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JOSE PAULO COUTINHO

v.

MARIA LUIZAVALENTINA PEREIRA & ANR.

(Civil Appeal No. 7378 of 2010)

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SEPTEMBER 13, 2019

**[DEEPAK GUPTA AND ANIRUDDHA BOSE, JJ]**

*Portuguese Civil Code, 1867:*

C *Whether Portuguese Civil Code, a foreign law – Applicability of principles of private international law, to the Code – Held: Portuguese law which may have had foreign origin became a part of the Indian laws – It is an Indian law and no longer a foreign law – Goa is a territory of India, all domiciles of Goa are citizens of India – Portuguese Civil Code is applicable only on account of the Goa, Daman and Diu (Administration) Ordinance, 1962 and the*  
D *Goa, Daman and Diu (Administration) Act, 1962 – Thus, the Portuguese Civil Code is an Indian law and no principles of private international law are applicable – Goa, Daman and Diu (Administration) Act, 1962.*

E *Property of a Goan domicile outside the territory of Goa, if governed by the Code or by Indian Succession Act or by personal laws, as applicable in the rest of the country – Held: Domicile of Goa, who starts living in Bombay or in any other part of India, cannot be said to be Portuguese and he cannot be said to be living in a foreign country – This person is only a Goan domicile living*  
F *outside Goa in India, which is his country – Portuguese Civil Code being a special Act, applicable only to the domiciles of Goa, will be applicable to the Goan domiciles in respect to all the properties wherever they be situated in India whether within Goa or outside Goa and s. 5 of the Indian Succession Act or the laws of succession would not be applicable to such Goan domiciles – Indian Succession*  
G *Act, 1925.*

*Grant of probate by the High Court of Bombay at Goa in respect of the Will executed by the father – Effect of, on the laws of inheritance – Held: Jurisdiction of a probate court is limited to*

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*decide whether the Will is genuine or not – Grant of probate will not in any manner affect the rights of inheritance of all the legal heirs of the deceased – Portuguese Civil Code, 1867 as applicable in the State of Goa, shall govern the rights of succession and inheritance even in respect of properties of a Goan domicile situated outside Goa, anywhere in India.*

*Interpretation of statutes: Principle of – Held: When there is a conflict between the general law and the special law then the special law shall prevail – This principle will apply with greater force to special law which is also additionally a local law – Its based on the latin maxim generalia specialibus non derogant i.e. general law yields to special law should they operate in the same field on the same subject.*

#### Allowing the appeal, the Court

**HELD: 1.1 The Civil Code may be a Code of Portuguese origin but after conquest and annexation of Goa, Daman and Diu, this Code became applicable to the domiciles of Goa only by virtue of the Ordinance and thereafter, by the Act. Therefore, the Civil Code has been enforced in Goa, Daman and Diu by an Act of the Indian Parliament and thus, becomes an Indian law. [Para 14] [402-E-F]**

**1.2 In so far as the continuance of old laws is concerned, the new sovereign is not bound to follow the old laws. It is at liberty to adopt the old laws wholly or in part. It may totally reject the old laws and replace them with laws which apply in the other territories of the new sovereign. It is for the new sovereign to decide what action it would take with regard to the application of laws and from which date which law is to apply. As far as the instant case is concerned, firstly the President by an Ordinance and later Parliament by an Act of Parliament decided that certain laws, as applicable to the territories of Goa, Daman and Diu prior to its conquest, which may be referred to as the erstwhile Portuguese laws, would continue in the territories. It was, however, made clear that these laws would continue only until amended or repealed by competent legislature or by other competent authority. Thus, these laws would not have been applicable unless**

A recognised by the Indian Government and the Portuguese Civil Code continued to apply in Goa only because of an Act of the Parliament of India. Therefore, the Portuguese law which may have had foreign origin became a part of the Indian laws, and, in sum and substance, is an Indian law. It is no longer a foreign law.  
B Goa is a territory of India; all domiciles of Goa are citizens of India; the Portuguese Civil Code is applicable only on account of the Ordinance and the Act. Therefore, it is crystal clear that the Code is an Indian law and no principles of private international law are applicable to this case. [Para 17, 18] [406-B-F]

C 2.1 The Indian Parliament has made the earlier Portuguese Civil Code applicable in the State of Goa. Article 24 has no applicability to the facts of the instant case. When a law is adopted or applied in a new situation, it has to be read in that context. Article 24 has to be read in context of the annexation of the territories of Goa by conquest and their becoming an inherent  
D part of India. There are no Goan citizens; there can be domiciles of Goa but all are citizens of India. As Indian citizens, under Article 19 of the Constitution, they are free to move to any part of the country, reside there and buy property subject to the local laws and limitations. Therefore, a domicile of Goa, who starts living in  
E Bombay or in any other part of India, cannot be said to be Portuguese by any stretch of imagination and he cannot be said to be living in a foreign country. Indian citizens living in India cannot, be said to be living in a foreign country. This person is only a Goan domicile living outside Goa in India, which is his country. Therefore, Article 24, has no applicability.[Para 22]  
F [407-G; 408-C-E]

G 2.2 The parties are ad idem that the Code applies. A bare reading of Article 1737 clearly indicates that the inheritance of a deceased comprises of all the assets, rights and liabilities of the deceased. The only exclusion, is totally personal assets or those excluded by the disposition of the said deceased or by law. Article 1766 provides that a married person shall not on the penalty of nullity dispose of certain and specific properties of the couple except if the said properties have been allotted to the said person. The basis of this article is that both spouses are equal owners of the entire property of the couple - acquired before or after  
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marriage. Therefore, the disposition of some part of the property without the consent of the other spouse can be termed a nullity. [Para 23-24] [408-E-H; 409-B-C]

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2.3 In most of the cases, the legitime would be half. Once it is concluded that the Civil Code is an Indian law and the domiciles of Goa, for all intent and purposes, are Indian citizens, it would not be prudent to hold that the Civil Code, in matters of succession, would apply only in respect to properties situated within the territories of Goa. [Para 25] [409-E-F]

