

**IN THE HIGH COURT OF BOMBAY AT GOA****WRIT PETITION NO. 786 OF 2018**

Vinda Vinayak Pai Dukle & Another .... Petitioners  
Versus  
Sangita Satish Haldankar & 26 Others .... Respondents

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Petitioner No. 2 in person.

Mr. R.G. Ramani, Advocate for the Respondent Nos. 1 to 11.

**CORAM : C.V. BHADANG, J.**

**DATE : 24<sup>th</sup> January, 2019**

**ORAL ORDER:**

By this petition, the petitioners, who are the judgment debtor nos. 8 and 9, are challenging the order dated 27.06.2018, passed by the Executing Court in Regular Execution Application No. 68/2013/II. By the impugned order, the Executing Court has rejected the objection filed by the petitioner no. 2 (judgment debtor no. 9), under Section 47 of the Code of Civil Procedure (CPC, for short).

2. The brief facts are that now deceased, Voicunta Bandodkar and his wife Smt. Muktabai Bandodkar filed Regular Civil Suit No. 14/1978/C, against now deceased Mr. Shankar Bandodkar and his wife Sagunabai Bandodkar, before the learned Civil Judge Junior Division at Margao. Voicunta and Shankar happened to be real brothers. Narcinva Bandodkar,

who was not a party to the suit, also happened to be the brother of Voicunta and Shankar. The suit was filed for recovery of possession alongwith mesne profits and mandatory injunction in respect of property more specifically described in prayer clause (a) of the plaint. The plaintiffs *inter alia* prayed for the following reliefs in terms of prayer clause (a).

*(a) The defendants be directed to quit, vacate and hand over the possession of the premises entered as for the purpose of tax as the house no. 17 and 18 or from any portion of premises situated in the property known as 1/2 of South Naicalem or Palmar Bernando Francisco de Costa Primeiro Adicao (trigessino oitavo lote) sitated at Aquem, Alto, Margao.*

3. The plaintiffs sought recovery of possession of the suit premises on the basis of the sale deed dated 19.03.1943.

4. The suit was resisted by the defendants claiming that they were in possession of three blocks on the western side and that they set up a plea of adverse possession. It was also contended that one small room was constructed by the defendant no. 1.

5. The learned Trial Court by a judgment and decree dated 27.09.2001 dismissed the suit, which was unsuccessfully

challenged in appeal, which came to be dismissed on 08.12.2003.

6. The legal representatives of the original plaintiffs, challenged the same before this Court in Second Appeal No. 36/2004, which was allowed on 05.07.2013 and the suit was decreed in terms of prayer clause (a) as above. The decree holders are seeking execution of the said decree in the aforesaid execution case.

7. Judgment debtor no. 9 has filed objection under Section 47 of CPC. It appears that the objection was based on three grounds namely, (i) that the decree is passed by the Executing Court, without having jurisdiction to pass the same and therefore, the decree is null and ab initio void (ii) that the suit property has not been properly described and identified and (iii) the decree holder has played fraud on the Court and hence, the decree unexecutable.

8. The decree holders filed a reply and resisted the same.

9. The Executing Court has refused to uphold the objection, which order is subject matter of challenge in this petition.

10. I have heard Advocate Duple, who is the petitioner no. 2 in person and also represents his wife, who is the petitioner no. 1. I have also heard Mr. Ramani for the respondent nos. 1 to 11/deed holders. With the assistance of the learned Counsel for the parties, I have perused record.

11. Although, the objection under Section 47 of CPC was based on three grounds as aforesaid, Mr. Duple, the petitioner no. 2, submitted that a separate suit is filed, challenging the decree on the ground of fraud and therefore, he is not pressing the said ground of fraud in the present petition. In other words, the only contention raised is that the Court had no jurisdiction to pass the decree and secondly, the property has not been properly described or identified. While elaborating the said submissions, it is contended that tenancy in respect of one block is admitted by PW-1 and as such, the defendants cannot be evicted from the suit premises in view of the provisions of the Goa, Daman and Diu Buildings (Lease, Rent

and Eviction) Control Act, 1968 (Act, for short). It is thus submitted that the Civil Court, inherently lacked jurisdiction to decree the suit.

