

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 859 OF 2015**

1. Sugandh Rama Gaude, daughter of
Rama Gaude, major,
2. Miss Asha Rama Gawde, daughter
of Rama Gaude, major,
Both Indian Nationals, Residents of
House No. 61/1, Sonshi, P.O.
Sattari-Goa. Petitioners

Versus

1. M/s V.G. Quenim, a proprietorship
concern of Mr. Vassudeva Guiri
Quenim, of major age, residing at
Miramar, Panaji, Goa.
(original decree holder)
(Since deceased)
Through his following legal
representatives:
 - 1(a) Mrs. Vilasini Vassudeva Quenim,
Wife of Vassudeva Guiri Quenim,
major, residing at "Laxmi Prasad",
D.B. Bandodkar Marg, Panaji, Goa
and presently residing at Lake View
Colony, Miramar, Panaji, Goa, on
temporary basis.
 - 1(b) Mrs. Hema Mohan, Daughter of
Vassudeva Guiri Quenim, and her
husband,
 - 1(c) Mr. Mohan Bose, both of major of
age, both residing at Bishop
Cuthbert, Hartlepook, United
Kingdom.

- 1(d) Mrs. Seema Rajiv Hede, Daughter of Vassudeva Guiri Quenim and her husband,
- 1(e) Mr. Rajiv Sinai Hede, both major of age, both residing at Medallion Drive, Westerville, Ohio, United States of America.
- 1(f) Mr. Prasad Vassudeva Quenim, son of Vassudeva Guiri Quenim, and his wife,
- 1(g) Mrs. Vini Prasad Quenim, both major of age, both residing at "Laxmi Prasad", D.B. Bandodkar Marg, Panaji, Goa and presently residing at Lake View Colony, Miramar, Panaji, Goa, on temporary basis.
- 1(h) Mrs. Karmal Narayan Sardessai, daughter of Vassudeva Guiri Quenim, and her husband,
- 1(i) Mr. Narayan Manohar Sardessai, both major of age, both residing at 'Yeshodhan', Tonca-Caranzalem, Goa.
- 2. Shri Gokuldas Rama Gaude, son of Rama Gaude,
- 3. Shri Bhanu Rama Gaude, son of Rama Gaude,
- 4. Smt. Meena Banu Gaude, wife of Banu Rama Gaude,
- 5. Shri Ashok Rama Gaude, son of Rama Gaude,

All major of age, Indian Nationals,
All residing at House No. 61/1,
Sonshi, Post Ponda, Sattari-Goa.
(Original judgment debtors)

.... Respondents

Mr. Jatin Ramaiya with Mr. Ivan Santimano, Advocates for the
Petitioners.

Mr. Neelesh A. Takkekar, Advocate for the Respondents.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 23rd MARCH, 2016

PRONOUNCED ON:- 30th MARCH, 2016

JUDGMENT:

Rule. Rule made returnable forthwith. Mr. Neelesh Takkekar, learned Counsel waives service on behalf of the respondents. Heard finally, by consent of the parties.

2. By this petition, the petitioners (obstructionists), are taking exception to the order dated 30.09.2015, below Exhibit-62 passed by the learned Civil Judge Senior Division, Bicholim in Execution Application No. 3/2005/A. By the impugned order, the application (Exhibit-62) filed by respondent nos. 1(a) to 1(i) (decree holders), for police protection for execution of the

possession warrant, has been allowed. The respondent nos. 2 to 5 are the original judgment debtors.

3. The brief facts necessary for the disposal of the petition may be stated thus:-

That, property surveyed under no. 50/1 of village Sonus Vonvoliem, alongwith three houses constructed therein, bearing house nos. 61/1, 61/2 and 61/3 alongwith their appurtenances are the subject matter of dispute.

