

Esha

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 20 OF 2019

Smt. Rosy Noronha, major of age,
married, housewife, r/o House No. 53,
Grande Palmar, Deao, Quepem, Goa. ... APPLICANT

Versus

- 1 Shri Vitorino D. Travasso
(expired), major of age, widower,
service, r/o Tilamol, Quepem, Goa.
- 1a. Shri Morgan Travasso, son of
deceased
- 1b. Smt. Luiza Travasso, daughter of
the deceased
- 1c. Kum. Luiza Travasso, daughter of
the deceased
- 1d. Shri Edwin Travasso, son of the
deceased
- 1e. Shri Loyed Travasso, son of the
deceased
- 1f. Kum. Pramila Travasso, daughter
of the deceased
All major in age, r/o Tilamol,
Quepem, Goa.
- 2 Shri Francisco Vaz, major of age
(expired), married, service and his
wife
- 2a. Kum. Veena Vaz, daughter of the
deceased

2b. Shri Anthony Vaz, son of the deceased

2c. Kum. Edna Vaz, daughter of the deceased

2d. Kum. Elsy Vaz, daughter of the deceased

2e. Shri Relsy Vaz, son of the deceased

All major in age, r/o Bomdarmol, Sirvoi, Quepem, Goa.

3 Smt. Marequina Vaz, major in age, married, housewife, both r/o Bomdarmol, Sirvoi, Quepem, Goa. ... RESPONDENTS

Mr. J. Coelho Pereira, Senior Advocate with Mr. Vilas Pavithran and Ms. T. Parab, Advocates for the Applicant.

Mr. Jose R. Serrao with Ms. Diana Rodrigues, Advocates for Respondent Nos. 2(a) to 2(e) and 3.

CORAM:

G.S. KULKARNI, J.

RESERVED ON:

27 SEPTEMBER 2022

PRONOUNCED ON:

14 DECEMBER 2022

JUDGMENT:

A. PREFACE:

1. The judgment has been divided into the following sections to facilitate analysis.

SECTIONS	HEADING	PARAGRAPH NO.
A	Preface	1
B	Facts	3
C	Submissions on behalf of the Applicant/Plaintiff	22
D	Submissions on behalf of the Respondents/Judgment Debtors	24
E	Reasons & Conclusion	25

2. This case brings to mind the classic belief that the woes of a successful plaintiff would really commence when the decree he obtains is put in execution. In the present case, in the applicant's civil suit of the year 1998, the decree in question attained finality in the year 2012, with the High Court dismissing the second appeal.

B. FACTS.

3. This Civil Revision Application assails an order dated 27 March 2017 passed by the learned Civil Judge Junior Division, 'B' Court, Quepem in execution proceedings (Regular Execution Application No. 2/2004/B), whereby, it has been held that the decree in the applicant's civil suit as confirmed by the Appellate

Court, as also by this Court in rejecting the respondents' Second Appeal is not executable. The impugned order is premised on an enquiry as conducted in terms of Section 47 of the Code of Civil Procedure (for short, "the CPC").

4. The factual antecedents.–

The applicant had filed Regular Civil Suit No. 17/1998/B against one Vitorino Travasso (defendant no. 1), Shri Francisco Vaz (defendant no. 2) and his wife, Smt. Marequina Vaz (defendant no. 3) for a declaration; for a mandatory injunction; and for a permanent injunction; and for specific performance of the suit agreement dated 3 February 1995. It was the applicant's case before suit Court (for short, "the Trial Court") that the said original defendants had entered into an agreement to sell plot 'A' (plot A-12 and A-13) being the sub-divided plots of the property known as "Padammol" or "Padlant" situated at Sirvoi Village, Quepem, South Goa (for short, "suit plot") admeasuring 1000 square metres, for Rs.40 per square metre totalling Rs.40,000/-. The applicant had contended that having advanced Rs.10,000/- to the original defendants and the applicant although had readiness and willingness to pay the balance consideration, the defendants had

failed to execute the sale deed in their favour qua the suit plot.

The prayers in the suit are required to be noted, which read thus:-

“The plaintiff therefore, prays, as under:

- a) That by a Judgement and Decree of this Hon'ble Court it be declared that as per the agreement and by virtue of writing dated 3-2-95 entered between the plaintiff and defendants is legal and as such the plaintiff is entitled to enforce against the defendants for Specific Performance of Contract thereby ordering the defendants to convey/sell the suit plot of the property in favour of the plaintiff by accepting the balance of consideration amounting to Rs.30000/- and the possession thereof be handed over to the plaintiff.*
- (aa) That by a Judgment and Decree of this Hon'ble Court in the nature of mandatory injunction on the defendants be ordered to demolish the boundary wall of laterite stones constructed all around the boundary of the suit plot and to restore the land to its original position.*
- b) That by a Judgement and Decree of this Hon'ble Court in the nature of permanent injunction the defendants their agents and servants be restrained from interfering, disturbing the peaceful possession of the plaintiff, in respect of the suit plot of land.*
- c) And for such other reliefs as this Hon'ble Court may find deem fit and proper in the circumstances of the case.”*

5. Respondent nos. 1(a) to 1(f) in the present proceedings are the legal heirs of original defendant no. 1, who has expired.

Respondent nos. 2(a) to 2(e) are the legal heirs of defendant no. 2, who also expired during the pendency of the proceedings.

