

*Esha***IN THE HIGH COURT OF BOMBAY AT GOA****WRIT PETITION NO. 195 OF 2024**

1. Mr. Hilario Francis Fernandes, 60 years of age, son of Sylvester Luis Fernandes, Resident of House No. 2/2048, Naika waddo, Calangute, Bardez, Goa.
2. Mrs. Juliette Georgina Clotilda Fernandes, 60 years of age, wife of Mr. Hilario Francis Fernandes, Resident of House No. 2/2048, Naika waddo, Calangute, Bardez, Goa.

... PETITIONERS

Versus

1. Mr. Christopher Fernandes alias Christopher Alfred Fenandes, alias Christopher John Fernandes, major of age, son of late Mr. Alfred Anthony Fernandes, Resident of B-404, Ashiyana, N.S. Phadke Marg, Saiwadi, Andheri (East), Mumbai – 400 069.
2. Mr. Rui John Leo Fernandes, 59 years of age, son of Sylvester Luis Fernandes, Resident of Mapusa, Bardez, Goa.
3. Mrs. Julie Fernandes, Major of age, w/o Mr. Rui John Leo Fernandes, Resident of House No. 604, Naika Waddo, Calangute, Bardez, Goa.

... RESPONDENTS

Mr. Ashwin D. Bhobe with Ms. Shaizeen Shaikh, Advocates
for the Petitioners.

Mr. John Abreu Lobo, Advocate for Respondent No. 1.

CORAM: BHARAT P. DESHPANDE, J.

DATED: 26th JUNE 2024

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith.

2. Heard finally with the consent of the parties.

3. The challenge in the present Petition is to the order passed by the first Appellate Court dated 27.09.2023 in Miscellaneous Civil Appeal No. 67 of 2021. By this order, the first Appellate Court quashed and set aside the order passed by the Inventory Court dated 06.12.2021 and directed to discard the additional declaration/affidavit filed by the Head of the Family [HoF] on 30.07.2019 with further direction to the HoF to give fresh declaration keeping in mind the provisions of Section 376 (3) and (4) of the Goa Succession, Special Notaries and Inventory Proceedings Act, 2012 [the Act of 2012, for short].

4. The learned Inventory Court vide order dated 06.12.2021 disposed of the Application [Exhibit-72] filed by the interested party, namely, Christopher Fernandes, who is Respondent No. 1 herein, raising objection to the additional declaration filed by the Petitioner/HoF on the precise ground that such additional

declaration is not in conformity with the provisions of Section 376 of the Act of 2012 and in fact it contains pleadings as to how the Will is null and void. The learned Inventory Court while considering such additional declaration rejected the objection filed by Respondent No. 1 on the ground that there is no provision to discard such declaration and that an inquiry will have to be conducted to find out whether the Will is a genuine document or otherwise. The Petitioner/HoF challenged such a decision wherein the impugned order dated 27.09.2023 was passed.

5. Mr. Bhobe would submit that the declaration was very much required and the same is in consonance with the provisions of Section 376 (3) and (4) of the Act of 2012 and therefore, the learned Inventory Court was fully justified to accept such declaration thereby directing to conduct an inquiry whether Respondent No. 1 could be considered as the heir on the basis of the Will and whether the Will is a genuine document. He submits that there is no provision or power to discard the declaration as the HoF is duty-bound to give a declaration disclosing the name and status of the estate leaver as provided in clause (i) of subsection (1) of Section 376 of the Act of 2012. He submits that the statement made in the said additional declaration is only to put forth the facts and the same could not have been discarded by the

first Appellate Court. He submits that the findings of the first Appellate Court are perverse and there is no mention of conducting any inquiry as directed by the learned Trial Court.

6. Mr. Bhobe would submit that the additional declaration was required since Respondent No. 1 filed a Petition before the Bombay High Court, however, it was subsequently withdrawn and this fact was required to be brought on record by additional declaration to prove that the said Respondent No. 1 is not the heir of the deceased. He further submits that the additional declaration only discloses that the Will cannot be taken on record as a genuine document for the purpose of deciding the Inventory Proceedings or even accepting Respondent No. 1 as the heir.