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2.4 Succession is governed normally by the personal laws and where there is a uniform civil code, as in Goa, by the Civil Code. Once Article 24 is not to be taken into consideration then it is but obvious that all the properties whether within Goa or outside Goa, must be governed by the Civil Code of Goa. If it was to be held otherwise, the consequences could be disastrous, to say the least. There would be no certainty of succession. It would be virtually impossible to determine the legitime which is an inherent part of the law of succession. The rights of the spouses to have 50% of the property could easily be defeated by buying properties outside the State of Goa. In the case of a Hindu Goan domicile it would lead to further complications because if the judgment of the Single Judge and the arguments of the respondents were to be accepted, for the properties in Goa, the Civil Code would apply but for the properties outside the territory of Goa, the Hindu Succession Act will apply. Similarly, for Muslims within the State of Goa, Civil Code would apply and outside Goa, the Muslim Personal Law (Shariat) Application Act, 1937 would apply. This would lead to many uncalled for disputes and total uncertainty with regard to succession. [Para 26] [409-G-H; 410-A-B]

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2.5 There must be unity in succession. The Portuguese law is based on the Roman law concept of hereditas i.e. inheritance to the entire legal position of a deceased man. Though it is held that this is Indian law, since it is a law of Portuguese origin, the guidance is to be taken from the way in which the law has been applied to come to the conclusion to see what is the intention of the law. Therefore, all the properties of the person whose

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- A inheritance is in question have to be calculated and considered as one big conglomerate unit and then the rules of succession will apply. [Para 27] [410-C, G]

- 2.6 There is a conflict between the Indian Succession Act, the Hindu Succession Act, the Muslim Personal Law (Shariat) Application Act, 1937, etc. and the Portuguese Civil Code with regard to the laws of inheritance but this conflict has to be resolved. The Parliament of India, after conquest of Goa, by adopting the Portuguese Civil Code accepted that the Goan domiciles were to be governed by that law in matters covered under the Code and specifically included in the laws which were made applicable. The Indian Parliament did not make applicable all Portuguese laws but the laws which were applied would apply with full force. The Goa, Daman and Diu (Administration) Act, 1962 is a special law dealing with the domiciles of Goa alone. This special law making the Portuguese Civil Code applicable is an exception carved out of the general laws of succession namely Indian Succession Act, Hindu Succession Act, 1956, Muslim Personal Law (Shariat) Application Act, 1937 and other laws. [Para 28] [410-H; 411-A-C]
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- 2.7 It is a well settled principle of statutory interpretation that when there is a conflict between the general law and the special law then the special law shall prevail. This principle will apply with greater force to special law which is also additionally a local law. This judicial principle is based on the latin maxim *generalalia specialibus non derogant*, i.e., general law yields to special law should they operate in the same field on the same subject. [Para 29] [411-D]
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- 2.8 The Portuguese Civil Code, in matters of succession, is both a special law and a local law. It is special and local because it deals with laws of succession for the domiciles of Goa only. The Portuguese Civil Code being a special Act, applicable only to the domiciles of Goa, will be applicable to the Goan domiciles in respect to all the properties wherever they be situated in India whether within Goa or outside Goa and Section 5 of the Indian
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Succession Act or the laws of succession would not be applicable to such Goan domiciles. [Para 30-31] [412-A-B; D-E] A

3.1 The order granting probate has not been produced by any side though it is admitted by all sides that probate was granted and the appellants had notice of the probate case. Assuming that probate had been granted, as regards the effect of the grant of probate on the laws of inheritance, grant of probate has nothing to do with inheritance. The jurisdiction of a probate court is limited to decide whether the Will is genuine or not. The Will may be genuine but the grant of probate does not mean that the Will is valid even if it violates the laws of inheritance. The legitime is the right of the heirs by birth. When both the spouses are alive, they own half of the property. Mere grant of probate will not mean that the husband can Will away more than half of the property even if that be in his name. The grant of probate by the Bombay High Court in respect of the Will executed by JMP did not in any manner affect the rights of inheritance of all the legal heirs of the deceased. [Para 32-33] [412-F-H; 413-A, E] B C D

3.2 The Portuguese Civil Code, 1867 as applicable in the State of Goa, shall govern the rights of succession and inheritance even in respect of properties of a Goan domicile situated outside Goa, anywhere in India. [Para 34] [413-F] E

4. The property of late JMP at Bombay is to be included in the inventory of properties in the inventory proceedings in Goa for all intent and purposes. The judgment of the Single Judge of the High Court is set aside and the order of the Court of Comarca Judge in Inventory Proceedings is restored. [Para 35] [413-G; 414-A] F

*A. P. Fernandes v. Annette Blunt Finch and others* 2015 (6) Mh.L.J. 717 ; *Pema Chibar v. Union of India & Ors.* AIR 1966 SC 442 : [1966] SCR 357 ; *Vinodkumar Shantilal Gosalia v. Gangadhar Narsingdas Agarwal* (1981) 4 SCC 226 : [1982] 1 SCR 392 ; *Mohd. Ahmed Khan v. Shah Bano* (1985) 2 SCC 556 : [1985] 3 SCR 844 ; *Sarla Mudgal & Ors. v. Union of India & Ors.* (1995) 3 SCC 635 : [1995] 1 Suppl. SCR 250 ; *R.S.* G

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- A *Raghunath v. State of Karnataka & Ors.* (1992) 1 SCC 335 : [1991] 1 Suppl. SCR 387 ; *Commercial Tax Officer, Rajasthan v. Binani Cements Ltd. & Ors.* (2014) 8 SCC 319 : [2014] 3 SCR 1 ; *Atma Ram Properties Pvt. Ltd. v. The Oriental Insurance Co. Ltd.* (2018) 2 SCC 27 : [2017] 12 SCR 1044 ; *Justiniano Augusto De Piedade Barreto & Ors. v. Antonio Vicente Da Fonseca & Ors.* (1979) 3 SCC 47 : [1979] 3 SCR 494 ; *Krishna Kumar Birla v. Rajendra Singh Lodha* (2008) 4 SCC 300 : [2008] 5 SCR 640 - referred to.
- B
- C *Comparative Analysis of Civil Law Succession, Villanova Law Review* Vol. 11, Issue 2 - referred to.