12. Reliance is placed on the decision of the Supreme Court in the case of **Harshad Chiman Lal Modi Vs. DLF Universal & Another 2005 (7) SCC 791, Sarwan Kumar & Another Vs. Madan Lal Aggarwal 2003 (4) SCC 147 and Hasham Abbas Sayyad Vs. Usman Abbas Sayyad & Others 2007 (2) SCC 355**, in order to submit that the issue of lack of jurisdiction strikes at the root of the matter and can be allowed to be raised at any stage of the proceedings, including in the execution of the decree.

13. Reliance is also placed on the decision of the Supreme Court in the case of **Ahmedsaheb (D) by Lrs & Others Vs. Sayed Ismail 2012 (8) SCC 516**, in order to submit that admission is the best proof and once, PW-1 has admitted that one of the block was tenanted, the Trial Court inherently lacked jurisdiction. The learned Counsel was at pains to point out that the issue of lack of jurisdiction was not raised and is not decided in Second Appeal No. 36/2004.

14. It is submitted that the property has not been properly identified and described particularly, in the absence of any survey number or chalta number and/or boundaries and therefore, the decree is unexecutable. Except this, there are no other contentions raised.

15. On the contrary, Mr. Ramani, the learned Counsel for the respondent nos. 1 to 11/decreed holders has supported the impugned order. It is submitted that the suit property was purchased by the father of the plaintiff no. 1 and defendant no. 1 in the year 1943 and prior to the purchase, a part of the property was in his possession as a tenant from his predecessor in title/landlord. It is submitted that after the purchase of the entire property, the issue of tenancy would fall into insignificance and in any event, the said issue about want of jurisdiction, on this ground, was never raised. It is pointed out that the contention, on the basis of the admission of PW-1, is considered by this Court while deciding Second Appeal No. 36/2004 and the petitioners cannot re-agitate the same. It is submitted that the petitioners are well aware of the property, which is subject matter of dispute and the contention about the description of the property has been raised for the first time in the execution case, which is not permissible.

16. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. At the outset, it may be mentioned that the ground of fraud is not pressed in this petition as according to the petitioners, there is separate suit, challenging the decree based on fraud, is filed. In the present petition, it is not necessary to dwell on the question whether, any separate suit would be maintainable or not. Suffice it to mention that the objection under Section 47 of CPC, is pressed at this stage, only on the twin grounds of alleged lack of jurisdiction in the Trial Court to decree the suit and the alleged absence of proper description and identification of the property.

17. Before going to the contentions as raised, it is necessary to note that the Trial Court as well as the Appellate Court had concurrently recorded a finding of title, to the suit property, in favour of the plaintiffs/decreed holders. However, the plaintiffs would be non-suited after holding that the defendants also have not proved a better title. This Court on 05.07.2013 in Second Appeal No. 36/2004 has held that once the plaintiffs having proved the title to the suit property, the Courts below, could not have non-suited the plaintiffs after having proved that the plaintiff is having a better title.

18. Insofar as the first ground is concerned, reliance is placed on the admission of PW-1, Voicunta, in the cross examination to the effect that the "suit block was occupied by all of them on lease i.e. by Voicunta alongwith defendant no. 1 and brother Narcinva". This aspect has been considered by this Court in para 15 of the judgment in Second Appeal No. 36/2004 and has refused to accept the contention as raised. It was contended by the petitioner no. 2 that this Court has not considered the question of lack of jurisdiction. I am afraid, the contention cannot be accepted. Even assuming that the contention about lack of jurisdiction was not considered, the factual finding insofar as admission of PW-1 is concerned (on which the contention about lack of jurisdiction is based), is against the petitioners. This Court has found that in the written statement the defendants did not claim tenancy in respect of the premises in their possession or any part thereof.

19. There cannot be any manner of dispute with the preposition that the plea of lack of jurisdiction would go to the root of the matter and would be available to be raised at any stage. However, the question, whether, there is indeed lack of jurisdiction would depend upon facts and circumstances of each

case. In the present case, I am unable to accept that there was any lack of jurisdiction in the Trial Court, as claimed.

20. Even insofar as the ground of lack of description and identification of the property is concerned, the same cannot be accepted. The plaint read as a whole and the prayer clause (a) as reproduced above, sufficiently describes the property, which is subject matter of dispute. The decree passed by this Court in Second Appeal No. 36/2004 is specifically in terms of prayer clause (a). This ground was also never raised previously by the petitioners.

21. I have carefully gone through the impugned order and I do not find that it suffers from any infirmity, so as to require interference. The petition is without any merit and is accordingly dismissed with no order as to costs.

**C. V. BHADANG, J.**

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