M/s V.G. Quenim, a proprietary concern of Mr. Vassudeva G. Quenim, had filed a civil suit against the respondent nos. 2 to 5, for specific performance of the agreement dated 05.07.1996. Undisputedly, the property survey no. 50/1 alongwith three other properties were purchased by respondent nos. 2 to 5 on 06.10.1995 from Jesus Botelho. According to the original plaintiffs, he was holding a mining lease dated 26.04.1990 and the aforesaid four properties including survey no. 50/1 were included in the mining lease. Regular Civil Suit No. 20/95 filed by the original plaintiffs, of whom the respondent nos. 1(a) to 1(i) are the legal heirs, was amicably settled as per the consent decree dated

30.07.1996, thereby agreeing to execution of the sale deed in respect of survey nos. 40/1, 41/3, 48/1 and 50/1. Insofar as the property except survey no. 50/1 is concerned, the sale deeds are already executed in terms of the consent decree. However, insofar as the property survey no. 50/1 is concerned, the original plaintiffs were required to file Execution Application No. 3/2005/A, which is pending before the learned Civil Judge Senior Division, Bicholim. Undisputedly, on 17.10.2011 a possession warrant was issued by the executing Court for handing over the possession of the property survey no. 50/1 alongwith, three houses. It appears that prior thereto, i.e. 19.03.2011, an application was filed by the petitioners herein, purportedly under Order XXI, Rule 97 of C.P.C., claiming that the property survey no. 50/1 is an agricultural land in which, name of Rama Gaude, the father of the petitioners/obstructionists, was recorded as a tenant. On the demise of Rama Gaude and his wife, the applicants who are the daughters of Rama Gaude alongwith the other legal heirs, including respondent nos. 2 to 5, became the owners of the suit property. In short, it was contended that the deed of sale dated 06.10.1995 was totally ineffective and void, in as much as under

the fifth amendment to the Agricultural Tenancy Act, the property could not have been purchased except at the "purchase price" as provided under the said Act. It was contended that the original plaintiffs/decreed holders may dispossess the applicants from the suit property.

4. It was also contended that although, the applicants were made parties to the agreement of sale dated 05.07.1996, through the Power of Attorney holder namely, the respondent no. 2, Gokuldas, they have not executed the Power of Attorney in favour of Gokuldas. In short, it was contended that Gokuldas could not have represented the applicants as their constituted Attorney. It was contended that thus, the applicants not being parties to the Special Civil Suit No. 28/2001/A, the decree is not binding on them. The said objection raised by the petitioners is registered as C.M.A. No. 5/2012/A. The record shows that on 05.03.2012, the executing Court has directed enquiry under Order XXI Rule 101 of C.P.C.

It undisputed that the objection is still pending and is not yet decided.

5. The decree holders filed two applications before the executing Court on 19.03.2012, one each for issuance of warrant for attachment through Bailiff in terms of the order dated 16.12.2011 and another for police protection for execution of the warrant. Application (Exhibit-62) is the application for grant of police protection. The aforesaid applications were opposed *inter-alia* on behalf of respondent nos. 2 to 5, as also the petitioners. The executing Court by an order dated 30.09.2015 has issued a fresh warrant for delivery of possession of the suit property and directed grant of police protection. Feeling aggrieved, the petitioners are before this Court.

6. I have heard the learned Counsel for the petitioners as also respondent nos. 2 to 5 and the decree holders. With the assistance of the learned Counsel for the parties, I have perused the record and the orders passed.

7. It is submitted by the learned Counsel for the petitioners that their objection being C.M.A. No. 5/2012/A, is still pending before the executing Court, in which the executing Court

has directed enquiry as far back as on 05.03.2012. It is submitted that thus, the executing Court could not have directed issuance of the warrant with police protection and kept the objection pending. The learned Counsel has placed heavy reliance on the decision of the Hon'ble Supreme Court in the case of **Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal and Another, AIR 1997 SC 856**, in order to submit that a stranger to the decree can get his claim adjudicated even prior to losing possession to the decree holder. The learned Counsel pointed out that in the sale deed dated 06.10.1995, under which the respondent nos. 2 to 5 are stated to have acquired the property, there is following recital:-

"AND WHEREAS, the father of the PURCHASERS, Shri Rama Mahadev Gaude, has been recorded as a tenant on Form No. I & XIV, of the Land Index, in respect of Survey Nos. 48/1, 401, 41/e & 50/1, described above;

AND WHEREAS, the father of the PURCHASER has agreed to purchase the said properties, in the name of the PURCHASERS, above referred;

AND WHEREAS, the PURCHASERS are the deemed owners of the aforesaid properties in terms of Agricultural Tenancy Act, 1964."

8. It is thus contended that they had become the deemed owners under the Agricultural Tenancy Act. It is pointed out that land purchased by the tenants under the provisions of the Agricultural Tenancy Act cannot be transferred, without the previous sanction of the Mamlatdar. The learned Counsel also pointed out that admittedly, the petitioners were not parties to the suit in which the decree was passed, which is now sought to be executed. He therefore submits that the impugned order directing issuance of warrant with police protection deserves to be quashed and set aside.