6. The civil suit in question was contested by the original defendants and came to be decreed by judgment and order dated 28 December 2001, passed by the learned Civil Judge Junior Division, Quepem. It would be relevant to extract the issues and the column of findings arrived thereon as framed by the learned Trial Judge in adjudicating the civil suit, which are as under:-

<u>Issues</u>	<u>Findings</u>
1. <i>Whether the plaintiff proves that defendants entered into an agreement to sell the suit plot to her and towards which she paid the advance of Rs.10,000/- to the defendants on 3.2.95 out of total purchase amount of Rs.40,000 ?</i>	Affirmative
2. <i>Whether the plaintiff proves that the possession of suit plot was handed over to the plaintiff by the defendants, but the defendants forcibly constructed boundary wall of laterite stones around the suit plot ?</i>	Negative
3. <i>Whether the plaintiff proves that she approached defendants requesting them to accept balance consideration amount of Rs.30,000/- and to execute the final sale deed and that she is willing and ever ready to perform her part of contract ?</i>	Affirmative

- | | |
|--|--------------------|
| 4. Whether the defendants prove that the plaintiff voluntarily paid Rs.10,000/- as advance expressing her desire to purchase any plot of defendants and defendants told her that any suitable plot will cost Rs.50,000/- and would identify plot for her only if she paid Rs.40,000/- within a year or would return her Rs.10,000/- without interest ? | Negative |
| 5. Whether defendants prove that defendant no. 2 returned Rs.25,000/- to the plaintiff paid by her and defendants told plaintiff to take back the advance amount of Rs.10,000/- and informed that they would not identify any suitable plot for her ? | Negative |
| 6. Whether the defendants prove that plaintiff has no cause of action to file the suit ? | Negative |
| 7. Whether the plaintiff proves that she is entitled for the relief claimed ? | Partly Affirmative |
| 8. What Order ? What relief ? | As per final order |

Additional Issue

Findings

- | | |
|--|----------|
| 1. Whether the plaintiff proves that she is entitled for mandatory injunction to demolish the boundary wall of laterite stones constructed around the suit plot and for restoration of the land in its original position ? | Negative |
|--|----------|

7. Thus, answering the above issues, the learned Trial Judge held that the applicant/plaintiff proved that the defendants had entered into an agreement to sell the suit plot to the applicant/plaintiff. In answering issue no. 1, the learned Civil Judge recorded a finding that there are testimonies of defendants' witness no. 1 (DW-1), from which, it was evident that the defendants after having identified suit plots A-12 and A-13 of an area of 1,000 square metres agreed to sell the same to the applicant/plaintiff for a consideration of Rs.40,000/- at the rate of Rs.40/- per square metre. It was observed that DW-1 also admitted that the plan at Exhibit PW-1/B, pertained to the plots developed by him, which fortified the case of the plaintiff that plots A-12 and A-13 were identified by the defendants after payment of advance money of Rs.10,000/-. The learned Civil Judge also observed that defendant no. 1 had sub-divided the entire property (larger land) into several plots and by admitting the said plan produced by PW-1, as pertaining to the sub-divided plots. This clearly depicted that plots A-12 and A-13 were identified to the applicant/plaintiff, after receiving the advance consideration. It was observed that DW-1 also admitted that the rate at which the plot was to be sold was fixed at Rs.40/- per square metre, and

an area of 1,000 square metres from plot A was to be sold to the plaintiff. It was hence clearly deposed by him that plots A-12 and A-13 were identified by the plaintiff. DW-1's testimony was also to the effect that defendant no. 2 had also identified the plots to be sold to the plaintiff. DW-1 also admitted that the entire property was originally owned by one Gadnis and that 25 plots were sold by Gadnis and the developers to different purchasers and around 15 plots were purchased by the defendants themselves. Based on such evidence, the suit was accordingly decreed in terms of prayer clause 'a'. The operative order as passed by the learned Civil Judge is required to be noted, which reads thus:-

"Suit is decreed in terms of prayer 'a'. Prayer 'aa' and prayer 'b' are rejected. It is declared that as per the agreement and by virtue of writing dated 3-2-95 entered between the plaintiff and defendants is legal and as such the plaintiff is entitled to enforce against the defendants for specific performance of contract thereby ordering the defendants to convey/sell the suit plot of the property in favour of plaintiff by accepting balance consideration amounting to Rs.30,000/- and the possession thereof be handed over to plaintiff.

No order as to cost.

Decree.

Pronounced in open court.

Proceedings closed."

8. The defendants being aggrieved by the judgment and order passed by the learned Civil Judge, filed Regular Civil Appeal No. 56/2002 before the Court of learned Additional District Judge, South Goa, Margao. The learned District Judge by his judgment and order dated 14 October 2003, dismissed the civil appeal with costs. It is material to note the two points, which were framed for determination in the appeal and the findings thereon, which are as follows:-

<u>Issue</u>	<u>Findings</u>
1. <i>Whether the so called agreement for sale is bad in law in view of the provisions of Article 1119 of the Civil Code ?</i>	Negative
2. <i>Whether any interference is called for with the findings given by the Trial Court ?</i>	Negative

9. The learned District Judge also observed that the deposition of DW-1 in the context of the agreement in question was “very material”, as the said witness had clearly admitted in his examination-in-chief, that the applicant/plaintiff booked a plot in survey no. 127/4 and gave him an amount of Rs.10,000/- as an advance (part consideration). It was observed that DW-1 also admitted that the price agreed was at the rate of Rs.40/- per

square metre and the area admittedly was 1,000 square metres. Hence, the total sale price to be paid by the applicant/plaintiff was Rs.40,000/- and not Rs.50,000/- as claimed in the written statement. The material portion of the cross-examination of DW-1, referred by the learned District Judge and relevant for the purpose of the present proceedings reads thus:-

"I had filed written statement and also defendants no. 2 and 3 had filed the same. Myself and defendant no. 2 developed only one property, Padamol bearing survey no. 127/4. We had entered into an agreement with Gadnis to develop the said property. 30-40 plots were made of the said property by us prior to 1995. In the said agreement it was stated that we had right to sell the said plots independently without interference of the original landlord. About 25 plots were sold by us. I now say that we sold said plots by making original vendor as party and we signed as developer. The remaining plots were taken by us. There were about 10-15 plots remaining with us."

