

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 173 OF 2015

Shri. Devdatta Dhond, ...Petitioner.

Versus

Shri. Bernard Pereira, ...Respondent.

Shri. J. P. Mulgaonkar with Ms. A. Kaisukar, Advocates for the petitioner.

Shri. Nitin Sardesai, Senior Advocate with Mr. L. Raghunandan, Advocates for the respondent.

Coram :- M. S. SANKLECHA, J

Date : - 30th March, 2015.

Order :

At the instance and request of the counsel the petition itself is being disposed of finally at the stage of admission.

2. This petition under Article 227 of the Constitution challenges the following orders passed by the Civil Judge, Junior Division, Mapusa (hereinafter referred to as “Executing Court”).

- (a) Order dated 20 September, 2014 directing the Bailiff in terms of Order XXI Rule 35 of Civil Procedure Code to execute the warrant of possession.
- (b) Order dated 3 November, 2014 (hereinafter referred to as “1st order”) dismissing the petitioner's application seeking possession of the premises bearing V. P. No.1008 as Survey No.149/1 of Tivim village (herein after referred to as “suit

premises”) so as to give effect to the order dated 23 September, 2014, passed by the Ad-Hoc District Judge, Panaji (hereinafter referred to as “Appeal Court”) and,

- (c) Order dated 3 November, 2014 (hereinafter referred to as “2nd order”) recording his satisfaction that warrant of possession is duly executed and possession of suit premisses has been handed over to the decree holder i.e. the respondent.

3. The undisputed facts leading to this petition are :

- (a) On 18th December, 2012 the Rent Controller allowed the application of the respondent seeking to evict the petitioner from the suit premises. The above order directed the petitioner to hand over the vacant and peaceful possession of the suit premises to the respondent.
- (b) On 11 February, 2013 the petitioner filed an appeal and an application for stay to the Administrative Tribunal against the order of eviction dated 18 December, 2012 passed by the Rent Controller. However as there was delay of 13 days in filing appeal the same was accompanied with application to condone the delay. Thereafter due to an amendment to the Goa (Lease, Rent and Eviction) Control Act, 1986,

(hereinafter referred to as “Rent Act”), that appeal stood transferred to the Appeal Court from the Administrative Tribunal.

- (c) On 9 September, 2014 the petitioner's application for condonation of delay in filing the appeal from order dated 18 December, 2012 of the Rent Controller was listed for hearing before the Appeal Court. At that time, the respondent appeared and at his request the appeal along with the condonation of delay application was adjourned to 7 October, 2014.
- (d) On 15 September 2014, when the respondent's application for execution of the order dated 18 December, 2012 was on board before the Executing Court, the petitioner requested the Executing Court that the execution application be posted after 7 October, 2014 as the appeal along with condonation of delay is listed before the Appeal Court on that date. The respondent opposed the application for adjournment. The Executing Court did not adjourn the hearing of the application but proceeded to issue a warrant of possession making it returnable on 29 September, 2014.
- (e) On 16 September, 2014, the respondent made an application to the Executing Court under Order XXI Rule

35 of the Civil Procedure Code for a direction that the Court Bailiff be directed along with police protection to execute the order dated 18 December, 2012, passed by the Rent Controller. In view of the above, on 17 September, 2014 itself the petitioner filed an application before the Appeal Court for an ad-interim stay of the order dated 18 December, 2012, evicting the petitioner from the suit premises, passed by the Rent Controller. The Appeal Court issued a notice to the respondent making the application for ad-interim relief returnable on 10 a.m. on 23 September, 2014.

- (f) In spite of the above, on 20 September, 2014 the Executing Court allowed the respondents application dated 16 September, 2014. It directed the Bailiff to break open the lock of the suit premises, if found closed, conduct a detailed panchnama of the materials found therein and ensure that the warrant is executed.
- (g) On 22 September, 2014, the petitioner filed an application before the Executing Court for stay of the order dated 20 September, 2014 directing the Bailiff to execute the order dated 18 December, 2012. The Executing Court issued notice to the respondent and posted the petitioner's

application for stay on 23 September, 2014 for hearing.

