

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.1135 of 2016**

1. Mr. Pandurang Sadu Kandolkar,
(since deceased through his legal heirs)
- 1(a) Rohidas Pandurang Kandolkar,
son of late Pandurang Sadu Kandolkar
aged 56 years, married, painter,
- 1(b) Mrs. Roshan Rohidas Kandolkar,
wife of Rohidas Pandurang Kandolkar
aged 50 years, married, housewife,
(both r/o Santa Cruz Tallia wado).
Bastora, Bardez-Goa .. Petitioners

Vs.

1. Mr. Cezario F. D'Souza,
aged 70 years,
married, service;
2. Mrs. Ulbaldina D'Souza,
aged 65 years, married,
housewife,
(both are r/o Santacruz Waddo,
Bastora, Bardez- Goa) .. Respondents.

Mr. G. Shirodkar, Advocate for the petitioners.

Mr. A. D. Bhobe, Advocate for the respondents.

CORAM :- C. V. BHADANG, J.

DATE:- 22nd March, 2017

ORAL JUDGMENT :

On 18/01/2017, a notice for final disposal was issued in this case. Accordingly, the petition is being disposed of finally.

2. The petitioner, who is the decree holder, is challenging the order dated 03/09/2016, by which, the Execution Application filed by the petitioner, has been dismissed.

3. There is a decree dated 04/05/1999 in favour of the petitioner, which is passed on the basis of consent terms. The consent terms, in turn, were based on the plan prepared by the Commissioner Mr. Survat Bhobe. The petitioner sought execution of the decree as per clause 6 of the Compromise Decree. The assistance sought from the Court was as under :

“(a) The defendants/ respondents be directed to clear the access on the western side of the compound wall and to maintain the access between the compound wall and the boundary of the suit property towards the southern and western side of Survey No.80/23. The access shown in the plan annexed to the compromised decree is blocked by the coconut trees, construction of compound wall and courtyard as shown in the sketch and report prepared by Mr. M. Naik Tuenkar and the same are annexed herewith.

(b) Any other mode may be granted to execute the decree.”

4. The learned Executing Court has found that the report prepared by Civil Engineer, Mr. Mahadev Tuenkar, is not a

reproduction of plan prepared by Commissioner Mr. Survat Bhobe and it was an independent exercise. In the opinion of Executing Court, the report of Mr. Tuenkar cannot, therefore, be considered. The Executing Court has observed in para 7 of the impugned order that if the execution was filed seeking clearance of the access, as shown by the Commissioner Mr. Survat Bhobe "surely and certainly, the Court could consider the prayer of the decree holder in a different perspective and on its own merits."

5. Thus, in short, the Execution Application has been dismissed on the ground that the execution is sought in terms of report of Mr. Mahadev Tuenkar and not in terms of the report and the plan prepared by Mr. Survat Bhobe.

6. The learned Counsel for the petitioner states that the petitioner is, in fact, seeking execution of decree in terms of the report and plan prepared by the Commissioner Mr. Survat Bhobe and reference to the report of Mahadev Tuenkar was made only to show the nature of obstruction.

7. Shri Bhobe, the learned Counsel for the respondents points out that the prayer clause in the Execution Application and the assistance sought does not show that the execution was sought in terms of the report of Mr. Survat Bhobe and on the contrary, the prayer makes a specific reference to the report of Mr.

Mahadev Tuenkar. The learned Counsel, however, submits that this Court may pass appropriate orders in the facts and circumstances of the case.

8. On hearing the learned Counsel for the parties and on perusal of record, I do not find that any case for interference is made out. It does appear that the petitioner has made reference to the report of Mr. Mahadev Tuenkar while seeking assistance of the Executing Court. It is evident that the Executing Court can execute the decree as it stands. The learned Counsel for the petitioner states that the petitioner would file a fresh application for execution, seeking appropriate relief in terms of the decree as passed. In such circumstances, the petition is disposed of, with no order as to costs. In the event the petitioner files Execution Application afresh, the Executing Court shall proceed to decide the same in accordance with law.

C. V. BHADANG, J.

SMA