

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 108 OF 2014

Shri Anant Gopinath Kessarkar
s/o late Gopinath H. Kessarkar,
aged about 54 years, businessman,
residing at House No. F-2,
Gopinath Kessarkar Building,
Opp. Bank Of India,
Station Road, Margao, Goa.

... Petitioner

Versus

1. Shri Teodoro Jacob Fernandes,
s/o Thomas Q. Fernandes,
Partner of Venture Services,
Residing at H.No.484,
Major in age, Opp. Railway Station,
Guirdolim, Chandor, Salcete, Goa.

2. Shri Paul Inacio Bento Fernandes
s/o Thomas Q. Fernandes,
Partner of Venture Services,
Residing at H.No.484,
Major in age, Opp. Railway Station,
Guirdolim, Chandor, Salcete, Goa.

... Respondents

Mr. Sahish Mahambrey, Advocate for the Petitioner.

Mr. V. Rodrigues, Advocate for the Respondents.

Coram:- N. M. JAMDAR, J.

Date:- 18 February 2015

ORAL JUDGMENT :

Rule. Rule made returnable forthwith. Respondents waive service. Taken up for hearing.

2. By this petition, the petitioner challenges the order passed by the Adhoc District Judge, South Goa, Margao dated 7 February 2013 allowing the Misc. Appeal filed by the respondents against the order passed by the Civil Judge, Senior Division, Margao directing that the respondents be detained in civil prison for 90 days.

3. The petitioner had filed execution application in the Court of Civil Judge, Senior Division, Margao against the respondents for recovery of Rs.5,62,750/-. In the execution proceedings an application was filed by the petitioner under Order XXI Rule 41(3) of Civil Procedure Code, seeking a direction to the respondents to file their affidavit of assets. This application was allowed by the learned Civil Judge on the same day. Thereafter, the execution application came up on board before the learned Civil Judge wherein the learned Civil Judge observed that inspite of opportunities given, the respondents had not filed their affidavit of assets and therefore they were guilty of disobedience of the order. Thereafter, the advocate for the respondents appeared and stated that the affidavit of assets has been filed. The learned Civil Judge held

that, since the respondents had not filed affidavit of assets in time, they are engaged in dilatory practice and, accordingly, directed that they should be detained in civil prison for 90 days.

4. Respondents thereafter filed an Misc. Appeal in the Court of District Judge, South Goa, Margao. The learned District Judge considered the objections raised by the petitioner as regard maintainability of the appeal and held that the appeal was maintainable. The learned District Judge also held that having filed affidavit of assets the order directing that respondents be detained in civil prison was not necessary to be passed and allowed the appeal by the impugned order dated 7 December 2013.

5. I have heard Mr. S. Mahambrey, the learned Counsel for the petitioner and Mr. V. Rodrigues, the learned Counsel for the respondents.

6. First contention is that the appeal was not maintainable, since as per Section 104(1)(h) of the Code only those orders directing arrest other than the one in execution of the decree are appealable. The learned District Judge has rightly noted that the order impugned before it was not an order in execution of the appeal, but an order under Order XXI Rule 37 of the Code.

7. Even otherwise assuming the appeal is not maintainable and the order passed by the District Court is set aside, the

consequence would be of revival of the order passed by the Civil Judge directing detention of the respondents for 90 days. Therefore, while considering the rival contentions on maintainability of the appeal before the District Court in exercise of my jurisdiction under Article 227 of Constitution of India, I will have to take into consideration the ultimate effect.

8. When the order holding that respondents were guilty was passed by the learned Civil Judge, the respondents were not present in the Court. Therefore, on the next date the respondents had moved the matter before the learned Civil Judge pointing out that the affidavit of assets was filed. In spite of the same, learned Civil Judge proceeded to pass an order of detention of 90 days. This is perverse, to say the least.

9. Granted that some deterrent action needed to be taken, but directing detention of the respondents for a period of 90 days in civil prison, was highly disproportionate. Orders directing party to be detained in civil prison are not to be lightly passed. It is true that majesty of law needs to be upheld, but such whimsical and arbitrary orders tend to lower the majesty of law.

10. Though I am not inclined to interfere with the impugned order, passed by the District Court some deterrent action against respondents is warranted. The District Court also has lost sight of the fact that merely because affidavit of assets was not filed the conduct of the respondents for filing despite

opportunities is not completely washed away. The learned District Judge ought to have passed some deterrent order against the respondents, though not an imprisonment in civil prison.

11. Considering the facts and circumstances of the case, I am of the opinion that a fine of Rs.10,000/- in total, upon respondents for not filing the affidavit of assets in time would meet ends of justice. Accordingly, the petition is disposed of by directing the respondents to pay costs of Rs.10,000/- in total to the petitioner within a period of two weeks from today. The petition is disposed of in above terms. Rule discharged. No costs.

N. M. JAMDAR, J.

NH