IN THE HIGH COURT OF BOMBAY AT GOA
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CIVIL REVISION APPLICATION NO. 74 OF 2001

1. Shri Joao Quadros,
married, landlord,

2. Shri Melito Quadros,
married, landlord, both
r/o Santemol, Raia,
Salcete, Goa. ... Petitioners.

Versus

1. Shri Luis Jose Serafico
Quadros, major, married
and his wife,

2. Smt. Tina Rebelo, both
r/o Sernabatim, Colva,
Salcete,

3. Shri Fancisco Xavier
Gabriel Quadros, and

4. Deodita Pinto, both r/o
Santemol, Raia, Salcete,
Goa. ... Respondents.

Mr. M. S. Usgaokar, Senior Advocate with Mr. Sudesh Usgaokar and Mr. Sanjay Sardessai, advocates for the applicants.

Mr. M. B. D'Costa, with Mr. J. A. Lobo, advocates for respondent nos.1 to 4.

CORAM : S. J. VAZIFDAR &
P. V. HARDAS, JJ.

DATE OF RESERVING THE JUDGMENT : 25th April, 2003.

DATE OF PRONOUNCING THE JUDGMENT : 2nd May, 2003.

JUDGMENT

This Civil Revision Application is filed against an Order dated 2nd February, 2001, passed by the Court of the District Judge, South Goa, Margao, in Miscellaneous Civil Appeal No. 138 of 199, dismissing the applicants' appeal against an Order dated 4th October, 1999, in

Inventory Proceedings No.91/91/M, in which the claims of the applicants alleged to be recoverable by them from the estate of their deceased parents, was disallowed from being included in the list of assets.

2. The proceedings were for partition of the estate and the distribution of the assets of the deceased Mrs. Remediana Clarina Gonsalves. She was the widow of Francisco Xavier Quadros. On the death of the latter, the proceedings for partition of his estate were adopted and stood concluded. The deceased were the parents of the parties herein and of:-

(i) Smt. Margarida Quadros, daughter, since deceased married to Shri Pedro Pinheiro,

(ii) Smt. Antonieta Quadros, daughter, married to Shri Felipe Dias,

(iii) Smt. Marianinha Quadros, daughter, married to Shri Jovito Gomes,

(iv) Smt. Aninha Quadros, daughter, married to Shri Tolentino Almeida, and

(v) Kum. Unbaldina Quadros, daughter, spinster.

3. Petitioner no.1 is the **cabeca de casal**, i.e. the head of the family. He initiated the inventory proceedings under the Civil Code, which is applicable in the present case. He filed the inventory list of estate of 15 items, which is the subject-matter of the present proceedings. Since some of the arguments are based on the nature of the description thereof, it would be convenient to set out the list. Item Nos.3 to 15 are listed verbatim. The list reads as under:-

"Item No.1: Immoveable property consisting of a residential house known as 'SANTAMOLA';

Item No.2: Immoveable property known as 'CHINTOLFONDI';

Item No.3: Half dowry given to daughter Maria Margarida.....Rs.750.00

Item No.4: Half dowry given to daughter Antonieta.....Rs.50.00

Item No.5: Debt of Rs.3,000/- paid by Melito D. Quadros to Mr. Jose Sebastiao da Piedade Callaco from Raia.....Rs.3,000.00

Item No.6: Debt of expenses towards maintenance of residential house situated in item no.1 incurred by Melito D. Quadros .....Rs. 30,000.00

Item No.7: Debt towards repairing to the same house, situated in the item no.1, done by Melito D. Quadros Rs.75,000.00

Item No.8: Debt towards construction of stone wall around the property under item no.1 above done by Melito D.Quadros....Rs.50,000.00

Item No.9: Debt towards construction of cow-shed, with stones and cement, by Melito D. Quadros in item no.1 above.....Rs.30,000.00

Item No.10: Debt towards improvements with cultivation of coconut plants in item no.1, by Melito D. Quadros.....Rs.20,000.00

Item No.11: Dowry given to Maria Ana by Fancisco.....Rs.8,000.00

Item No.12: Dowry given to Maria Ana by Melito D. Quadros...Rs.35,000.00

Item No.13: Dowry given to Maria Aninha by Joao A. Quadros.....Rs.3,000.00

Item No.14: Dowry given to Maria Aninha by Melito D. Quadros...Rs.15,000.00

Item No.15: Dowry given to Maria Aninha by Serafico Quadros.....Rs.2,000.00

4. Mr. M. B. D'Costa, the learned counsel appearing on behalf of the respondents, raised a preliminary objection to the maintainability of the Civil Revision Application. He submitted that the impugned Judgment was concerned with an appeal from a decree in a suit and not from inventory proceedings. According to him, the impugned Order was passed in Miscellaneous Civil Appeal No.138 of 1999. The argument cannot be accepted in view of the judgments of this Court which are binding on me. The Order of the trial Court was in Inventory Proceedings No.91/91/M. The point is covered in favour of the petitioners by the judgments of this Court in **Aruna Gaekwad & Ors. vs. Sanjita Udaisingh Rane Sardessai 2000(2) Goa L.T. 479** and **Shri Krishna Mhalu Pai Raikar & Anr. vs. Hari Mhalu Pai Raikar**, dated 12th April, 2001, in Appeal

From Order no.16/2000 (A.M. Khanwilkar, J.).