(emphasis supplied)

10. The learned District Judge thus observed that the deposition of DW-1 that the original owner of the land was one "Gadnis", which was also borne out from the survey records (Exhibit PW-1/G), wherein, the name of Vishwanath Sinai Gadnis was shown in the occupant's column along with others. The learned District Judge observed that there is an agreement between the original

owner and the developers, in which, the right was conferred on defendant nos. 1 and 2 to sell the plots to individual buyers/purchasers. It was hence observed that defendant nos. 1 and 2 taking a position that they were not the owners of the said property, as also, even if they were the owners, the consent, signatures of their spouses were not obtained, had no substance. Analyzing the evidence, the learned District Judge observed that it had come in evidence that the boundaries of the suit plot were established by the applicant/plaintiff, as also the fact of the payment of Rs.10,000/- was proved. Hence, the agreement in question as entered between the applicant/plaintiff and the defendants was clearly established. The learned District Judge also observed that the plaintiff was cross-examined at length, but nothing of relevance could be proved by the defendants to dislodge the applicant's/plaintiff's case, or to show that no such agreement was entered between the parties. It was also observed, that in the examination in chief, DW-1 had admitted that plots A-12 and A-13 at Exhibit PW-1/B were identified as the plots to be sold to the applicant/plaintiff. The learned District Judge further observed that defendant no. 2 had failed to step into the witness box, to prove any contention that the plots were not identified.

The learned District Judge thus recorded a finding that it was clear from the testimony of DW-1 that the plots were identified as also, an amount of Rs.10,000/- was accepted by the defendants, hence, the applicant's/plaintiff's case in its entirety had stood proved. It was also observed that DW-1 in his cross-examination had also admitted, that the plots shown/identified in Exhibit PW-1/B are the same plots, which were developed by him. It was further observed that the said witness unsuccessfully tried to change his versions from time to time, however, of no consequence. It is on such findings that the learned District Judge dismissed the appeal of the defendants.

11. The defendants being aggrieved by dismissal of their appeal by the learned District Judge approached this Court in a second appeal filed under Section 100 of the CPC. The learned Single Judge of this Court by a judgment and order dated 6/13 December 2012 dismissed the second appeal, which was admitted on the following substantial questions of law:

“(i) Whether the valuation of the suit was according to the valuation of the consideration in terms of Section 7(X)(A) of the Court Fees Act, 1870 ?

“(ii) Whether the trial Court had pecuniary jurisdiction to try and entertain the present suit ?

(iii) *Whether a mere suit for declaration without claiming relief of specific performance was maintainable and if so, whether the plaintiff/respondent had averred and proved readiness and willingness to perform her part of the contract under Section 16(c) of the Specific Relief Act ?”*

12. In regard to the contentions as urged on behalf of respondents (appellants therein) this Court in paragraph 21 observed thus:

“Coming to the submission made by Mr. Teles that the defendants are not the owners of the suit plot, therefore, no decree for specific performance can be passed against them is concerned, as rightly pointed out by Mr. Coelho Pereira, learned Counsel for the respondent/plaintiff, no issue has been framed in this regard by the trial Court but the issue was raised by the appellants before the lower appellate Court and the lower appellate Court dealt with this issue. In the absence of specific pleadings the defendants were not entitled to raise such issue for the first time before the Appellate Court. That apart, there was agreement between the original owners and developers in which right has been given in favour of defendants no.1 and 2 to sell the plot independently to respective buyers and purchasers. Moreover, the evidence discloses that some of the remaining plots were taken by the defendants pursuant to agreement of development entered into with the owners. Therefore, in my view, the question of non-suiting the plaintiff on the ground that the defendants have no title to the suit property, does not arise.

13. It is thus seen that the judgment and decree dated 28 December 2001 passed by the learned Civil Judge in the civil suit

(Regular Civil Suit No. 17/1998/B) in question, attained finality even before this Court on the second appeal of the defendants, being rejected. It appears that there were no further proceedings, thus, the decree as passed by the learned Trial Judge has attained finality.

14. Despite the appeal of the defendants being dismissed by the learned District Judge, and confronted by the refusal of the judgment debtors/respondents to honour the decree, the applicant/plaintiff initiated execution proceedings (Regular Execution Application No. 2/2004/B) against the defendants/ judgment debtors, which were filed before the learned Civil Judge Junior Division, 'B' Court at Quepem (for short, “the Executing Court”). Such an application was filed about 18 years back that is on 3 March 2004. In her execution application in column (g), the applicant/plaintiff stated that the defendants/ judgment debtors under the judgment and decree dated 28 December 2001 passed by the learned Trial Judge were ordered to convey by sale deed, plot A (plots A-12 and A-13) of the sub-divided plots, of the property known as PADAMOL or PADLANT situated at Sirvoi Village, Sub-District and Taluka-Quepem, District-South Goa,

surveyed under survey no. 127/4 of Sirvoi Village, admeasuring 1,000 square metres at the rate of Rs.40/- per square metre in favour of the decree holder by accepting the balance amount of consideration of Rs.30,000/- and the possession thereof be handed over to the applicant/ plaintiff forthwith. The respondents are the legal heirs of the original defendants, and are the persons against whom the execution of the decree was sought for (original defendants had expired on the date of filing the execution application).

