

MRS. ETHEL LOURDES D'SOUZA LOBO

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v.

LUCIO NEVILLE JUDE DE SOUZA & ORS.

(Civil Appeal No. 9202 of 2019)

SEPTEMBER 19, 2022

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[S. RAVINDRA BHAT AND SUDHANSU DHULIA, JJ.]

Portuguese Civil Procedure Code – Arts. 1369, 1379, 1391, 1412, 1416, 1417(c) & 1736, 1737, 2126, 2127 – Inventory proceedings were initiated on account of death of ‘G’ and his wife – These proceedings were initiated for partition of the estate of the deceased – Estates comprised three items of immovable property – Property in dispute is item no.1 – In licitation of the said property, ‘H’ gave the highest bid – ‘H’ was also Cabeca de Casal (administrator) – He died – By then, he had not deposited any amount towards bid offered by him – Claim for reauction was resisted by heirs of ‘H’, who contended they could continue the proceedings and were entitled to item no. 1 – However, who supported reauction contended that that H’s right to participate, and claim the specific item of property, at the appropriate stage-when owelty was to be demanded, was a mere personal right, which extinguished upon his death – Held: In the instant case, it cannot be said that H’s right to participate, and claim the specific item of property, at the appropriate stage - when owelty was to be demanded, was a mere personal right, which extinguished upon his death – The entitlement to bid in the licitation process was not a personal right, but in his capacity as a member of the family, of which he had been constituted as the Cabeca de Casal – If all other items are heritable by his heirs and legal representatives (as there is no dispute that they are, because they step into his shoes) an entirely different conclusion is unsupportable in regard to the item of property for which he bid successfully, but for which no demand was made, for payment of any amount – This was because, the final chart of partition containing the excess payments to be made, by one or other members of the family had not been prepared; no demand for payment or deposit of owelty was concededly made by any member of the family – However, that

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- A *did not mean that the highest bid by H was, in some inexplicable manner, effaced – His position and right as a successful bidder, and his obligation to pay the concerned amount, when called upon to do so, were heritable by his heirs and legal representatives – Appeals dismissed.*
- B *Jose Paulo Coutinho v. Maria Luiza Valentina Pereira & Ors. (2019) 20 SCC 85 : [2019] 12 SCR 390 ; Zacarias Durate Domoingos Pereira v. Camilo Inacil Evaristo Pereira, AIR 1984 Bom 295 ; T.S. Swaminatha Odayar v. Official Receiver of West Tanjore [1957] 1 SCR 775 ; Baburao Karekar v. Vilas Atmaram Bandodkar (2015) 12 SCC 659 ; Motibai Sarvotham Pai Cano & Ors. v. Maria Elsa Do Perpetuo Socorro Mota & Ors. 1994(2) Bom. C.R. 628 ; Vasudev Ramchandra Shelat v. Pranlal Jayanand Thakar [1975] 1 SCR 534 ; Umabai & Anr. v. Nilkanth Dhondiba Chavan (Dead) by L.Rs. & Anr. (2005) 6 SCC 243: [2005] 3 SCR 521 ; Bhimrao Ramchandra Khalate (Deceased) through L.Rs. v. Nana Dinkar Yadav Tanpura & Ors 2021 (9) SCC 45 : [2021] 8 SCR 151 ; Ashok Kumar Gupta and Anr. v. Sitalaxmi Sahuwala Medical Trust and Ors. 2020 (4) SCC 321 : [2020] 2 SCR 983 ; Amirtham Kudumbah v. Sarnam Kudumban [1991] 2 SCR 389 – referred to.*
- C *1994(2) Bom. C.R. 628 ; Vasudev Ramchandra Shelat v. Pranlal Jayanand Thakar [1975] 1 SCR 534 ; Umabai & Anr. v. Nilkanth Dhondiba Chavan (Dead) by L.Rs. & Anr. (2005) 6 SCC 243: [2005] 3 SCR 521 ; Bhimrao Ramchandra Khalate (Deceased) through L.Rs. v. Nana Dinkar Yadav Tanpura & Ors 2021 (9) SCC 45 : [2021] 8 SCR 151 ; Ashok Kumar Gupta and Anr. v. Sitalaxmi Sahuwala Medical Trust and Ors. 2020 (4) SCC 321 : [2020] 2 SCR 983 ; Amirtham Kudumbah v. Sarnam Kudumban [1991] 2 SCR 389 – referred to.*
- D *1994(2) Bom. C.R. 628 ; Vasudev Ramchandra Shelat v. Pranlal Jayanand Thakar [1975] 1 SCR 534 ; Umabai & Anr. v. Nilkanth Dhondiba Chavan (Dead) by L.Rs. & Anr. (2005) 6 SCC 243: [2005] 3 SCR 521 ; Bhimrao Ramchandra Khalate (Deceased) through L.Rs. v. Nana Dinkar Yadav Tanpura & Ors 2021 (9) SCC 45 : [2021] 8 SCR 151 ; Ashok Kumar Gupta and Anr. v. Sitalaxmi Sahuwala Medical Trust and Ors. 2020 (4) SCC 321 : [2020] 2 SCR 983 ; Amirtham Kudumbah v. Sarnam Kudumban [1991] 2 SCR 389 – referred to.*
- E *1994(2) Bom. C.R. 628 ; Vasudev Ramchandra Shelat v. Pranlal Jayanand Thakar [1975] 1 SCR 534 ; Umabai & Anr. v. Nilkanth Dhondiba Chavan (Dead) by L.Rs. & Anr. (2005) 6 SCC 243: [2005] 3 SCR 521 ; Bhimrao Ramchandra Khalate (Deceased) through L.Rs. v. Nana Dinkar Yadav Tanpura & Ors 2021 (9) SCC 45 : [2021] 8 SCR 151 ; Ashok Kumar Gupta and Anr. v. Sitalaxmi Sahuwala Medical Trust and Ors. 2020 (4) SCC 321 : [2020] 2 SCR 983 ; Amirtham Kudumbah v. Sarnam Kudumban [1991] 2 SCR 389 – referred to.*