5. The Court of the Comarca Judge of Salcete and Quepem and the District Judge, South Goa, Margao, by the impugned Judgments rejected Item Nos. 3 to 15 of the above list. Item Nos. 1 and 2 which relate to the said immoveable properties were admitted.

RE. ITEM NOS. 3 AND 4:

6. Mr. Usgaokar submitted that despite the items being admitted, the same were rejected. However, as rightly submitted by Mr. D'Costa, in respect of these Items it is merely stated that the amounts were given to the concerned daughters. There are no particulars as to who gave these said amounts to the daughters. In the circumstances, the inclusion of Item Nos.3 and 4 in the list was rightly rejected.

RE. ITEM NOS. 11 TO 15:

7. Item Nos. 11 to 15 are similar to Items Nos. 3 and 4. They however furnish the particulars of who forwarded the said amounts. Mr. D'Costa submitted that the particulars were insufficient inasmuch as it is not

mentioned in the list that the amounts were paid by the respective persons mentioned in each Item to the parents as a loan/advance to enable them to utilize the said amounts for their daughters' marriage. Item Nos.11 and 15 pertain to the respondents. If they do not wish the said amounts to be included in the list, there is nothing that prevents them from objecting to the same. Mr. D'Costa's submission has some force in respect of Item No.13, as it refers to an amount allegedly paid by petitioner no.1 who, as the **cabeca da casal**, prepared the list. Assuming that there was a defect in the pleading as contended by Mr. D'Costa, the same cannot bind petitioner no.2. However Mr. D'Costa stated that petitioner no.2 to whom Item Nos. 12 and 14 pertain also had the opportunity and ought to have further clarified the items as he was entitled to under Article 1379 paragraph 2 of the Portuguese Code of Civil Procedure, which reads as follows:-

> "During the period of examination or inspection the advocates and the Public Prosecutor may complain about lack of description of the properties, or give their say in case the administrator or the donee deny the existence of the properties in their possession or the duty to bring them under collation, or raise question as to which properties he received and has obligation to collate."

8. In my opinion, the inclusion by petitioner no.1 of the Items under reference in the list, implied that according to him, the amounts were forwarded by the respective persons mentioned against each Item to the

parent, for the purpose referred to therein. There is no other explanation or reason why the same should have been included. Petitioner no.1 was legitimately entitled to proceed on that basis which he did. Looking at the nature of the parties, this is even more plausible.

9. Added to this is the fact that at a meeting held in the Court of the Civil Judge, Junior Division, the sisters admitted having received the amounts at serial numbers 12 and 14, with which petitioner no.2 is concerned. At this meeting, the respondents were present. No objections were raised at this meeting. There is nothing to suggest that the admissions made by the sisters ought not to be accepted. Petitioner no.1 in his examination-in-chief has deposed to Item No. 13 stating that he had advanced Rs.3,000/-. This has not been challenged. Paragraph 8 of the written statement reads as under:-

> "8. With reference to items numbers 11 to 15, it is stated that the interested parties Serafico and Jose A. Quadros and Francisco had given amounts to their mother towards the marriage expenses of their sisters. It is denied that any amount was given to Melito towards the dowry of their sisters as claimed in items numbers 12 and 14."

10. The learned District Judge rejected the inclusion of Item Nos. 11 to 15 on the ground that they could be included only if it is shown that the amounts had

been paid from the estate. This is a clear error of law. It is not necessary that the amount must be paid from the estate. It is sufficient if the amount is paid as a loan to the estate and the estate thereafter pays the same for any purpose. The privity is between the estate and the person who advances monies to the estate. What the estate does with the same is, in that sense, irrelevant. Here what the estate has done with the amount is only indicative of what the estate did with the amount advanced to it. Further, the learned Judge appears to have principally proceeded on the basis that there is no documentary evidence in respect of the said amounts. Indeed it would have been surprising if there was documentary evidence in such a matter. The learned Judge has said that the evidence cannot be said to be cogent and sufficient, principally because there was no documentary evidence. Firstly, it is not necessary that claims of this nature can be established only by documentary evidence. It was incumbent upon the learned Judge to have examined and dealt with the entire evidence, including the oral evidence. The learned Judge failed to do so.