Case Law Reference

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|---|-------------------------|--------------|---------|
|   | 2015 (6) Mh.L.J. 717    | referred to. | Para 9  |
|   | [1966] SCR 357          | referred to. | Para 15 |
| D | [1982] 1 SCR 392        | referred to. | Para 16 |
|   | [1985] 3 SCR 844        | referred to. | Para 20 |
|   | [1995] 1 Suppl. SCR 250 | referred to. | Para 20 |
| E | [1991] 1 Suppl. SCR 387 | referred to. | Para 29 |
|   | [2014] 3 SCR 1          | referred to. | Para 29 |
|   | [2017] 12 SCR 1044      | referred to. | Para 29 |
|   | [1979] 3 SCR 494        | referred to. | Para 30 |
| F | [2008] 5 SCR 640        | referred to. | Para 33 |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7378 of 2010.

From the Judgment and Order dated 08.08.2008 of the High Court of Bombay at Goa, Panaji in Appeal From Order No. 12 of 2000.

- G Devadatt Kamat, Sr. Adv., Rajesh Inamdar, Aditya Bhat, Javedur Rahman, Ashwin G. Raj, Rauf Rahim, Advs. for the Appellant.

Yashraj Singh Deora, Ms. Sonal Mashankar, Shyam Agarwal, M/S. Mitter & Mitter Co., Advs. for the Respondents.

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The Judgment of the Court was delivered by A  
**DEEPAK GUPTA, J.**

1. “Whether succession to the property of a Goan situate outside Goa in India will be governed by the Portuguese Civil Code, 1867 as applicable in the State of Goa or the Indian succession Act, 1925” is the question which arises for decision in this appeal. B

2. One Joaquim Mariano Pereira (JMP) had three daughters viz., (1) Maria Luiza Valentina Pereira (ML), Respondent No.1 (2) Virginia Pereira and (3) Maria Augusta Antoneita Pereira Fernandes. He also had a wife named Claudina Lacerda Pereira. He lived in Bombay and purchased a property in Bombay in the year 1955. On 06.05.1957 he bequeathed this property at Bombay to his youngest daughter, Maria Luiza Valentina Pereira, Respondent No.1. He bequeathed Rs. 3000/- each to his other two daughters. His wife expired on 31.10.1960 when he was still alive. JMP died on 02.08.1967. The probate of the Will dated 06.05.1957 was granted by the High Court of Bombay, at Goa on 12.09.1980. Both the other daughters were served notice of the probate proceedings. C  
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3. Goa was liberated from Portuguese rule on 19.12.1961. An ordinance being The Goa, Daman and Diu (Administration) Ordinance was promulgated on 05.03.1962 and thereafter the Goa, Daman and Diu (Administration) Act, 1962 was enacted, hereinafter referred to as ‘the Act of 1962’. Both the Ordinance as well as the Act of 1962 provided that the laws applicable in Goa prior to the appointed date i.e., 20.12.1961 would continue to be in force until amended or repealed by the competent legislature or authority. Section 5 of the Act of 1962 which is relevant for our purpose reads as follows:- E  
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“5. Continuance of existing laws and their adaptation. - (1) All laws in force immediately before the appointed day in Goa, Daman and Diu or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority. G

(2) For the purpose of facilitating the application of any such law in relation to the administration of Goa, Daman and Diu as a Union territory and for the purpose of bringing the provisions of any such law into accord with the provisions of the Constitution, the H



A Central Government may within two years from the appointed day, by order, may (*sic* make) such adaptations and modifications, whether by way of repeal or amendment, as may be necessary or expedient and thereupon, every such law shall have effect subject to the adaptations and modifications so made.”

B 4. It is not disputed before us that the Portuguese Civil Code, 1867 (hereinafter referred to as ‘the Civil Code’) as applicable in the State of Goa before its liberation in 1962 would apply. The Civil Code is in two parts – one part deals with all substantial civil laws including laws of succession and the other part deals with procedure. As far as the present case is concerned, the parties are *ad idem* that in so far as the succession to the properties in Goa is concerned, they are governed by the Civil Code. The main dispute is that whereas the appellant, who is one of the legal heirs of the daughters of JMP, claims that even the property of JMP in Bombay is to be dealt with under the Civil Code, the case of the respondent i.e., the daughter who was bequeathed the property in Bombay, is that as far as the immovable property situate outside Goa in any other part of India is concerned, it would be the Indian succession Act, 1925 which would apply.

E 5. It would be apposite to digress a little and refer to certain provisions of the Civil Code in relation to succession. Succession is governed under Title II, Chapter I of the Civil Code. Under the Civil Code<sup>1</sup>, a person cannot dispose of all his property by way of Will. There are two portions of the property – one which can be disposed by Will, Gift, etc. and the other which is the indisposable portion in terms of Article 1784 of the Civil Code which reads as follows:-

F “Legitime means the portion of the properties that the testator cannot dispose of, because it has been set apart by law for the lineal descendants or ascendants.

G Sole paragraph: This portion consists of half of the properties of the testator, save as provided in Clause-2 of Article 1785 and Article 1787.”

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H <sup>1</sup> In this judgment, the articles of Portuguese Civil Code have been quoted from the translation of the Code made by Manohar Sinai Usgaocar, Senior Advocate, Civil Code in Goa, First Edition, 2017, Vaikuntrao Dempo Centre for Indo Portuguese Studies. The wording in a translation made by the Government of Goa in some articles is slightly different but the meaning is the same and that has no impact on the judgment in hand.