Case Law Reference

	[2019] 12 SCR 390	referred to	Para 3
F	[1957] 1 SCR 775	referred to	Para 15
	[1975] 1 SCR 534	referred to	Para 22
	[2005] 3 SCR 521	referred to	Para 23
	[2021] 8 SCR 151	referred to	Para 23
G	[2020] 2 SCR 983	referred to	Para 23
	[1991] 2 SCR 389	referred to	Para 23

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9202 A
of 2019.

From the Judgment and Order dated 10.08.2012 of the High Court
of Bombay at Goa in Writ Petition No. 671 of 2010.

With

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Civil Appeal No. 9203 of 2019.

Ms. Vibha Datta Makhija, Sr. Adv., Keane Sardinha, Vibhuti
Sushant Gupta, Ram Naresh Yadav, Swetank Shantanu, Pratap Shanker,
Ankit Kumar, Jyoti Kumar Singh, R. Ayyam Perumal, Advs. for the
appearing parties.

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The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.

1. The present appeals arises from a judgment rendered by the
Bombay High Court, Goa Bench¹. The dispute arises out of inventory
proceedings² under Chapter XVII by Articles 1369 to 1447 of the
Portuguese Civil Procedure Code (hereafter “the Code”).

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2. Inventory proceedings in the present case arose and were
initiated on account of the death of Lt. Guilherme Caetano Souza and
his wife, Maria Guilhermina Augusta Lourdes Aguiar Souza. These
proceedings were initiated in 1985 for partition of the estate of the said
deceased.³ There were six heirs of the deceased (hereafter referred to
by their names) - i.e., Pedro (survived by the petitioner, Ethel Lourdes;
and Respondent Nos. 23-26); Hermano (survived by the first four
respondents); Maria Emilia Pulqueria Natividade (fifth respondent,
deceased and survived by her heirs – Respondent Nos. 6 to 11); Maria
Patricia Lucia (deceased, survived by Respondent Nos. 12 to 21); Maria
Emilia Julieta (deceased); and Edwin (deceased). The estate in question
comprised, *inter alia*, three items of immovable property. Lt. Edwin,
one of the heirs, succeeded to two items (Nos. 2 & 3) of the properties,

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¹ In WP No. 671/2010 dated 10.08.2012

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² Described in *Treatise of Civil Code*, by Dr. Luis da Cunha Gonsalves, Volume X
page 590 as

*“Inventory is a complete description of assets and debts or of the estate of
the inheritance and liabilities of the estate, in order that one or other, or the balance
remaining after payment of debts, be divided amongst the successors of the deceased,
or allotted to his sole heir.”*

