

**IN THE HIGH COURT OF BOMBAY AT GOA**

WRIT PETITION NO. 844 OF 2018

NARAYAN MAHADEV SHIRODKAR., ... Petitioner

Versus

BHANUDAS @ BABAN MOHAN KUNKERKAR.,... Respondent

Mr. Joaquim Godinho, Advocate for the Petitioner.

Coram:- C. V. BHADANG, J.

Date:- 27th February 2019

P.C.

On 22.11.2018, a notice for final disposal was issued in this petition. However, the respondent-judgment debtor has chosen not to appear although served.

2. I have heard Mr. J. Godinho, learned Counsel for the petitioner-decree holder and the petition is being disposed off finally.

3. The petitioner has filed Execution Application no.11/2004 seeking execution of a decree dated 24.11.2003 which is a money decree in the sum of Rs.65,000/- with interest at the rate of 12% per annum from the date of filing of the suit till realisation. The petitioner filed an application, exhibit-D-70, therein under Order XXI Rule 11(2) of Civil Procedure Code

(C.P.C. for short) which came to be allowed by the executing court by an order dated 06.03.2013 and the executing court held that the respondent is liable to pay Rs.1,37,512/- to the petitioner as on 08.11.2012 along with future interest. The executing court specifically held that the petitioner is not entitled to claim Rs.19,000/- from the respondent towards the publication of Proclamation. The executing court attached a shop bearing no.G-19, ground floor of building A of Raghuvansh Apartment, Sanquelim, Goa, and has restrained the respondent from transferring or creating a charge on the said shop in any manner. The executing court had issued a notice to the respondent for settling the terms of Proclamation of Sale.

4. Feeling aggrieved, the respondent challenged the said order before the District Judge in Misc. Civil Appeal No.60/2013. The learned District Judge by the impugned judgment and order dated 30.04.2018 has allowed the appeal and set aside the order dated 06.03.2013 passed by the executing Court. It is this order which is subject matter of challenge in this petition.

5. Mr. Godinho, the learned Counsel for the petitioner has submitted that the appeal filed under Order XLIII of C.P.C. was not maintainable as in an appeal under Order XLIII of C.P.C., the order passed by the learned Trial Court, under Order XXI Rule 11(2) of C.P.C. cannot be challenged.

6. Apparently, there is no consideration of this argument in the impugned judgment. A perusal of the impugned judgment shows that certain observations, may not be correct and cannot be said to be borne out of record for instance the District Judge has held that the executing court has found the decree holder is entitled to claim Rs.19,000/- which is not correct. The finding of the learned District Judge that the execution case was barred by limitation also, prima facie, cannot be accepted. Although the execution application was dismissed in default on 13.12.2011, the same was restored to file on 12.11.2012 which order was not challenged by the respondent and had attained finality. Thus, it was not open for the learned District Judge to examine the correctness of the said order as has been done in para 6 of the impugned judgment.

7. Considering the overall circumstances, I find it appropriate that the learned District Judge re-considers the appeal including the ground of maintainability of appeal on its own merits and in accordance with law.

8. In that view of the matter, the petition is partly allowed. The impugned judgment and order dated 30.04.2018 is quashed and set aside. Misc. Civil Appeal No.60/2013 is restored to the file of the learned District Judge for disposal in accordance with law.

9. The petitioner shall remain present before the learned District Judge on 11.03.2019 at 10.00 a.m.

C. V. BHADANG, J.

arp/\*