

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2757 OF 2016

Goldie Sud .. Petitioner

vs.

State of Maharashtra & Ors. .. Respondents

Mr.A.G.Damble, Sr.Counsel a/w Ms.Deepa Ponuja i/b Mr.Trevar Pereira
for the petitioner

None for the respondent

CORAM : K. K. TATED, J.
DATE : APRIL 12, 2016

P.C.:

1 Heard the learned counsel for the petitioner.

2 Advocate for the petitioner submits that they tried to serve the respondents by private notice. He submits that notice issued to the respondent by registered post A/D returned unserved with postal remark 'refused to accept'. To that effect, petitioner filed affidavit of service dated 18.3.2016. The same is taken on record and marked 'X' for identification.

3 The learned Senior Counsel for the petitioner further submits that they tried to serve the respondents by hand delivery on 5.3.2016. At that time, respondent nos.2 and 3, Ms.Hemlata Bolinjkar and

Ms.Nalini Bolinjkar refused to accept the same. To that effect, petitioner himself filed affidavit of service dated 16.3.2016. Same is taken on record and marked 'X-1' for identification. Though respondents are duly served no one appeared on behalf of them when the matter was called out.

4 By this petition, under Article 227 of the Constitution of India, petitioner plaintiff challenges the order dated 15.12.2015 passed by Small Causes Court at Mumbai, Bandra Bench below Exhibit-7 in Execution Application No.129 of 2015 in R.A.E.Suit No.262/539 of 2002 rejecting petitioner's application for recalling and modification of the order dated 5.11.2015. Petitioner filed Execution Application No.129 of 2015 on which the Trial Court passed order directing to issue notice to the defendants. Hence, the present Writ Petition.

5 The learned Senior Counsel for the petitioner submits that in the present proceeding, petitioner filed R.A.E. Suit No.262/539 of 2007 in the court of Small Causes Court at Mumbai, Bandra Bench for recovery of possession of the suit premises from tenant i.e. flat no.3, 2nd floor, Maleagrina Building, 494 Bandra (West), Mumbai 400 050 on the ground of arrears of rent, sub letting, no-user and bonafide requirement. That suit was decreed by the Trial Court on 24.6.2015. Thereafter, the petitioner filed application for execution of decree. In that application, the Trial Court passed order on 5.11.2015 directing to issue notice to the other side. The learned Senior counsel for the petitioner submits that if Execution Application is filed within two years from the date of decree there is no question of issuing any notice to the

defendant. He submits that in the present proceeding, Trial Court passed decree on 24.6.2015 and thereafter the petitioner filed application for execution on 10.9.2015 i.e. within two years from the date of decree. He submits that these facts were explained by the petitioner by filing application below Exhibit-7 in Execution Application No.129 of 2015. In spite of that the Trial Court rejected the petitioner's application for recalling and or modification of the order dated 5.11.2015.

6 The learned Senior Counsel for the petitioner submits that our Hon'ble Court in the matter of ***Ulhas Pandharinath Chodankar and Anr. vs. The Senior Civil Judge, "C" Court at Mapusa, Bardez, Goa in Writ Petition No.254 of 2016 by order dated 10.3.2016*** held that if Execution Application is filed within two years from the date of decree then it is not necessary to issue notice to the defendant. He relies on paragraph 6 of the said order which reads thus:

"6. In the instant case, the decree that is being sought to be executed through the executing Court is passed on 16.01.2014. The execution application has been filed in December, 2015, that is, before expiry of period of two years from the date of decree. Under Order 21 Rule 22 C.P.C., when an application for execution of decree is made after expiry of two years from the date of decree, then only the executing Court is required to issue a notice to the judgment debtor for requiring him to show cause as to why the decree should not be executed against him, and otherwise not. In other words, when the execution is sought before expiry of period of two years from the date of the decree, a reverse situation would be true thereby meaning that no mandatory duty would be cast upon the Court to issue a show cause

notice to the judgment debtor. It would also mean that the executing Court would have the power to execute the decree forthwith without issuing any notice to the judgment debtor. There is no provision in Order 21 Rule 22 conferring any discretionary power upon the executing Court to issue a show cause notice to the judgment debtor even in a case where the execution is sought for within two years from the date of the decree. If no such power has been conferred by any express provision of law, I do not understand as to how the learned Senior Civil Judge could read such a power as residing in him in the scheme of the provisions of Order 21 C.P.C. Learned Senior Civil Judge has also accepted the fact that execution has been sought within two years from the date of the decree. Even in the case of *Inocencio Fernandes (supra)*, the need for executing the decree forthwith, in a case where the execution application has been made within the stipulated time, it was one year at the time when the judgment was rendered, has been underlined. However it appears that learned Senior Civil Judge has not considered the ratio of this case in a proper perspective. Therefore, the order impugned herein would have to be termed as an order passed in breach of express provisions of law and cannot be sustained.”

7 On the basis of these submissions, the learned Senior counsel for the petitioner submits that the impugned order passed by Trial Court dated 15.12.2015 and order dated 5.11.2015 be set aside and direct the Trial Court to consider the petitioner's Execution Application according to law.

8 Heard the learned Senior Counsel for the petitioner at length. The only issue involved in the present matter whether it is necessary to issue notice to the defendant even if Execution Application is filed within two years from the date of decree. In the present proceeding

there is no dispute that Trial Court passed decree on 24.6.2015 in R.A.E.Suit No.262/539 of 2007. Thereafter the petitioner plaintiff filed Execution Application No.129 of 2015 i.e. within two years from the date of decree. Considering the oral judgment of this court in the matter of *Ulhas Pandharinath Chodankar and Anr. vs. The Senior Civil Judge, "C" Court at Mapusa, Bardez, Goa* (Supra) I am of the opinion that impugned order passed by Trial Court is required to be set aside with direction to consider the plaintiff's Execution Application No.129 of 2015 according to law. It is to be noted that if Execution Application is filed beyond prescribed period of two years then only notice is required to the defendant under Order XXI Rule 22 of the Code of Civil Procedure, 1908. Considering these facts, following order is passed:

- a) Order dated 15.12.2015 below Exhibit-7 in Execution Application No.129 of 2015 and order dated 5.11.2015 below Exhibit-1 in Execution Application No.129 of 2015 passed by Small Causes Court at Mumbai, Bandra Bench, Mumbai is set aside.
- b) Small Causes Court at Mumbai, Bandra Bench is directed to pass appropriate order according to law in Execution Application No.129 of 2015 filed by the petitioner plaintiff.
- c) Writ Petition is allowed accordingly.

JUDGE