³ Inventory proceedings No. 109/1985/1

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- A having bid highest among the heirs in an auction (licitation) held on 28.02.2001. The property in dispute is Item No. 1.
3. It is an undisputed fact that the Code is a comprehensive law, incorporating both substantive and procedural elements, regarding various matters, including those relating to personal laws, with elements of inheritance and succession to estates. The Code was initially framed in 1867; it became applicable as “law in force” upon assimilation of Goa into the Indian Union by virtue of Section 5 (1) of the Goa, Daman and Diu Administration Act, 1962.
4. When succession opens up to an estate, the properties (both movable and immovable) and liabilities of the deceased are inventorized. In the inventory proceedings, an elder member of the family is appointed as *Cabeça de Casal* (administrator). The administrator has to prepare an inventory of all the properties of the deceased. The deceased's properties are inventorized and evaluated, after which they are to be distributed in accordance with the shares laid down in the Code⁴.
5. The steps following the above are that under Article 1369 of the Code, the initial valuation of the property has to be settled by the parties initiating the inventory proceedings. By Article 1387, the concerned court, orders the appraisal of the properties by an appraiser, where no questions (issues or disputes) are raised against the description or those so raised had been decided. The valuation stage would arise when the licitation takes place, and parties offer the market value for each property. After parties are intimated about the list of assets under Article 1379, they or any of them have to apply for licitation. By Article 1391, if interested parties do not apply for licitation within 48 hours, the right is waived, and there can be no licitation. In such an event, the property enlisted in the proceedings would be allotted to the interested parties in accordance with their respective shares. Licitation, quite simply is a closed auction, in which heirs of the deceased, entitled to shares in the estate, participate. Licitation is provided by Article 1412; it reads as follows:
- G *“The licitation is an auction to which only the heirs and moiety holder spouse are admitted, except the cases where, in terms of preceding articles, the donee or legatee should also be admitted. It may fall over the properties of the*
- H ⁴ Ref *Jose Paulo Coutinho v. Maria Luiza Valentina Pereira & Ors.* (2019) 20 SCC 85

inheritance which are not necessarily to be allotted in any particular party.” A

6. Reverting to the facts of this case, on 28.02.2001, Item No. 1 too was part of the licitation; Late Maria Emilia Souza was the highest bidder. Since she defaulted in the payment of the owelty amount, a fresh bid was ordered. On 17.12.2004, the bidding in the second licitation commenced, and continued on to 03.01.2005 involving Item No. 1. Hermano (represented by the first four respondents in this court) was successful, with the highest bid for ₹34,15,100/. Hermano had been constituted as the *Cabeca de Casal*. He died on 11.07.2008. By then, he had not deposited any amount towards the bid offered by him. At that stage, the final partition chart had not been drawn. This fact was reported to the concerned court seized of the inventory proceedings. At the same time, an application was moved by Adelaide M. De Souza (Pedro’s heir, Respondent No. 26) for being impleaded as a party to the proceedings. The present appellant also moved an application for the appointment of a fresh *Cabeca de Casal* and reauction of Item No.1. D

7. The claim for reauction was resisted by Hermano’s heirs, who argued that they could continue the proceedings and that they were entitled to Item No.1. The Inventory court (or the trial court), by its order⁵ allowed the appellant’s application citing Article 1417(c) of the Code. The respondents had argued that the provision did not apply since the notice of payment of owelty amounts had not been made. The trial court held that the property had to be reauctioned and since Hermano had not deposited the sale proceeds within the time stipulated, and his heirs could not claim ownership of the auctioned property, i.e., Item No.1. It was further held that Hermano’s heirs could not succeed in respect of the bid, because that was not a heritable item. This decision was appealed against, by Hermano’s heirs. E F

8. The District Judge, Margao, by its order⁶ reversed the ruling of the inventory court and held that the effect of a successful bid was that the successful bidder had a right to the property, which upon his death devolved on his legal heirs. Being aggrieved by the decision of the District Judge, the appellant approached the High Court, which on the basis of the materials on record concluded that the inheritance of an heir in inventory contemplated under Section 1737 of the Code, included rights G

⁵ dated 25.03.2009

⁶ dated 27.08.2010, in Misc. CA 87/2009.

- A flowing from a successful bid in a licitation, as it included the right to pay owelty. It was further held that the occasion for depositing the amount towards auction would arise only after the amounts were apportioned with regard to each heir's share and only if the bid amount exceeded the shares of the successful bidder in the inventory proceedings. It was
- B further held that the obligations and rights devolved upon legal successors, i.e., present respondents. The court also held that the right of a successful bidder could not be considered to be *in personam* so resulting in its extinguishment after his death. To hold so, the High Court cited Article 1439 of the Code, which, in its opinion, confers a right *in presenti* upon a successful bidder in an inventory proceeding to hold the property as an
- C administrator.