15. Before the Executing Court the defendants/judgment debtors in opposing the execution of the decree raised several contentions. It was contended by the defendants/judgment debtors that the applicant/plaintiff in the suit did not assert that the defendants/judgment debtors were the owners of the plots. It was contended that the document of which specific performance was granted, was only a receipt, which was not registered when part performance under Section 53A of the Transfer of Property Act requires the agreement to be in writing and to be registered. It was contended that the plaintiff/decreed holder failed to produce documents to the effect that the judgment debtors were the owners

of the property. It was contended that the applicant/plaintiff (decree holder) after entering into a sale deed with one Morgan Travasso was aware that the property belonged to the Gadnis family, and it was so observed by the first appellate Court. The defendants/judgment debtors pointed out to the Executing Court the deposition of DW-1, 'Vitorino Travasso', where he stated that 30-40 plots were developed, however, there are no pleadings that the judgment debtors were the developers on behalf of the Gadnis family. It was contended that there is no document to support such case of the applicant/plaintiff and no foundation was laid in the pleadings, that after purchasing the plots from Gadnis, the defendants/ judgment debtors developed the land by making plots. It was contended that the original owners, Gadnis (the third parties in the execution proceedings) had denied selling of the land to the developers. It was contended that at no point of time, did judgment debtor nos. 1 and 2 jointly purchased plot no. A and/or jointly acquired any right to develop plot no. A. Therefore, the judgment debtors could not transfer any right, title or interest in plot A to the decree holder. It was next contended that there was no approved development plan and the survey plan of survey no. 127 also did not show the sub-divided plots. It was, hence,

contended by the defendants/judgment debtors that the decree obtained by the applicant/decreed holder based on stray admissions made in cross-examination, itself was flawed and a nullity, which could be challenged in the execution proceedings, which are collateral proceedings. Accordingly, it was prayed that the execution application be dismissed as the decree is not executable.

16. On the other hand, before the Executing Court on behalf of the applicant/plaintiff (decree holder), it was contended that the judgment and decree as rendered by the learned Trial Court was upheld by the first and second appellate Court on all issues and being final was binding on the judgment debtors. It was contended that it was not tenable for the defendants/judgment debtors to raise contentions of a nature which would require the Court to go behind the decree. It was contended that in the written statement as well as in the additional written statement, defendant nos. 1 and 2 had admitted that they are the owners and that all these factual contents being raised in defence in execution, had stood concluded in the proceedings of the suit, which were followed by the proceedings of the first appeal and the second appeal. It was thus urged that the judgment debtors were required

to be directed to accept the balance consideration and execute a sale deed in favour of the applicant/decreed holder, failing which the Superintendent of the Court be called upon to execute the sale deed on behalf of the defendants/judgment debtors.

17. The Executing Court on the above rival contentions, applying the provisions of Section 47 of the CPC, passed an order dated 17 August 2015 directing an enquiry in terms of Section 47 of the CPC *inter alia* observing that an enquiry needs to be conducted to identify the exact location of the area of the suit plot, which was agreed to be sold to the plaintiff/decreed holder in survey plan of survey no. 127 of Village Sirvoi, so as to determine whether the decree is executable. In passing such orders, the Executing Court observed that the question which was required to be determined, in the execution proceedings was as to whether the plot agreed to be sold to the applicant/plaintiff (decree holder) was in existence and physically identifiable “in loco”, considering the contention of the decree holder that the developer had sold plots to various buyers, however, the approved plan showing the subdivided plots was not produced so as to locate and identify the plot to be sold to the decree holder. It was observed that in PW-1/A, in

writing had defined the boundaries of the plots agreed to be sold to the decree holder. It was further observed that from the sketch plan produced at Exhibit PW-1/B, the exact location of the suit plot on the survey plan of survey no. 127 of Village Sirvoi could not be located. It was observed that in view of the plea of nullity of the decree as urged by the judgment debtors, it was necessary that the decree holder clearly identifies the plot agreed to be sold with the boundaries, more so, when the decree holder had failed to produce any document on record to show that plot A was jointly purchased by the original judgment debtor nos. 1 and 2 before granting any of the reliefs sought in the execution proceedings.

18. In pursuance of such order of the Executing Court directing an enquiry in terms of Section 47 of the CPC, an enquiry was held by the Executing Court. In such enquiry the applicant/decreed holder examined herself as PW-1. The applicant/decreed holder also examined her Surveyor Civil Engineer, Mr. Sujit B. Prabhudessai as PW-2, Mr. Anthony Thomas Fernandes as PW-3 was also examined. The defendants/judgment debtors nos. 2(a) to 2(e) and 3 did not examine any witnesses.

19. The Executing Court considering the evidence on record passed the impugned order dated 27 March 2017 thereby holding that the decree in question was not executable. In coming to such a conclusion, referring to the evidence as led on behalf of the applicant/decreed holder, the Executing Court observed that the applicant/decreed holder had produced the report and sketch plan of Mr. Sujit Prabhudessai clearly identifying the suit plot on the survey plan of survey no. 127/4 of Village Sirvoi, which according to the decreed holder and her witnesses now resembles a single unit as it is enclosed on all four sides by a laterite stone compound wall. It was observed that as per the said evidence led by the decreed holder on the eastern boundary of the suit plot lay plots B2 and B3 belonging to one Mr. Anthony Thomas Fernandes, who had purchased the same vide sale deed dated 22 July 1995. It was observed that PW-2, who was an Engineer as examined by the decreed holder had identified the suit plot on the basis of sale deed of Anthony Thomas Fernandes. It was observed that in his cross-examination when a question was put to him on the starting sequence of plot no. B4/3 is B4/1, B4/2, B4/3, B4/4 etc., he admitted it to be correct, hence, showed that the sequence of plot nos. B4/3 is B4/1, B4/2, B4/3 and B4/4 are correct then the

sequence shown in the sketch plan attached to the sale deed of Anthony Thomas Fernandes would be incorrect. It was observed that PW-2 admitted that the entire properties A and B were not sub-divided into plots as per the survey records. The Executing Court, therefore, observed that there were no approved sub-division plans showing that the suit plot was agreed to be sold to the decree holder, jointly by original defendants thereby making it difficult to identify the suit plot agreed to be sold to the decree holder jointly by the judgment debtors.