RE. ITEM NO. 5

11. The respondents' case in the written statement is that the loan was repaid by their deceased

mother out of common funds. Mr. Usgaokar stated that petitioner no.2 was in possession of the receipt evidencing repayment of the loan. This he stated was because petitioner no.2 had repaid it on behalf of his mother. In his cross-examination, petitioner no.2 stated that he used to hand over the money to his mother for such payment and then collect the money from her and pay the same to the creditors. To a question as to why it was necessary for him to first hand over the money to his mother and thereafter take the same money from her to pay the creditors, petitioner no.2 stated that he did so because his mother was the elder of the family after the death of his father. It is difficult to accept the evidence of petitioner no.2. There is no plausible reason why he had to first hand over the money to his mother, thereafter take the money back from her and repay the loan. The reason alleged by petitioner no.2 is not plausible. It does not stand to reason. In the circumstances, the learned Judge rightly rejected this Item. Considering the amount involved, namely Rs.3,000/-, it is not implausible that the same was paid by the mother from out of the common funds.

RE. ITEM NOS . 8 AND 9

12. It is important firstly to see the respondents' case in the written statement in respect of

Item Nos. 8 and 9. In paragraph 5 of the written statement, the respondents admit that the stone wall was constructed by petitioner no.2. Further, they stated that the same was constructed by him to protect his cattle, which he used to keep in the property. Hence, it is averred, petitioner no.2 cannot claim any amount in respect of this construction. It is also denied that the construction cost was Rs.50,000/-. The respondents' case was that it would not exceed Rs.3,000/-. In paragraph 6 while dealing with Item No.9 of the list, the respondents admit that the cow-shed was constructed by petitioner no.2. They further stated that the same was constructed by him to house his cattle since he was engaged in the milk business, for which he had bought a number of cattle heads and housed them in the cattle-shed. He therefore it is averred, cannot claim the amount spent for the construction thereof. It is further stated that if he desires to claim such amount, he would have to pay the rent for the use of the cattle-shed, which would not be less than Rs.1,000/- per month. Lastly, it is averred that the construction would not cost more than Rs.4,000/-.

13. It is important, therefore, to note that in the written statement the respondents' case is that petitioner no.2 was engaged in the milk business and that he owned several cattle heads. It is important to note the same because in the oral evidence for the first time,

respondent no.1 has come out with a case that the business was actually being conducted by the parents and that petitioner no.2 was only helping them with the same. This aspect becomes relevant while dealing with Item Nos. 6 and 7 of the list.

14. Suffice it to state in respect of Item Nos.8 and 9 that the respondents admitted that petitioner no.2 put up the said construction. It is further important to note that in the cross-examination the positive case put to petitioner no.1 was that petitioner no.2 had constructed the compound wall to protect his cattle which he used to keep in the property. Thus two cases were put to petitioner no.1. Firstly, that petitioner no.2 had constructed the compound wall and secondly, that the cattle belonged to petitioner no.2.

15. Mr. D'Costa rightly submitted that even assuming that the value of the construction is as alleged by the petitioners, they would not be entitled to the valuation in these inventory proceedings. The construction was utilized by petitioner no.2 for his own benefit and not for the benefit of the other members of the family. He, therefore, cannot claim the amount that he has spent for the said construction. However, by a partition and sale of the estate the construction would also be sold. The petitioners would be entitled to the value of such

constructions as on the date of the death of their mother. This is an aspect which will have to be determined by the inventory court.

16. The impugned Order does not deal with these aspects at all. The learned Judge has entirely failed to exercise his jurisdiction and powers to decide these claims. Thus, Item Nos. 8 and 9 will have to be included in the inventory list, subject to valuation thereof on the date of death of the petitioners' mother.

RE. ITEM NO. 10

17. The respondents deny that any improvements were done by Melito by cultivation of coconut plants or that an amount of Rs.20,000/- was spent by him for the same. The learned Judge in the impugned order has, in fact, dealt with the oral evidence in regard to the petitioners' claim under Item No.10. The learned Judge has disbelieved the evidence of P.W.4. I am not inclined to take a different view while exercising my powers of revision under Section 115 of the Code of Civil Procedure. I do not find any infirmity in the finding in this regard. The Order of the learned Judge rejecting Item No. 10 is, therefore, upheld.

RE. ITEM NO. 6

18. In the written statement, the respondents' case is that the expenses of maintenance of the residential house were carried out by their deceased mother and not by petitioner no.2. The fact that the work was carried out has not been denied. Nor have the respondents denied the cost incurred as stated by the petitioners. The respondents' defence is limited to the aspect that it was not petitioner no.2 but their deceased mother, who incurred the expenses for the work.

