

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.296 of 2016**

Mr. Devesh Tulsidas Kenaudekar
s/o late Mr. Tulshidas Kenaudekar
major of age, r/o House No.7415,
Altinho, Mapusa, Bardez, Goa. .. Petitioner

V/s.

1. Mrs. Lalita Prabhakar Quenaudecar
@ Prabhakar Ambaji Quenaudecar,
major of age, r/o Corte do Oirteiro,
Panaji, Goa
2. M/s Profile Developments,
a partnership firm, with office at
Prestige Icon, 14th Lane Corner,
Prabhat Road, Pune, Maharashtra,
represented by its partner,
Mr. Pramod, Kusumakar Dighe,
major of age, with office at
Prestige Icon, 14th Lane Corner,
Prabhat Road, Pune, Maharashtra.
3. Ms. Iria Maria dos Milagres
Ermelinda Ditosa da Costa,
w/o Maximo P. F. de Souza,
major of age, married,
Government Primary Teacher,
r/o Mapusa, Bardez, Goa.
4. Mr. Maximo Prudente Francisco
de Souza, major of age, married,
r/o Mapusa, Bardez, Goa
5. Mrs. Alda Digna Ries de Costa,
spinster, student, major,
residing at London, U.K.,
represented by her attorney,
Respondent No.2
6. Mrs. Maria Emilia Milagrina
de Braganca, married, major,
r/o Moira, Raimwaddo, Bardez, Goa.

7. Mr. Martin D'Souza,
married of full age,
r/o Moira, Raimvaddo, Bardez, Goa.
8. Mrs. Maria Laura Elisa Macedo,
married, major, r/o Nairobi,
Kenya, at the following address:-
Mrs. E. Miranda, C/o. Mr.P. Miranda
P.O. Box 4001, Nairobi-Kenya.
9. Mr. Tucaram Deugi Quenaudekar,
married, major of age,
r/o Altinho, Mapusa, Bardez,
Goa (since deceased - through
his legal representatives)
- 9a. Mr. Tulsidas Tukaram Kenaudekar
(since deceased- through
his legal representatives)
- 9a(i) Kavita Horiom Nipaniker,
major, r/o Indira Nagar,
Chimbel, Goa.
- 9a(ii) Hariom Gunaji Nipaniker
major, r/o Indira Nagar,
Chimbel Goa.
- 9a(iii) Vanita Dilip Signapurker
major, r/o opp. Asilo Hospital,
Mapusa, Bardez, Goa.
- 9a(iv) Dilip Vishnu Signapurkar
major, r/o opp. Asilo Hospital,
Mapusa, Bardez, Goa.
- 9a(v) Dhanyata Tulsidas Kenaudekar,
major, residing at Altinho,
Mapusa, Bardez, Goa.
- 9b. Mrs. Tulsidas Kenaudekar,
major, r/o Altinho, Mapusa,
Bardez, Goa.
- 9c. Mr. Gunaji Nipanikar,

major, r/o near Church,
Santa Cruz, Tiswadi, Goa.

- 9d. Mrs. Prema Gunaji Nipanikar,
major, r/o near Church,
Santa Cruz, Tiswadi, Goa.
10. Mrs. Tucaram Deugi Quenaudecar,
major, r/o Altinho, Mapusa,
Bardez, Goa.
11. Mr. Sadanand Bala Quenaudecar
major of age, married,
r/o Bombay at an address
unknown to the petitioner.
12. Mrs. Sadanand Bala Quenaudecar,
major of age, married,
r/o Bombay at an address
unknown to the petitioner.
13. Mr. Shricant Sao Quenaudecar,
major of age, married,
r/o Bilwant, Mapusa, Goa.
14. Mrs. Shricant Sao Quenaudecar,
major of age, married,
r/o Bilwant, Mapusa, Goa.
15. Harichandra Ambagi Quenaudecar,
major of age, married,
r/o P.W.D. Quarters, Building F,
Bhatlem, Panaji, Goa
(since deceased- through his
legal representatives)
- 15a. Devji Harischandra Kenaudekar,
major of age, r/o Alto Porvorim,
Bardez, Goa.
- 15b. Anamika Devji Kenaudekar,
major of age, r/o Alto Porvorim,
Bardez, Goa.
- 15c. Gajanan Harischandra Kenaudekar,
major of age, r/o Altinho Porvorim,

Bardez, Goa, (since deceased-
through his legal representatives)

- 15c(i) Mr. Pratik Gajanan Kenaudekar,
major of age, r/o Chuby Cheeks,
Porvorim, Bardez, Goa.
- 15d. Aparna Gajanan Kenaudekar,
major of age, r/o Alto Porvorim,
Bardez, Goa.
- 15e. Manohar Harischandra Kenaudekar,
major of age, r/o Alto Porvorim,
Bardez, Goa.
- 15f. Anuja Manohar Kenaudekar,
major of age, r/o Alto Porvorim,
Bardez, Goa.
- 15g. Laxmikant Harischandra Kenaudekar,
major of age, r/o Alto Porvorim,
Bardez, Goa.
- 15h. Radha Laxmikant Kenaudekar,
major of age, r/o Alto Porvorim,
Bardez, Goa.
- 15i. Saudamini Harischandra Kenaudekar,
major of age, r/o Alto Porvorim,
Bardez, Goa.
- 15j. Purnima Nilkant Singanapurkar,
major of age, r/o Alto Porvorim,
Bardez, Goa.
- 15k. Prabhakar Nilkant Signapurkar,
major of age, r/o Alto Porvorim,
Bardez, Goa.
- 15l. Shamsundar Harischandra Kenaudekar,
major of age, r/o Alto Porvorim,
Bardez, Goa.
- 15m. Anuradha Shamsundar Kenaudekar
major of age, r/o Alto Porvorim,
Bardez, Goa.