9. On the contrary, it is submitted by the learned Counsel for the respondent nos. 1(a) to 1(i) that the material ground raised in the objection is that the suit property was an agricultural land. The learned Counsel has pointed out that this aspect was also raised by the respondent nos. 2 to 5 before this Court in First Appeal No. 66/2004, challenging the judgment and decree granting specific performance. The said appeal was dismissed by this Court on 02.11.2004. The learned Counsel has referred to the

observations and findings of this Court in paragraph 15 of the judgment, by which the contention raised on behalf of the respondent nos. 2 to 5, has been negated. The learned Counsel points out that this Court had found that respondent nos. 2 to 5 having agreed to sell all the four properties and having sold three of them, now cannot be allowed to say that the fourth property could not be sold by them because it could not be used otherwise than for agriculture. It is pointed out that this Court had found that respondent nos. 2 to 5 had not led any evidence to show that the properties were actually being used for agriculture. The learned Counsel has taken me through the judgment and order dated 15.02.2007 in Civil Revision Application No. 21/2006. That, was a civil revision application filed by respondent nos. 2 to 5, whereby their objection to the execution of the decree was rejected. The learned Counsel points out that, while dismissing the civil revision application, this Court reaffirmed that the subject property was not an agricultural land and right from 1976 to 1995, when the respondent nos. 2 to 5 purchased the land, neither any such claim of the father of Gokuldas Rama Gaude being a deemed purchaser of the property was raised, nor a certificate to that

effect was obtained. It is thus submitted that this Court having found that the subject land is not agricultural land, the petitioners cannot be allowed to raise the same issue again. The learned Counsel points out that the subject property was purchased without reference to any claim of Rama Gaude being the tenant. It is thus submitted that the present petitioners, who are the daughters cannot stake a claim to the property. The learned Counsel submits that this is yet another attempt to obstruct the execution and delivery of possession and to keep the defendants away from the fruits of the decree.

10. I have given my anxious consideration to the rival circumstances and the submissions made. Undisputedly, the petitioners, who are the daughters of Rama Gaude, were not parties to the civil suit and their objection being C.M.A. No. 5/2012/A, is still pending before the executing Court. Not only that, the executing Court has directed enquiry on the said objection under Order XXI, Rule 101 of the Civil Procedure Code on 05.03.2012. It is true that the respondent nos. 2 to 5 have raised similar grounds about their land being the agricultural land.

However, this Court twice i.e. while deciding First Appeal No. 66/2004 and Civil Revision Application No. 21/2006, both at the instance of respondent nos. 2 to 5, have negated the said contentions. As noticed earlier, the petitioners have also raised certain grounds based on the recitals dated 06.10.1995. It is necessary to note that the rival submissions as set out above have a bearing on the merits of the objections raised by the petitioners in the pending C.M.A. No. 5/2012/A. The short question is whether pending decision on the said objection, the executing Court could have directed issuance of possession warrant ?

11. It appears from the perusal of the impugned order that this aspect was raised by the petitioners before the executing Court. The executing Court has dealt with this aspect in paragraph 8 of the impugned order. The executing Court has found that in the midst of the hearing of the objection i.e. C.M.A. No. 5/2012/A and upon hearing all the parties including the obstructionist, an order came to be passed on 05.03.2012 for issuance of fresh warrant of attachment. It is further found that the said order has become final as there is no challenge to the same. The executing

Court has also found that the petitioners being silent sufferers, the pendency of civil miscellaneous application is "no hindrance for the grant of the police protection and for issue of warrant for the delivery of possession". Thereafter, the executing Court has went upon to observe that the police protection is granted to guard the bailiff against the resistance by the judgment debtors only and not against the obstructionist. In that view of the matter, the executing Court has found that the case of **Brahmadeo Chaudhary** (supra), would be of no assistance to the petitioners.