20. The relevant observations of the Executing Court can be found in paragraphs 10, 11, 12 and 17 of the impugned order, which reads thus:-

“10. The decree holder has also produced the report and sketch plan of engineer Mr. Sujit B. Prabhudessai clearly identifying/depicting the suit plot on the survey plan of the property bearing survey NO. 127/4 of Village Sirvoi, which according to the decree holder and her witnesses now resembles a single unit as it is enclosed on all four sides with laterite stone compound wall. Further according to the decree holder on the eastern boundary of the suit plot lies plots B2 & B3 belonging to Mr. Anthony Thomas Fernandes who had purchased the same vide sale deed dated 22.07.1995. It is pertinent to note here that PW2 who is engineer of the decree holder has identified the suit plot on the basis of the sale deed of Mr. Anthony Thomas Fernandes and as identified by him by the decree holder. PW2 also admitted that besides the sale

deed of Mr. Anthony Thomas Fernandes he has not gone through any other sale deeds. In his cross examination when a question was put to him that starting sequence of plot No. B4/3 is B4/1, B4/2, B4/3 and B4/4 etc he admitted it to be correct. This shows that if the sequence of plot No. B4/3 is B4/1, B4/2, B4/3 and B4/4 is correct then sequence of the plot nos. shown in the sketch plan attached to the sale deed of Mr. Anthony Thomas Fernandes would be incorrect. In fact PW2 admitted that the entire property A and B are not sub divided into plots as per the Inspector of Survey Land and Records and individual purchasers have done their own partition and are not plot number under an approved sub division plan as per survey records. PW2 also admitted that plot numbers for plot B are not given by Inspector of Survey Land and Records or any other authority. Therefore it is seen that there was no approved subdivision plan showing the suit plot agreed to be sold to the decree holder jointly by original judgment debtors Nos.1 and 2 thereby making it difficult to identify the suit plot agreed to be sold to the decree holder jointly by the judgment debtors.

11. According to the decree holder the Judgment Debtors 2(a) to 2(e) & 3 have falsely contended that they are not the owners of the "Plot A" of the property bearing survey no. 127/4 of village Sirvoi as vide deed of sale dated 02.03.1995 duly executed and registered before the Sub-Registrar of Quepem under no. 156 at pages 592 to 613 of Book No. I Volume No. 102 dated 30.03.1995, the intervener herein Mr. Kashinath Vishwananth Gadnis along with his wife Sneha Kashinath Gadnis and his brother Amarnath Vishwanath Gadnis have sold the said "Plot A" of the said property bearing survey No.127/4 of village Sirvoi, Taluka Quepem to the deceased judgment debtor No.2 herein. Therefore according to the decree holder the Judgment Debtors are very much the owners of the said "Plot A" and have every right and title to sell the suit plot to her as per the decree/order in her favour. But it is pertinent to note that the said sale deed does not

show that the original Judgments Debtor Nos. 1,2 and 3 had jointly purchased the property nor has the decree holder being able to show that as per the agreement between the Judgment Debtors the individual properties of the judgment debtors was agreed to be jointly developed by them by subdividing into plots for joint sale to prospective buyers.

12. In cross Decree Holder has admitted that she has not seen the title documents of the judgment debtors although she has pleaded that Judgment debtors are the owners of the suit plot. In fact decree holder has admitted that she had purchased plot from Mr. Anthony Thomas Fernandes by deed of sale dated 04.12.1998 which is taken on record at exhibit 89 in cross. It is seen that this sale deed was executed during the pendency of the civil suit filed by the decree holder. It is seen that vide the said sale deed the decree holder has purchased plot B-4/3 from Anthony Thomas Fernandes which was part of plot purchased by him from Mr. Morgan Travasso. Although the decree holder was aware of this fact Mr. Morgan Travasso as owner of plot B sold Plot B-2 and B-3 to Mr. Anthony Thomas Fernandes the decree holder preferred to remain silent and not bring this fact on record in the civil suit filed by her. The decree holder has examined Mr. Anthony Thomas Fernandes as PW3 who has stated he had purchased plot No. B3 and B4 from Judgment Debtors vide sale deed at exhibit 85. But the sale deed at exhibit 85 shows that PW3 purchased the plots from one Mr. Morgan Travasso who name is recorded as vendor in the sale deed being the owner. In cross examination PW3 reiterated that he purchased the property from Vitorino Travasso but his son Morgan Travasso son of Vitorino Travasso has signed the sale deed. The evidence of PW3 shows that only in order to support the case of the decree holder he has stated that he purchased the plots from the original judgment debtors and as such his testimony is not reliable.

17. In the present execution proceedings the suit plot was jointly agreed to be sold to the decree holder by the original judgment debtors who are the defendants in the civil suit and by way of the present decree the judgment debtors are ordered to transfer the suit plot to the decree holder by way of sale deed. Therefore in order for satisfaction of the decree the individual property belonging to any one of the legal heirs of Judgment debtors Nos.1 and 2 or individually to judgment debtor No.3 cannot be ordered to be transferred in favour of the decree holder. The decree holder has by way of documentary and oral evidence failed to show that the suit plot identified by her jointly belongs to the original debtors or that the suit plot was part of the property jointly developed by the original judgment debtors on behalf on the original landlord and agreed to be sold to the decree holder in terms of the writing dated 3/2/1995. It is seen that judgment debtors are not the joint owners of the suit plot as identified by the decree holder and as such they are incompetent to create any legal right or transfer any legal title of ownership in respect of the suit plot in favour of the decree-holder.

