

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 46 OF 2015

1. Mr. Deu Gauns,
son of Mr. Cheu Gauns,
Aged about 47 years,
Service, r/o H. No. 362,
Gaunkar Waddo,
Batim, Ilhas – Goa.

2. Mr. Manohar Gauns,
major of age,
r/o Zorichem Bhatt,
Goa-Velha, Ilhas, Goa.

..... Petitioners

V e r s u s

Ms. Ana Maria Fernandes,
Wife of Mr. Aniceto Fernandes,
Aged about 73 years, housewife,
r/o H. No.113, Firguem Bhatt,
Goa-Velha, Ilhas, Goa.

..... Respondent

Mr. Vledson L. Branganza, Advocate for the Petitioners.

CORAM: C. V. BHADANG, J.
DATE: 10TH SEPTEMBER, 2015.

ORAL ORDER:

By this petition, the petitioners/Judgment Debtors are challenging the judgment and order dated 15/5/2014 passed by the learned District Judge in Misc. Civil Appeal No.4/2014. By the impugned judgment, the Appellate Court has dismissed the appeal, thereby confirming the order dated 7/12/2013 passed by the Executing Court, refusing to set aside the ex parte order passed against the petitioners.

2. The brief facts are that the respondents had filed a suit for eviction and possession of the disputed property against the petitioners. The disputed structure comprises of a cow shed. The suit was initially dismissed, however, it was decreed in appeal. That decree is passed more than 20 years back. The respondents thereafter filed an Execution application no.12/2010/C for execution of the decree, which is pending before the Executing Court at Panaji. It appears that the petitioners were served and had put in their appearance in the Execution case. However, subsequently on account of the absence of the petitioners and their counsel, an ex parte order came to be passed against the petitioners on 23/10/2012. It is contented that this was on account of the fact that the date was incorrectly noted in the diary of the counsel. Further according to the petitioners, they acquired the knowledge of the ex parte order on 28/11/2012. Immediately on the next date i.e. on 29/11/2012, the petitioners filed an application purportedly under Order 21, Rule 106 of the Code of Civil Procedure for setting aside the said order. That application was rejected by the Executing Court on 7/12/2013 on the ground that it was filed beyond the period of limitation of 30 days and without any application for condonation of delay. The Executing Court also found that the case made out that the date was incorrectly noted cannot be accepted.

3. The petitioners challenged the said order before the learned District Judge. The learned District Judge affirmed the order passed by the Executing

Court. That is how the petitioners are before this Court.

4. It is submitted by Mr. Braganza, the learned counsel for the petitioners that the learned Executing Court has misread the provisions of Order 21, Rule 106 (3) of C.P.C. It is submitted that under the said provisions the period of 30 days would start from the knowledge of the order and not from the date of the order. It is submitted that the Executing Court also fell in error in properly appreciating the case that on account of an incorrect noting of the date, that the petitioners failed to remain present inviting the ex parte order. The learned counsel has placed reliance on the decision of the learned Single Judge of the Madras High Court in the case of **P. Azeez Ahmed Vs., State Bank of India, Vaniyambadi, reported in AIR 1995 Madras 194**, in order to submit that non appearance of a party because of wrong noting would afford a good ground for setting aside the ex parte order.

5. I have considered the circumstances and the submissions made. With the assistance of the learned counsel for the petitioners, I have perused the impugned order passed by the Executing Court as also the judgment of the Appellate Court.

6. On consideration of the circumstances and the submissions made, I do not find that any case for interference is made out. The submission

based on the misreading of the Order 21, Rule 106, sub-rule 3, C.P.C cannot be accepted. The relevant rule reads as under:

106. Setting aside orders passed ex parte, etc.- (1) The applicant, against whom an Order is made under sub-rule (2) of rule 105 or the opposite party against whom an Order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the court to set aside the order, and if he satisfies the court that there was sufficient cause for his non-appearance when the application was called on for hearing, the court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No Order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order.

7. It can thus be seen that the contingency envisaged in the said rule is where a Court passes an ex parte order and the party subsequently approach the Court with the contention that in fact notice was not duly served. In such an eventuality obviously the date of knowledge of the order would be material and would be reckoned for computation of the period of 30 days. Here is a case where the petitioners were duly served and had put in

their appearance, in the Execution case. Thus in my considered view the submission that the learned Trial Court has misread the proper import of Rule 106 (3) of Order 21 of C.P.C cannot be accepted.

8. In so far as the ground that the petitioner failed to remain present on account of incorrect noting in the advocate's diary, I find that that the learned Trial Court had perused the diary of the advocate. The Executing Court has also found that the Judgment Debtor had put in appearance through their advocate on 5/8/2011 but no reply was filed on the subsequent dates i.e 3/11/2011 and 5/12/2011. It appears that subsequently the incumbent Judge was transferred. However, no reply was filed on 12/4/2012. On 26/7/2012 although the advocate was present no reply was filed. The Executing Court has in details noticed the various dates. It has been found that the advocate's diary mentioned that the matter was posted on 4/9/2012, 11/10/2012 and 23/10/2012. However, on that date there was no appearance on behalf of the petitioners. The learned Trial Court has thus found that in fact the entries are contrary to the submissions made in para 3 of the application that the date was missed. The Appellate Court has affirmed this finding.

9. In the case of **P. Azeez Ahmed, (supra)**, an order directing the petitioner to be confined to civil prison was passed ex parte. In para 6 of the the said judgment, the High Court found that there was no material to show

that the Judgment Debtor had got means to pay the decretal amount. This was the main reason and ground on which the order was set aside. It is obvious that there cannot be any straightjacket formula as to whether such a ground would be available or not in seeking to get an ex parte order to be set aside. The matter would essentially depend upon the facts and circumstances of each case. Having perused the impugned order passed by the Executing Court, I do not find that any case for interference is made out in exercise of the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India.

10. In the result, the writ petition is dismissed.

C. V. BHADANG, J.

Ap/-