

Meena

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 250 OF 2012

Mr. Manuel Pereira,
Son of Luciano Baptist Pereira
major of age, resident of
Khurakhala, Corlim,
Tiswadi, Goa
House No. Not Known.

...Petitioner

Versus

1. Maria Leticia Francisca Ludomira
Rodrigues (since deceased)
represented by her sole universal heir
Mrs. Ana Severina Lia dos Milagres
Rodrigues alias Ana Lia Rodrigues, [deceased]
major of age, resident of AS-1,
Kampurkar Residency,
Near Holy Family High School,
Socorro, Porvorim, Bardez Goa.
Deceased and survived through
legal representatives 3.(b),

1.(a)(i). Mr. Elizate Rodrigues
married, service,
c/o Central Library,
6th floor, Patto,
Panaji, Goa;

1.(a)(ii) Mr. Fausto Rodrigues,
Married, service,
Resident of House No: F2,
Ivory Tower,
near Stella Maria Chapel,
Miramar, Goa;

1.(a)(iii) Mr. Bento Rodrigues,
Married, service,
Resident of Karapurkar Residency,

House No: 871/1,
Near Holy Family high
School, Porvorim, Goa;

- 1.(a)(iv) Agnelo Rodrigues [Deceased]
Married, service,
Resident of Graca Divine,
H.No: 62/4
Near Livra Febre,
Chapel, Chimbél, Goa.

[Amendment carried out as per order dated 02/02/2016 passed
in MCA no.978/2013.]

- 1(a)(iv)(a) Aldrin Rodrigues
Son of late Agnelo Rodrigues
Major of age

- 1(a)(iv)(b) Aldrich Rodrigues
Son of late Agnelo Rodrigues
Major of age

- 1(a)(iv)(c) Antonieta Fonseca e Rodrigues
Wife of late Agnelo Rodrigues
Major of age
Resident of graca divine,
H.No. 62/4 Near Livra Febre,
Chapel, Chimbél, Goa.

[Amendment carried out as per order dated 12/03/2018 passed
in MCA No 8 of 2018.]

2. Maria Alina das Angustias Does,
major of age, resident of
31st January Road, Panaji,
Goa (since deceased)

- 2(a). Mr. Azarias Darryl Malcolm Rodrigues,
Karapurkar Splendor,
Opp Varsha Colouny 12,
Borges Nagar,
Alto Porvorim,
Bardez Goa-403521.

Amendment carried out as per order dtd. 29/8/2016 [MCA / 232/2019]

3. Maria Aurelia Carmelina Does
Rodrigues, (since deceased)
through her legal representatives

a) Luciano Maria Charles Simao
Rodrigues, major of age,
residing at 42/12 Lawrence Park,
CHF, Naigaon (West) Vassai,
Taluka, Thane District,
Mumbai, 401207

b) Dolores Maria de Jesus Lonita
de S. Simao Rodrigues, e Rebelo,
residing at Verla – Parra,
Bardez, Goa. H.No. Not known.

c) Dayle Richa Leticia de S.
Simao Rodrigues, major of age,
daughter of Bento Manuel Genoveva
de S. Simao Rodrigues, resident of
AS-1, Karapurkar Residency,
Near Holy Family High School,
Socorro, Porvorim, Bardez, Goa.

[4. Lazaro Antonio Pereira] Deceased
major of age, resident of
Khursakhala, Corlim,
Tiswadi, Goa. House No. not known.

5. [Genoveva Pereira,] [deceased]
major of age, resident of
House No. 116, Ward No.5,
Alto Gimaraes, Near Lyceum
Building, Altinho, Panaji, Goa.

Deceased, Survived by the
following Legal Representatives

5.(a) Miss. Judith Sequeira,

Spinster, Major of age,
Resident of c/o Antonio
Sequeira, H.No.116, Word No.5
Near Lyecum Campus,
Altinho, Panaji Goa.

5.(b) Mrs. Heaveline Sequeira,
Married, major of age,
Resident of c/o Antonio
Sequeira, H.No.116, Word No.5
Near Lyecum Campus,
Altinho, Panaji Goa.

5.(c) Mr. Tome Sequeira,
Resident of c/o Antonio
Sequeira, H.No.116, Word No.5
Near Lyecum Campus,
Altinho, Panaji Goa.

[Amendment carried out as per order dated 02/02/2016 passed
in MCA No.980/2013.]

6. Ana Francisca Pereira,
major of age, resident of
House No. 116, Ward No.5,
Alto Gimaraes,
Near Lyceum Building,
Altinho, Panaji, Goa.

