

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 678 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 06.03.2010, passed by the Senior Civil Judge, Vasco-da-Gama in Execution Application No. 14/2007/A. By the impugned order, the learned Executing Court has dismissed an application

(Exhibit-15), filed by the petitioners/decreed holders for attachment of the property of the respondent/judgment debtor.

2. The petitioners have filed the aforesaid application for execution of the decree dated 07.11.2006, passed in Special Civil Suit No. 110/1992/A, for recovery of amount of Rs.5,98,096.38 with further interest at the rate of 18% per annum. In that execution application, the petitioners have filed an application (Exhibit-15), setting out in all 14 properties in para 3 of the application, which according to the petitioners are owned by the respondent/judgment debtor. The petitioners have sought attachment and sale of the said properties and the house situated therein.

3. The application was opposed on behalf of the respondent.

4. The respondent filed an affidavit disclosing his assets, under Order XXI, Rule 41(2) of the Civil Procedure Code (CPC, for short) and claimed that his annual income from his profession of farming is Rs.48,000/- and he does not own any house or other property anywhere in India, although, he has an undivided share in the ancestral property situated at

Torla, Shiroda. The respondent also disclosed that he is having a savings bank account with Bank of India, Syndicate Bank and the Goa Co-operative Bank at Shiroda Branch and a savings bank account at Vasco branch alongwith a LIC policy of Rs.1 lakh and a two wheeler hero honda activa bearing no. GA-01-K-9619.

5. It appears that the Executing Court conducted an inquiry, in which, the respondent examined himself and was cross examined on behalf of the petitioners, in which, the respondent admitted that house no. 1610, which according to the Panchayat records is about 120 square metres and another structure, which is bearing house no. 1611 is standing in his name. Insofar as the agricultural land is concerned, the respondent claims that it is standing in the name of his father Murari Tendulkar and that there are other co-sharers. The respondent also admitted that he is having 1/10th share in the property of Murari Tendulkar.

6. The Executing Court has found that properties as mentioned in the application (Exhibit-15) are registered in the name of Murari Tendulkar and one Sulochanabai Velguenkar and the properties stated in the application Exhibit-15 at serial

nos. (b) to (n) are in the name of Murari Tendulkar and the Executive Engineer, Works Division XVII, PWD, Ponda. The Executing Court has found that the properties are co-ownership properties and there is nothing on record that they are partitioned and the share of the respondent is ascertained and separated.

7. The Executing Court has found that insofar as the house, which is bearing no. 1611 is concerned, although, it is standing in the name of the respondent, there is nothing on record to show as to in which survey number the said godown is situated or the area and the description of the same is not forthcoming. Thus, the Executing Court has found that on account of the absence of the details, the same cannot be allowed to be attached. However, insofar as the various savings bank accounts, the LIC policy and the two wheeler, is concerned, the Executing Court has found that they can be attached on furnishing the details by the petitioner/deed holder.

8. I have heard Mr. Desai, the learned Counsel for the petitioners and Mr. De Sa, the learned Counsel for the respondent. Perused record.

9. Mr. Desai, the learned Counsel for the petitioners has submitted that an undivided share in the ancestral properties can be attached and sold and the Executing Court was in error in refusing to direct attachment, merely on account of the fact that they were co-ownership properties. It is submitted that the respondent has admitted in the cross examination that he has 1/10th share in the ancestral properties and therefore, the Executing Court was not precluded from directing attachment of the said share. Insofar as the savings bank accounts and LIC policy are concerned, it is submitted that the respondent has not given the details of the said accounts or of the LIC policy. In the submission of the learned Counsel for the petitioners, this is yet another attempt to avoid the execution of the decree.

10. Mr. De Sa, the learned Counsel for the respondent has submitted that nothing prevented the petitioners from ascertaining the details of the bank accounts and the LIC policy, during the cross examination of the respondent. In the submission of the learned Counsel for the respondent, although, an undivided share, in an appropriate case, can be attached and sold, it should be an ascertained share. It is pointed out that the share of the respondent is not ascertained

and there are other co-sharers, admittedly, in the properties, even as per the revenue record. It is submitted that in some of the properties, there are some tenants shown.

11. I have carefully considered the rival circumstances and the submissions made.

12. Mr. De Sa, the learned Counsel for the respondent, on instructions, states that two out of three bank accounts have been closed for want of maintenance of minimum balance and the LIC policy has since lapsed. He states that the respondent shall furnish the up to date details of three bank accounts alongwith the balance, if any, before the Executing Court, within two weeks. The statement so made is accepted.

13. Insofar as the properties which are shown in the name of Murari Tendulkar and Sulochanabai Velguenkar are concerned, Mr. Desai, the learned Counsel for the petitioners states that the petitioners shall file an application for attachment of the said properties afresh with notice to the co-sharers. If such an application is filed, the Executing Court shall decide the same on its own merits and in accordance with law.

14. This takes me to the claim as regards house no. 1610 and no. 1611, which the respondent has admitted to be belonging to him. The Executing Court could not have refused the attachment of these two structures, only on the ground that the survey number, in which they are situated is not shown.

15. In such circumstances, the following order is passed:

O R D E R

- (i) The petition is partly allowed.
- (ii) The impugned order dated 06.03.2010 is hereby set aside.
- (iii) The Executing Court shall take steps for attachment and sale of house nos. 1610 and 1611 situated at Shiroda, Ponda, in accordance with law.
- (iv) Liberty is granted to the petitioners to file an application for attachment of the properties as set out in Exhibit-15 after noticing the co-sharers. If such an application is filed, the learned Executing Court shall decide the same after issuing notice to the co-sharers in accordance with law and on its own merits.
- (v) Rival contentions of the parties, on merits, are left open.
- (vi) Parties to appear before the Executing Court on 19.09.2019 at 10:00 a.m.

- (vii) Rule is made absolute in the aforesaid terms,
with no order as to costs.

C. V. BHADANG, J.

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