

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 604 OF 2015

SHRI. LOURENCO FERNANDES (SINCE
DECEASED) THROUGH HIS LEGAL
REPRESENTATIVE MR.JERONE
FERNANDES.

... Petitioner

Versus

SOCIEDADE PATRIORICA DOS BALDIOS
DAS NOVAS CONQUISTAS REP.BY
ATTORNEY MR.HUGO RODRIGUES AND
ANR.,

... Respondents

Shri Prasheen Lotlikar, Advocate for the Petitioner.
Shri Sudin Usgaonkar, Senior Advocate with Ms. T. Ghanekar,
Advocate for the Respondents.

Coram:- C. V. BHADANG, J.

Date:- 26th September, 2016

ORAL ORDER :

Heard Shri P.S. Lotlikar, the learned Counsel for the petitioner
and Shri Sudin Usgaonkar, the learned Senior Counsel appearing for
the respondents.

2. The petitioner is the judgment debtor no.1(b) before the
Executing Court. By the impugned order dated 17/11/2014, the
petitioner has been directed to be detained in civil prison, as the
petitioner has failed to satisfy the decree which is sought to be
executed. In fact, this is the third time that the issue of detention of
the petitioner in civil prison is coming before this Court.

3. The brief facts are that the respondents had filed Special Civil Suit No.15/1990 against now deceased Lourenco Fernandes, who is the father of the petitioner. That suit was for recovery of possession, injunction and mesne profits. Lourenco Fernandes died during the pendency of the suit and his legal representatives were brought on record. It appears that the suit was decreed on 23/08/1999 which was unsuccessfully challenged by the petitioners in First Appeal No.126/1999 before this Court. It is thus not in dispute that the decree passed by the Trial Court in Special Civil Suit No.15/1990 has attained finality.

4. The respondents sought to execute the said decree. It appears that initially an order was passed on 5/07/2004 by which the petitioner was directed to be detained in civil prison. When the said order was challenged before this Court the petitioner undertook to deposit the amount and after 4 days of detention he was released. Indisputably, the petitioner did not abide by the assurance given before this Court. Thereafter, the respondents again sought for a similar order after about 8 years when by an order dated 20/02/2013, the Executing Court directed the petitioner to be detained in civil prison. This was challenged by the petitioner in Writ Petition No.463/2013 which was disposed off on 21/10/2013. This Court on noticing the earlier order dated 5/07/2004 held that the petitioner was found to be having sufficient means to satisfy the decree in the year 2004. Those findings arrived at para 4 by the Executing Court no longer survive.

In that view of the matter, this Court directed the Executing Court to conduct inquiry subject to the petitioner depositing an amount of Rs.1.00 lakh without prejudice to the rights and contentions. The amount of Rs.1.00 lakh accordingly has been deposited before the Executing Court. The Executing Court conducted inquiry. The respondents examined AW1 Mr. Jeromino Fernandes while petitioner examined himself as RW1. The Executing Court after considering the evidence found in para 18 of the order that the petitioner has sufficient means to satisfy the decree and directed his detention in civil prison which order is subject matter of challenge in this Petition.

5. It is contended on behalf of the petitioner that the petitioner has not inherited any property from his deceased father who was the defendant in the suit. It is submitted that the petitioner can at the most be liable to satisfy the decree to the extent of the property inherited from his father and not otherwise. It is next contended that there is a distinction between a party having sufficient means and such means to satisfy the decree. The learned Counsel has pointed out that there is no finding that the petitioner is having sufficient means to satisfy the monetary claim arising out of the decree. Thirdly, it is claimed that the claim of tenancy in respect of subject matter of the dispute is pending before the Mamlatdar. He submits that in the event the petitioner succeeds in the tenancy case he would not be liable to pay anything.

6. On the contrary, it is submitted on behalf of the respondents that the issue about the petitioner not having inherited the property of the father was not raised before the Executing Court nor in the previous Writ Petition No.463/2013. The learned Senior Counsel does not dispute that there is no documentary evidence to show that the petitioner is having any property as such in his name. However, it is pointed out that on the basis of the evidence of RW1, the Executing Court has rightly come to the conclusion that the petitioner is having sufficient means. The learned Senior Counsel has referred to the judgment and order dated 23/08/1999 in Special Civil Suit No.15/1990 in order to submit that the petitioner was brought as one of the legal heirs of the original defendant on record and was attending the matter even during the pendency of the suit. The learned Senior Counsel has referred to the observation in para 4 of the judgment in order to point out that in a meeting held on 14/10/1989, the petitioner attended the said meeting on behalf of his father and had given a writing, admitting the arrears of auction bid for the year 1987-88 and 1988-89. It is lastly submitted that the Executing Court on consideration of the evidence has recorded finding of fact which cannot be disturbed in the present petition.