- 15n. Miss Shine Kenaudekar
major of age, r/o Alto Karnali,
Old Goa, Tiswadi, Goa.
16. Mrs. Harischandra Ambagi Quenaudecar,
r/o P.W.D. Quarters, Building F,
Bhatlem, Panaji, Goa.
[Respondent nos. 3 to 9, 9a to 9d,
10 to 15, 15a to 15n & 16 are
deleted as per order dt. 15-04-16]
17. Mr. Prabhakar Ambaji Kenaudekar,
major of age, r/o Corte Oiteiro,
Panaji-Goa.
18. Mrs. Sumitra Shahu Mirajkar,
major of age, r/o Mapusa,
Bardez Goa.
19. Mr. Shahu Mirajkar,
major of age, r/o Mapusa,
Bardez Goa.
20. Parvati Bala Kenaudekar,
major of age, r/o Mapusa,
Bardez Goa.
21. Ms. Indumati Bala Kenaudekar,
major of age, r/o Mapusa,
Bardez Goa.
22. Mrs. Asha Mahaji Kenaudekar,
major of age, r/o Mapusa,
Bardez Goa.
23. Mograj Mahaji Kenaudekar
major of age, r/o Mapusa,
Bardez Goa.
24. Mr. Narendra Mahaji Kenaudekar
major of age, r/o Mapusa,
Bardez Goa.
25. Mr. Sangeeta Mahaji Kenaudekar,
major of age, r/o Mapusa,

Bardez Goa.

26. Mrs. Hirabai Apa Chaban,
major of age, r/o Mapusa,
Bardez Goa.
27. Mr. Appa Chavan,
major of age, r/o Mapusa,
Bardez Goa.
28. Mrs. Mangala Digambar Hasotikar,
major of age, r/o Mapusa,
Bardez Goa.
29. Mr. Digamber Hasotikar,
major of age, r/o Mapusa,
Bardez Goa.
30. Mr. P. Miranda,
major of age, r/o Nairobi,
Kenya, P.O.Box 4001, Nairobi-kenya.

[Respondent nos.18 to 30 are
deleted as per order dt.15-04-16] ... Respondents

Mr. R. Menezes, Advocate for the petitioner.

Mr. J. E. Coelho Pereira, Senior Advocate with Ms. J. Godinho, Advocate for the respondent no.2.

Mr. V. Korgaonkar, Advocate for the respondent no.17.

CORAM :- C. V. BHADANG, J.

DATE :- 26th August, 2016

ORAL ORDER :

The challenge in this petition is to the orders dated 30/07/2014, 22/01/2016 and 16/02/2016, passed by the learned Senior Civil Judge at Mapusa in Execution Application No.2/2013/C and the judgment and order

dated 15/10/2015, passed by the learned District Judge at Mapusa in Miscellaneous Civil Appeal No.118/2014, by which the learned District Judge has confirmed the order dated 30/07/2014, passed by the Executing Court. The petitioner is seeking an order for dismissal of the Execution case and in the alternative, directing the Executing Court to frame issues "qua the petitioners objection" and to adjudicate upon them.

2. The brief facts, necessary for the disposal of the petition, may be stated thus :

That respondent nos.3, 4 and 5 (since deleted) filed Regular Civil Suit No.120/1973/A for partition of the property better known as 'Temericho Sorvo'. It appears that on 28/11/1997, the parties filed consent terms and the suit was decreed in terms of the same. A preliminary decree was drawn on 23/12/1999. By the aforesaid consent terms, the parties agreed to shares as set out in para 2 of the consent terms. Clauses (2) and (4) of the consent terms, which are relevant, read thus :

"(2) It is agreed and accepted by the Plaintiff and Defendants that the shares of the parties hereto in the suit

property are as follows:-

<u>Names</u>	<u>Shares</u>
<u>Plaintiff</u>	50/112
Defendants 1 and 2	3/16
Defendants 3 and 4	25/112
<u>Defendants 5 and 6</u>	<u>1/28</u>
Defendants 7,8,17 & 18	1/28
Defendants 9, 10, 19, 20, 21,22,23,24,25 and 26	1/28
Defendants 11 to 14 and 15 & 16	1/28.

(4) Plaintiff and Defendants also agree that the suit property be held to be incapable of convenient physical partition and that therefore, the same may be sold in a Judicial auction among parties and the sale proceeds divided among plaintiff and defendants in accordance with their respective shares."