Submission of parties

- 9. Mr. Keane Sardinha, learned counsel for the appellant, urged that the findings of the first appellate court and the High Court, are erroneous. It was argued that the rights conferred upon a successful bidder who is a party to inventory proceedings under Article 1737 do not devolve upon his heirs on his death. The appellant urged that a bid in an auction does not create any right or interest in the property, nor is there a concluded contract between the bidders and other interested parties. Consequently, no heritable right or legally enforceable right passes to
- D the heirs of the deceased participant in a licitation proceeding. It was submitted that there was no chart of partition determining the share of owelty amounts in the proceedings, which meant none of the parties could lay claim or demand their share of the price.

- 10. It was further submitted that the right to claim an asset through
- E an auction can never be a heritable right, and is extinguished upon the death of the bidder. In the present case, it was emphasized that Hermano had expired much before the bid amount was paid. Consequently, the auction had no legal effect. Relying upon Article 1417(c), it was submitted that since no amount was in fact deposited, after licitation, even after the successful bid, no rights could vest in Hermano's heirs upon his
- G death.

- 11. It was further stressed by Mr. Sardinha that in respect of the same property, i.e., Item No.1, a previous auction – held in the year 2001 was deemed abortive on account of failure by the successful bidder to deposit the owelty amount. In these circumstances, the same logic
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had to prevail to oust any claim by Hermano's heirs. Lastly, it was urged that the inventory proceedings had prolonged - since the auction in the present case was held in 2005 and till his death Hermano did not wish to fulfil his obligation. His heirs resisted the reauction, which would fetch a higher amount for the property, and be fair and equitable to all heirs.

12. Ms. Vibha Dutt Makhija, learned counsel for the respondent submitted at the outset that this Court should not interfere with the concurrent findings of the appellate court and the High Court. Learned counsel submitted that inventory proceedings cannot be linked to partition suits. They are meant to describe and apportion the estate of a deceased person. Article 2064 to 2166 of the Code enacts substantive provisions, whereas procedural provisions are contained in Articles 1369 to 1447. In this procedure, when licitation is held at the request of parties, specific properties are earmarked after their comprehensive agreed valuation. The parties then indicate the mode of partition which is ruled by the court. It is after this process that the court prepares a chart of partition indicating the *inter se* amounts to be paid by the parties to the inventory proceedings depending on their entitlement and shares, and having regard to the adjustment of the manifest value of their shares with any obligations on their part (such as the final amount payable after adjustment, as successful bidders). It was submitted that in the present case, the stage of final partition had not been reached. Consequently, the highest bid, i.e., ¹ 34,15,100, could not be called the owelty amount payable by Hermano.

13. It was submitted that the court correctly held that the estate of Hermano comprised not only of his rights and obligations but also his right as a shareholder in the inventory proceedings – which included his right as a successful bidder for Item No.1. In this regard, reliance was placed upon Article 1737, by the respondent in support of their submissions.

Analysis and Conclusions

14. The provisions of the Code, to the extent they are relevant, are extracted below:

"Article 1736 (Concept of heir and legatee)

Heir is a person who succeeds to the totality of the inheritance, or to a part thereof without specifying the sum

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- A *of money or the object. Legatee is a person, in whose favour the testator disposes of a sum of money, or specified objects, or a certain part thereof.*

Article 1737

- B *The inheritance covers all the properties, rights and obligations of the author, which are not merely personal or which are otherwise excepted by the disposition of the author himself or by law.*

***** ***** *****

C ***Sub Division V***

Of the Licitation and Partition

Article 2126 (Form of partition and declaration of licitation)

- D *After the description and appraisal is done, as aforesaid, the parties shall be heard as to the form of partition, and if any of them is willing to bid for any property or other object, he shall so declare in his reply.*

Article 2127 (Formalities of licitation and when to be held)

- E *The licitation shall precede the act of partition, after all the parties are summoned, and it shall take place amongst them only, as if it is a case of an auction.*

Article 1416 (Chart of partition)

- F *After the file is received with the order referred to in Article 1414, the office shall draw the chart of partition, within eight days, in accordance with the same order and in accordance with the provision of the preceding Article.*

- G *For the purposes of the drawing of the chart, first of all, it will be found what is the total amount of the assets, by adding the values of each kind of properties as per appraisals and licitations and by deducting the passive debts, legacies and charges which ought to be discounted; thereupon the amount of the share of each party shall be worked out and the part which is allotted to the party in each type of properties; finally the allotment of each share will be done with reference to the numbers of the items of the description.*

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The lots which are to be drawn by sortition shall be A designated by letters.

