

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 291 OF 2016

1. Shri Nakul Naik,
aged about 85 years,
2. Shri Vishwas @ Vishnu Nakul
Naik,
aged about 62 years,
Both r/at H. No. 573/1,
Chonsai, Parcem, Pernem,
Goa. Petitioners

V e r s u s

Shri Anant Babal Naik,
aged about 58 years,
r/o H. No.72, Chonsai,
Parcem, Pernem, Goa. Respondent

Mr. J. J. Mulgaonkar, Advocate for the Petitioners.

Mr. V. R. Parsekar, Advocate for the Respondent.

CORAM: C. V. BHADANG, J.
DATE: 26TH APRIL, 2016.

ORAL JUDGMENT:

Rule. Rule made returnable forthwith. The learned counsel for the respondent waives service. Heard finally by consent of the parties.

2. The petitioner, who is the judgment debtor is challenging

the order dated 23/7/2015 passed by the learned Civil Judge, Junior Division, Pernem in Regular Execution Application No.3/2013, by which the Executing Court has refused to entertain the objection raised by the petitioner to the execution of the decree and has directed the execution of the same.

3. The brief facts are that the respondent had filed Regular Civil Suit No.38/2005 against the petitioners for removal of encroachment, as set out in para 8 of the plaint. The suit came to be decreed on 27/4/2012 and the same is confirmed by the first Appellate Court as well as by this Court in Second Appeal No.44/2014 by judgment and order dated 26/6/2014. Thereafter, the respondent sought execution of the decree in which the petitioners raised an objection. It was contended that although para 8 of the plaint (where the encroached portion is described) makes a reference to the plan drawn by one Zilba Naik, he was not examined before the trial court. It was contended that instead an engineer i.e. PW.3, Madadev Tuenkar was examined, who had prepared a plan which was exhibited at Exhibit 50 (colly). The contention is that, in the absence of examination of Zilba Naik, the decree which directs the removal of the encroachment as described in para 8 of the plaint, would be inexecutable as the encroachment is not properly identified.

4. The learned Executing Court has found that although Zilba

Naik was not examined (as the said witness was not available), the ground raised by the petitioners about his non-examination which was raised in the second appeal has not been accepted. Secondly, it was found that the respondent had examined an Engineer, namely Mahadev Tuenkar, PW.3, who had prepared the plan at exhibit 50 on the basis of the plan prepared by Zilba Naik and as such, there is no prejudice. In that view of the matter, the objection came to be negated directing execution of the decree.

5. On hearing the learned counsel for the parties and on perusal of the impugned order, I do not find that any case for interference is made out. Although Zilba Naik was not examined as a witness, the petitioners had suffered a decree which has been confirmed up to second appeal. Not only that, the contention raised on the ground of non examination of Zilba Naik has also been negated by this Court in the judgment dated 26/6/2014 passed in Second Appeal No.44/2014. That apart, the record shows that another engineer was examined, who had prepared the plan at Exhibit 50 which is identical to the plan drawn by Zilba Naik.

6. The learned Executing Court has rightly found that the Executing Court cannot go behind the decree and has directed the execution of the decree. I do not find any infirmity in the impugned order so as to cause manifest injustice. As such, I decline to entertain

the petition which is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/-