7. I have carefully considered the submissions on behalf of the parties. Proviso (b) to Section 51 of the Civil Procedure Code would show that a judgment debtor cannot be committed to civil prison unless the Court finds that the judgment debtor has had since the date

of the decree means to pay the amount of decree or some substantial part thereof and he refuses or neglects to pay the same. It can thus be seen that if the judgment debtor is shown to have sufficient means 'at any time after passing of the decree', to satisfy the decree or some substantial part thereof and then refuses or neglects to satisfy the same, the Executing Court would be within its bounds to direct such detention.

8. In the present case, as far back in the year 2004, the Executing Court had come to the conclusion that the petitioner was having sufficient means and the petitioner was in fact sent to civil prison. After 4 days of detention he was released on an assurance being given to this Court that he will satisfy the decree. Secondly, in the year 2013 there was yet another order directing detention of the petitioner in civil prison which order was set aside by this Court and the matter was sent back after which the Executing Court has conducted inquiry. The learned Counsel for the petitioner has tried to point out the observations in paras 16 & 17 of the impugned order to submit that they are contrary. In para 16, the Executing Court has found that there is no document to show that petitioner has assets while in para 17 it is observed that there is documentary proof. The learned Senior Counsel for the respondent in all fairness submitted that there is an apparent error as the conjoint reading of paras 16 and 17 would clearly show that all that the Executing Court intended to say is that there is no documentary proof to show that the petitioner

has any property. The Executing Court in para 17 has observed thus:

"17. In other words, there is documentary proof that Judgment Debtor no.(1b) has assets. A person who may have means to purchase any property, may not necessarily purchase any property. Meaning, one cannot infer that if a person does not have assets, then he has no means to purchase the assets or that he is poor person."

It can thus be seen that the Executing Court wants to say (and this position is not disputed on behalf of the respondent) that there is no documentary evidence of the petitioner holding any property.

9. Be that as it may, the fact remains that it is undisputed that there is no document as such to show that petitioner is having any property in his name. What is significant is that in para 18 of the impugned order the Executing Court has considered the evidence of RW1 in which he has admitted that till the year 2008 he was getting cashew yield worth 20 quintals and his expenditure per year was Rs.70,000 to Rs.80,000/-. He was spending Rs.70,000/- to Rs.80,000/- in order to get the cashew yield. He has spent Rs.3.00 lakhs over the litigation. The petitioner has further stated in his evidence that at present, he is cultivating a property admeasuring 22 hectors where he is having cashew plantation over 30% of the area. He has purchased cashew apples and cashew nuts and he is extracting liquor. This has prompted the Executing court to hold that the petitioner has sufficient

means. On a careful consideration of the impugned order, I do not find that the finding recorded by the Executing Court in para 18 is dehorse the evidence on record. It is trite that in a petition under Article 227 of the Constitution of India, this Court cannot reappreciate the evidence.

10. This takes me to the contention that the petitioner has inherited any property from his father and as such he is not liable to satisfy the decree. In this regard, it is significant to note that the petitioner did not file any reply to the application filed by the respondent for detention of the petitioner in civil prison. Thus, this contention which is no sought to be raised was not raised before the Executing Court. The order passed by this Court in the earlier Writ Petition No.463/2013 also does not show that any such ground was raised. that apart on his own saying the petitioner claims that he has inherited the tenancy rights in respect of the suit filed from his father.

It is not necessary to go into the merits of such a claim as the same is said to be pending before the Mamlatdar. Considering the fact that this ground was not raised before the Executing Court, I do not find that the same can be allowed to be raised in this petition. The petition is without any merit and is accordingly dismissed with no order as to costs.

11. The petition is without any merit and is accordingly dismissed with no order as to costs.

12. At this stage, the learned Counsel for the petitioner seeks extension of interim relief for a period of two weeks which is opposed by the learned Senior Counsel for the respondent. Having heard the learned Counsel for the parties, it is ordered that the interim relief shall continue for a period of two weeks from today.

C. V. BHADANG, J.

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