Paragraph 1: The values shall be indicated by figures only. The numbers of the items of the description shall be shown in figures and by words and when they are continuous only the terminal numbers between which the numbering is comprised shall be noted. In case some fraction of the items fall to the coheirs, such fraction shall be mentioned. B

Paragraph 2: In each lot the kind of properties of which it is comprised shall be shown.

Paragraph 3: The judge shall initial each and every page C of the chart and shall confirm the errata note of corrections, erasures or interlineations.

Article 1417 (Steps to be taken when the gifted properties or properties

subject of licitation exceed the share of the party) D

Where the office finds, at the time of drawing the chart, that the properties gifted or taken by licitation exceed the share of the respective party or the disposable portion of the deceased, a note shall be recorded in the file, in the shape of a chart, indicating exactly what is the amount of the excess, and thereupon the following shall be observed: E

(a) Where in between the properties gifted to a co-heir there exists any property not divisible, which does not fit wholly in the share to the donee, such property shall form part of the mass of partible properties as any other property of the inheritance; in other cases, the donee shall be notified to exercise, within three days, his right of choice which is conferred upon him by paragraph 4 of Article 2107 of the Civil Code, failing which his share will be allotted with the properties indicated by the judge; F G

(b) Where the gift made to a stranger is inofficious, the same shall be reduced in terms of Article 1493 onwards of the Civil Code;

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- A *(c) Those who have not taken the properties in licitation and who are to be allotted the owelty money due by those who were successful in the licitation, shall be notified to demand within three days the payment, if they so desire. If the demand is made the successful bidder shall be notified to deposit the amount failing which the licitation will be of no effect.*
- B *Where the payment is not demanded, the owelty money shall earn the legal interest from the date of final judgment of partition and the creditors thereof may register the legal hypothecation over the properties adjudicated to the debtor."*
- C 15. It is recognized that, unlike partition suits, inventory proceedings under the Code are not essentially adversarial. In these proceedings, initiated upon the death of one governed by the Code, that event is reported to the Court. A *Cabeça de Casal* (administrator or head of the household) is appointed by the Court, from amongst senior members of the family, to manage the properties of the deceased. When the proceedings culminate after the apportionment of shares, there is no decree.⁷ The *Cabeça de Casal* is enjoined to report all items of the deceased's estate - if there are bequests in testamentary instruments, their description. Thereupon the items are sought to be divided: for that purpose, each item is valued. Those properties which cannot be divided, are then the subject of licitation proceedings, where heirs are allowed to bid for each item of those properties. The chart of partition is then prepared, listing out the share and the value of shares of each heir. Those who secure properties (through licitation, etc.) in excess of such share have to pay owelty amounts. As to what is owelty, was explained by this Court in *T.S. Swaminatha Odayar v. Official Receiver of West Tanjore*⁸ in the following terms:
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"It therefore follows that when an owelty is awarded to a member on partition for equalization of the shares on an excessive allotment of immovable properties to another member of the joint family such a provision of owelty ordinarily creates a lien or a charge on the land taken under the partition. A lien or a charge may be created in express

⁷ *Ref. Zacarias Durate Domoingos Pereira v. Camilo Inacil Evaristo Pereira*, AIR 1984 Bom 295

H ⁸[1957] 1 SCR 775

terms by the provisions of the partition decree itself. There A would thus be the creation of a legal charge in favour of the member to whom such owelty is awarded. If, however, no such charge is created in express terms, even so the lien B may exist because it is implied by the very terms of the partition in the absence of an express provision in that behalf. The member to whom excessive allotment of property C has been made on such partition cannot claim to acquire properties falling to his share irrespective of or discharged from the obligation to pay owelty to the other members. What he gets for his share is, therefore, the properties allotted to him subject to the obligation to pay such owelty and there is imported by necessary implication an obligation on his part D to pay owelty out of the properties allotted to his share and a corresponding lien in favour of the members to whom such owelty is awarded on the properties which have fallen to his share.”