- (h) On 23 September, 2014, the Appeal Court granted a stay to the order dated 18 December, 2012 passed by the Rent Controller, evicting the petitioner from the suit premises. The stay was granted till 24 September, 2014. In view of the urgency the Appeal Court directed that the Executing Court be intimated about the order immediately. Accordingly, the Executing Court was telephonically informed about the order passed by the Appeal Court, and the Executing Court in turn seems to have informed the Bailiff, who had proceeded to execute its order dated 20 September, 2014.
- (i) Thereafter, the Bailiff filed his report dated 23 September, 2014. In his report the Bailiff indicates that, he had executed the decree by handing over the suit premisses along with items therein to the decree holder. However, in conclusion, the report indicates that the keys of the suit premises consisting of two shops were handed over to the Nazir of the Executing Court for safe custody.
- (j) On 4 October, 2014 the petitioner filed an application to the Appeal Court for the release of the keys of the suit premises to him. By an order dated 20 October, 2014, the

Appeal Court rejected the petitioner's application. However, while rejecting the application of the petitioner, it directed the petitioner to pursue its case before the Executing Court and directed the Executing Court to decide the issue of whether or not the eviction order dated 18 December, 2012, passed by the Rent Controller, has been duly executed by the Bailiff.

- (k) Consequent to the above order dated 20 October, 2014, the petitioner on 3 November, 2014, filed an application to the Executing Court in terms of the order dated 20 October, 2014, of the Appeal Court, seeking possession of the suit premises in view of the interim stay granted by the Appeal Court in its order dated 23 September, 2014. On 3 November, 2014 (1st order), the Executing Court dismisses the petitioner's application holding that, the prayer sought in the application cannot be decided by him as the entire issue is pending before the Appeal Court. It also records that the only issue that can be decided by the Executing Court is, whether or not the order of eviction dated 18 December, 2012, is duly executed, to its satisfaction or not.
- (l) On the same day by an order dated 3 November, 2014 (2nd order), the Executing Court on reading the Bailiff's report

concluded that the order dated 18 December, 2012 of the Rent Controller has been duly executed to its satisfaction.

4. The petitioner is pressing for reliefs only against the two orders dated 3 November, 2014 of the Executing Court. Although the petitioner has in the petition raised a challenge to the jurisdiction of the Executing Court on the ground that the Civil Procedure Code is not applicable for execution of order passed under the Rent Act in view of the Rules framed thereunder, the same is not being pressed along with the order dated 20 September, 2014 at the hearing.

5. Mr. J. P. Mulgaonkar, learned counsel for the petitioner in support of the petition submits as under :

- (a) An order dated 3 November, 2014 (1st Order), rejected the petitioner's application for being handed over the possession of the suit premises so as to effectuate the order dated 23 September, 2014, passed by the Appeal Court has been dismissed on the ground that the same cannot be considered by the Executing Court. This notwithstanding fact that the order of the Appeal Court dated 20 October, 2014, specifically directed the petitioner to pursue its application with regard to the possession of the suit premises, before the Executing Court. Thus the binding

direction of the Appeal Court was completely ignored by the Executing Court,

- (b) The order dated 3 November, 2014 (2nd order), by which the Executing Court recorded its satisfaction that the decree has been executed on the basis of the Bailiff report dated 23 September, 2014 is completely without jurisdiction. This is so as before the decree could be executed on 23 September, 2014, the Appeal Court had passed ad-interim order in favour of the petitioner staying the order of execution and the same was communicated to the Executing Court and thereafter to the Bailiff. Thus the Executing Court and the Bailiff could not have gone ahead with the execution of the decree on 23 September, 2014. Besides the order also challenged on the ground that it proceeds to record its satisfaction that the decree has been executed prior to Bailiff being informed by the Appeal Court order on the basis of his personal knowledge which was not forming a part of the record ;
- (c) Lastly, it is pointed out that the entire proceeding i.e. execution has been conducted in a predetermined fashion to present a fait accompli and render the order of the Appeal Court pronounced on 23 September, 2014 and

communicated to the Executing Court on 23 September, 2014, useless / redundant. Besides it was the respondent who took an adjournment before the Appeal Court on 9 September, 2014 to 7 October, 2014. Notwithstanding the above, the respondent moved before Executing Court on 16 September, 2014, to implement the order dated 18 December, 2012, of eviction.

