

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 353 OF 2011**

1. Shri Benedito (Betty) Dias alias Benidict Dias and Power of Attorney of Petitioners 2,3 and 4;
2. Smt. Milagrina Dias, wife, major, married, housewife;
3. Shri Philip Dias, son, major;
4. Shri Marcelo Dias, son, major;

All resident of H. No. 665, Thana,
Cortalim, Goa.

.... Petitioners

Versus

Shri Armando ~~Benedita~~ ^{Benedito} Fernandes
(through LR's)

1(a) Smt. Maria Piedade ~~Aida~~ ^{Alda} Adelina
Fernandes;

1(b) Smt. Meena Panjabi;

1(c) Shri Murli Panjabi;

1(d) Smt. Rosemary Dina A. Fernandes;

1(e) Shri Noel Fernandes;

1(f) Shri Peter Audrey B.J. Fernandes;

1(g) Smt. Venessa R. Fernandes

(through their Power of Attorney Holder
Shri Abelardo Rodrigues Medeiros)

All resident of "Silver Tower", Bldg. "A",
First Floor, AC-1, next to Cine Vishant,
Aquem, Margao, Goa.

.... Respondents

Shri Guru Shirodkar with Ms. Varsh Parab, Advocates for the
Petitioners.

Smt. Anarkali Agni, Senior Advocate with Ms. Aditi Kamat,
Advocate for the Respondents.

*Necessary
corrections carried
out in terms of Order
dated 21.04.2017
passed in M.C.A. No.
196/2017*

CORAM:- C. V. BHADANG, J.

DATE:- 9th FEBRUARY, 2017

ORAL JUDGMENT:

The challenge in this petition, at the instance of the petitioners/judgment debtors, is to the order dated 24.08.2010, passed by the Executing Court in Regular Execution Application No.4/2003/D. By the impugned order, while rejecting the objection of the petitioners, the Executing Court has directed execution of the decree as prayed, including demolition of the structures existing in survey no.69/1 of village Cortalim, Goa.

2. The respondents/decreed holders have obtained a decree against the petitioners on 29.08.1990, in the following terms:

"That the suit is decreed and the defendants are declared as trespassers in respect of suit property. Consequently, they are directed to demolish the mud structure admeasuring 15 square metres and two huts admeasuring 5 square metres each and extended portion of the suit structure admeasuring 10-12 square metres and hand over vacant possession of the same. That the defendants, their servants, family members, are also permanently restrained from interfering with the suit property, in any manner. In the

circumstances of the case, parties shall bear their own costs."

3. It is undisputed that the aforesaid decree was challenged in appeal, before the learned District Judge in Regular Civil Appeal No. 38/2004, which has been dismissed on 19.10.2006 and thus, the decree has attained finality, as it was not challenged any further.

4. The respondents filed an application for execution of the decree on 08.05.2003, seeking following assistance from the Court:

"(a) By an immediate order directing the Judgment Debtors from continuing with any construction in or on the suit structure and or to pass an order to maintain status-co of the suit structure.

(b) By directing the Defendants to demolish the illegal structures put up by them in the suit property and restoring the property to its original condition/state.

(c) In the event of the failure to comply with the Court order to lodge the Judgment Debtors in civil prison till compliance of the order.

(d) Alternatively to have suitable orders passed to the Deputy Collector/his representatives to have the illegal structure/extended portion of the suit structure demolish and have them removed from the suit structure."

5. The petitioners resisted the execution on the ground that the execution application is barred by limitation. It was contended that the respondents have mudkarial rights in respect of the subject structures, about which application for declaration under Section 8A of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (the Act, for short), is pending and there is an order of registration in their favour passed on 03.02.1983. It was contended that thus, the Executing Court ought to have stayed it's hands, awaiting decision in the mundkarial proceedings.

6. Before the Executing Court, the parties led evidence. The learned Executing Court by the impugned order dated 24.08.2010 has directed the execution of the decree, including demolition of the structures existing in survey no. 69/1, which order is subject matter of challenge in this petition.

7. I have heard Shri Shirodkar, the learned Counsel for the petitioners and Smt. Agni, the learned Senior Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned order passed.

8. Shri Shirodkar, the learned Counsel for the petitioners has raised four contentions (i) that execution application is barred by limitation, as the limitation provided under Article 135 of the Limitation Act is three years from the date of the decree or where a date for performance is fixed from such date; (ii) there is an order of registration as a Mundkar in favour of the petitioners; (iii) an application for declaration and an application for purchase, under the Act are pending before the Mamlatdar and (iv) that the structures, which are directed to be demolished by way of mandatory injunction, are not identified.

