

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 673 OF 2011**

1. Mr. Vishwambar K. Salkar, resident of Vasco-da-Gama (since deceased) represented by:

1(a) Smt. Laxmibai Vishwambar Salkar,

1(b) Mr. Krishna Vishwambar Salkar,

1(c) Mr. Ramakant Vishwambar Salkar,

1(d) Miss Madhavi Vishwambar Salkar alias Mrs. Madhavi V. Tamba,

Residents of Krishna Sadan, Opp. St. Joseph Institute, H. No. Nil, Vasco-da-Gama.

.... Petitioners

Versus

Shri Kamalakant Murari Tendulkar, c/o Uma Service Centre, Vasco-da-Gama.

Presently residing at H. No. 1610, Torla, Shiroda, Ponda, Goa - 403 401.

.... Respondent

Mr. Shivan Desai with Mr. Varun Bhandanker, Advocates for the Petitioners.

Mr. Rohit Bras De Sa with Ms. V. Shet, Advocates for the Respondent.

CORAM : C.V. BHADANG, J.

DATE : 29th July, 2019

ORAL JUDGMENT:

The challenge in this petition is to the order dated 29.07.2011, passed by the Executing Court in Regular Execution Application No. 19/2010/A. By the impugned order, the Executing Court has dismissed the application (Exhibit-34), filed by the petitioners/decreed holders, under Order XXI, Rule 37 of the Civil Procedure Code (CPC, for short).

2. The aforesaid execution application is filed by the petitioners for execution of decree dated 07.11.2006, passed in Special Civil Suit No. 110/1992/A, for recovery of an amount of Rs.5,98,096.38 with further interest at the rate of 18% per annum. In the said execution application, the petitioners filed an application (Exhibit-34) for arrest and detention of the respondent/judgment debtor in civil prison, on the ground that the respondent has failed to make payment of the decretal amount and has not even shown willingness for making the said payment.

3. The application was resisted on behalf of the respondent, on the ground that he is an agriculturist, having an annual income of Rs.48,000/- and has no means to satisfy the decree. It was contended that in the absence of the petitioners showing that the respondent inspite of having sufficient means to satisfy the award/decreed has failed to do so, no case for detention in the civil prison is made out. It was submitted that there was no malafides on the part of the respondent to frustrate the decree.

4. The learned Executing Court after considering the provisions of Section 51 read with Order XXI, Rule 37 of CPC

has found that the petitioners have not made out a case that the respondent is likely to abscond or leave the local limits of the jurisdiction of the Court or that the respondent had dishonestly transferred, concealed or removed any part of his property or committed any other act of bad faith. The learned Executing Court relying on the decision of the Supreme Court in the case of **Jolly George Varghese & Another Vs. The Bank of Cochin AIR 1980 SC 470** has found that there has to be some element of bad faith and mere indifference to pay, is not sufficient for directing arrest and detention of the judgment debtor. In that view of the matter, the learned Executing Court has dismissed the application.

5. I have heard Mr. Desai, the learned Counsel for the petitioners and Mr. De Sa, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record.

6. On hearing the learned Counsel for the parties, it does appear that, at this stage, there is no case made out for directing arrest and detention of the respondent. There is a connected petition being Writ Petition No. 678/2011, in which, the petitioners are challenging the order of the Executing Court,

refusing to direct attachment and sale of certain properties belonging to the respondent. At present, even according to the petitioners, the respondent is having about 14 properties, in which, the respondent is having 1/10th share, which can be attached and sold. Normally, the mode of execution of decree, by arrest and detention in the civil prison has to be resorted to as a matter of last resort. The Executing Court, in my considered view, has rightly found that, for the present, there is no case made out for directing arrest and detention of the respondent in civil prison.

7. In the result, the petition is dismissed, with no order as to costs.

C. V. BHADANG, J.

EV