6. Normally, if a person has children or parents, he can only dispose of half of the property by will or gift and the remaining property has to be allotted to his heirs whether ascendants or descendants in the shares laid down in the Civil Code. Where a person has no children or where he leaves behind illegitimate children or the deceased leaves behind only ascendant heirs who are not the parents then the indisposable portion is less than half. The Code provides that the estate of every person can be divided into two parts – one which he can dispose of by testamentary disposition and the other which he cannot dispose of. The second part which he cannot dispose of has to be inherited by the heirs in the shares as laid down in the Civil Code and this part which cannot be disposed, is called *legitime*. This *legitime* is destined for the heirs in the direct ascending or descending line.

7. Another interesting aspect of the Civil Code is that after the death of a person, inventory proceedings are started wherein the entire properties (both movable and immovable) and liabilities of the deceased are inventorised. In these proceedings normally one of the eldest members of the family is appointed as *Cabeça de Casal*, i.e. the administrator. The administrator is required to prepare an inventory of all the properties of the deceased. Once the properties of the deceased are inventorised and evaluated, these have to be shared in accordance with the shares laid down in the Civil Code. In case the deceased had made some testamentary bequests, then those bequests are to be adjusted against that portion of the estate which was not the *legitime*. As pointed above, only half of the total property could be bequeathed and any bequest in excess of half would not be a valid bequest.

8. As far as the present case is concerned, inventory proceedings under the Civil Code were initiated for the properties of JMP. On 27.04.1981 his daughter Virginia Pareira was appointed as *Cabeça De Casal* (administrator). She prepared the inventory of the properties and in these proceedings the house in Bombay which had been bequeathed in favour of the respondent no.1 was listed at Sl.No.8. The respondent objected to the inventory on the ground that the property situated at Bombay was not governed by the inventory proceedings. Thereafter, Virginia Pareira died. Then respondent no.1 was appointed as administrator. She filed a fresh list of properties and excluded the property at Bombay. The appellant, who is one of the legal representatives of Virginia Pareira filed objections to the removal of the property at Bombay

- A from the inventory and sought the inclusion and valuation of the said property to work out what was the disposable portion and what was the *legitime*. The inventory court vide order dated 09.03.1998 held that the property at Bombay was to be excluded from the list of assets in the inventory proceedings at Goa. Thereafter, the appellant filed an appeal
- B in the High Court of Bombay, Goa Bench. However, he withdrew the appeal with liberty to file a fresh application before the inventory court for inclusion of these assets. He filed this application and the inventory court on 15.10.1999 allowed the application and held that the property at Bombay should be included in the list of assets. Respondent no.1 and her husband (respondent no.2) challenged the said order of the inventory
- C court before the High Court of Bombay, Goa Bench. This appeal was allowed on 08.08.2008. The High Court vide the impugned judgment held that in view of the provisions of the Indian Succession Act, 1925 especially Section 5 thereof, the Civil Code would not apply in so far as the property situate outside Goa in other parts of India are concerned. Hence, this appeal by the appellant.
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9. At this stage, it would be pertinent to mention that in the meantime, a similar question was referred to a Division Bench of the Bombay High Court, Goa Bench. The Division Bench in the case of *A.P. Fernandes vs. Annette Blunt Finch and others*<sup>2</sup> came to the conclusion that the judgment of the learned Single Judge which is
- E impugned in the present appeal did not lay down the correct law and that the Civil Code would apply even to the property situate outside Goa.

10. Shri Devadatt Kamat, learned senior counsel appearing on behalf of the appellant, submits that though we may be sitting as Judges of the Supreme Court of India, we will have to apply the Portuguese
- F Law as applicable to the domiciles of Goa. He further submitted that since Portuguese law is applicable, the principles of private international law would apply. He invoked the doctrine of *renvoi* to urge that since the citizens of Goa were governed by a foreign law, this Court would apply the foreign law to the citizens of Goa. He further submitted that
- G under the Portuguese law there is principle of unity of succession of the property of a deceased Portuguese citizen whether situated within or outside the country, which are to be included for the purpose of inventory proceedings. He also urged that Article 24 of the Code was not applicable

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<sup>2</sup> 2015 (6) Mh.L.J. 717

and, in fact, the applicable articles were Articles 1737, 1784 and 1961. According to him, the judgment of the learned Single Judge does not lay down the correct law and the judgment of the Division Bench should be approved. He also submitted that the grant of probate of the Will does not *ipso facto* lead to the conclusion that the Will is valid. Lastly, it is contended that Section 5 of the Indian Succession Act has no application to the present case.

11. On the other hand, Shri Yashraj Singh Deora, learned counsel for the respondent nos. 1 and 2 urges that the Portuguese Civil Code would apply only in the territory of Goa and would have no extraterritorial application over immovable properties situated outside the State of Goa. He also submitted that the property at Bombay would be governed by the provisions of the Indian Succession Act and in terms of Section 5 thereof. According to him, Article 24 of the Civil Code relates only to properties 'situated in the kingdom'. It is lastly submitted that the common law principle of *lex rei situs* would apply in the case of immovable properties. Therefore, the law in force at the place where immovable property is situated should apply. He further submits that the Civil Code would only apply to the properties within the State of Goa and not beyond. Lastly, it is contended that the probate of the Will, wherein the petitioner had participated, is a final adjudication determining the rights of the parties.

12. According to us, the following issues arise for determination:

- I. Whether the Portuguese Civil Code can be said to be a foreign law and the principles of private international law are applicable?
- II. Whether the property of a Goan domicile outside the territory of Goa would be governed by the Code or by Indian Succession Act or by personal laws, as applicable in the rest of the country e.g. Hindu Succession Act, 1956, Muslim Personal Law (Shariat) Application Act, 1937, etc.?
- III. What is the effect of the grant of probate by the Bombay High Court in respect of the Will executed by JMP?