16. Owelty, then, is awarded to a member in proceedings of partition for equalization of the shares on “*an excessive allotment of immovable properties to another member.*” The total amount which has to be distributed to the heirs as per their shares, therefore, includes *inter alia*, on the owelty sums paid in, by one who can claim entitlement to immovable property in excess of the share allocable to her or him.

17. One of the earlier decisions of the Bombay High Court in *Shri Damodar Ramnath Alve v. Shri Gokuldas Ramnath Alve & Anr.*⁹ explained the stage of payment of owelty:

“23. Article 1417 refers to the steps to be taken when the gifted property or properties subject of licitation exceed the share of the party. Clause (c) of Article 1417 reads as under:-

“c) Those who have not taken the properties in licitation and who are to be allotted the owelty money due by those who were successful in the licitation, shall be notified to demand within three days the payment, if they so desire. If the demand is made the successful bidder shall be notified

⁹ 1997 (4) Bom CR 653

- A *to deposit the amount failing which the licitation will be of no effect.”*
- B *In the instant case the demand was made and notice was issued on 4th January 1989. Thus, from this day period of 5 days begins. He filed an application dated 12th January 1989, stating therein that he be exempted from the payment of oweity money until the decision of Civil Suit No. 202/1986/A and same came to be dismissed on 18th February 1989. On 27th February 1989, appellant Damodar filed another application stating that challans be issued to him to deposit the oweity money. Challans were handed over to him on 28th February 1989. However, by filing applications, the period is not extended. The appellant Damodar failed to deposit the money within 5 days and, therefore, Damodar no more remained a successful bidder. His right was extinguished.”*
- D 18. It is clear that the question of paying oweity, or any amount, by any heir, including one who bids successfully for an item, is dependent upon a demand by one or the other heirs. This point was brought home, highlighting the need for making a demand, in another decision of the Bombay High Court, i.e., *Motibai Sarvotham Pai Cano & Ors. v. Maria Elsa Do Perpetuo Socorro Mota & Ors.*¹⁰ where the court held as follows:
- F *“A look at the provision of Article 1417 clearly suggests that for failure to pay oweity money the creditor is entitled to legal interest from the date of judgment until recovery and is further entitled to register a sort of mortgage in respect of the property when demand is not made. It is therefore clear that failure to pay money does not bring about the reversion of the property. But, in a case where the demand is made by the person who is entitled to receive oweity and if the same is not paid within three days of the notice of demand, the allotment becomes ineffective and the property be put to re-auction and at that re-auction the defaulting party is not entitled to participate and offer any bid.”*
- G *“A look at the provision of Article 1417 clearly suggests that for failure to pay oweity money the creditor is entitled to legal interest from the date of judgment until recovery and is further entitled to register a sort of mortgage in respect of the property when demand is not made. It is therefore clear that failure to pay money does not bring about the reversion of the property. But, in a case where the demand is made by the person who is entitled to receive oweity and if the same is not paid within three days of the notice of demand, the allotment becomes ineffective and the property be put to re-auction and at that re-auction the defaulting party is not entitled to participate and offer any bid.”*

H ¹⁰ 1994 (2) Bom. C.R. 628

In *Ranjit Satardekar v. Clotildes Fernandes* it was held as A follows:¹¹

“14. In my view, article 2137 of the Civil Code does not confer any substantive right on a party. It deals with aspects of procedure regarding payment of auction price. It was contained in the law enacted in 1867. The C.P.C., as already stated, was enforced w.e.f. 1/01/1941 and in the light of new provisions having been made subsequently as to when the payment is to be demanded and by whom and to whom and the consequences which should follow in case of failure to deposit, the provisions of Article 2137 of the Civil Code, in my view would stand impliedly repealed and substituted by the provision of Article 1417(c) of C.P.C. Admittedly, the appellants were notified to demand the payment as contemplated by Article 1417(c) but did not insist that the same should be made and in the light of that the appellants' challenge to the chart of partition, *prima facie*, cannot be accepted. It also does not make much sense that the highest bidder should be asked to deposit the entire price of the bid when his own share in the bided property is substantial. The view that the provision of article 2137 of the Civil Code stands impliedly repealed and now article 1417 C.P.C. overrides article 2137 of the Civil Code is a view held by learned authors Fernando Andrade Pires de Lima and Joao De Matos Antunes Varela reproduced herein above. It is also the view held by Supreme Court of Portugal in its decision dated 9/04/1957 in File No. 56.939 wherein the Supreme Court stated:

‘article 2126 and following of the Civil Code today is in a great part substituted by the respective provisions of the Code of Civil Procedure’...”

