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Court : Mumbai Goa

Decided On : Mar-11-2014

Judge : U.V. Bakre

Appeal No. : Appeal From Order No. 67 of 2013

Appellant : Lisa Rodrigues E Mendonca and Another

Respondent : Eugenio Rodrigues and Others

Judgement :

1. Heard Mr. Pereira, learned Counsel appearing on behalf of the appellants and Mr. Sardessai, learned Counsel appearing on behalf of respondents no. 1 and 2.

2. Admit.

3. Heard forthwith by consent of the learned Counsel for the parties.

4. By this appeal, the appellants take exception to the order dated 24/07/2013 passed by the learned Civil Judge, Senior Division at Vasco-da-Gama ('trial Court'), on the objections dated 27/07/2012 filed by the respondents no 1 and 2 herein, in Special Inventory Proceedings No. 11/2011/A.

5. Respondent no. 3 initiated the said Inventory Proceedings No.11/2011/A on account of the death of her parents namely Mr. Macario Rodrigues, who expired on 15/03/2009 and Mrs. Yolanda D'Silva Rodrigues, who expired on 08/03/2010.

By order dated 13/01/2012, the said respondent no. 3 was appointed as Cabeca da Casal and she filed the list of assets dated 06/06/2012. Respondents no.1 and 2 filed their objections to the said list of assets thereby praying to exclude the properties since they are either gifted by means of gift deeds or bequeathed by means of Wills by the deceased Estate leavers, free of collation. Mainly, they objected on the following grounds:

(i) The assets are not listed as per requirements of the provisions of law;

(ii) The properties listed are not indicated with reference to all the particulars such as boundaries, nature of properties, land registration numbers, land revenue(matriz) numbers, flat/house house numbers, area and other details as are necessary so as to adequately identify the same;

(iii) The list of assets does not mention the improvements belonging to the inheritance (if any) and improvements made by third party;

(iv) The list does not include the expenses incurred by the interested party Shri Eugenio Rodrigues: (a) towards the maintenance and medical expenses of the deceased estate leavers; and (b) towards litigations in respect of the properties of the estate leavers;

(v) List of assets is not supported with the documents pertaining to the properties listed therein;

(vi) The list does not mention the future paternal and maternal legitime given to the interested party Mrs. Meena S. Quadros and Mrs Lisa Rodrigues Mendonca as dowry, namely gold ornaments, cash, flats and cash in lieu of flat, all of which given towards future legitime.

6. The Cabeca da Casal filed her reply to the objections of respondents no. 1 and 2. The present appellants also filed their reply to the said objections.

7. Respondents no. 1 and 2 along with their objections had produced copies of the following documents :

(i) Two Gift Deeds, both dated 6/8/2008, executed by Macario Rodrigues and his wife Mrs. Yolanda Rodrigues, in favour of Mrs Sarita Rodrigues (respondent no. 2);

(ii) Two Wills namely (a) Will dated 06/08/2008 executed by Macario Rodrigues; (b) Will dated 06/08/2008 executed by Mrs. Yolanda Rodrigues, both in favour of Eugenio Rodrigues (respondent no. 1);

(iii) A Sale Deed dated 27/01/2010 executed by Eugenio Rodrigues and Smt. Yolanda Rodrigues in favour of Mrs. Anita Dias; and

(iv) An Agreement of Development-cum-Sale dated 24/01/2008 between Macario Rodrigues and M/S Aditya Constructions.

8. The learned trial Court, upon considering the entire material on record, partly upheld the objections. The trial Court upheld the objection in respect of items no.1, 2, 3, 4, 5 and 6 and held that the said items cannot be the subject matter of the Inventory Proceedings. The said order dated 24/07/2013 is impugned in the present appeal.

9. Mr. Pereria, learned Counsel appearing on behalf of the appellants submitted that the impugned order is contrary to the provisions contained in Portuguese Civil Code and the Portuguese Civil Procedure Code. He submitted that a conjoint reading of provisions of Articles 2103, 2098, 2099, 2100 tom 2106, 2107 and Article 2111 which deal with the collation would show that the collation is subject to the concepts of œcalculation of half?, œreduction in case of in-officiousness?, œvalue of the gift at the time of opening of inheritance?, and œlegitime of the donee?. He submitted that in terms of Article 2009 of the Portuguese Civil Code, inheritance opens by the death of the estate leaver and, therefore, the death of estate leaver is material consideration. He further pointed out that in terms of Article 2011, the transmission of ownership and possession of inheritance to the heirs takes place from the time of the death. He, therefore, submitted that comparison of Articles 2009 and 2011 with entire Section of Collation (Articles 2098 to 2111), it is clear that the concept of collation is a subsequent modality for partition of the estates (separation of ownership/possession) though at the time of