7. Mr. Dana Aranha and his wife
son of not known

8. Mrs. Francisca Jenifer Aranha,
both major, daughter of not known
Respondent 7 and 8 residing at
Andheri (East) Mumbai, and
represented by their duly
constituted attorney
Mr. Lawrence Pinto, resident of
“Pinto Bagh”, Alice V. D'Souza Compound,
Bejai, New Road, H.No. Not known.
Mangalore 575004.

...Respondents

Mr. Valmiki Menezes, Advocate *for the petitioner.*

Mr. F.E. Noronha, Advocate *for respondent Nos. 3(B) and 3 (c) and legal heirs of respondent Nos.1 to 3*

Mr. J.P. Mulgaonkar, Senior Advocate with Ms. Rupa Banaulikar, Advocate *for respondent Nos.7 and 8.*

CORAM: **MANISH PITALE, J**

RESERVED ON : **29TH November, 2021**

PRONOUNCED ON : **7TH December, 2021**

JUDGMENT:

1. This Writ Petition arises out of order dated 29/12/2011 passed by the Court of Civil Judge Senior Division, Panaji (hereinafter referred to as the Executing Court) in an application for execution filed by respondent Nos.1 to 3 (Original decree holders), whereby an application filed on behalf of respondent Nos.7 and 8 (Objectors) to the execution proceedings was allowed and it was directed that an enquiry under Order 21 Rule 101 of the Code of Civil Procedure (C.P.C.) would be undertaken. The petitioner and proforma respondent nos. 4, 5 and 6 are the original judgment debtors, who claim that the aforesaid application of the Objectors was not maintainable, which the Executing Court failed to appreciate.

2. Respondent Nos.1 to 3 filed suit for recovery of possession and injunction against the petitioner and proforma respondent nos. 4 to

6, claiming that they were lawful co-owners of the suit property which they had inherited. They claimed that the petitioner and proforma respondent nos. 4 to 6 i.e. the original defendants had disturbed their possession in the suit property by cutting some trees therein, due to which a police complaint was filed and eventually the said suit was filed seeking possession of the share of respondent Nos.1 to 3 in the property. The petitioner and proforma respondent nos. 4 to 6 resisted the prayers made on behalf of respondent Nos.1 to 3. The Court of Civil Judge, Senior Division, framed issues and the matter went to trial.

3. By the judgment and order dated 12/06/1986, the aforesaid Court found that respondent Nos.1 to 3 were able to prove that the suit property was half of the whole property described as “Quarta Parte do predio Santiago Pintado”. It was also held that the other half of the said property belonged to one Maria Tereza Volifred Cortez. On the basis of the findings rendered in the judgment, it was held that respondent Nos.1 to 3 were entitled for damages of Rs.9500/- and the petitioner and proforma respondent nos. 4 to 6 were directed to restore possession of the suit property i.e. half of

the property called “Quarta Parte do predio Santiago Pintado” to the said respondent nos. 1 to 3.

4. The said decree was put to execution by respondent Nos.1 to 3. In these proceedings respondent Nos.1 to 3 filed an application stating that the suit property be partitioned by metes and bounds, suggesting that a Commissioner should be appointed to divide the property in two equal halves, so that they could be put in possession of half the property. A Commissioner was appointed, who submitted his report suggesting the manner in which the property could be partitioned in two halves, so that half share could be recovered for respondent Nos. 1 to 3.

5. The said order was challenged before this Court in Writ Petition No.532 of 2009 and the petition was finally disposed of in terms of minutes of order agreed between the parties. As per the said agreement between the parties, the order of the Executing Court was modified and it was directed that plot Nos. (a), (b), (c) and (d) would be demarcated in the entire property and that the Executing Court would allot to respondent Nos.1 to 3 and the petitioner and proforma respondent nos. 4 to 6 plots (a) and (b) and plots (c) and (d) by draw of lots.

6. At this stage respondent Nos.7 and 8 filed an objection in the said execution proceedings, claiming that they were the heirs of Maria Tereza Volifred Cortez and they were entitled to object to the manner in which the decree was being executed. It was submitted that as they were legal heirs of the said Maria Tereza Volifred Cortez and the judgment and decree passed in favour of respondent Nos.1 to 3 itself recorded that half the property belonged to the said predecessor of respondent Nos.7 and 8, they were entitled to raise objections.