On behalf of the petitioners, reliance is placed on the decision of the Kerala High Court in the case of **M.J. Simon Vs. Special Grade Panchayat, Athirampuzha, AIR 2001 Kerala 132.**

9. It is submitted by Smt. Agni, the learned Senior Counsel for the respondents that the issue of limitation would not arise in this case, in as much as the impugned decree was subject matter of challenge in appeal, which was decided on 19.10.2006. It is submitted that the decree by the Trial Court would merge with the decree of the Appellate Court. It is submitted that the petitioners have undertaken extensive construction of a ground plus one RCC structure, after the passing of the impugned decree, which is clearly in breach of the order, granting prohibitory injunction restraining the petitioners from carrying out any construction. The learned Senior Counsel has relied upon the proviso to Article 136 of the Limitation Act, 1963 in order to submit that an application for enforcement of a decree granting perpetual injunction, is not subject to any period of limitation. She has referred to the photographs, which are collectively at Exhibit 64, in order to demonstrate that in the place of existing old mud hut, extensive RCC construction of ground plus one structure has effected and that too without permission/license from the local Authority. It is submitted that in such a case, the decree holders cannot be driven to another round of litigation, as has been held by the Hon'ble Supreme Court in the case of **Jai Dayal & Others Vs.**

Krishan Lal Garg & Another, AIR 1997 SC 3765. It is submitted that the subsequent breach of a prohibitory injunction can be remedied in execution proceedings and in fact, a separate suit would be barred by Section 47 of the Code of Civil Procedure. It is submitted that mere registration as a Mundkar is not sufficient, unless there is an order of declaration and/or purchase , which is not forthcoming in this case. It is submitted that the Executing Court has properly considered the circumstances and the evidence on record and the order does not call for any interference.

10. I have carefully considered the rival circumstances and the submissions made. I would first propose to deal with the challenge on the ground of limitation. It is a matter of record that the decree sought to be executed is passed on 29.10.1990, while the application for execution was filed on 14.05.2003. The decree as set out above, is a composite decree consisting of both, a mandatory part and the one granting prohibitory injunction. There are separate Articles dealing with the period of limitation for execution of a decree of mandatory injunction and for a decree other than granting mandatory injunction, which are contained in Articles 135 and

136 of the Limitation Act respectively. While in Article 135, the period for enforcement of the mandatory injunction is three years, provisions of Article 136 and the proviso thereto would make it explicit that execution of a decree granting perpetual injunction, is not subject to any period of limitation. It can clearly be seen that mandatory injunction was in respect of a mud structure admeasuring 15 square metres and two huts admeasuring 5 square metres each and the extended portion of the suit structure admeasuring 10 to 12 square metres. It has clearly come on record that the petitioners after the passing of the decree had carried out RCC construction of a ground plus one structure and that too, without any license/permission from the local Authority. The structure, which was originally standing on the land and the present structure, have clearly come on record by virtue of photographs at Exhibit 64, which are proved before the Executing Court.

11. It can thus be seen that what was sought to be executed was the part of the decree granting prohibitory injunction, or so to say a breach thereof, which would be governed by proviso to Article 136 of the Limitation Act. The relief in clause (j)(b) in the execution application, is referable to

a construction made subsequent to the passing of the decree.

12. The decision of the Kerala High Court, in the case of **M.G. Simon** (supra), cannot take the case of the petitioners any further and in fact, would assist the respondents. In that case also, it has been held that an application for enforcement of the decree granting prohibitory injunction shall not be subject to any period of limitation and where there is a composite decree, granting mandatory and prohibitory injunction, one part is subjected to limitation period of three years, whereas the other is not subjected to any period of limitation. The petitioner can enforce the prohibitory injunction, whenever violation of that part takes place.

13. In the case of **Jai Dayal** (supra), the Hon'ble Supreme Court has held that once the decree of perpetual and mandatory injunction has become final, the judgment debtor is required to obey the decree and a party cannot and should not, by his action be permitted to drive the decree holder to file a second suit. It has been inter-alia held that non-compliance is a continuing disobedience in respect of which a separate/fresh suit is barred under Section 47 of the CPC. Thus, in my considered

view, the contention based on the execution being barred by limitation, cannot be accepted.

14. Insofar as the claim of the mudkarial rights is concerned, the petitioners are claiming that there is an order of registration, which only has a presumptive value. (See **Roque Fernandes (since deceased), Through Legal Heirs & Others Vs. Dempo Properties and Investments, 2010(2) Bom.C.R. 802** and **Smt. Gulabi Sangtu Devidas & Others Vs. Smt. Prema Govinda Gaonkar & Others, 1994(3) Bom.C.R. 328**). That apart, the learned Counsel for the petitioners submitted during the course of the arguments at bar that the claim of mundkarial structure is in respect of 200 square metres of land (i.e. is in respect of the old structure) and thus, cannot be in respect of the construction, which is effected after the passing of the impugned decree. At any rate, there is no order by which the petitioners have been declared mundkars, much less have been allowed to purchase the mundkarial house. The Trial Court in para 41 has found that bare perusal of photographs at Exhibit 64 indicate that it is a structure not confirming to the old structure as found in Exhibit 104. The Executing Court has also referred to the evidence of DW-1, who

claims that he has been declared as mundkar in respect of survey no.61, but cannot substantiate his contention that the old house bearing house no.585. The Executing Court has also specifically come to the conclusion after the perusal of the inspection report that at the time of the inspection, the second floor was under construction and as per the panchanama, it is a case of re-construction of the house and that too, without permission. The contention that the structure is not identified also cannot be accepted.

15. I have carefully gone through the impugned order passed by the Executing Court and I do not find that it suffers from any infirmity, so as to require interference under the supervisory jurisdiction of this Court.

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

C. V. BHADANG, J.

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