7. Mr. Lobo appearing for Respondent No. 1 would contend that the requirements of Section 376 of the Act of 2012 only gives power to the HoF to give a declaration on oath and not the pleadings or the contentions which the HoF or as the interested party would try to suggest. He submits that such declaration, in question, cannot be termed as a declaration under Section 376 (3) of the Act of 2012 since it mostly contains the pleadings as well as the allegations as to how the Will is null and void.

8. Mr. Lobo would submit that in view of Section 378 of the Act of 2012, any declarations given by the HoF are required to be presumed to be true until the contrary is proved. According to him, such a declaration is acceptable. It is submitted that the statement made therein that the Will is null and void ought to have been considered as proved and the burden would lie on the Respondents to prove otherwise.

9. Mr. Lobo would further submit that the learned first Appellate Court has rightly considered the provisions and interpreted them in a proper way and such an order need not be interfered with as the same is not perverse and illegal.

10. The rival contentions fall for determination.

11. The Inventory Proceedings are pending from the year 2005 wherein the Petitioner is appointed as the HoF. The affidavit cum declaration was furnished by the Petitioner in the year 2017 itself, which in fact is shown as an additional declaration of the HoF [Exhibit-D/62 from pages 225 onwards]. This declaration apart from the earlier ones shows that earlier the HoF by the name Maria Fernandes expired and thereafter, the Petitioner was appointed as the HoF. It further shows that it was reported by the

Advocate appearing for one of the interested parties, namely, Ms. Edith Claudia Fernandes, vide Application dated 31.07.2015 that Ms. Edith Claudia Fernandes expired on 24.05.2015 at Andheri, Mumbai and she left behind the Will/Testamentary dated 08.12.2014 executed in the office of the Sub-Registrar Andheri, Mumbai. It is stated that by virtue of the said Will, Respondent No. 1 is shown as her heir.

12. A copy of the death certificate of Ms. Edith Claudia Fernandes was also produced by the HoF along with the additional declaration. Thus, it is clear from the record that by way of an additional declaration filed on 14.06.2017, the Petitioner as HoF has made a declaration with regard to the Will and that Respondent No. 1 has been shown as the heir or beneficiary in the Will. Subsequently, an Application was filed to produce the said Will on record by the Respondents and accordingly, the HoF/Petitioner filed an additional declaration on 30.07.2019 [pages 228 onwards] which is marked as Exhibit-71 before the Inventory Court.

13. By this additional declaration, the HoF declared about the fact that Respondent No. 1 filed a Petition before the High Court on the basis of such Will, however, such Petition was permitted to

be withdrawn vide order dated 30.06.2015. The HoF further claimed and made a statement/declaration that Respondent No. 1 is not the heir or the beneficiary under the said Will. However, the rest of the contents of the said additional declaration are in the form of pleadings/submissions as to why such Will is to be considered as null and void.

14. Considering the provisions of Section 376 of the Act of 2012 and more particularly, sub-sections 1, 3 and 4 of Section 376, the duty of the HoF while discharging the functions as the HoF, diligently and faithfully, is to make a declaration of the aspects which are found mentioned in sub-section 1 of Section 376, which read thus:

“376. Order of appointment of head of the family.—

(1) When the petition is duly filed, the court may hold an inquiry to decide who shall hold the office of head of the family and shall upon considering the petition and documents accompanying it, appoint a person as the head of family and notify him to take oath that he shall discharge his duties diligently and faithfully and make a declaration stating:—

(i) the name and status of the estate leaver, date on which and the place where he died;

(ii) the name, status, age and capacity of the heirs, testamentary or legal, without excluding those who

are known to have been conceived and the degree of kinship of the legal heirs;

(iii) whether the estate leaver has left a will or a gift and, if so, the head of the family shall produce the original or a certified copy of the will or of the gift deed;

(iv) whether the estate leaver was married and, whether there was an ante-nuptial agreement and if so, he shall produce a certified copy of the agreement;

(v) where a party is subject to orphan's jurisdiction, the names of persons who shall constitute the family council. The court may accept or reject the proposed names;

(vi) whether there are assets to be collated and give the names of the conferees. The head of the family shall also give the names and addresses of the legatees and of the creditors;

(vii) what are the assets of inheritance."