death of the estate leaver, there is an inchoate transmission of the ownership/possession of all the heirs. He, therefore, submitted that the gift claimed to be exempted under Article 2103 will have to be decided during the Inventory Proceedings both for claim of exemption from collation as well as for non-violation of legitime of the heirs. According to him, therefore, the Portuguese Civil Code prioritises the concept of Indisposable Portion (Legitime) over all else in the matter of succession. He submitted that Article 1784 defines the Indisposable Portion or legitime to mean the portion of the properties that the testator cannot dispose of because it has been set apart by law for lineal descendents or ascendents. He submitted that Article 1789 lays down the rule regarding the reduction of in-officious gifts and disposition and Article 1790 provides for the detailed procedure for calculation of the value of the said disposable portion. He pointed out that Article 1406 of the Portuguese Civil Procedure Code of 1939 lays down the consequence of 'in-officiousness of Gift' and empowers any party to declare that he wishes to bid for an item which has been gifted by the deceased. According to him, even in the case of Gift, which is not subject to collation, the concept of in-officiousness operates and that the concept attached to in-officiousness can be finally determined only after the second appraisal is done. He, therefore, submitted that the gifted property (even after claimed to be not subject to collation) cannot be thrown out at the very first stage of finalisation of list of the properties. Mr. Pereira, learned Counsel appearing on behalf of the appellants, therefore, urged that the reasonings given by the trial Court are fallacious being contrary to law. He, therefore, urged that each of the items No. 3, 4, 5 and 6, the existence of which is not disputed, could not have been excluded from the list of assets. He, therefore, alleged that the impugned order is liable to be set aside and items no.1 to 6 ought to be restored back to the list of the assets and Inventory Proceedings should proceed further.

10. On the other hand, Mr. Sardessai, learned Counsel appearing on behalf of respondents no. 1 and 2 submitted that the main issue in the present appeal is whether the trial Court was right in holding that the gifts made to the spouse of the son are not subject to collation, by relying upon Article 2103 and, therefore, the consequential order, rejecting the appellants' objection to items no. 1 and 2 can be upheld. He submitted that if one reads the said Article 2103, it is clear beyond

doubt that the gifts made to the spouse of the son are not subject to collation. He submitted that it is the principle of interpretation of status that literal interpretation has to be accepted. He submitted that the learned Counsel appearing on behalf of the appellants has not shown any ambiguity in the said provision of Article 2103 and, therefore, there is no justification for this Court to deviate from the golden rule of literal interpretation. He further submitted that the learned Counsel for the appellants has tried to give different interpretation to Article 2103 by citing various Articles which otherwise are irrelevant and by raising hypothetical questions, which are not germane to the present lis. He submitted that Article 2099 in clear terms states that collation may be dispensed with amongst œforced heirs? subject to right of reduction in case of in-officiousness. He, therefore, submitted that only when it comes to forced heirs, collation is not dispensed with and in-officiousness can be a ground of reduction. He pointed out that Article 1969 carves out six categories of the œforced heirs? wherein the spouse of the child is not mentioned. He, therefore, submitted that clear intention is given to give full effect to what has been stated in Article 2103 i.e. œgifts made to the spouse of the son are not subject to collation?. He further submitted that the provisions of Article 2103 are in the nature of exception to the general law and, therefore, said exception should be given full effect and cannot be diluted. He submitted that the attempt of the appellants is to dilute the rigour of Article 2103 thereby nullifying the whole exception and rendering it totally ineffective. According to Mr. Sardessai, such an interpretation, which would nullify the rigour of the provision that too by considering hypothetical situation, has to be avoided. He, therefore, urged that no fault can be found with the impugned order and prayed that the appeal be dismissed.

11. Mr. Gawas, learned Counsel appearing on behalf of respondents no. 3 and 4 adopted the arguments advanced by the learned Counsel for the appellants.

12. I have perused the entire material on record. I have considered the submissions advanced by the learned Counsel for the parties.

13. Insofar as items no.1 and 2 are concerned, there is no dispute that there are 2 gift deeds dated 06/08/2008 by which the said items have been gifted to interested party no. c(ii) i.e. respondent no. 2 herein, who is the wife of the son of the