**I. Whether the Portuguese Civil Code can be said to be a foreign law and the principles of private international law are applicable?**

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- A 13. The territories forming part of Goa, Daman and Diu were part of the kingdom of Portugal. They were annexed by the Government of India by conquest on 20.12.1961 and became a part of India by virtue of Article 1(3)(c) of the Constitution. After acquisition by conquest, these territories became part and parcel of India, that is Bharat. As pointed out earlier, for making provision for administration of the said territories, the President of India, exercising powers vested in him under Article 123(1) of the Constitution on 05.03.1962 promulgated an Ordinance called the Goa, Daman and Diu (Administration) Ordinance, 1962. This Ordinance was replaced by an Act of Indian Parliament known as The Goa, Daman and Diu (Administration) Act, 1962, which came into effect from 05.03.1962. On the same day, the Constitution was amended by the Constitution (12<sup>th</sup> Amendment) Act, 1962 whereby Goa, Daman and Diu were added as Entry 5 in Part II of the First Schedule to the Constitution with retrospective effect from 20.12.1961. These territories of Goa, Daman and Diu were also included in clause (d) of Article 240(1) of the Constitution with effect from 20.12.1961.
- D Thus, it is more than apparent that Goa, Daman and Diu became an integral part of India as a Union Territory of India with effect from the date of its annexation by conquest. Goa became a full-fledged State in 1987.
- E 14. The Civil Code may be a Code of Portuguese origin but after conquest and annexation of Goa, Daman and Diu, this Code became applicable to the domiciles of Goa only by virtue of the Ordinance and thereafter, by the Act. Therefore, the Civil Code has been enforced in Goa, Daman and Diu by an Act of the Indian Parliament and thus, becomes an Indian law. This issue is no longer *res integra*.
- F 15. A Constitution Bench of this Court in ***Pema Chibar vs. Union of India & Ors.***<sup>3</sup>, was dealing with a case wherein the petitioner had obtained licences for import of goods of the value of more than one million pounds. Though the orders for import of the goods to Goa were placed before 20.12.1961, the goods did not reach Goa by the said date.
- G Thereafter, the petitioner applied for renewal of the licences and claimed that the Indian Government was bound by the licences granted by the earlier rulers. This Court held that once a property is taken over by conquest, the new sovereign (namely, the Government of India) would

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<sup>3</sup> AIR 1966 SC 442

not be bound by the acts of the old sovereign except where it recognised such rights. Reliance was placed by the petitioner on the Ordinance and the Act, referred to above. Rejecting the contention, this Court held as follows:

“8. But this is not all. The Ordinance and the Act of 1962 on which the petitioner relies came into force from March 5, 1962. It is true that they provided for the continuance of old laws but that could only be from the date from which they came into force, i.e., from March 5, 1962. There was a period between December 20, 1961 and March 5, 1962 during which it cannot be said that the old laws necessarily continued so far as the rights and liabilities between the new subjects and the new sovereign were concerned. So far as such rights and liabilities are concerned, (we say nothing here as to the rights and liabilities between subjects and subjects under the old laws), the old laws were apparently not in force during this interregnum. That is why we find in S. 7 (1) of the Ordinance, a provision to the effect that all things done and all action taken (including any acts of executive authority, proceedings, decrees and sentences) in or with respect to Goa, Daman and Diu on or after the appointed day and before the commencement of this Ordinance, by the Administrator or any other officer of Government, whether civil or military or by any other person acting under the orders of the Administrator or such officer, which have been done or taken in good faith and in a reasonable belief that they were necessary for the peace and good Government of Goa, Daman and Diu, shall be as valid and operative as if they had been done or taken in accordance with law. Similarly, we have a provision in S. 9(1) of the Act, which is in exactly the same terms. These provisions in our opinion show that as between the subjects and the new sovereign, the old laws did not continue during this interregnum and that is why things done and action taken by various authorities during this period were validated as if they had been done or taken in accordance with law. A doubt was raised as to the power of the Military Governor to issue a proclamation like the one he did on December 30, 1961, to which we have already referred. That doubt in our opinion is cleared by these provisions which make all such orders as if they had been made in accordance with law. The proclamation of December 30, 1961 which clearly

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A showed what kind of import licences would be recognised must be held to be in accordance with law and that means that no imports were recognised except those covered by the proclamation.”

We are aware that the Court did not say anything with regard to the rights and liabilities between subjects and subjects under the old laws and kept that question open. We shall deal with this aspect later.

16. A three-Judge Bench of this Court in *Vinodkumar Shantilal Gosalia* vs. *Gangadhar Narsingdas Agarwal*<sup>4</sup> was dealing with the question as to whether the respondent no.1 before it had acquired the right to obtain a mining lease from the Portuguese Government, and, if so, whether after the annexation of Goa, the Government of India recognised that right and, therefore, was bound to grant a mining lease to respondent no. 1 in terms of the application made by him to the Government of Portugal. The Court made the following pertinent observations:

D “17. ...it is necessary to reiterate a well-settled legal position that when a new territory is acquired in any manner-be it by conquest, annexation or cession following upon a treaty-the new “sovereign” is not bound by the rights which the residents of the conquered territory had against their sovereign or by the obligations of the old sovereign towards his subjects. The rights of the residents of a territory against their state or sovereign come to an end with the conquest, annexation or cession of that territory and do not pass on to the new environment. The inhabitants of the acquired territory bring with them no rights which they can enforce against the new state of which they become inhabitants. The new state is not required, by any positive assertion or declaration, to repudiate its obligation by disowning such rights. The new state may recognise the old rights by re-granting them which, in the majority of cases, would be a matter of contract or of execution action; or, alternatively, the recognition of old rights may be made by an appropriate statutory provision whereby rights which were in force immediately before an appointed date are saved...”