12. The relevant provisions may be noted in brief at this stage. Order XXI, Rule 35 of C.P.C. provides for delivery of any immovable property in terms of a decree for possession by removing any person "bound by the decree", who refuses to vacate the property. Order XXI, Rule 35(3) of C.P.C. provides that where possession of any building or enclosure is to be delivered and the person in possession, being bound by decree, does not afford free access, the Court, through its officers, may *inter-alia*, amongst other directions, remove or open any lock or bolt or break open any door or do any such other act necessary for putting the decree

holder in possession. Thus, Order XXI, Rule 35(3) of C.P.C. authorises the Magistrate, directing the use of such reasonable force, as may be necessary for effecting the delivery of possession of the property. Normally, the orders of police protection, are relatable to the powers of the executing Court under Order XXI, Rule 35(3) of C.P.C. The Hon'ble Apex Court in the case of **Bhanwar Lal Vs. Satyanarain, (1995) 1 SCC 6** has held that the very application under Order XXI, Rule 35 of C.P.C. for police protection for removal of the obstruction can be treated as an application under Order XXI, Rule 97 of C.P.C. Under Order XXI, Rule 97, it is the decree holders, who can apply to the executing Court complaining of such resistance or obstruction of possession of the immovable property, in execution of a decree, where the execution is resisted or obstructed by any person. Under Order XXI, Rule 99 of C.P.C., a person other than the judgment debtor i.e. a stranger to the decree, is dispossessed of a immovable property by the holder of a decree, he may make an application to the Court complaining such dispossession. Such objection raised by a third party/stranger, under Order XXI, Rule 99 of C.P.C., is required to be adjudicated in terms of provisions of Order XXI,

Rules 100 to 103. It is necessary to mention at this stage that the petitioners, who are the obstructionists had filed a objection, purportedly under Order XXI, Rule 97 of C.P.C. The title and the mentioning of a wrong provision may not be decisive, as the Court will have to look to the substance of the objection, which is essentially to the execution of the decree. The Hon'ble Apex Court in the case of **Brahmdeo Chaudhary** (supra) has held that the stranger can get his claim adjudicated under Order XXI, Rules 97 and 99 of C.P.C., even prior to losing possession to the decree holder. The situation which emerges is that while an application under Order XXI, Rule 35 of C.P.C. for police protection/assistance filed by the decree holders has to be treated as an application under Order XXI, Rule 97 of C.P.C., a stranger/obstructionist can get his objection adjudicated under Order XXI, Rule 99 of C.P.C., even prior to losing the possession. It was in these circumstances, obligatory on the executing Court to decide the objection before directing issuance of warrant and granting police protection. It needs to be mentioned at this stage that the said objection is filed by the petitioners on 19.03.2011 i.e. even prior to the order dated 05.03.2012, directing issuance of possession warrant, on which

reliance is placed by the executing Court. At the cost of repetition it needs to be mentioned that the executing Court has also directed enquiry on the said objection as far back as on 05.03.2012. Thus, it is inconceivable that while the objection is pending, a warrant of possession was issued with police protection. I would hasten to add that, having regard to the rival contentions and the findings recorded by this Court in First Appeal No. 66/2004 and Civil Revision Application No. 21/2006, the controversy may be limited. Nonetheless, the competent Court has to dwell such objection, on hearing the parties and decide the same, one way or the other. While saying so, I am conscious of the fact that twice the matter had come up before this Court in which, findings are recorded in favour of the decree holders, on the point of land not being an agricultural land. However, it would neither be necessary nor appropriate to decide the objection in this proceedings, when the same is pending before the executing Court.

13. In my considered view, the executing Court should not have brushed aside the fact of pendency of the objection raised by the petitioners and the effect of the ratio of the decision in the

case of **Brahmdeo Chaudhary** (supra), on the ground that the police protection is granted to guard the Bailiff against the resistance of the judgment debtors only. The reasoning cannot be accepted as the objection and the resistance by the third party has already come on record. I therefore find that the executing Court will have to be directed to decide the objection being C.M.A. No. 5/2012/A alongwith the application for issuance of possession warrant and police protection, after hearing the parties, afresh. I am conscious of the fact that the decree holders are litigating from the year 2001 when the suit was filed and are trying to get the decree executed from the year 2005. However, in the given circumstances, there is no other option, than to direct the executing Court to decide the C.M.A. No. 5/2012/A alongwith application (Exhibit-62) and the application for issuance of a possession warrant, afresh.

14. Hence, the following order is passed:

ORDER

(a) The petition is allowed.

(b) The order dated 30.09.2015 is hereby set aside.

(c) The executing Court shall decide the C.M.A. No. 5/2012/A alongwith application (Exhibit-62) and the application for issuance of a possession warrant, after hearing the parties, in accordance with law, within a period of three months from the receipt of this order.

(d) Parties to co-operate for early disposal of the matter.

(e) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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