7. It was submitted that when there was no prayer in the plaint filed by respondent Nos.1 to 3 for partition of the suit property and the judgment and decree passed by the trial Court also did not grant any relief of partition of the suit property by metes and bounds, the manner in which the decree was being executed was unsustainable. It was submitted on behalf of respondent Nos.7 and 8 that the property could not be partitioned without the intervention of the said respondents and without taking on record their say in respect of the report of the Commissioner. It was further claimed that even if the suit property was to be partitioned, no portion of the property could be allotted to the petitioner and proforma respondent nos. 4

to 6 i.e. the judgment debtors, as there was finding of the trial Court that the property belonged to respondent Nos.1 to 3 i.e. the decree holders and the said Maria Tereza Volifred Cortez i.e. predecessor of respondent Nos.7 and 8. It was further claimed that if the suit property was to be partitioned, as per the report of the Commissioner, the same should be allotted to respondent Nos.1 to 3 as decree holders and to respondent Nos.7 and 8, being the legal heirs of the said Maria Tereza Volifred Cortez.

8. The petitioner raised a strong objection to the aforesaid objections filed on behalf of respondent Nos.7 and 8. It was submitted before the Executing Court on behalf of the petitioner that respondent Nos.7 and 8 had no right to raise objection in the executing proceedings as their application could not be filed under any of the Rules of Order 21 of the CPC. It was submitted that since respondent Nos.7 and 8 were not resisting or obstructing possession to be given to the decree holders i.e. respondent Nos.1 to 3 in terms of the decree and it could also not be said that they had been dispossessed by the said respondents, there was no question of inquiry being undertaken as per Order 21 Rule 101 of the CPC.

9. By the impugned order dated 29/12/2011, the aforesaid objections raised on behalf of the petitioner and proforma respondent nos. 4 to 6, were rejected and it was held that respondent Nos. 7 and 8, as third parties, were entitled to have an inquiry for adjudication of their objections as regards partition of the suit property in terms of Order 21 Rule 101 of the CPC.

10. Aggrieved by the same, the petitioner filed the present Writ Petition, wherein Rule was granted on 22/06/2012 and interim stay of further proceedings before the Executing Court was also granted.

11. Mr. V. Menezes, learned Counsel appearing for the petitioner submitted that the objections sought to be raised on behalf of respondent Nos.7 and 8 did not quote any provision of the CPC. It was submitted that even if such objections were to be read in the context of Order 21 of the CPC, it did not fall in the scheme contemplated under Order 21 Rules 97 to 103 of the CPC. It was submitted that neither Rule 97 nor Rule 99 of Order 21 of the CPC was applicable to respondent Nos.7 and 8 and therefore, such objections were not maintainable. It was submitted that the nature of objections sought to be raised on behalf of respondent Nos.7 and 8, recorded in paragraph 4 of the impugned order, demonstrated

that, if at all, the said respondents were entitled to relief in the matter, they ought to have filed a separate suit seeking appropriate reliefs. According to the learned Counsel appearing for the petitioner, the Executing Court completely failed to appreciate this aspect of the matter while passing the impugned order. It was submitted that the aspect as to whether the property can be partitioned in view of the decree passed by the trial Court in the present case, was not a matter that could be raised by respondent Nos.7 and 8 by approaching the Executing Court and they ought to have filed a separate suit to seek appropriate reliefs. On this basis, it was submitted that the impugned order deserved to be set aside.

12. Mr. Noronha, learned Counsel who was appearing for legal heirs of respondent No.3 submitted on the date of hearing that he also had instructions to appear for the legal heirs of respondent Nos.1 and 2 and that he would be filing Wakalatnama for the said respondents also. Mr. Noronha indeed filed Wakalatnama for the said respondents, which is noted from the memorandum along with the Wakalatnama placed on record. Mr. Noronha, learned Counsel appearing for the said respondents submitted that respondent Nos.7 and 8 ought to have filed a separate suit for claiming appropriate

reliefs and that the objections raised before the Executing Court could not have been entertained.

13. Mr. J.P. Mulgaonkar, learned Senior Advocate appearing for respondent Nos.7 and 8 submitted that all objections pertaining to execution of decree, including objections raised by third parties have to be dealt with by the Executing Court under Order 21 Rule 97 to 103 of the CPC. It is submitted that as per settled law pertaining to the interpretation of Section 47 r/w Order 21 Rules 97 to 103 of the CPC, respondent Nos.7 and 8 could not have filed a separate suit. It was submitted that all questions, including the objections raised on behalf of respondent Nos.7 and 8, need to be decided under Order 21 Rules 97 to 103 of the CPC. In fact, an order passed in such proceedings is treated as a decree against which an appeal is to be filed under Order 21 Rule 103 of the CPC. The whole purpose is to avoid multiplicity of litigation and that therefore, the impugned order does not deserve interference.