Analysing the judgment of the Constitution Bench in *Pema Chibar case* (supra), it was held as follows:

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H <sup>4</sup> (1981) 4 SCC 226

“28. The decision in Pema Chibar (supra) is an authority for four distinct and important propositions: (1) The fact that laws which were in force in the conquered territory are continued by the new Government after the conquest is not by itself enough to show that the new sovereign has recognised the rights under the old laws; (2) The rights which arose out of the old laws prior to the conquest or annexation can be enforced against the new sovereign only if he has chosen to recognise those rights; (3) Neither Section 5 of the Administration Act nor Section 4(2) of the Regulation amounts to recognition by the new sovereign of old rights which arose prior to December 20, 1961 under the laws which were in force in the conquered territory, the only rights protected under Section 4(2) aforesaid being those which accrued subsequent to the date of enforcement of the Administration Act, namely, March 5, 1962; and (4) The period between December 20, 1961 when the territories comprised in Goa, Daman and Diu were annexed by the Government of India, and March 5, 1962 when the Administration Act came into force, was a period of interregnum...”

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Thereafter, the Court finally held that in cases of acquisition of territory by conquest, the rights which had accrued under the old laws do not survive and cannot be enforced against the new Government unless it chooses to recognise that right. The relevant portion of the judgment reads as follows:

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“29. The true position then is that in cases of acquisition of a territory by conquest, rights which had accrued under the old laws do not survive and cannot be enforced against the new Government unless it chooses to recognise those rights. In order to recognise the old rights, it is not necessary for the new Government to continue the old laws under which those rights had accrued because, old rights can be recognised without continuing the old laws as, for example, by contract or executive action. On the one hand, old rights can be recognised by the new Government without continuing the old laws; on the other, the mere continuance of old laws does not imply the recognition of old rights which had accrued under those laws. Something more than the continuance of old laws is necessary in order to support the claim that old rights have been recognised by the new Government. That ‘something more’ can be found in a statutory provision whereby rights which had

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A already accrued under the old laws are saved. In so far as  
 continuance of old laws is concerned, as a general rule, they  
 continue in operation after the conquest, which means that the  
 new Government is at liberty not to adopt them at all or to adopt  
 them without a break in their continuity or else to adopt them  
 from a date subsequent to the date of conquest.”

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 17. It is important to note that this Court held that in so far as the  
 continuance of old laws is concerned, the new sovereign is not bound to  
 follow the old laws. It is at liberty to adopt the old laws wholly or in part.  
 It may totally reject the old laws and replace them with laws which  
 apply in the other territories of the new sovereign. It is for the new  
 C sovereign to decide what action it would take with regard to the  
 application of laws and from which date which law is to apply. As far as  
 the present case is concerned, firstly the President by an Ordinance and  
 later Parliament by an Act of Parliament decided that certain laws, as  
 applicable to the territories of Goa, Daman and Diu prior to its conquest,  
 D which may be referred to as the erstwhile Portuguese laws, would  
 continue in the territories. It was, however, made clear that these laws  
 would continue only until amended or repealed by competent legislature  
 or by other competent authority.

E 18. We are clearly of the view that these laws would not have  
 been applicable unless recognised by the Indian Government and the  
 Portuguese Civil Code continued to apply in Goa only because of an Act  
 of the Parliament of India. Therefore, the Portuguese law which may  
 have had foreign origin became a part of the Indian laws, and, in sum  
 and substance, is an Indian law. It is no longer a foreign law. Goa is a  
 territory of India; all domiciles of Goa are citizens of India; the Portuguese  
 F Civil Code is applicable only on account of the Ordinance and the Act  
 referred to above. Therefore, it is crystal clear that the Code is an  
 Indian law and no principles of private international law are applicable to  
 this case. We answer question number one accordingly.

G 19. Once we come to this conclusion, the answer to the second  
 question becomes very simple.

**II. Whether the property of a Goan domicile outside the  
 territory of Goa would be governed by the Code or by Indian  
 Succession Act or by personal laws, as applicable in the rest of  
 the country e.g. Hindu Succession Act, 1956, Muslim Personal  
 H Law (Shariat) Application Act, 1937, etc.?**

20. It is interesting to note that whereas the founders of the Constitution in Article 44 in Part IV dealing with the Directive Principles of State Policy had hoped and expected that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territories of India, till date no action has been taken in this regard. Though Hindu laws were codified in the year 1956, there has been no attempt to frame a Uniform Civil Code applicable to all citizens of the country despite exhortations of this Court in the case of *Mohd. Ahmed Khan vs. Shah Bano*<sup>5</sup> and *Sarla Mudgal & Ors. vs. Union of India & Ors.*<sup>6</sup>

21. However, Goa is a shining example of an Indian State which has a uniform civil code applicable to all, regardless of religion except while protecting certain limited rights. It would also not be out of place to mention that with effect from 22.12.2016 certain portions of the Portuguese Civil Code have been repealed and replaced by the Goa Succession, Special Notaries and Inventory Proceedings Act, 2012 which, by and large, is in line with the Portuguese Civil Code. The salient features with regard to family properties are that a married couple jointly holds the ownership of all the assets owned before marriage or acquired after marriage by each spouse. Therefore, in case of divorce, each spouse is entitled to half share of the assets. The law, however, permits pre-nuptial agreements which may have a different system of division of assets. Another important aspect, as pointed out earlier, is that at least half of the property has to pass to the legal heirs as *legitime*. This, in some ways, is akin to the concept of ‘coparcenary’ in Hindu law. However, as far as Goa is concerned, this *legitime* will also apply to the self-acquired properties. Muslim men whose marriages are registered in Goa cannot practice polygamy. Further, even for followers of Islam there is no provision for verbal divorce.