19. This court too has endorsed the view expressed by the Bombay High Court on the subject, in *Baburao Karekar v. Vilas Atmaram Bandodkar*¹². G

¹¹ Civil Application No. 294 of 2007 in First Appeal No. 289 of 2006, decided by Bombay High Court on 14.02.2008

¹² (2015) 12 SCC 659 H

- A "II. Article 1417(c) of the Portuguese Code translated by Mr M.S. Usgaocar in *Family Laws of Goa Daman & Diu*
 '(c) Those who have not taken the properties in licitation and who are to be allotted the owelty money due by those who were successful in the licitation, shall be notified to demand within three days of the payment, if they so desire. If the demand is made the successful bidder shall be notified to deposit the amount failing which the licitation will be of no effect.
- C Where the payment is not demanded, the owelty money shall earn the legal interest from the date of final judgment of partition and the creditors thereof may register the legal hypothecation over the properties adjudicated to the debtor.'
- D III. Comments by noted Portuguese jurist Joao Antonio Lopes Cardoso, in his book *Judicial Partitions — Theory and Practice*, Vol. 2, Edn. 1955 on Article 1417
 'If the Registry finds, when preparing the chart, that the assets taken in the auction exceed the share of the respective interested party, it shall make a memo in the form of a chart stating precisely the amount of the excess. [Article 1417 of the Portuguese Code of Civil Procedure]
- F Thereafter, those who did not offer any bid or rather those who receive less, to whom owelty money is due by the highest bidders or by those who have exceeded their respective share, shall be notified to demand the payment within three days, if they so wish.
- G If they make a demand, the highest bidder or the person who has been allotted in excess shall be notified to deposit the owelty money under pain of the auction becoming ineffective. [Article 1417 clause (c) of the Portuguese Civil Procedure Code.]'"
- H 10. Though the learned counsel for the parties have urged different meanings to the translated versions to further their respective cases, on close scrutiny, we do not find any variance in the meanings of the translated provisions of the Code. In fact, according to us, the purport and meaning of

Article 1417(c) is clear and unambiguous. After a chart of partition is drawn up and approved by the court, under clause (c) of Article 1417, a duty is cast on the court to identify all the parties who had not taken part in the family auction/licitation and ensure service of notice on such person(s) so that within 3 days of receipt of such notice, the said parties i.e., creditors can raise a demand for payment, if they so wish. Once such a demand is raised the auction-purchaser/successful bidder is duty-bound to pay the amount, failing which the licitation will cease to have any legal effect. No time-limit for payment by the auction-purchaser is specified. It is in the aforesaid backdrop of the provisions of the Code that the court will be required to examine the rival stand of the parties as projected before us in the present appeal.

II. *Admittedly, in the present case, no notice was issued by court to the creditor(s) to raise any demand for payment as required under Article 1417(c) of the Code. The High Court has proceeded on the basis that the reply filed by the respondent before the learned trial court on 26-6-2008 constitutes such a demand and further that within 3 days thereof payment was not made by the appellants thereby vitiating the auction proceedings. Even if we are to proceed on the aforesaid basis insofar as the demand of the respondent is concerned, the alleged failure on the part of the appellants to deposit the amount within 3 days could not have occasioned a default to vitiate the auction proceedings, as held by the High Court. Article 1417(c) does not contemplate invalidity of the licitation on failure to deposit the amount demanded by the creditor within 3 days. The period of 3 days has been stipulated for raising a demand by the creditor after such creditor receives the notice that he may raise a demand for payment. If Article 1417(c) is to be read in the manner indicated above we do not see how the High Court could have held the auction proceedings/licitation to have been vitiated on the alleged failure of the auction-purchaser/appellants to pay the amount within 3 days. In any case, the "demand" made in the reply dated*

