order, the petitioners has been directed to vacate the house and restore possession to Respondent. The house has been obviously allotted to the respondent in the Inventory. The final order has become res judicata as no

appeal or revision is pending against it. The Bailiff has been directed to evict the petitioner and further ordered to hand over the possession of the house to the respondent. Considering the difficulty that may be faced by the petitioner, I hereby direct the petitioner to deliver quiet and vacant possession of the house (Item No. 115 in the Inventory Proceeding) to the respondent at 10.00 a.m. on the morning of 30th April, 1984. The learned Judge is therefore directed not to execute this order in view of the above direction . The revision application is dismissed. Rule is discharged. Order as to no costs.

37. Petition dismissed.