22. It is in this context that we shall have to decide whether the property of late JMP situated in Bombay i.e. outside the territory of Goa would be governed by the Code or by the Indian Succession Act. As pointed out earlier, this is not a conflict of international law. The Indian Parliament has made the earlier Portuguese Civil Code applicable in the State of Goa. It is in this light that we shall now read Article 24 on which great reliance has been placed by the learned Single Judge in the impugned judgment. This Article reads as follows:

<sup>5</sup> (1985) 2 SCC 556

<sup>6</sup> (1995) 3 SCC 635

- A “The portuguese subjects who travel or reside in foreign country, shall be subject to portuguese laws regarding their civil capacity, their status and immovable properties situated in the kingdom, in respect of the acts which will produce effects therein. However, the external form of the acts shall be governed by the law of the country, where they were celebrated, except in cases where there is provision to the contrary.”
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In our view, this article has no applicability to the facts of the present case. When a law is adopted or applied in a new situation, it has to be read in that context. We have to read Article 24 in context of the annexation of the territories of Goa by conquest and their becoming an inherent part of India. There are no Goan citizens; there can be domiciles of Goa but all are citizens of India. As Indian citizens, under Article 19 of the Constitution, they are free to move to any part of the country, reside there and buy property subject to the local laws and limitations. Therefore, a domicile of Goa, who starts living in Bombay or in any other part of India, cannot be said to be Portuguese by any stretch of imagination and he cannot be said to be living in a foreign country. Indian citizens living in India cannot, by any stretch of imagination, be said to be living in a foreign country. This person is only a Goan domicile living outside Goa in India, which is his country. Therefore, Article 24, in our opinion, has no applicability.

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23. This brings us to the issue as to what will be the law which would be applicable. The parties are *ad idem* that the Code applies. We shall now refer to certain provisions of the Code. Article 1737 of the Code reads as follows:

- F “The inheritance comprises of all the properties, rights and obligations of the deceased, which are not merely personal or excluded by disposition of the said deceased, or by the law.”

A bare reading of Article 1737 clearly indicates that the inheritance of a deceased comprises of all the assets, rights and liabilities of the deceased. The only exclusion, is totally personal assets or those excluded by the disposition of the said deceased or by law.

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24. Article 1766 provides that a married person shall not on the penalty of nullity dispose of certain and specific properties of the couple except if the said properties have been allotted to the said person. The article reads as follows:

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“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.”

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The basis of this article is that both spouses are equal owners of the entire property of the couple – acquired before or after marriage. Therefore, the disposition of some part of the property without the consent of the other spouse can be termed a nullity. We are referring to this Article only to highlight the fact that in case the Civil Code is to apply this would also be a factor to be taken into consideration because can it be said that this article will only apply to the properties within the territory of Goa and not to properties in other parts of the country i.e. India?

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25. Article 1774 reads as follows:

“The persons obliged to reserve the legitime may only dispose of the portion which the law permits them to dispose of.”

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A domicile under his personal law is obliged to reserve a *legitime* which can be disposed of only in accordance with the laws of inheritance. As pointed out earlier, in most of the cases, the *legitime* would be half. Again, the question would arise that is this *legitime* to be calculated by taking into consideration only the immovable properties in Goa or by taking all the properties of the deceased into consideration? Once we have come to the conclusion that the Civil Code is an Indian law and the domiciles of Goa, for all intent and purposes, are Indian citizens, would it be prudent to hold that the Civil Code, in matters of succession, would apply only in respect to properties situated within the territories of Goa? We do not think so.

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26. Succession is governed normally by the personal laws and where there is a uniform civil code, as in Goa, by the Civil Code. Once Article 24 is not to be taken into consideration then it is but obvious that all the properties whether within Goa or outside Goa, must be governed by the Civil Code of Goa. If we were to hold otherwise, the consequences could be disastrous, to say the least. There would be no certainty of succession. It would be virtually impossible to determine the *legitime* which is an inherent part of the law of succession. The rights of the spouses to have 50% of the property could easily be defeated

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- A by buying properties outside the State of Goa. In the case of a Hindu Goan domicile it would lead to further complications because if we were to accept the judgment of the learned Single Judge and the arguments of the respondents, for the properties in Goa, the Civil Code would apply but for the properties outside the territory of Goa, the Hindu Succession Act will apply. Similarly, for Muslims within the State of Goa, Civil Code would apply and outside Goa, the Muslim Personal Law (Shariat) Application Act, 1937 would apply. This would lead to many uncalled for disputes and total uncertainty with regard to succession.
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- C 27. There must be unity in succession. The Portuguese law is based on the Roman law concept of *hereditas* i.e. inheritance to the entire legal position of a deceased man. This concept of universal succession is described in the Comparative Analysis of Civil Law Succession,<sup>7</sup> as under:

- D “18. In Comparative Analysis of Civil Law Succession, Villanova Law Review Vol 11 Issue 2, the concept of ‘universal succession’ and ‘hereditas’ has been described as

- E “... succession by an individual to the entirety of the estate, which includes all the rights and duties of the decedent (de cuius), known collectively as the hereditas under Roman law. The succession to the whole of the estate could be by one heir (heres) or several (heredes), they taking jointly regardless of whether the succession was testate or intestate. The estate (hereditas), which passed in Roman succession was the sum of all the rights and duties of the deceased person (persona) except for his political, social and family rights which were not considered inheritable. Transfer of title to the heirs was deemed to occur simultaneously with the individual’s death and was a complete transfer of title at that time.”
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- G Though we have held that this is Indian law, since it is a law of Portuguese origin, we may have to take guidance from the way in which the law has been applied to come to the conclusion to see what is the intention of the law. Therefore, all the properties of the person whose inheritance is in question have to be calculated and considered as one big conglomerate unit and then the rules of succession will apply.

- H 28. There is a conflict between the Indian Succession Act, the Hindu Succession Act, the Muslim Personal Law (Shariat) Application

Act, 1937, etc. and the Portuguese Civil Code with regard to the laws of inheritance but this conflict has to be resolved. In our view, the Parliament of India, after conquest of Goa, by adopting the Portuguese Civil Code accepted that the Goan domiciles were to be governed by that law in matters covered under the Code and specifically included in the laws which were made applicable. The Indian Parliament did not make applicable all Portuguese laws but the laws which were applied would apply with full force. The Goa, Daman and Diu (Administration) Act, 1962 is a special law dealing with the domiciles of Goa alone. This special law making the Portuguese Civil Code applicable is an exception carved out of the general laws of succession namely Indian Succession Act, Hindu Succession Act, 1956, Muslim Personal Law (Shariat) Application Act, 1937 and other laws.

