

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL REVISION APPLICATION NO.39 OF 2017
WITH
CIVIL APPLICATION NO.268 OF 2017

Sunanda Parulekar & Others. Applicants.
Versus
Paulo Francisco Fernandes & Anr.. Respondents.

Ms. Susan Linhares, Advocate for the Appellants.

Mr. Amey Phadte, Advocate for the Respondents.

Coram : N.M. Jamdar, J.

Date : 22 December 2017.

Oral Order:

By this Revision Application, the Applicants-Judgment Debtors have challenged the Order passed by the learned Civil Judge, Senior Division, Mapusa dated 25 January 2017 in respect of Execution Application No.10/2014/C.

2. The Respondents-Decree Holders had filed the Suit for Mandatory, and Permanent Injunction, and other consequential reliefs. The Respondents-Decree Holders had prayed for a mandatory injunction, directing the Defendants to demolish and remove the illegal construction and extension of the house done in the property belonging to the Respondents-Decree Holders and for permanent

injunction not to interfere with the possession. The Suit was filed on 31 October 2003 and it appears that it was immediately taken up, when the parties arrived at a settlement. The Defendants-Judgment Debtors admitted that they had made the encroachments. They had done so on a wrong advice and they had apologised for the same. The Plaintiffs-Decree Holders, considering the apology tendered and request of the Defendants-Judgment Debtors to forgive them, agreed for certain modalities and accordingly, the consent terms were executed. It was also agreed that the Judgment Debtors will not interfere, in any manner, with the property. The suit was disposed of on the basis of the compromise on 13 April 2004.

3. On 19 May 2014, the Respondents-Decree Holders filed Execution Application No.10/2014/C in the Court of Civil Judge, Senior Division, Mapusa. In this execution proceeding, the Applicants appeared and sought to raise objections for the execution of the Decree. They contended that they had no opportunity to defend the Suit, as the Suit was compromised, and the water being essential commodity their pipe line cannot be removed and the Applicants-Defendants being Mundkars have right to carry out the construction. The learned Executing Court took a view that the Court cannot look into the objections raised in view of the compromise terms already executed and rejected the application by

the impugned Order dated 25 January 2017.

4. Heard Ms. Linhares, learned Counsel for the Applicant-Judgment Debtors and Mr. Amey Phadte, learned Counsel for the Respondents-Decree Holders. The main contention raised by the Ms. Linhares, the learned Counsel for the Applicants is that the execution proceedings are beyond the period of limitation, that is 3 years, as specified in Article 135 of the Limitation Act and, therefore, the Decree cannot be executed.

5. The learned Executing Court rightly took a view that the Court cannot look into the objections raised on merits in view of the compromise terms. Before the learned Executing Court, as is apparent from the impugned Order, no contention that the Decree cannot be executed in view of Article 135 of the Limitation Act was raised.

6. Even assuming that the Applicants are entitled to contend regarding the bar under Article 135 in this Revision Application for the first time, the contention has no merit. Firstly the Suit never went to trial and within the short span it was filed, the parties entered into a compromise and they filed compromise terms. The Court simply put its seal on something that the parties had agreed amongst

themselves. According to the Mr. Phadte ,the learned Counsel for the Respondent-Decree Holders this compromise will not fall within the ambit of Article 135 of the Limitation Act which contemplates the '*grant*' of mandatory injunction. According to the Mr. Phadte, it is only when the Court *grants* an order of the Court a mandatory injunction that the limitation of three years would apply and if it is done by way of compromise, then Article 136 wherein *any other decree or order of the Civil Court* is contemplated, would come into play. This contention has merit.

