

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.798 OF 2016

Chowgule and Company Limited
now Chowgule and Company
Private Limited.

Incorporated under the
Companies Act, 1956,
having its Registered office at
'Chowgule House', Mormugao
Harbour – Goa, Through its Power
of Attorney Mrs. Satyajit R. ...
Sawant (Original Plaintiff)

Petitioner

Versus

1 Mrs. Nina De Conceicao Menezes
E Antao @ Nina Antao (since
deceased) Represented by her
following legal representatives:

- 1(a) Mr. Roy Antao
(who is already on record as
Respondent No.2),
- 1(b) Mrs. Sherin Antao,
Daughter-in-law,
r/o H. No.2701, Near Art
Ads, Opposite Santos
Garage, Margao.
- 1(c) Mrs. Shalini Antao
Daughter
(who is already on record)
- 1(d) Mr. Sane Antao
(who is already on record as
Respondent No.3)
- 1(e) Mrs. Lena Antao
Daughter-in-law,
All residents of Betalbatim,
Salcete, Goa.

- 1(f) Mrs. Rajani Antao
and her husband,
- 1(g) Mr. Gustao Clovis Da Costa
Both r/o Assolna Salcete.
- 1(h) Mrs. Bindya Carvalho
And her husband
- 1(i) Mr. Osy D'mello
- 1(j) Mr. Varun Carvalho
All r/o Betalbatim, Salcete
- 1(k) Mrs. Sarojini Antao
Married to
- 1(l) Mr. George Menezes,
Both r/o Betalbatim,
Salcete, Goa.
- 2 Mr Eugenio Roy Olavo
De Menezes Gerreiro Eantao
alias Roy Antao
- 3 Mr. Sane De Menezes
Gerreiro Eantao alias Sane
Antao
All residents of H.No.282
Betalbatim, Salcete, Goa. ... Respondents.
(Original Defendant)

Shri S.D. Lotlikar, Senior Advocate with Ms. A. Naik, Advocate for the petitioners.

Shri H.D. Naik, Advocate for the respondents.

CORAM : NUTAN D.SARDESSAI, J.
RESERVED ON : 23rd November 2017.
PRONOUNCED ON: 18th January 2018.

JUDGMENT:

1. The petitioners have taken exception to the legality and propriety of the order dated 22/07/2015 passed by the

Executing Court dismissing the application for police protection as also the order dated 08/02/2016 passed by the Civil Judge Junior Division, Sanguem in this petition under Article 227 of the Constitution of India.

2. Shri S.D. Lotlikar, learned Senior Advocate came to be heard on behalf of the petitioners who submitted that the suit filed by the petitioners against the respondents for injunction came to be decreed in their favour by the judgment and decree dated 26/11/1997 and pursuant to which the then Senior Civil Judge, Quepem observed at paragraph 7 that unless and until the respondents acquired the surface rights over the suit properties, their acts even under the garb of mining activities would amount to the acts of trespass and illegal interference and in that view of the matter restrained the respondents from trespassing and interfering in the suit property apart from other reliefs and costs. However, the learned Junior Civil Judge, Sanguem vide the impugned order dated 08/02/2016 dismissed the execution proceedings. The said judgment had considered the written submissions filed on behalf of the petitioners, the plea of the respondents that subsequent to the decree dated 26/11/1997, the Agreements

were executed between them consequent to which whatever rights had accrued in favour of the petitioners pursuant to the decree were waived and acknowledging the rights of interference of the respondents in the property. The learned Judge had further recorded in the impugned order that the respondents consequent to the execution of the Agreement in July,1999 entered into the suit property which was the subject matter of the execution proceedings in the capacity of holder of mining concession / lease for carrying out mining operations and on an interpretation of the said Agreements the learned Judge concluded that the petitioners subsequent to the passing of the decree had assigned their interest in the subject matter forming a part of the decree in question and in that view of the matter dismissed the execution proceedings as not maintainable.

3. It was the further contention of Shri S.D. Lotlikar, learned Senior Advocate for the petitioners that no Agreement was entered into for assignment and yet the learned Trial Court clearly held to the contrary. In the absence of acquisition of any surface rights by the respondents, their entry in the suit property tantamounted to an act of trespass.

There was a clear non-application of mind in passing the impugned order which was in excess of jurisdiction and hence the petition had to be allowed.

4. Shri H.D. Naik, the learned Advocate for the respondents adverted to the impugned order at paragraph 22 and submitted that the petitioners were entitled at the highest to the compensation and as observed by the learned Trial Court that the decree stood extinguished on account of the petitioners having assigned their interest in the subject matter forming a part of the decree in favour of the respondents. He relied in **Smt. Kunda Radhuvir Gharse v/s. M/s. Timble Planting Private Ltd.** [1998 (4) Bom CR 520], **M/s. Lithoferro v/s. M/s. Resources International** [Appeal from order No. 71 of 2007] and submitted that there was no basis in the contentions on behalf of the petitioners that surface rights had to be acquired. He adverted to the reply filed by the respondents wherein a specific plea was taken on behalf of the respondents to the passing of decree dated 26/11/1997, the Agreements were executed and whatever rights accrued in favour of the petitioners pursuant to the decree were waived and acknowledging the rights of the

