

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 446 OF 2014

MR. EDWARD PERPETUA JOHN CALDEIRA
THR. THEIR ATTORNEY MISS AZLINDA
FERNANDES AND ANR.,

... Petitioners

Versus

SMT. JAIVANTI GUNO PRIOLKAR AND
ANR.,

... Respondents

Mr. Vivek Rodrigues, Advocate under Legal Aid Scheme for the
petitioners.

Ms. G. Xettigar, Advocate for the respondent no.2.

Coram:- C. V. BHADANG, J.

Date:- 22nd August, 2016

P.C.

By this petition, the petitioners are challenging the order dated 30/07/2013 passed by the Executing Court in Execution Application No.24/2008/C. By the said order, the application filed by the respondents under Section 144, read with Section 151 of the Code of Civil Procedure (CPC, for short), for restitution has been granted. The petitioners/ Decree Holders (D.Hs., for short) have been directed to hand over possession of the suit house bearing No.54/G, situated at Porbawada in village Goltim, Piedade, Ilhas, Goa to Judgment Debtors (J.Ds.). Further, the salary of the J.D. No.2, which was attached, was directed to be restituted. The petitioners have restricted the challenge to the order, directing handing over possession of the suit house. It is undisputed that the said order has been executed and

the respondents J.Ds. have been placed in possession of the suit house.

2. The brief facts are that now deceased Ethelvina Caldeira had filed Regular Civil Suit No.197/1986/D against the original defendant Jaivanti Guno Priolkar for possession of the suit house. The case made out in the plaint was that the suit house was given to the original defendant on Leave and Licence basis on humanitarian ground and the application filed by the defendant for declaration as mundkar, was dismissed on 30/06/1986. The learned Trial Court dismissed the suit on the ground that original plaintiff Ethelvina Caldeira was a British National and could not hold property, without permission from Reserve Bank of India under the Foreign Exchange Regulation Act, 1973. This was challenged by the original plaintiff in Regular Civil Appeal No.4/1990 before the learned District Judge at Panaji. The said appeal was allowed on 15/02/1995, thereby decreeing the suit. Eventually, the D.Hs., in execution of the said judgment, had obtained the possession of the suit house.

3. It appears that the respondents herein contended that the original plaintiff Ethelvina died at London on 21/01/1995 and her legal heirs were not brought on record and as such, the appeal had abated. It was contended that the decree for possession has become inexecutable. The Executing Court found that the fact of death of Ethelvina Caldeira was not brought to the notice of the Appellate

Court by her Power of Attorney holder and thus, the appeal had abated. In that view of the matter, the restitution was directed and the said order has been executed.

4. I have heard Shri Rodrigues, the learned Counsel, under Legal Aid Scheme, for the petitioners and Ms. G. Xettigar, the learned Counsel for the respondent no.2.

5. The only contention, which was raised on behalf of the petitioners was that if the original plaintiff (the appellant before the Appellate Court) had died after the appeal was closed for judgment, the appeal would not abate. Reliance was placed on the provisions of Order XXII, Rule 6 of CPC. In order to ascertain this aspect, the Record and Proceedings of the Appellate Court have been called. The record clearly discloses that the arguments in the appeal were heard on 01/02/1995 and the appeal was decided on 15/02/1995. Thus, it can be seen that, on the death of the appellant Ethelvina Caldeira on 21/01/1995, the appeal was not closed for judgment. Shri Rodrigues, the learned Counsel for the petitioners, in all fairness, does not dispute this position. Faced with this situation, the learned Counsel submits that the order of the Appellate Court was held to be inexecutable only on 30/07/2013. It is further submitted that liberty may be reserved to the petitioners to take appropriate steps for setting aside the abatement of the appeal.

6. I have considered the circumstances and the submissions made.

7. In view of the fact that the original plaintiff/ appellant Ethelvina Caldeira had died prior to the date, on which the appeal was reserved for judgment, the contention that the appeal could not have abated, cannot be accepted. The impugned order has also been executed and respondents/ J.Ds. have been put in possession. In such circumstances, no case for interference is made out. The petition is, accordingly, dismissed, with no order as to costs.

8. The petitioners may avail remedy, if any, available in law and if so advised, in the matter. If any such remedy is availed, the Competent Court shall decide the same on its own merits and in accordance with law.

C. V. BHADANG, J.

SMA