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- A *26-6-2008 is not pursuant to any notice issued under Article 1417(c) of the Code.*
- B *12. All the above facts lead us to the conclusion that the High Court was not correct in holding that in the present case the licitation was rendered invalid as there had been a failure on the part of the appellant to pay the amount demanded by the respondent as required under Article 1417(c) of the Code. The conclusions recorded by the High Court in the impugned order are plainly untenable and would justify interference.”*
- C 20. It is, thus, obvious that upon successfully bidding in an auction, the amount to be paid in by the concerned heir is payable upon a demand by any other heir to such bidder, asking for the amount to be deposited. The limitation period, so to say, is dependent upon the demand so made. The *rationale* for this rule is that till the amount in excess of such bidder's share is not computed, they remain in the dark about the sum to be paid.
- D In the present case, it is not disputed by the appellant that such a demand was not made; the parties were not notified as to the amounts they were entitled to; or that the respondent did not make the demand. For this reason, this court is not persuaded by the submissions of the appellant.
- E 21. As far as the rights of Hermano's heirs to succeed to his entitlement to the item bid for is concerned, the appellant's argument was that the right to receive such property was conditional or contingent upon his depositing the entire bid amount; since he did not do so, the heirs cannot inherit some vague inchoate right. A perusal of Article 1737 of the Code reveals that it is cast in wide terms; it declares that the
- F “inheritance” covers “*all properties, rights and obligations of the author, which are not merely personal or which are otherwise excepted by the disposition...*” Concededly Hermano was an heir, entitled to a share in the estate of the deceased. Upon his death, that share would devolve on the heirs. The question then is whether Hermano's entitlement to claim a particular item upon payment of oweltly, when demanded, is “property” or a “mere personal right.”
- G 22. What Article 1737 provides for is that inheritance, or the estate of a deceased, comprises of all properties, rights, and obligations which are not personal or otherwise excepted from disposition. Thus, the concept of inheritance is wide and embraces all rights and obligations, including
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property. Now, property itself is a wide term; it includes corporeal and incorporeal property, movables and immovable property, intellectual property (which are essentially negative rights, in the form of legal enclosures that the owner is entitled to, to prevent use by others). Rights and entitlements are even wider concepts. In *Vasudev Ramchandra Shelat v. Pranlal Jayanand Thakar*¹³ this court approved the view that delivery of shares, with share transfer forms, which led to rights to get the shares registered, was property:

"We think that such a right is in itself "property" and separable from the technical legal ownership of the shares. The subsequent or "full rights of ownership" of shares would follow as a matter of course by compliance with the provisions of Company law. In other words, a transfer of "property" rights in shares, recognised by the Transfer of Property Act, may be antecedent to the actual vesting of all or the full rights of ownership of shares and exercise of the rights of shareholders in accordance with the provisions of the Company law."

23. The other manner of examining the issue is whether Hermano's rights were "personal rights". A right to claim specific performance of an agreement to sell has been held to be a personal right in *Umabai & Anr. v. Nilkanth Dhondiba Chavan (Dead) by L.Rs. & Anr.*¹⁴ and *Bhimrao Ramchandra Khalate (Deceased) through L.Rs. v. Nana Dinkar Yadav Tanpura & Ors*¹⁵. Similarly, the claim of a trustee against another co-trustee is a personal right, *per Ashok Kumar Gupta and Anr. v. Sitalaxmi Sahuwala Medical Trust and Ors.*¹⁶; and in *Amirtham Kudumbah v. Sarnam Kudumban*¹⁷, it was held that the right to impeach a sale effected by a minor's guardian is a personal right vested in the minor which is not transferable.

24. In the present case, it cannot be said that Hermano's right to participate, and claim the specific item of property, at the appropriate stage - when owelty was to be demanded, was a mere personal right, which extinguished upon his death. The entitlement to bid in the licitation

¹³ 1975 (1) SCR 534

¹⁴ (2005) 6 SCC 243

¹⁵ 2021 (9) SCC 45

¹⁶ 2020 (4) SCC 321

¹⁷ 1991 (2) SCR 389

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- A process was not a personal right, but in his capacity as a member of the family, of which he had been constituted as the *Cabeça de Casal*. If all other items are heritable by his heirs and legal representatives (as there is no dispute that they are, because they step into his shoes) an entirely different conclusion is unsupportable in regard to the item of property for which he bid successfully, but for which no demand was made, for payment of any amount. This was because, the final chart of partition containing the excess payments to be made, by one or other members of the family had not been prepared; no demand for payment or deposit of oweltiy was concededly made by any member of the family. However, that did not mean that the highest bid by Hermano was, in some inexplicable manner, effaced. His position and right as a successful bidder, and his obligation to pay the concerned amount, when called upon to do so, were heritable by his heirs and legal representatives.

25. For the foregoing reasons, the impugned judgment of the High Court is sound. The appeals are therefore, without merit, and, D consequently, dismissed without an order on costs.

Ankit Gyan and Anurag Bhaskar
(Assisted by : Rahul Kumar, LCRA)

Appeals dismissed.