(Emphasis supplied)

3. Thus, it can be seen that the original defendant nos.5 and 6, namely Tukaram Kenaudekar and his wife had signed the consent terms. It appears that the original defendant no.5 Tukaram died and his legal representatives namely 5(a) to 5(d) were brought on record. Subsequently, the defendant nos.5(a)

Tulsidas Kenaudekar expired on 22/09/2004 while his wife Mamata Kenaudekar predeceased him on 05/09/1998. The petitioner Devesh Kenaudekar happens to be the son of Tulsidas Kenaudekar.

4. On 20/04/2011, an application was filed in the final decree proceedings for permission to publish a notice of auction in a local newspaper, which was allowed. On 10/08/2011, an application was made by the original plaintiffs/ Decree Holders that the names of the legal representatives be added in the notice of auction, which was allowed on the same day. The publication was made on 09/09/2011 and ultimately, a final decree was drawn after auction on 04/05/2012. The property was sold to the highest bidder Mrs. Lalita Prabhakar Kenaudekar for Rs.3,21,50,000/- as per the final minutes of auction drawn on 15/12/2011 and 30/12/2011.

5. In January, 2013, an Execution Application No.2/2013 was filed by the respondent no.1 on the basis of the final decree. The petitioner filed a reply, objecting to the execution, claiming that no

individual notice of the auction proceedings was served. The petitioner also filed an application under Order XXI, Rule 97 of CPC. On 28/05/2013, the application filed by the petitioner under Order XXI, Rule 97 of CPC was dismissed, which was not challenged by the petitioner any further and the same has attained finality. On 22/08/2013, the petitioner filed another application for framing of issues and adjudication thereof, which was opposed. That application has been dismissed on 30/07/2014.

6. The petitioner challenged the same in Miscellaneous Civil Appeal No.118/2014 before the learned District Court. That appeal is dismissed on 15/10/2015, which brings the petitioner to this Court.

7. I have heard the learned Counsel for the parties. With the assistance of the learned Counsel for the parties, I have gone through the impugned order and the judgment.

8. It is contended on behalf of the petitioner that the individual notice was not served on the

petitioner about the auction. The learned Counsel was at pains to point out that, had an individual notice been served, the petitioner could have taken part in the auction. The learned Counsel points out that the Decree Holders were aware about the existence of the legal representatives of Tulsidas, which included the petitioner and nothing prevented them from serving an individual notice.

9. On the contrary, it is submitted by the learned Senior Counsel for the respondent no.2 that an application for service by publication was made, which was allowed and accordingly, a notice was published in the local newspaper. The learned Senior Counsel points out that all other heirs except the petitioner, have collected their share of the proceeds. It is pointed out that the petitioner has also lost the possession of the property. The learned Counsel points out that the petitioner has not challenged the order dated 28/05/2013 and as such, the Courts below have rightly held that no case for framing of any issues or trial arises. On behalf of the respondents, reliance is placed on the decision of the Supreme

Court in the case of Barkat Ali Vs. Badri Narain, [2008 Law Suit (SC)168, in order to submit that the principles of *res judicata* apply at the subsequent stage of same proceedings.

10. I have carefully considered the circumstances and the submissions made and I do not find that any case for interference is made out.

11. It may be mentioned that the predecessors of the petitioner, namely Tukaram Kenaudekar and his wife, who were defendant nos.5 and 6 respectively in the suit, had signed the consent terms, in respect of which a preliminary decree was drawn. The consent terms were signed as far back as on 28/11/1997 and the preliminary decree was drawn on 23/12/1999. Para 2 of the consent terms/ decree would make it clear that original defendant nos.5 and 6 (through whom the petitioner is claiming) together were entitled to 1/28th share of the suit property.

12. It may be mentioned that the petitioner had filed an application under Order XXI, Rule 97 of CPC,

which was rejected by the Trial Court on 28/05/2013. The petitioner did not choose to challenge the said order, which has attained finality. Thus, in my considered view, the learned Counsel for the respondent no.2 is justified in contending that the second application for framing of issues and for trial of the same was not maintainable as being barred on the principles of *res judicata*. In the order dated 28/05/2013, the Executing Court had found that the petitioner, who was Judgment Debtor no.8(a)(v), was not in exclusive possession of the suit property, when his deceased father had signed the consent terms and his request to withdraw the consent terms was not accepted by the Court and the consent decree was passed accordingly, which is binding on all the parties. The Executing Court had found that in auction proceedings, the highest bidder had purchased the suit property, and the purchaser was also issued a Sale Certificate after deposit of the purchase price. The Appellate Court has found that by filing an application to frame issues, the petitioner was trying to raise the same grounds as raised in his earlier application, which was dismissed on 28/05/2013. It

may also be mentioned that the petitioner has already lost the possession and all the other heirs, except the petitioner, have collected their shares of the proceedings. In such circumstances, I am not inclined to interfere with the concurrent findings recorded by the Courts below only on the ground that an individual notice was not given to the petitioner. The petition is without any merit and is, accordingly, dismissed, with no order as to costs.

C. V. BHADANG, J.

SMA