respondents in the property including the survey numbers being the subject matter of the execution proceedings. Hence, no question arose nor was it open to the petitioners to contend that there were acts of interference by the respondents as to entitle them to seek recourse to the execution of the decree dated 26/11/1997. The execution proceedings were thus not maintainable and the learned Trial Court had rightly dismissed the same holding that they were not maintainable. He further placed reliance in **Jagdish Dutt & Anr v/s. Dharam Pal & Ors** [AIR 1999 SC 1694] and submitted that in view of the execution of the Agreements of raising and selling in two terms, the decree was no longer capable of execution. He wrapped up his arguments and pressed for the dismissal of the petition by placing reliance on **Krishna Kashinath Patil v/s. S. Mohandas Kamath** [2002 (1) All MR 353].

5. I have heard Shri S.D. Lotlikar, learned Senior Advocate on behalf of the petitioners, Shri H.D. Naik, learned Advocate for the respondents, considered the judgments relied upon and most importantly the order under challenge. At the outset, the learned Civil Judge Senior Division as he then was

had clearly observed in the Judgment dated 26/11/1997 that “unless and until the respondents acquired the surface right over the suit properties, their acts even under the garb of mining activities would amount to the acts of trespass and illegal interference”. No doubt there were Agreements entered into between the petitioners and its sister concern with the respondents in respect of the raising and sale of iron ore of the mining concession for two different periods of time. However, it cannot at all be heard on behalf of the respondents that on account of the execution of the said Agreements, the decree in question stood extinguished or obliterated as not to give any effect to it and as had been done by the learned Trial Court. The petitioners as the decree holders had expressed grievance that the respondents were admitting the interference in the property bearing survey No.6 and in that context sought the assistance of the Court both in the nature of police protection and to give effect to the decree dated 26/11/1997 which restrained the respondents from trespassing and interfering in the suit properties identified therein apart from paying the costs to the petitioners.

6. The learned Trial Court was seized of the fact that the petitioners had taken a stand that the respondents had attempted to interfere in the property bearing Survey No.6 in the village Potrem admittedly forming a part of the mining concession but was clearly swayed with the plea taken by the respondents that subsequent to the passing of the decree dated 26/11/1997, there were Agreements executed between the parties and to hold that whatever rights accrued in favour of the petitioners as decree holders pursuant to the decree were waived and acknowledging the rights of interference of the respondents including the survey number in question which was the subject matter of the execution proceedings.

7. It appears from the tenor of the impugned order that the Trial Judge was impressed by the execution of the Agreements of raising and sale entered into between the parties and in that context totally fell in error to hold at paragraph 17 that the petitioners had subsequent to the passing of the decree assigned its interest in the subject matter forming a part of the decree in question in favour of the respondents. There was no justification for such a finding by the learned Trial Judge when there was no Agreement nor

any clause incorporated in the raising and sale Agreements that the petitioners were waiving their rights to the decree in their favour and/or that they were assigning their rights in the property in question in favour of the respondents.

8. I find merit in the contention of Shri S.D. Lotlikar, learned Senior Advocate for the petitioners that there was no acquisition of surface rights by the respondents and which tantamounted to acts of trespass thereby entitling the petitioners to seek the assistance of the Court by recourse to the execution proceedings initiated for the execution of the decree in their favour. Moreover, there was no quarrel at the instance of the respondents that the decree had become final in the absence of any challenge to it and the only question at large being whether such a decree was executable or otherwise. This question requires an answer that in the absence of any assignment of right in favour of the respondents, the decree in the petitioners' favour did not stand extinguished. The finding of the learned Trial Judge therefore that the decree got extinguished on account of the execution of the raising and sale Agreements is without any sound basis. Moreover, it was always open to the learned Trial

Court to hold an enquiry in terms of Section 47 of the Act and decide whether the decree actually stood satisfied or not rather than hastily concluding in the absence of any contemporaneous record that it stood extinguished on the execution of the said Agreement of raising and sale of iron ore. The decree as rightly submitted by Shri S.D. Lotlikar, learned Senior Advocate for the petitioners subsisted and therefore the learned Trial Court was clearly in error to hold that it stood extinguished and was incapable of execution. The judgments in **Kunda Gharse**, **Lithoferro** and **Jagdish Dutt** (supra) apart from that of **Krishna Patil** (supra) are clearly distinguishable. Moreover in **Jagdish Dutt** (supra), there was a clear assignment or transfer of interest in the subject matter of the decree in favour of the judgment debtor and in the view of the matter was it held that the decree got extinguished to the extent of the interest so assigned and the execution could lie only to the extent of the remaining part of the decree. Such is not the position in the present case. The orders passed by the learned Trial Court of declining the police protection and dismissing the execution proceedings in particular is without jurisdiction calling for an interference

from this Court. In view thereof i pass following

ORDER

The petition is allowed and the impugned order is quashed and set aside.

The parties are directed to appear before the Trial Court on 5th February, 2018 at 10.00 hours.

NUTAN D. SARDESSAI,J.

mv