21. The Executing Court thus observed that although the suit plot was jointly agreed to be sold to the decree holder by the original judgment debtors/defendants in the civil suit and although, under the decree, the judgment debtors were ordered to transfer the suit plot to the applicant/decreed holder by way of sale deed, however, for the satisfaction of the decree, the individual property belonging to the legal heirs of the judgment debtor nos. 1 and 2 or individually of judgment debtor no. 3, cannot be ordered

to be transferred in favour of the decree holder. It was observed that the decree holder by way of documentary and oral evidence has failed to show that the suit plot identified by her jointly belongs to the original judgment debtors or that the suit plot was part of the property, jointly developed by the original judgment debtors on behalf of the original landlord and agreed to be sold to the decree holder, in terms of the first writing (agreement) dated 3 February 1995. It was observed that the judgment debtors are not the joint owners of the suit plot as identified by the decree holder, and as such, are incompetent to create any legal right or title of ownership of the suit plot in favour of the decree holder. On such findings, the impugned order has been passed by the Executing Court.

C. SUBMISSIONS ON BEHALF OF THE APPLICANT/PLAINTIFF.

22. Mr. Coelho Pereira, learned Senior Advocate for the applicant, in assailing the impugned order passed by the Executing Court has made the following submissions:

- (i) It is submitted that the reply cum objections of the defendants/judgment debtors did not warrant interference of the Executing Court, since it did not meet the necessary predicates of Section 47 of the CPC. Such

reply cum objections brought into question issues, that stood settled by judgment and decree dated 28 December 2001. It is submitted that the reply cum objections *inter alia* allege that the applicant/decreed holder had played fraud in order to grab the property without going through the title of the property. It is submitted that the issue of fraud cannot be determined by the Executing Court exercising powers under Section 47 of the CPC.

(ii) It is submitted that an application was moved under Order XXI Rule 97 read with Rule 101 and Section 151 of the CPC by Kashinath Sinai Gadnis seeking intervention in the said proceedings, which was granted by order dated 22 December 2014. In the enquiry under Section 47 of the CPC such intervenor had remained absent. It is submitted that the two points, which were framed for determination by the Executing Court namely, whether the decreed holder proves that the suit plot agreed to be sold to her by virtue of writing dated 3 February 1995 could be identified/located on the survey plan of the property bearing survey no. 127/4 of Village Sirvoi, and whether the decreed holder proves that the present decree is executable, both points have been answered in the negative. It is submitted that the Executing Court has acted illegally and has exercised jurisdiction illegally with material irregularity.

(iii) The Executing Court by holding that the decree dated 28 December 2001 was not executable has gone behind the decree, which is an exercise not permissible in law.

(iv) The points for determination framed and answered by the Executing Court were points/issues already determined by the learned Civil Judge Junior Division in decreeing the applicant/decreed holder's suit vide judgment and decree dated 28 December 2001.

(v) The points as framed for determination and answered in the negative, were issues decided by the Trial Court, first appellate Court and the second appellate Court, hence, there could not have been an enquiry on such issues. The impugned order is hence marred by perversity.

(vi) For these reasons, the execution application of the applicant/decreed holder dated 3 March 2004 needs to be granted by this Court and the judgment debtors be directed to convey by way of sale deed plot A (plot nos. A-12 and A-13) and possession thereof be hand over after directing that amount of Rs.30,000/- be accepted by the judgment debtors.

23. In support of such contentions, reliance is placed on the decisions of the Supreme Court in **Rafique Bibi (D) by LRs Vs. Sayed Waliuddin (D) by LRs & Others¹**; **C. Gangacharan Vs. C. Narayanan²** and **Century Textiles Industries Limited Vs. Deepak Jain & Another³**.

1 (2004) 1 SCC 287

2 (2000) 1 SCC 459

3 (2009) 5 SCC 634

**D. SUBMISSIONS ON BEHALF OF THE RESPONDENTS/
JUDGMENT DEBTORS.**

24. On the other hand, Mr. Jose Serrao, learned Advocate for respondent nos. 2(a) to 2(e) and 3 has made the following submissions:

(i) The impugned order passed by the Executing Court requires no interference as it has been rightly held that the decree is not executable. It is submitted that the deed of sale produced by the applicant stating that the property was purchased by defendant no. 1-Vitorino Travasso and defendant no. 2-Francisco Vaz from one Gadnis shows that the land belonging to Francisco Vaz had nothing to do with the decree.

(ii) That PW-3 also produced a deed of sale dated 22 July 1995 (Exhibit 85) stating that PW-3 had purchased the plot from the original judgment debtors Francisco Vaz and Vitorino Travasso, hence, Morgan Travasso had nothing to do with the decree. It is submitted that Mr. Morgan Travasso had purchased the property from the landlord, Gadnis.

(iii) That PW-2, Mr. Sujit Prabhudessai, Engineer had stated that the property A and B are not sub-divided by the Inspector of Survey and Land Record and the individual purchasers have carried out their own partition. It is submitted that even the sequence of plots would be incorrect as per Exhibit PW-1/A. Besides, in preparing

Exhibit PW-1/A, it was not verified that defendant no. 1–Vitorino Travasso and defendant no. 2–Francisco Vaz were owners of plot A.

(iv) Landlord, Gadnis had also stated that he never allowed the judgment debtors to develop and make plots on his behalf and the question of selling the plots with or without his intervention did not arise. Consequently, the applicant/decreed holder failed to identify the plot as per the decree wherein the alleged developed plots carried out by the original judgment debtors were required to be conveyed to the applicant.

(v) The findings of the first appellate Court in paragraph 9 are upheld in paragraph 21 of the judgment by the High Court in the second appeal holding that the developers were entitled to sell the property without the interference of the owner of the property, namely, Gadnis. It is contended that such findings are without jurisdiction as there is no pleading to that effect. In support of such contention, reliance is placed on **Sri Shivaji Balaram Haibatti Vs. Sri Avinash Maruthi Pawar**⁴.