15. As per sub-section 2 of Section 376, while making such a declaration, the HoF shall produce a certified copy of the renunciation deed, if any, and such other documents as may be relevant to the case. Section 376 (3) of the Act of 2012 puts a duty on the HoF when he makes reference to any document in his declaration, he shall, wherever possible give particulars in respect

of the date of the original document, place where drawn or registered and the registration number etc. Sub-section 4 of Section 376 of the Act of 2012 further puts a duty on the HoF that he should make such an affidavit and copies of such shall be furnished to the interested parties and may be accompanied by a list of assets and documents.

16. Mr. Lobo is justified in submitting that once such declaration is made as provided under Section 376 of the Act of 2012, it carries evidentiary value as provided under Section 378 of the Act of 2012. The Court is bound to presume such a declaration to be true until the contrary is proved. Thus, the function and duty of the HoF is to faithfully make such a declaration about the contents as found in clauses (i), (ii) and (iii) of sub-section 1 of Section 376 of the said Act.

17. It is no doubt true that the HoF is also one of the interested parties in the said proceedings. However, the appointment of one of the interested parties to the office of the HoF assumes significance. The duty of HoF is required to be performed diligently and faithfully in order to decide the inventory proceedings. However, if the HoF is interested in raising such an objection as one of the interested parties to any document or

otherwise, he is free to do so only in the individual capacity and not as HoF.

18. In the present matter, the Petitioner while holding the office of the HoF seems to be confused with the declaration and his functions. Though he has a right as an interested party to raise an objection with regard to the Will, he is duty bound as HoF to diligently and faithfully declare such document to the Court so that proper adjudication could have been carried out.

19. The learned Inventory Court while deciding the objection to the additional declaration failed to consider this aspect. Mixing two issues in the declaration is unwarranted. The fact remains that the declaration as provided under Section 376 of the Act of 2012 is considered to be a sacrosanct act on the part of the HoF with an object to assist the Court, whereas the other contentions found in the additional declaration are coming forward from the interested parties, which could have been separated. The learned Inventory Court, while rejecting such an objection, found that an inquiry is necessary whereas the first Appellate Court quashed and set aside such an order and directed the HoF to disclose the facts on a fresh declaration.

20. To my mind the course adopted by both the Courts below is not proper. The learned Inventory Court on assessing the declaration could have discarded the portion which is considered to be pleadings in the additional declaration filed in the year 2019 by retaining the first part regarding the statement as far as the Petition filed before the High Court and withdrawal of the same later on. Similarly, the statement of the HoF that Respondent No. 1 is not the heir on the basis of such Will, could also be considered as a statement made on behalf of the HoF. However, the remaining portion of such additional declaration could not have been accepted for the simple reason that contentions in the said additional affidavit cannot be termed as declaration *per se* as provided under Section 376 of the Act of 2012. At the most, the contentions could have been considered as pleadings, which are objected to, for and on behalf of the interested parties and not in the capacity as a HoF.

21. As far as the inquiry is concerned, the learned Inventory Court could have separated such an aspect by considering the latter part as an objection and then directing to conduct the inquiry in that regard. By accepting the contrary statement, the learned Inventory Court virtually shifted the burden on the

Respondents in view of the presumption under Section 378 of the said Act.

22. The learned first Appellate Court again failed to consider both the aspects i.e. the declaration part and the pleadings/objection part.

23. The best recourse in the above situation is to discard the remaining portion of the additional declaration which starts with the statement “I say that the document bearing a nomenclature “*Will/Testament*” dated 8/12/2014 *in the matter of legality, propriety and correctness of the Will*”. The first part wherein the declaration is made with regard to the decision of the High Court and the statement that Respondent No. 1 is not the heir on the basis of the Will stands retained.

24. It is made clear that the HoF being one of the interested parties is free to raise objections in his individual capacity against such Will and if such objections are raised, the learned Inventory Court shall deal with it independently and after hearing both sides.

25. Accordingly, both the impugned orders stand modified as disclosed above.

26. Rule is made absolute in the above terms.

BHARAT P. DESHPANDE, J.