

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 286 OF 2019

CARMELINA FERNANDES (DEC) AND 9
ORS.,

... Petitioners

Versus

ALEXIO JOSE FERNANDES ALIAS ALEIXO
JOSE FERNANDES AND 5 ORS.,

... Respondents

Adv. Ashwin D. Bhobe for the Petitioners.

Adv. J. Abreu Lobo for Respondent nos.1,2(a,b,e&f),3,4 & 6

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 8th December 2020

Order:

When the Estate Lever died, his successors filed Inventory Proceedings No.78/2005/B before the Civil Judge, Junior Division, Mapusa, Goa. On 27th June 2007, the Trial Court disposed of those Inventory Proceedings. Then, on 2nd June 2018, the first respondent applied for execution of the Trial Court's Judgment, dated 27.6.2007. That is, the first respondent wanted the Executing Court to evict the petitioner from the house that had been allotted to him in the Inventory Proceedings.

2. But the petitioner resisted the eviction. In fact, on 21st February 2009, he applied to the Executing Court to keep the execution proceedings in abeyance. It was on the premise that he had challenged the trial Court's judgment in an independent suit: Special Civil Suit No.108/2008, before the Civil Judge, Junior Division, Mapusa. But, through the order, dated 20.3.2010, the Executing Court dismissed the petitioner's interlocutory application.

3. Aggrieved, the petitioner filed Misc. Civil Appeal No.105/2010 before the District Judge, North Goa, Mapusa. But he could not succeed; the Appellate Court dismissed the petitioner's Misc. Civil Appeal, through its Judgment, dated 31.10.2018. Finally, assailing that judgment, the petitioner has filed this Writ Petition under Article 227 of the Constitution of India.

4. Heard Shri A. D. Bhobe, the learned counsel for the petitioner; and Shir J. A. Lobo, the learned counsel for the Respondents.

5. As seen from the record, the petitioner suffered adverse findings in the Inventory Proceedings. To have that judgment, dated 27.6.2007, enforced, the first respondent laid execution. But, in the meanwhile, the petitioner filed an independent suit. Article 448 of the Goa Succession Special Notaries and Inventory Proceeding Act 2012 ("the 2012 Act") allows the aggrieved party to file a suit against the orders or judgment in the Inventory Proceedings. In the alternative, Article 451 of the 2012 Act allows the same party to file an appeal. Here, the petitioner has invoked Article 448 and filed Special Civil Appeal No.108/2008.

6. As to the Executing Court's power to stay the proceedings pending before itself, there is no express provision under the 2012 Act. Indeed, there is a provision under Order 21, Rule 26 of CPC, which, to the extent relevant, reads thus:

"26. When Court may stay execution: (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree *for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any*

other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

2. ...

3. ...

(italics supplied)

7. In the first place, as this Court has held in *Zacarias Durate Domingos Pereira v. Camilo Inacio Evaristo Pereira*, AIR 1984 Bom. 295, Order 21 of CPC does not apply to inventory proceedings. Even if it were to apply, it is, at best, only an interim measure to enable the respondent in the execution proceedings to approach the Appellate Court and secure interim protection pending the appeal. That is, against the trial Court's judgment that has given rise to the execution proceedings, an aggrieved party has his statutory appeal, say, under section 96 of CPC. But, usually, once the successful party secures a decree, he lays execution. And the executing Court may proceed further and execute the decree. Then, the judgement debtor's statutory remedy, such as appeal, becomes otiose. Only to ward off such a futile position, Order 21 Rule 26 enables the Executing Court to stay the proceedings pending before itself only for a limited period. In other words, the proper court to stay the operation of a decree is the appellate court. And sometimes, it may be the very trial court. So, the executing Court's power under Order 21, Rule 26 of CPC is only a step-in-aid for the judgment debtor to secure a regular stay from the appellate court.

8. Here, first, the petitioner did not apply to the Trial Court for the suspension of the judgment in the inventory proceedings. Nor has he

sought the stay of the execution. Actually, he lost the suit. Even in appeal, the petitioner made no such effort.

9. On the other hand, Article 922 of the Portuguese Civil Procedure Code contemplates a situation though not identical but, at least, analogous to what we have before us. And the provision reads thus:

Article 922 – Appeal lies from final judgment which decides liquidation, embargos of execution debtor and which verifies and marshals the credits, when any of them takes cognizance of merits of the case. *The appeal has not the effect of staying the operation of the final judgment* when filed against the final judgment passed by the court of comarca, except where the appeal from final judgment passed is from embargos of the execution opponent *and the applicant of embargo had offered security to stop further prosecution of the execution.*"

(italics supplied)

10. Here, the petitioner has not taken recourse to this provision either. First, Article 922 applies to appeal proceedings. Here, the petitioner did not invoke the appeal remedy; instead, he filed a suit. Second, in the appeal, there is a prescribed procedure, which includes the appellant offering security. As a whole, Article 922 is unavailable for the petitioner.

11. Under these circumstances, I fail to see any valid reason to interfere with the concurrent findings of the executing Court and the Appellate Court: that the Executing Court has no jurisdiction to stay the proceedings.

12. Even otherwise, under Article 227 of the Constitution of India, I cannot correct the errors on the merits as if I were sitting in appeal over the orders in revision. I may only fix the jurisdictional errors if any. I find neither a jurisdictional error nor any justifiable reason to interfere.

I, therefore, dismiss the Writ Petition.

DAMA SESHADRI NAIDU, J.

ap/-