(vi) It is submitted that the Executing Court interpreted the decree, but under the guise of interpretation cannot make a new decree for the parties and if the contentions as urged on behalf of the applicant/decreed holder are accepted, it would amount to making a new decree for the parties. Such contention is supported by placing reliance on the decisions of the

⁴ (2018) 11 SCC 652

Supreme Court in **V. Ramaswami Aiyangar & Others Vs. T.N.V. Kailasa Thevar⁵** and **Jai Narain Ram Lundia Vs. Kedar Nath Khetan & Others⁶**.

E. REASONS AND CONCLUSION:

25. The issues which fall for consideration in the present proceedings arises from an order passed by the Executing Court under Section 47 of the CPC in the context of the decree in question dated 28 December 2001 as confirmed in the first appeal and subsequently, by this Court in the second appeal. It needs to be stated, that the powers an Executing Court would wield under Section 47 are certainly distinct and much narrower than the powers, which the suit Court and the appellate Court's would exercise in adjudicating the proceedings before such forums. In law, the “first appellate Court”, has complete and absolute jurisdiction to delve on questions of facts and law, as the appeal is a continuation of the suit proceedings. In the hierarchy of appeals, the second appeal is adjudicated by the High Court only on the substantial questions of law. Thus, the exercise of powers under Section 47 of the CPC has been held to be microscopic and lies in a

5 1951 AIR (SC) 189

6 (1956) AIR (SC) 359

very narrow inspection hole. The Executing Court can allow objections to the executability of the decree, if it is found that the same is void *ab initio* and null and/or the decree is not capable of execution in law either because the same was passed in ignorance of provision of law or the law was promulgated making a decree inexecutable after its passing (see **Dhurandhar Prasad Singh Vs. Jai Prakash University**⁷).

26. It is well settled that the Executing Court has no jurisdiction to go behind the decree. The Executing Court would not have any authority/jurisdiction to vary the terms of the decree, however erroneous it may be. It is also well settled that the decree even if erroneous, is still binding between the parties. The Executing Court can certainly look into the aspect as to whether the decree is a nullity and if such an issue is raised by the judgment debtor, such questions would then be required to be decided by the Executing Court, the underlying principle being, that the decree, which is a nullity in the eye of the law, is no decree and hence, even by consent of parties, such a decree cannot be executed by the Court, however, any objection that a decree was incorrect in law cannot be taken in execution proceedings. The decree, as

⁷ AIR 2001 SC 2552

defined in Section 2(2) of the CPC means a formal expression of an adjudication, which insofar as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in the controversy in the suit. Once it is so determined and expressed formally in the decree, setting up a new case or right for investigation in execution thereof would amount to going behind the decree (see **Basu Deo & Another Vs. the Fourth Additional District Judge, Jhansi & Others**⁸).

27. Applying the above principles to the facts in hand, it would be required to be examined as to what was the approach of the Executing Court in exercising jurisdiction under Section 47 of the CPC. The Executing Court undertook an enquiry by framing two points for a determination, which are as follows:–

<u>POINTS</u>	<u>FINDINGS</u>
1) <i>Whether the decree holder proves that the suit plot agreed to be sold by virtue of writing dated 03.02.1995 can be identified/located on the survey plan of property bearing survey no. 127/4 of village Sirvoi ?</i>	No
2) <i>Whether the decree holder proves that the present decree is executable ?</i>	No

28. The Executing Court permitted the parties to submit their replies and lead evidence. The applicant/decree holder examined herself as PW-1. She also examined her Surveyor Mr. Sujit Prabhudessai (PW-2) and Mr. Anthony Thomas Fernandes (PW-3). These witnesses of the applicant/decree holder were cross-examined on behalf of the judgment debtors. The judgment debtors did not examine any witnesses. Although there was an intervention of Gadnis, he was absent in the course of adjudication of the proceedings under Section 47 of the CPC.

29. The Executing Court considering the evidence on record and on the findings as recorded in paragraphs 10, 11, 12 and 17 has come to the conclusion that the decree is not executable. Such findings of the Executing Court can be analysed as under, so as to cull out as to exactly what the Executing Court has held:-

(i) It is difficult to identify the suit plot, agreed to be sold to the applicant/decree holder by the judgment debtors as there was no approved plan showing the suit plot agreed to be sold to the decree holder jointly by the judgment debtor nos. 1 and 2.

(ii) The case of the judgment debtors needs to be accepted that the documents do not show that original judgment debtors nos. 1, 2 and 3 had jointly purchased the

property as also, the applicant/decreed holder was unable to show that as per the agreement between the judgment debtors, the individual properties of the judgment debtors were agreed to be jointly developed by sub-dividing the plots for the joint sale of plots to prospective buyers.

(iii) If the suit plot was jointly agreed to be sold by the judgment debtors to the applicant/decreed holder, this cannot involve individual property belonging to any one of the legal heirs of judgment debtor nos. 1 and 2 or individually judgment debtor no. 3 being ordered to transfer their plots in favour of the applicant/decreed holder.

(iv) The applicant/decreed holder on documentary or oral evidence has failed to show that the suit plot identified by the applicant/decreed holder pertained to the judgment debtors or the suit plot was part of the property jointly developed by the original landlord and agreed to be sold to the applicant/decreed holder in terms of the writing dated 3 February 1995.

(v) The judgment debtors are seen not to be the joint owners of the suit plot as identified by the decreed holder and as such, they are incompetent to create any legal right or transfer any legal title of ownership, in respect of the suit plot in favour of the applicant/decreed holder.

(vi) For the above reasons, the decreed is not executable.

30. In my opinion, the above findings as recorded by the Executing Court are untenable and legally perverse to say the least, the reasons for which can be discussed.

31. It appears from the tenor of the impugned order that the Executing Court has completely overlooked the contours of its jurisdiction under Section 47 of the CPC. On reading of the impugned order, it is clearly seen that the Executing Court has gone behind the decree, while entertaining questions on identity of suit land as raised on behalf of the judgment debtors when the said issue had attained finality.