14. The learned Senior Counsel placed reliance on the judgments of the Hon'ble Supreme Court in the cases of ***Ashan Devi and Another v/s. Phulwasi Devi and others*** [(2003) 12 SCC 219] and ***Shamsher Singh and Another v/s. Lieutenant Colonel***

Nahar Singh (Dead) through legal representatives and others [(2019) 7 SCC 279], to emphasize on the true scope of proceedings under Order 21 Rules 97 to 103 of the CPC. It was submitted that the whole purpose of the scheme under the said provisions was to avoid multiplicity of litigation and for settling of objections and questions pertaining to execution of decree, only in execution proceedings. On this basis, it was submitted that the Writ Petition deserved to be dismissed.

15. Having heard the learned Counsel for the rival parties, it needs to be examined as to what is true nature of the objections raised on behalf of respondent Nos.7 and 8 in the present case and whether such objections would fall within scope of the proceedings before the Executing Court under Order 21 Rules 97 to 103 of the CPC.

16. A perusal of Rule 97 of Order 21 of the CPC would show that it pertains to resistance or obstruction to possession of immovable property when the decree holder puts the decree in execution. The objector can be any person who can place on record cogent material to show that the resistance or obstruction to execution of the decree and delivery of the possession to the decree holder is justified. Under Rule 99 of Order 21 of the CPC, where a person other than

the judgment debtor is dispossessed of the immovable property by the decree holder, he can make an application to the Executing Court complaining of such dispossession and such grievance has to be adjudicated by the Executing Court in accordance with the provisions contained in Order 21 of the CPC.

17. The judgment debtor or the third person who is threatened with dispossession or actually dispossessed can approach the Executing Court raising grievance, which has to be decided under Order 21 Rule 101 of the CPC. Upon adjudication of all questions under Order 21 Rule 101 of the CPC, the Executing Court under Rule 98 thereof puts the decree holder in possession of the property or it can dismiss the application for execution. When a grievance regarding dispossession by the decree holder is raised and determined under Order 21 Rule 101 of the CPC, the Executing Court can make an order under Rule 100 thereof to put such an applicant in possession or it can dismiss such an application. All such orders passed under Order 21 Rules 98 and 100 of the CPC are treated as decrees under Order 21 Rule 103 of the CPC and they are subject to the same conditions as to appeal, as if they were decrees.

18. Hence, Order 21 Rules 97 to 103 of the CPC, pertaining to resistance to delivery of possession to decree holder or purchaser, specifies the entire scheme under which a decree can be resisted.

19. In the present case, the judgment and decree of the trial Court required the petitioner and proforma respondent nos. 4 to 6, as judgment debtors, to restore possession of the suit property i.e. half of the property “Quarta Parte do predio Santiago Pintado”, to the decree holders i.e. respondent nos.1 to 3. The said decree was put to execution by the said decree holders. In these proceedings a Commissioner came to be appointed and it was directed that the property would be partitioned so that possession of half the said property could be handed over to respondent Nos.1 to 3 to satisfy the decree passed by the trial Court.

20. Whether such direction for partition of the property could have been issued in the light of the prayers made in the plaint and considering the nature of the decree passed by the trial Court is another matter, but, the fact is that a Commissioner was appointed, who submitted his report and in terms of the said report, the Executing Court issued a specific direction. When a challenge was raised to the said direction, this Court while disposing of Writ

Petition No.532 of 2009, in terms of minutes of order submitted by the decree holders i.e. respondent Nos.1 to 3 and the judgment debtors i.e. the petitioner and proforma respondent nos. 4 to 6, it was directed that the suit property would be divided into four plots and two plots each by draw of lots would be allotted to respondent Nos.1 to 3 on the one hand and the petitioner and proforma respondent nos. 4 to 6 on the other hand.

21. Respondent Nos.7 and 8 claim to be legal heirs of the Maria Tereza Volifred Cortez and they heavily relied upon the findings rendered by the trial Court in respect of issue no.5, wherein it was held that respondent Nos.1 to 3 had proved that they had entitlement to half of the property known as “Quarta Parte do predio Santiago Pintado” and the other half belonged to the said Maria Tereza Volifred Cortez. On this basis, respondent Nos.7 and 8 raised the aforementioned objections, which were recorded by the Executing Court in the impugned order at paragraph 4. The said paragraph reads as follows:

“4. The third party objected to partitioning the suit property in to metes and bounds and allotting the same to the decree holders and Judgment debtors on the

following grounds:

(a) In the plaint, there was no prayer to partition the suit | property and the trial Court has also not granted any relief to partition the suit property by metes and bounds.