6. As against the above, Mr. Nitin Sardessai, learned senior counsel for the respondent in support of the impugned order submits as under :

- (a) The petitioner has sought to invoke the existing jurisdiction under Article 227 of the Constitution of India to quash the impugned orders dated 3 November, 2014 (both 1st and 2nd orders). This supervisory jurisdiction as is well settled is to be exercised most sparingly only where the orders are passed in violation of fundamental principles of law leading to injustice. In the present case, both the orders of the Executing Court dated 3 November, 2014 (1st and 2nd orders) are unexceptionable and do not warrant any interference. The orders of the Executing Court are only ensuring that the fruits of the order dated 18 December, 2012 of eviction passed in favour of the respondents are

made available to him.

- (b) There has been no violation of the Appeal Court order dated 23 September, 2014 by the Executing Court as the Bailiff was not communicated of the same before he executed the order dated 18 December, 2012 and handed over possession to the respondent. An order of stay comes into force / effect only when the same is communicated to the person to whom the stay is addressed / directed. In support reliance was placed on the decision of the Apex Court in **Mulraj v. Murti Raghunathji Maharaj AIR 1967 Supreme Court 1386.** Thus the petitioner wants to lock the stable after the horses have bolted, this is of no avail. Thus the order dated 3 November, 2014 (2nd order) in reaching satisfaction that the decree has been executed on the basis of the Bailiff report cannot be faulted. Besides, it is submitted that even if that part of the order dated 3 November, 2014 (2nd order) to the extent it relies upon personal knowledge is ignored, the impugned order (2nd order) is still sustainable. Thus, no fault can be found with the order dated 3 November, 2014 (2nd order) of the Executing Court recording its satisfaction that the decree has been executed ; and

- (c) So far as to order dated 3 November, 2014 (1st order), by which the petitioner's application for handing over possession of the suit premises was dismissed, it is submitted that no fault can be found with it. In any event it is submitted that once the Executing Court is satisfied that the execution of the decree has already taken place by order dated 3 November, 2014 (2nd order), then the occasion to consider the interim application pending the Executing Court's satisfaction of the execution of the decree would not arise. In the aforesaid circumstances, it is submitted that no interference is called for.

7. It is settled position in law that the supervisory jurisdiction under Article 227 of the Constitution of India is not to be lightly exercised. The jurisdiction under Article 227 of the Constitution of India is the power of the Superintendence over all Courts and Tribunal functioning within the State. This power has to be exercised sparingly to ensure that sub-ordinate Courts and Tribunals exercise their jurisdiction within their limits and not in a manner not permitted by law. This jurisdiction is not to be exercised to re-examine and re-evaluate the evidence in a manner done by the Appeal Court. (See : *Surya Dev Rai v. Ram Chander Rai and other*, (2003) 6 Supreme Court Cases 675). Thus there can be no

quarrel with the respondents submission that this power under Article 227 of the Constitution of India is to be sparingly exercised. However, the issue here is, whether in the present facts, this jurisdiction has to be exercised or not, keeping in mind the above parameters laid down by the Supreme Court.

8. The impugned order dated 3 November, 2014 (2nd order), proceeds on the basis as recorded therein that the Bailiff had executed the decree on 23 September, 2014 by handing over the suit premises to the respondent before he was informed of the stay order dated 23 September, 2014, passed by the Appeal Court. This fact of the Bailiff being informed of the Appeal Court order after the decree has been executed is not a part of the record, however it forms the basis of the impugned order on the basis of the personal knowledge of the Executing Court who claims to have been orally informed. It is basic principle of law that an adjudicating authority cannot decide a dispute between the parties on the basis of his own personal knowledge. An adjudicating authority is a neutral umpire who has to decide the dispute before him on the basis of evidence led by the parties which are subjected to challenge by the other side. It is not open to an adjudicating authority to enter the arena of dispute between the parties and become a witness for one of the parties. This evidence of the Executing Court being informed

orally is not a part of the record in the proceedings. Thus the petitioner had no occasion to challenge the same. So far as the submission of the respondent that the order would be sustainable even if one excludes the portion attributed to personal knowledge in the impugned order. I find that it is not so. The only basis to arrive at a conclusion that execution of the decree was over before receipt of the Appeal Court order is only to the personal knowledge of the Adjudicating authority. In the absence of the above, there is no evidence to show whether the execution was completed prior to or after the Bailiff was communicated the order of the Appeal Court. On the aforesaid ground itself the order dated 3 November, 2014 (2nd order), is vulnerable as the impugned order has proceeded to exercise jurisdiction in a manner which is not permitted in law. Thus, this would warrant exercising authorities under Article 227 of the Constitution of India and setting aside the impugned order dated 3 November, 2014 (2nd order) to decide afresh on the basis of the evidence on record and not on personal knowledge.