19. The impugned Order proceeds principally on the basis that the petitioners had not produced any contracts or receipts to establish that the work was carried out at the expense of petitioner no.2. At one stage the learned Judge appears to have confused the evidence relating to some of the items with that of the evidence relating to Item Nos. 6 and 7. There was no question of the petitioners establishing the amount spent for the work. The respondents did not deny the same. It was necessary, therefore, for the learned Judge to have considered and decided the question of onus of proof. It was also necessary to have considered the oral evidence on this aspect. This is not a fact which can be proved only by documentary evidence. It is true that the evidence of the contractor establishes only that the work was done and

not that petitioner no.2 incurred the costs in respect thereof.

20. The evidence discloses on the balance of probability that petitioner no.2 did have the financial means to incur the expenses. I have while dealing with Item Nos. 8 and 9, observed that petitioner no.2 was carrying on milk business. This was, in fact, admitted in the written statement. Petitioner no.2 also carried on the business of pharmacy. Mr. D'Costa tried to establish that this business was not carried out by petitioner no.2. I am unable to agree with him. The licence for the business was in the name of petitioner no.2. The respondents' case was that it was Gabriel, i.e. the brother of the petitioners, who carried on the said business, but that the licence was taken in the name of petitioner no.2, because Gabriel intended going abroad. (Pharmacy business had commenced in 1974). In fact, this case is contrary to the answer of respondent no.1 in his cross-examination, where he stated that he did not know since when the pharmacy business had been transferred to the name of petitioner no.2. Moreover, Gabriel has not given any evidence to this effect. Respondent no.1 has admitted that the pharmacy business yielded a good income. There is one further factor that indicates the same. In respect of Item Nos. 8 and 9, the respondents have admitted that the costs of construction of the shed were incurred by petitioner no.2, albeit,

involving according to them, aggregate expenses of only Rs.7,000/-. In his cross-examination at one stage, respondent no.1 had to admit that: "It is true that the business of pharmacy was being done by my brother, Melito (i.e. petitioner no.2)". In the circumstance,s on the basis of the record, it must be held that petitioner no.2 had the financial ability to meet the expenses referred to in Item Nos. 6 and 7.

21. In the circumstances, the learned Judge wrongly removed Item No.6 from the list. Item No.6 ought to be included in the inventory list.

RE. ITEM NO. 7

22. The respondents deny that petitioner no.2 spent any amount towards repairs of the house. In the written statement, it is averred that all the repairs were carried out by their deceased mother during her life-time out of money contributed by all the sons. It is important to note that once again the fact that the work was carried out is not denied. Nor have the respondents denied the costs incurred for the same.

Further, it would be noticed that 50% of the amount was, even according to the respondents, incurred by the

petitioners,inasmuch as in the written statement it is averred that the money was contributed by all the sons.

23. The error in the impugned Order qua Item No.6 was also committed qua Item No.7. It is further pertinent to note that the respondents also did not produce any documentary evidence in support of their contention that the amounts were contributed by them. The learned Judge unfortunately did not consider the oral evidence as he ought to have while dealing with this Item either. This is an error which can certainly be corrected in revision. I have already held that petitioner no.2 had the ability to incur the expenses. There is no convincing evidence to show that the deceased mother incurred the expenses from out of the amounts contributed by the four sons. There is no evidence to suggest that the respondents, other than respondent no.1 in any event contributed any amount. Thus, at the highest, what can be said in favour of the respondents is that the petitioners had not established their case to the extent of the share of respondent no.1. Only respondent no.1 led his evidence. His evidence does not, by any stretch of imagination establish that Gabriel spent any amount. In fact, his evidence suggests that he did not. The evidence of Gabriel has not been led. Thus, at the most, 25% could be deducted from the amount claimed. I intend doing so, for the simple reason that the onus in respect of respondent no.1’s 25% cannot be said to have

shifted from the petitioners.

24. The removal of the Item altogether is unsustainable and is a result of the learned Judge not having considered the evidence and the most important question of on whom the onus lay.

25. The removal of Item no.7 is thus upheld only to the extent of Rs.19,000/-, i.e. about 25% of Rs.75,000/-. Item No.7 shall, therefore, be retained to the extent of Rs.56,000/-.

26. In the circumstances, the impugned Order is set aside to the extent indicated above. In other words, the removal of Item Nos. 3, 4, 5 and 10 from the list is upheld. The removal of Item No.6 is set aside. The same shall be retained in the inventory list. The removal of Item No.7 to the extent of Rs.56,000/- is set aside. Item No.7 shall be retained in the inventory list to the extent of Rs.56,000/- (rupees fifty six thousand only). Removal of Item Nos. 8 and 9 is set aside. Their value however, shall be determined by the Inventory Court, on the date of the death of the deceased mother, in accordance with law.

27. In the circumstances of the case, there shall be no order as to costs.

S. J. VAZIFDAR, J.

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