7. Further, the Respondents-Decree plaintiffs had sought both, mandatory as well as permanent injunction. The learned Single Judge of Allahabad High Court in the case of *Dakhilal Kushwaha vs. 5th Additional District Judge and others*,¹ has made a distinction between the period of limitation applicable to grant of mandatory injunction and grant of permanent injunction and also for delivery of possession. In another decision of the learned Single Judge of Allahabad High Court in *Som Nath and Ors. vs. VIth Addl. District Judge, Bareilly and Ors.*,² took a view that if there is a decree for both mandatory and permanent injunction, the Article 136 will apply. It observed thus :

¹ 1985 SCC Online All 864

² 2011 SCC OnLine All 180

“9. I do not agree with the contention of learned Counsel for the Petitioner that the decree was for mandatory injunction alone, hence it could not be executed after more than three years. Firstly other prayers were also there apart from prayer of mandatory injunction. Secondly, even in the prayer of mandatory injunction in the plaint (sa) the first part of the prayer was that defendant must be directed to remove the construction made in the passage, however in the same sentence it was also prayed that in case defendant did not do so, through Court Amin plaintiff should be delivered possession after demolition of new constructions.

10. Accordingly, it could not be said that it was pure and simple relief of mandatory injunction. In this regard Revisional Court rightly referred to Dakhilal Kushwaha v. A.D.J.

11. In the aforesaid authority it has been held that if the suit is decreed for demolition and possession then decree for demolition becomes non-executable if execution is not filed within three years, however, decree for possession may be enforced by filing execution application within 12 years and in the latter contingency defendant/JD would be either entitled to take away the superstructure or he would be paid the cost thereof. Same principle applies to a combined decree of mandatory injunction and prohibitory injunction. The third relief

granted by the Trial Court and maintained upto this Court is for a perpetual prohibitory injunction. The operative portion of the judgment by the Trial Court is not very happily worded, however, reading it along with issue No.5 regarding relief it is quite clear that it has also been decreed that the plaintiff has right of passage through A B C D E F G A unobstructed in any way. It means that decree for permanent prohibitory injunction has also been granted. Such a decree can not be enjoyed unless constructions in the passage apart from wall E X are removed. For executing a decree for permanent prohibitory injunction no time limit is prescribed (proviso to article 136 of the Schedule to the Limitation Act, 1963). The Trial Court passed the decree for removal of construction also. Accordingly, in my opinion, just as decree for possession remains intact even if execution application for executing decree for mandatory injunction is not filed within three years, similarly, decree for permanent prohibitory injunction remains executable even if application for executing that part of the decree through which mandatory injunction has been granted is not filed within three years. Further, if in order to execute the decree for permanent prohibitory injunction, removal of some construction is necessary then it may be done at any time even though it was also directed to be done through the decree by way of mandatory injunction.”

No contrary decision or position of law is shown by the Applicants. From the above decisions it is clear that execution of the decree for mandatory injunction cannot be defeated, if filed after a period of 3 years, if it is coupled with the Decree of permanent injunction. I have gone through the compromise. Bare perusal itself will show that mandatory injunction was only one of the prayers sought and was agreed upon, if at all it can be considered as a *grant* of injunction. Both types of injunctions were agreed between the parties. The prayers were intermixed and a scheme was worked out by arrangement. The execution proceedings therefore cannot be said to be beyond the period of limitation under Article 135, as what will apply is Article 136, which provides limitation period of twelve years.

8. Ms. Linhares then submitted that there is no specific prayer in respect of permanent injunction in the Execution Application. There is no merit in this submission. What is sought to be executed is what was agreed in the compromise. Even, otherwise, Clause (iv) of the Prayer clauses would take into account the ambit of this aspect as well.

9. The Applicants had blatantly encroached upon the property of the Respondents-Decree Holders and the moment the Suit was filed they tendered apology and asked for forgiveness and

entered into the compromise terms. Instead of adhering to their commitments, the Applicants have invented all possible technical arguments to defeat the execution. Earlier Revision Application filed was dismissed as withdrawn. It was done so because in the meanwhile, the Applicants had filed the Second Appeal. The Second Appeal is dismissed today, by a separate order. Even in this Court, it was put to the Applicants if they require longer time to abide by what they had agreed, such longer time can be considered. The matter was adjourned to take instructions, but the Applicants chose to argue the matter. This Revision is a clear case of abuse of process of law.

10. The Revision Application is dismissed with costs of Rs.5,000/- to be paid by the Applicants to the Respondents-Decree Holders within a period of two weeks from today. Interim order granted in this Revision Application stands vacated.

11. In view of the dismissal of the Revision Application, the Civil Application also stands dismissed.

N.M. Jamdar, J.