deceased estate leavers. There is no dispute that a conjoint reading of Articles 2103, 2098, 2099, 2100 to 2106, 2107 and Article 2111 of the Portuguese Civil Code reveals that the collation is subject to the concept of œcalculation of half?, œreduction in case of in-officiousness?, œvalue of the gift at the time of opening of inheritance?, and œlegitime of the donee?. There is also no dispute that in terms of Article 2009, inheritance opens by the death of estate leaver and in terms of Article 2011, transmission of ownership and possession of the inheritance to the heirs takes place moment the death of the estate leaver takes place. However, what is relevant in the present case is that the said gifts are in favour of the spouse of the son of the deceased estate leavers. Article 2103 of Portuguese Civil Code, 1867 specifically states that the gifts made to the spouse of the son are not subject to collation. Therefore, what is clear from this provision is that irrespective of whatever is stated elsewhere in the Civil Procedure Code, the gifts under the gifts deeds dated 06/08/2008 are not subject to collation. If the said gifts include the portions of the land which could not have been gifted, then that question may become the subject matter of any other litigation, but cannot be a subject matter of inventario, since such gifts are not subject to collation. As rightly pointed out by the learned Counsel appearing on behalf of the respondents, Article 2099 states that collation may be dispensed with among œforced heirs?..... save the right of reduction in case of in-officiousness. Thus, only when it comes to œforced heirs?, the collation is not dispensed with and in-officiousness can be a ground for reduction. It is pertinent to note that the legislature has specifically used the term œforced heirs?. Article 1969 carves out six categories of œforced heirs?. However, the spouse of the son is not mentioned in this Article 1969. What emerges out of the above is only that the gifts made to the spouse of the son are not subject to collation.

14. There is no substance in the contention of the learned Counsel appearing on behalf of the appellants that if the concept œin-officiousness? i.e. being in excess of disposable portion and offending the legitime is completely given go bye, then, any set of parents would circumvent Article 1784 in totality by gifting all their properties to son-in-law or daughter-in-law thereby totally depriving all the children even of their legitime. What is stated by Article 2103 is only that the gifts made to the spouse of the son are not subject to collation. That does not mean that such

gifts cannot be at all challenged, if they are illegal. In any case, the situation as stated by the learned Counsel for the appellants has not arisen in the present case. One should keep in mind that in the Portuguese Law as applicable to the State of Goa, there are provisions of contracting out of law. One such provision is contained in Article 1096 which is an exception to the law that husband and wife shall share the property by equal shares i.e. communion. Article 1096 which is an exception provides for contracting out of the above law of communion of assets by signing an ante nuptial deed. As has been rightly contended by the learned Counsel for the respondents, the attempt of the appellants is only to dilute the rigour of Article 2103 and to read into it various other provisions so as to nullify its effect. Such an interpretation cannot be allowed to be made in respect of the Statute. Article 2075 requires the immovable properties to be described with reference to their boundaries, names and numbers. However, the asset at item no. 1 has not been so described. The learned Counsel for the Appellants, though contended that this irregularity can be cured, however, the fact remains that even in this Appeal the said defect has not been cured. Therefore, items no.1 and 2 have been correctly kept out of the inventory proceedings, by the trial Court.

15. Coming to items no. 3, 4, 5 and 6, by wills dated 06/08/2008, the deceased estate leavers have bequeathed the items no. 3 and 4 free of collation, to their son Eugenio Rodrigues, the interested party no. C(i), who is the respondent no.1, herein . Besides the above, the said items no. 3 and 4 are also subject matter of an Agreement for Development-cum-Sale dated 24/01/2008 between the deceased estate leavers and M/s. Aditya Construction. A portion of Item No.5 has been sold by a Deed of Sale dated 27/01/2010 and unsold portion has been bequeathed by the deceased estate leaver to the interested party namely Eugenio Rodrigues with a specific averment that it is free of collation. The Cabeca de Casal has placed on record a certified copy of the plaint in Regular Civil Suit No. 9/2013/B filed by the Cabeca de Casal and her husband thereby challenging the said two Wills made by the deceased estate leavers dated 06/08/2008, the sale deed dated 27/01/2010 and Agreement for Development-cum-Sale dated 24/01/2008 and these litigations are pertaining to the said items no. 3, 4, 5 and 6. In such circumstances, items no. 3, 4, 5 and 6 could not have been included in the inventory proceedings and have been rightly excluded by the trial Court. As has

been rightly observed by the learned trial Court, Article 1380 lays down that where the dispute as regards the existence of the properties cannot be summarily decided in the inventory proceedings, because there is a necessity of larger investigation, the parties are required to be directed to pursue ordinary remedy and inventory proceeding is required to proceed in respect of the other properties. The concerned parties have already resorted to such ordinary remedy. Besides the above, the numbers of the flats by which the items no. 3, 4, 5 and 6 can be identified have not been stated and as already stated above, though the learned Counsel for the appellants contended that such defects can be cured, however, the fact remains that the appellants have not done so. In the circumstances above, the finding of the trial Court insofar as items no.3, 4, 5 and 6 are concerned, cannot be faulted. With regard to the other items and about the claims, which have not been listed, the trial Court has held that enquiry will have to be conducted.

16. In view of the above, the impugned order is in accordance with the settled principles of law. No interference therewith is called for.

17. In the result, the appeal is rejected.

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