(b) in view of the findings given by the trial Court and issue no.5 in the suit that the suit property belongs half to the plaintiffs and the other half to Maria Tereza Cortez, who is the late mother and mother in law of the third party, the suit property cannot be partitioned without the intervention of the third party and the other legal heirs of Maria Tereza Cortez and without allowing the third party and other legal heirs of the said Maria and other legal heirs to file their say and on the Commissioners report dated 20.12.2003 in the case.

(C) Even if the suit property is partitioned no portion of suit property can be allotted to the Judgment debtors as the suit property belongs to only to the decree holders said Maria Tereza Cortez.

(d) Even if the suit property is partitioned as per the Commissioners report the same should be allotted to the decree holders and legal heirs of the said late Maria Tereza Cortez.”

22. A perusal of the aforesaid objections demonstrates that respondent Nos.7 and 8 are challenging the partition directed in consequence of the decree passed by the trial Court in the present

case. They are not resisting the decree sought to be executed by respondent Nos.1 to 3 i.e. the decree holders, indicating that their objections are not relatable to Order 21 Rule 97 of the CPC. At the same time, they are also not claiming that they have been dispossessed by the decree holders i.e. respondent Nos.1 to 3 and hence their objection is also not relatable to Order 21 Rule 99 of the CPC. In effect, respondent Nos. 7 and 8 are claiming that they should be put in possession of half the property while the decree holders i.e. respondent Nos.1 to 3 are put in possession of other half of the property in execution of the decree. This means that respondent Nos.7 and 8, while purporting to raise objections to the decree sought to be executed by respondent Nos.1 to 3 i.e. the decree holders, are seeking to take possession from the judgment debtors in respect of the other half of the property. It is in this backdrop, that respondent Nos. 7 and 8 have raised the above quoted objections and they seriously dispute the partition of the property itself.

23. This Court is unable to appreciate the contentions raised on behalf of respondent Nos.7 and 8, that their objections ought to be decided only under the scheme contemplated as per Order 21 Rules 97 to 103 of the CPC. The said respondents were unable to indicate

as to under which Rule of Order 21 of the CPC were their objections filed before the Executing Court. They were unable to demonstrate that the contents of the objections could be read in the context of either Rule 97 or Rule 99 of Order 21 of the CPC. Therefore, it becomes clear that the nature of reliefs sought by respondent Nos.7 and 8, could be raised only in a substantial suit, if at all, wherein the said respondents could array the petitioner and proforma respondent nos. 4 to 6 i.e. the judgment debtors as well as respondent Nos.1 to 3 i.e. the decree holders as contesting parties.

24. Reliance placed on the judgments of the Hon'ble Supreme Court in the cases of ***Ashan Devi and Another v/s. Phulwasi Devi and others*** and ***Shamsher Singh and Another v/s. Lieutenant Colonel Nahar Singh (Dead) through legal representatives and others*** (supra) appears to be misplaced. There can be no quarrel with the propositions laid down in the said judgments, which indicate that Order 21 Rules 97 and 99 of the CPC have to be widely and liberally construed, to enable the Executing Court to adjudicate all questions pertaining to execution of the decree. Even if the Executing Court is to adjudicate *inter se* claims of the decree holder and third parties in execution proceedings to

avoid prolongation of the litigation by driving parties to file an independent suit, in the facts of the present case the said position of law is found to be inapplicable.

25. A perusal of the impugned order shows that the Executing Court in the present case has not discussed this aspect of the matter at all and the contentions raised on behalf of the petitioner and proforma respondent nos. 4 to 6 have been brushed aside by merely stating that third parties are entitled to have an inquiry to adjudicate the objections in terms of Order 21 Rule 101 of the CPC. This Court is of the opinion that in the facts and circumstances of the present case, the issues sought to be raised by respondent Nos.7 and 8 cannot be decided in the proceedings initiated for execution of the said decree and under the scheme contemplated as per Order 21 Rules 97 to 103 of the CPC.

26. In view of the above, it is found that the objections filed on behalf of respondent Nos.7 and 8 could not have been entertained by the Executing Court and that the impugned order is erroneous. Hence, the Writ Petition is allowed. The impugned order is quashed and set aside and the objections filed by respondent Nos.7 and 8 before the Executing Court are dismissed.

27. Rule made absolute in above terms.

MANISH PITALE, J.

MEENA VISHAL
BHOR