

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 639 OF 2012

Glorio Rosario Furtado,
(Deceased) Through Legal
Heirs:

(1) Smt. Serolina Velho e Furtado,
(Deceased) Through Legal
Glorio Furtado, resident
of C/o. Memlee Furtado,
House No. 709-A, Dandewado,
Chinchinim, Goa.

2. Smt. Fatima Pereira,
daughter of late Shri
Glorio Furtado,
(Major in age)

3. Shri Agnelo Pereira,
Son in law of late shri
Glorio Furtado,
(Major in age)

Both residents of Velsao,
near Government Primary
School, P. O. Cansaulim,
Goa,

4. Dominica Furtado e Souza,
alias MICA D' Souza,
daughter of late Shri Glorio Furtado;

5. Aureso Luis De Cunha E Souza
Son in law of late
Shri Glorio Furtado,
(Major in age)

Both residents of House
No. E-41, Patto, Ribandar,
Inhas, Goa.

6. Crista Fernandes,
daughter of late Shri
Glorio Furtado,

7. Milagres Fernandes,

son in law of late Shri
Glorio Furtado,

Both residents of near PWD Office,
Fatorda, Margao, Salcete, Goa.

8. Mito Jio Furtado,
Son of late Shri Glorio Furtado,

9. Shri Sahara Furtado,
daughter in law of late
Shri Glorio Furtado,
(Major in age)

Both residents of behind
Holy Cross High School,
Quepem, Goa.

10. Movina Dias,
daughter of late Shri Glorio Furtado,

11. Shri Winston Dias,
Son in law of late Glorio Furtado,

Both residents of House No. 68,
Borda, Margao, Salcete, Goa.

12. Mipatra D' Souza,
daughter of late Shri Glorio Furtado,
(Major in age)

13. Shri Francisco D Souza,
son in law of late Shri Glorio Furtado,
(Major in age)

14. Memlee Furtado,
son of late Shri Glorio Furtado
(Major in age)

15. Dulcina Dias,
daughter in law of late Shri Glorio Furtado,
(Major in age)

Both residents of House no. 709-A, Dandewado,
Chinchinim, Salcete, goa.
(Registered Addresses)

..... Petitioners

V e r s u s

1. The Cathedral Chapter of
The Archdiocese of Goa and Daman
also known as Cabido Do Se Primacial
De Goa, represented by Mons.
Agapito Lourenco, Original
Respondent no. 1, aged 72 years,
resident of Cabido Se,
Primacial de Goa,
Old Goa,.
2. Sanatana Fernandes, aged
35 years, wife of
Alexandre Fernandes,
3. Alexandre Fernandes,
husband of Respondent no. 2
Aged 45 years, Profession
Driver,

both residing behind
Mamlatdar Office Quepem,
Goa. (Both Deceased and
represented through Legal
Representatives as follows)
 - a). Smt. Zulem Mascarenhas,
(major in age)
 - b) Edwin Mascarenhas,
Both residents of
Borimol, Quepem, Goa.
(Major in age)
 - c) Ubaldo Fernandes,
 - d) Esubia Fernandes,
Both residing behind
Municipality, Quepem,
Goa.
 - e) Lawry Rodrigues,
 - f) Ulasio Rodrigues,
Both residents of PWD
Quarters, Colleamoddi,
Quepem, Goa.
(Major in age)

- g) Smt. Bonifa Frnandes,
 - h) Shri Jose Fernandes,
Both residents of Kakoda,
Curchorem, Goa.
(Major in age)
 - l) Menino Fernandes
 - j) Rosita Fernandes,
Both rsiding behind
Municipality, Quepem,
Goa.
(Major in age)
4. Ramesh Sirvoicar,
aged 40 years, owner of the
Petrol Pump, Bus Stand,
Quepem, Goa.
5. Shachi Costa,
wife of Policeman Roque Rosario,
aged 26 years, residing
behind Mamlatdar Office,
Quepem, Goa.
Major in age
6. Jose Martinho Fernandes,
aged 51 years, employee of
Chowgule, residing
behind Mamlatdar office,
Quepem, Goa. (Since deceased)
Major in age.
And represented through
Legal Representatives as
follows
- a) Clara Fernandes,
residing behind the
Municipality, Quepem, Goa.
Major in age
 - b) Zenibi Joseph,
 - c) Jorge Joseph,
Both residents of Kerala,
 - d) Ulama Fernandes,

- e) Hasmita Fernandes
- f) Gabriel Fernandes,
All residing behind the
Municipality, Quepem, Goa. Respondents

Mr. D. Pangam and Mr. L. Fernandes, Advocate for the Petitioners.

Mr. R. G. Ramani, Advocate for the Respondent nos. 3c,i and j

Coram :- F. M. REIS, J

Date : 10th July, 2015.

ORAL JUDGMENT

Heard Shri D. Pangam, learned Counsel appearing for the Petitioners and Shri R. G. Ramani, learned Counsel appearing for the Respondent nos. 3(c), (i) and (j).

2. Rule. Heard forthwith with the consent of the learned Counsel. Learned Counsel appearing for the Respondents, waives service.