9. It was next submitted by Mr. Nitin Sardesai, learned senior counsel for the respondent by placing reliance upon the decision of the Supreme Court in “*Mulraj*” (supra) that an order of stay comes into force only when it is intimated to the person to whom it is directed. In the present facts it is submitted that the order of the Appeal Court dated

23 September, 2014 was intimated to the Executing Court by the Appeal Court, and from there to the Bailiff. The Execution of the order dated 18 December, 2012 was already completed when the order was communicated to the person it was directed to. There can be no quarrel with the above proposition. It finds legislative acceptance in the Explanation to Order 41 Rule 5(1) of the Civil Procedure Code, introduced in 1977. In this case the order of the Appeal Court is directed to the Executing Court. Therefore, all proceedings come to a halt when the order is communicated to the Executing Court. The Bailiff is only an extension / agent / officer of the Executing Court implementing its directions / order. Therefore, it does appear to me that once the Executing Court is aware of the order of stay passed by the Appeal Court from that time onwards all proceedings are in defiance of the Appeal Court order would be non-est in law and status quo ante would have to be restored to the position as existing at the time the Executing Court was informed of the order of the Appeal Court. Thus the submission of Mr. Nitin Sardesai, learned senior counsel for the respondent that the decree has been executed by the Bailiff before he had knowledge of the Appeal Court's order is not acceptable as the person to whom the Appeal Court order is directed is the Executing Court. In the present facts, the Bailiff is an Officer of the Court in terms of Order XXI Rule 35(3) of the Civil Procedure Code. Thus the critical

issue is at what time was the Executing Court informed of the Appeal Court order. This has to be decided on the basis of either facts on record of the Court proceedings or on the evidence led by the parties.

10. It is submitted by the petitioner that there are other inconsistencies in the Bailiff's report dated 23 September, 2014, such as the custody of the suit shops were handed over to the decree holder and yet at the same time it records that the keys of the suit shops were handed over to the Nazir of the Executing Court for the safe custody. There are also other issues raised such as the respondent taking adjournments from the Appeal Court, in appeal against the decree and yet proceeding with the execution application with the Executing Court. For the purposes of this petition, I am not examining the same as there are debatable matters. However, for the purpose of exercising extraordinary supervisory jurisdiction under Article 227 of the Constitution of India the order dated 3 November, 2014 (2nd order) of the Executing Court holding that it is satisfied on the basis of personal knowledge that the execution of the order dated 18 December, 2012 has been done by the Bailiff in accordance with his report dated 23 September, 2014 is not sustainable and thus order dated 3 November, 2014 (2nd order) is quashed and set aside. The issue of whether or not the execution of order dated 18 December, 2012 has taken place on 23 September, 2014, is restored to

the Executing Court for a fresh order to be passed on the basis of evidence lead before it and not on the basis of personal knowledge of which no evidence is found on record.

11. In view of the aforesaid direction the Executing Court shall decide the aforesaid issue as expeditiously as possible and preferably within three months from today. In view of above direction, the other order dated 3 November, 2014 (1st order), which is also impugned in the present proceeding need not be disturbed at this stage. This is for the reason that the order dated 3 November, 2014 (1st order), rejected the petitioner's application for being handed over the suit premises. However as the Executing Court is being directed to consider whether the execution had taken place or not on 23 September, 2014, before the intimation of the Appeal Court order dated 23 September, 2014 to the Executing Court, the interim application which was rejected by the order dated 3 November, 2014 (1st order) need not be considered at this stage. In case the Executing Court does not decide the issue restored to it, within three months from today, then the petitioner is at liberty to move a fresh application to the Executing Court for passing an order on possession of the suit shops pending the decision of the Executing Court on its satisfaction whether order dated 18 December, 2012, has been executed by the Bailiff on 23 September, 2014. Needless to state this

application would be considered on its own merits without any manner being influenced by its order dated 3 November, 2014 (1st order). It is made clear that the keys of the suit premises will continue to be with the Nazir of the Executing Court till orders as stated hereinabove are passed by the Executing Court.

12. Petition disposed of in above terms. No order as to costs.

M. S. SANKLECHA, J.

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