

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 129 OF 2015

SHRI. ULHAS SHANKAR BARDE AND
ANR.,

... Petitioners

Versus

SHRI. HARISHCHANDRA SHANKAR BARDE
AND ANR.,

... Respondents

Mr. Joseph Vaz, Advocate for the Petitioners.

Mr. S. D. Lotlikar, Senior Advocate with Ms. P. Hegde, Advocate for
the Respondents.

Mr. Rohan Desai, Advocate for the Applicants in MCA No.
497/2015.

Coram:- F. M. REIS, J.

Date:- 7th August, 2015

ORAL ORDER

Heard Shri J. Vaz, learned Counsel appearing for the Petitioners
and Shri Lotlikar, learned Senior Advocate appearing for the
Respondents.

2. The above Petition takes exception to an Order passed by the
learned Civil Judge, Senior Division, Mapusa, dated 14.01.2015, in
execution proceedings, whereby the Petitioners were, inter alia,
directed to demolish the construction carried out in the suit property
situated at Corlim surveyed under chalta no. 36 to 39 of P.T. Sheet
no. 116 of City Survey, Mapusa. The construction ordered to be
demolished was identified in the plan marked PW.1/J collectively in
the suit.

3. Shri J. Vaz, learned Counsel appearing for the Petitioners, has pointed out that when the matter came for consideration before this Court on the earlier occasion, this Court had passed an Order to direct a Court Commissioner to visit the site and submit a report identifying two rooms which were stated to be in occupation of the Respondents.

Learned Counsel further pointed out that such exercise is completed and that this Court by a specific Order had in fact directed the Petitioners to hand over the possession of the said two rooms.

Learned Counsel further pointed out that the question of acceding to the request of the Respondents to divide the house amicably cannot be accepted as, according to him, Inventory Proceedings are pending for distributing the assets of the parents of the Petitioners. Learned Counsel further pointed out that the Decree itself is defective as, according to him, the suit filed by the Respondents was not maintainable as there were three sisters who were not made parties to the said proceedings. Learned Counsel further pointed out that the learned Judge has relied upon exhibit PW.1/J, which, was not admitted in evidence nor duly proved in the suit filed by the Respondents. Learned Counsel has thereafter taken me through the evidence of the Surveyor Shri Prazares Gonsalves and pointed out that the said plans were not duly proved and, as such, the question of relying upon such plan in the Execution Proceedings is not at all justified. Learned Counsel further pointed out that as Inventory Proceedings were in fact pending during the pendency of the suit, the

question of directing the demolition of the disputed structure would not arise as, according to him, any such improvement would be subject to the Inventory Proceedings which are pending.

4. On the other hand, Shri S. D. Lotlikar, learned Senior Counsel appearing for the Respondents, has pointed out that the Decree passed by the Civil Court clearly, inter alia, directs the Petitioners to demolish the illegal structures put up in the disputed property. Learned Senior Advocate further pointed out that the Decree which has attained finality is based on the plans produced by the Respondents in the said suit which is at exhibit Pw.1/J. Learned Senior Advocate further pointed out that as the Petitioners raised a grievance that the disputed structure has not been identified, the Respondents produced a certified copy of the said plan from the records of the Civil Suit. Learned Senior Advocate further pointed out that the objection that the plans have not been proved, cannot be raised in an Execution Proceeding. Learned Senior Advocate further pointed out that the contention of the Petitioners that as Inventory Proceedings are pending, the Decree cannot be executed is not at all permissible as, according to him, the Decree has to be executed in its entirety. Learned Senior Advocate as such pointed out that the Petition be rejected. Learned Senior Advocate further submits that the question of settling the dispute amicably would not arise as, according to him, the Petitioners are not prepared to divide the property amicably between the Petitioners and the Respondents.

Learned Counsel further submits that as no settlement is possible, this Court should proceed to decide the above Petition on merits.

5. Shri Rohan Desai, learned Counsel, has pointed out that he has filed an application under Order 21 Rule 97 of the Civil Procedure Code to obstruct the Decree sought to be executed. Learned Counsel further pointed out that the Applicants in the above Misc. Civil Application are all the sisters of the Petitioners as well as Respondents and, as such, being necessary party to the proceedings are entitled to raise such objections. Learned Counsel further pointed out that the application be allowed and the intervenors be heard in the above Petition.

6. I have carefully considered the submissions of the learned Counsel. With the assistance of the learned Counsel, I have also gone through the records. With regard to the application filed by the Intervenor under Order 21 Rule 97 of the Civil Procedure, I find that the question of entertaining such application in the above Writ Petition would not arise at all. Applicants, if so advised, may resort to the remedies in law. On this short consideration, the application stands rejected.

7. With regard to the contention of Mr. J. Vaz, learned Counsel appearing for the Petitioners, that the disputed property has not been identified, I find that the learned Judge has relied upon the document

at exhibit PW.1/J which was produced in the suit to come to the conclusion that the disputed structure has been identified. The contention of Mr. J. Vaz, learned Counsel appearing for the Petitioners, that the plan has not been duly proved, is a matter which cannot be examined by the Executing Court. It is well settled that the Court cannot go behind the Decree. In such circumstances, the question now raised with regard to the admissibility of the plan produced in the suit is not at all permissible by the Judgment Debtor. Apart from that, the records reveal that the plan was duly exhibited in the suit and, as such, the plan can be read in evidence. Apart from that, on perusal of the evidence produced by Shri J. Vaz, learned Counsel appearing for the Petitioners, there is a specific averment in the affidavit filed by the Surveyor Mr. Prazares Gonsalves to the effect that after examining the property he found the positions at loco, and prepared a report along with the plan. On perusal of the cross examination, the said witness has also been duly cross examined on such aspect. Though it is not for the Executing Court to go into these aspects as the evidence was produced before this Court by the Petitioner, I found it appropriate to consider the correctness of the submission of Shri J. Vaz, learned Counsel appearing for the Petitioner. In such circumstances, the contention of Mr. Vaz, learned Counsel appearing for the Petitioner that the plan was not duly proved, cannot be accepted.

8. With regard to the contention of Mr. Vaz, learned Counsel, that

as the Inventory Proceedings are pending, the question of directing the demolition of the disputed structures is not at all been justified, I find that it is not disputed that the Inventory Proceedings were itself pending when the suit was filed by the Respondents. In such circumstances, it was open to the Petitioners, if so desired, to take necessary steps to get the suit kept in abeyance until the Inventory Proceedings were disposed of in case, there was any nexus between the dispute in the suit and the Inventory Proceedings. Having failed to do so, it is not open to the Petitioner to now contend that the execution proceedings should be differed until the Inventory Proceedings were disposed of. In such circumstances, I find that this contention cannot be raised by the Petitioners who were defendants in the suit in the Execution Proceedings. But, however, in case the Petitioners, if so advised, are entitled in law to raise any such contention in any other proceedings, the Petitioner may resort to any such available remedies in accordance with law.

9. Considering that the Decree under execution has become final, I find that there is no case made out for any interference in the impugned Order. Hence, the Petition stands rejected.

F. M. REIS, J.

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