3. I have extensively heard Mr. Pangam, learned Counsel appearing for the Petitioner and Shri R. G. Ramani, learned Counsel appearing for the Respondent nos. 3(c), (i) and (j).

4. The main grievance of Shri Pangam, learned Counsel appearing for the Petitioners, is that the learned Executing Court whilst passing the impugned Order has proceeded to examine the veracity of the Decree passed by the learned

Judge whilst disposing of the suit filed by the Petitioners whereby, inter alia, the learned Judge directed the removal of the encroachment in an area of 765 square metres of the disputed property.

5. It is the contention of Shri R. G. Ramani, learned Counsel appearing for the respective Respondents, that the area of 765 square metres has not been identified and that the learned Judge whilst disposing of the suit filed by the Petitioners had in fact dismissed such suit though a direction referred to herein above came to be granted. Learned Counsel further pointed out that this direction is without jurisdiction and does not curl out from the findings arrived at by the learned Trial Court whilst disposing of the suit and, consequently, the learned Executing Court was justified to come to the conclusion that the said portion of the directions in the Decree cannot be executed. Learned Counsel has thereafter taken me through the findings of the learned Judge in the impugned Order wherein the learned Judge has come to the conclusion that such directions are not in consonance with the findings of the issues framed in the suit. Learned Counsel further submits that the Respondents have not carried out any encroachment in the alleged area of 765 square metres and, as such, the learned Judge was justified to dismiss the Execution Application filed by the Petitioner.

6. On the other hand, Mr. Pangam, learned Counsel appearing for the Petitioners, in reply pointed out that the Court cannot go behind the Decree and, as such, the exercise by the learned Judge in examining the correctness of the findings in the Decree under execution are totally erroneous and in excess of

jurisdiction of the Executing Court. Learned Counsel further submits that the area of 765 square metres has in fact been clearly identified by the Petitioners and, according to him, in any event, in case there was any dispute with that regard, the learned Judge ought to have hold an inquiry in terms of Section 47 of the Civil Procedure Code. In support of his submission, he has relied upon the Judgment of the Apex Court, reported in **2003(2) SCC 330** in the case of **Pratibha Singh & anr. vs. Shanti Devi Prasad & anr.** Learned Counsel as such submits that the impugned Order be quashed and set aside.

7. I have given a thoughtful consideration to the rival contentions and with the assistance of the learned Counsel appearing for the respective parties, I have also gone through the records. On perusal of the Decree passed by the learned Trial Judge, I find that the operative part of the Decree dated 15.03.1997, reads thus :

“The suit is dismissed. However, the defendants, their servants, agents and family shall not interfere with an area of 765.00 square metres shown in plan annexed to Exbt. Pw.1/D and shall remove any structure or obstruction if done in the suit plot. Not order as to costs. Decree shall be drawn accordingly.”

8. The Petitioners in fact had challenged the said Judgment before the Appellate Court as the reliefs sought by the Petitioners were rejected. On perusal of the Judgment passed by the Appellate Court, I find that in fact the Respondents had raised a contention that the directions to remove the encroachments in the

area of 765 square metres in the Decree were not sustainable but, however, the learned Appellate Judge refused to entertain such objections.

9. In such circumstances, the directions issued in the Decree have attained finality and, as such, the learned Judge cannot embark into a fresh investigation as to whether such relief granted by the learned Trial Court is justifiable or not. The only objections which can be entertained in the execution proceedings in such circumstances are in terms of section 47 of the Civil Procedure Code. Section 47 of the Civil Procedure Code reads thus :

“Section 47 : Questions to be determined by the Court executing decree.- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) omitted by Act 104 of 1976. effective from 1-2-1977

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court

Explanation I: For the purposes of this section, a plaintiff whose Suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II: (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) All questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

10. On perusal of the said provisions, in case there is any dispute with regard to the execution of the Decree, the Executing Court has to hold an inquiry and decide such dispute after hearing the parties in accordance with law. In the present case, as the dispute was raised by the Respondents with regard to the executability of the Decree sought to be executed by the Petitioners, the learned Judge ought to have held an inquiry in terms of Section 47 of the Civil Procedure Code before examining the objections raised by the Respondents. On this count alone, the impugned Order passed by the learned Judge cannot be sustained and deserves to be quashed and set aside. The above view also finds support in the Judgment of the Apex Court relied upon by Shri Pangam, learned Counsel appearing for the Petitioner in the case of ***Pratibha Singh & anr. vs. Shanti Devi Prasad & anr.*** (supra).

11. In view of the above, I find that the impugned Order passed by the learned Judge deserves to be quashed and set aside and the learned Judge be directed to hold an inquiry in terms of Section 47 of the Civil Procedure Code on the

objections raised by the Respondents in accordance with law.

12. In view of the above, I pass the following :

ORDER

(i) The impugned Order dated 20.06.2002 is quashed and set aside.

(ii) The learned Judge is directed to decide the objections filed by the Respondents to the Execution Proceedings in the light of the observations made herein above and in accordance with law.

(iii) Rule is made absolute in the above terms.

(iv) The parties are directed to appear before the learned Judge dated 17.08.2015 at 10.00 a.m.

F .M. REIS, J.

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