29. It is a well settled principle of statutory interpretation that when there is a conflict between the general law and the special law then the special law shall prevail. This principle will apply with greater force to special law which is also additionally a local law. This judicial principle is based on the latin maxim *generalia specialibus non derogant*, i.e., general law yields to special law should they operate in the same field on the same subject. Reference may be made to the decision of this Court in *R.S. Raghunath vs. State of Karnataka & Ors.*<sup>8</sup>, *Commercial Tax Officer, Rajasthan vs. Binani Cements Ltd. & Ors.*<sup>9</sup> and *Atma Ram Properties Pvt. Ltd. vs. The Oriental Insurance Co. Ltd.*<sup>10</sup>

30. As far as Goa is concerned, there is a specific judgment in this regard i.e. *Justiniano Augusto De Piedade Barreto & Ors. vs. Antonio Vicente Da Fonseca & Ors.*,<sup>11</sup> though relating to the interpretation of Section 29 of the Limitation Act, 1963, which deals with local and special laws. Dealing with the issue of the Portuguese Civil Code, the Court held that it could not escape from reaching the conclusion that the Portuguese Civil Code is a local law within the ambit of Section 29(2) of the Limitation Act, 1963. A special law is a law relating to a particular

<sup>7</sup> Comparative Analysis of Civil Law Succession, Villanova Law Review Vol. 11, Issue 2

<sup>8</sup> (1992) 1 SCC 335

<sup>9</sup> (2014) 8 SCC 319

<sup>10</sup> (2018) 2 SCC 27

<sup>11</sup> (1979) 3 SCC 47

A subject while a local law is a law confined to a particular area or territory. In our considered view, the Portuguese Civil Code, in matters of succession, is both a special law and a local law. It is special and local because it deals with laws of succession for the domiciles of Goa only. In Para 14 of this judgment, the Court held as follows:

B “14. We, therefore, arrive at the conclusion that the body of provisions in the Portuguese Civil Code dealing with the subject of Limitation of suits etc. and in force in the Union Territory of Goa, Daman and Diu only is ‘local law’ within the meaning of Section 29(2) of the Limitation Act, 1963. As stated earlier these provisions have to be read into the Limitation Act, 1963, as if the Schedule to the Limitation Act is amended mutatis mutandis. No question of repugnancy arises. We agree with the Judicial Commissioner that the provisions of the Portuguese Civil Code relating to Limitation continue to be in force in the Union Territory of Goa, Daman and Diu.”

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D 31. In view of the aforesaid, we are clearly of the view that the Portuguese Civil Code being a special Act, applicable only to the domiciles of Goa, will be applicable to the Goan domiciles in respect to all the properties wherever they be situated in India whether within Goa or outside Goa and Section 5 of the Indian Succession Act or the laws of succession would not be applicable to such Goan domiciles.

E **III. What is the effect of the grant of probate by the Bombay High Court in respect of the Will executed by JMP?**

32. We shall now deal with the issue “what is the effect of the grant of probate of the Will of late JMP by the High Court of Bombay?”

F At the outset, we may say that the order granting probate has not been produced by any side though it is admitted by all sides that probate was granted and the appellants herein had notice of the probate case. Assuming that probate had been granted, what is the effect of the grant of probate on the laws of inheritance? Grant of probate has nothing to do with inheritance. The jurisdiction of a probate court is limited to decide whether the Will is genuine or not. The Will may be genuine but the grant of probate does not mean that the Will is valid even if it violates the laws of inheritance. To give an example, supposing a Hindu bequeathes his ancestral property by a Will and probate of the Will is granted, such grant of probate cannot adversely affect the rights of those members of

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the coparcenary who had a right in the property since birth. Similar is the case in Goa. The *legitime* is the right of the heirs by birth. When both the spouses are alive, they own half of the property. Mere grant of probate will not mean that the husband can Will away more than half of the property even if that be in his name. A

33. This Court in *Krishna Kumar Birla vs. Rajendra Singh Lodha*<sup>12</sup> held as under: B

“57. The 1925 Act in this case has nothing to do with the law of inheritance or succession which is otherwise governed by statutory laws or the custom, as the case may be. It makes detailed provisions as to how and in what manner an application for grant of probate is to be filed, considered and granted or refused. Rights and obligations of the parties as also the executors and administrators appointed by the court are laid down therein. Removal of the existing executors and administrators and appointment of subsequent executors are within the exclusive domain of the court. The jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the will. A question of title arising under the Act cannot be gone into the (*sic* probate) proceedings. Construction of a will relating to the right, title and interest of any other person is beyond the domain of the Probate Court.” C D E

In view of the clear-cut exposition of law in the aforesaid case, we hold that grant of probate by the Bombay High Court did not in any manner affect the rights of inheritance of all the legal heirs of the deceased.

34. In view of the above discussion, we answer the question framed in Paragraph 1, holding that it will be the Portuguese Civil Code, 1867 as applicable in the State of Goa, which shall govern the rights of succession and inheritance even in respect of properties of a Goan domicile situated outside Goa, anywhere in India. F

35. In view of the above, we are clearly of the view that the impugned judgment has to be set aside and the property of late JMP at Bombay is to be included in the inventory of properties in the inventory proceedings in Goa for all intent and purposes. Hence, we allow the G

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<sup>12</sup> (2008) 4 SCC 300



- A appeal, set aside the judgment of the learned Single Judge dated 08.08.2002 and restore the order of the Court of Comarca Judge of Salcete and Quepem, at Margao in Inventory Proceedings No.20436 dated 15.10.1999. Pending application(s), if any, stand(s) disposed of.

Nidhi Jain

Appeal allowed.