32. The Executing Court did not have jurisdiction under Section 47 of the CPC to consider any evidence which was contrary to the concluded findings, which were based on evidence on record of the suit and more particularly, when confirmed by the Appellate Court and even this Court in the proceedings unsuccessfully prosecuted by the judgment debtors. What is significant is that an inquiry under Section 47 of the CPC at the behest of the judgment debtors was not in the nature of a *de novo* trial on the issues, which stands concluded in the previous adjudications initiated at the behest of the judgment debtors. The judgment debtors are not

third parties to the suit. They are not setting up any obstruction to the execution of a decree like a third party may do so, invoking the provisions of Order XXI Rule 97 of the CPC. In the course of such adjudication, it was necessary for the Executing Court to carefully consider as to whether any attempt was being made to defeat the decree and by a cautious approach and a mindful examination of the findings of the learned Trial Court, and to the findings of the Appellate Court, take an appropriate decision. This for the reason that the judgment debtors were certainly precluded from disturbing the concluded adjudications. Thus, any application under Section 47 of the CPC cannot be adjudicated in a manner so as to reopen the concluded issues and come to different conclusions.

33. On a brief survey of the proceedings of the suit, it needs to be observed that by the impugned order, the adjudication which had taken place before the first appellate Court and the adjudication of the second appeal before the High Court, in fact stands nullified by the Executing Court. This is discernible from the following discussion.

34. It is required to be observed that paragraphs 2 and 3 of the plaint in no uncertain terms described the suit property in the following manner:

2. The plaintiff states that the defendants entered into an sale agreement with her to sell her the plot 'A' i.e. (plot A12 and A13) of the Sub Divided plots of the property known as "PADDAMOL or PADLANT", situated at Sirvoi Village, Sub District and Taluka Quepem, District South Goa, the same is surveyed under No. 127/4 of Sirvoi Village admeasuring 1000.00 square metres at the rate of Rs.40/- per square metre (hereinafter referred to as the suit plot of the property for brevity sake).

3. The plaintiff states that the suit plot of the property is bounded on the east by plot B-2 and B-3 of the property, on the west 6 metres wide road, on the north plot A-11 of the said property and on the south by 6 metres wide road.

35. It is seen from the common written statement as filed on behalf of the defendants that there was no specific denial in regard to the identity of the plot as seen from paragraphs 3 and 4 of the written statement. The nature of denial of the contents of the said paragraphs can never be construed to be any denial of the description and/or identity of the property. This was accordingly accepted and considered by the learned Trial Judge, before whom it was a non-issue. It is thus imperative to note the case/version of the defendants in the written statement. Paragraphs 3 and 4 of the

common written statement are required to be noted, which read thus.

“3. With reference to para 2 of the plaint, the content of the same is denied being false, fabricated and malafide. It is denied that the defendants ever entered into an agreement of any kind with the plaintiff to sell her the plot 'A' i.e. (plot A12 and A13) of the sub-divided plots of the property known as “PADDAMOL or PADLANT” situated at Sirvoi village, bearing survey no. 127/4 of Sirvoi Village, admeasuring 1000 sqm. (one Thousand square metres) and the plaintiff is put to strict proof thereof.

4. With reference to para 3, the contents of the same are denied and the plaintiff is put to strict proof thereof.”

36. The Trial Court adjudicating the suit, vide its judgment and order dated 28 December 2001, referred to the plan which was produced by PW-1 identifying the suit plot at Exhibit PW-1/B. Also referring to the cross-examination of PW-1, who deposed that, it is one plot, but at the time of execution of the agreement, the suit plot was shown as two plots. The learned Trial Judge observed that Vitorino Travasso (DW-1) had categorically deposed that the applicant/decreed holder had booked a plot from property 'Padamol' in survey no. 127/4. He also deposed that the plot was identified to the applicant as plot nos. A-12 and A-13 by defendant no. 2. He also deposed that the plots were sold by the

defendants by making the original vendor as a party and they signed as a developer and the remaining plots were purchased by them.

37. The learned Trial Judge also recorded a finding that DW-1 Vitorino Travasso had admitted in his cross-examination that the plots were developed by him along with defendant no. 2 and were identified as such, to be sold to the applicant/decree holder. DW-1 also admitted that the entire property was divided into three plots (A, B and C), which were further divided and were sold to various purchasers by taking advance money. DW-1 also admitted that he issued the receipt to the plaintiff. The learned Trial Judge accordingly recorded a finding that DW-1, firstly as a developer and then as a vendor sold sub-divided plot(s) from property 'Padamol' of survey no. 127/4 to various persons including the applicant/plaintiff. The learned Trial Judge also recorded a finding from the testimony of DW-1 that it was evident that the defendants had agreed to sell plot nos. A-12 and A-13 after being identified by the plaintiff, for a consideration of Rs.40,000/- at the rate of Rs.40/- per square metre of an area of 1,000 square metres. DW-1 also admitted that the plan at Exhibit PW-1/B shows the

plots developed by him. The learned Trial Judge, therefore, recorded that this fortified the case of the plaintiff that plots A-12 and A-13 was identified by the defendants after payment of advance money of Rs.10,000/-.

38. The learned Trial Judge also rejected the belated contention of the judgment debtors that the suit for specific performance would not lie as defendant no. 1 by sub-dividing plot A into several plots and by admitting plan produced by PW-1 at Exhibit PW-1/B to be the sub-divided plots, would go to show that plots A-12 and A-13 were identified to the plaintiff after receiving the advance money.

39. The judgment debtors assailed judgment and order passed by the learned Trial Judge on all counts in the proceedings of the first appeal filed before the learned District Judge. It needs to be observed that before the learned District Judge the primary ground as urged by the judgment debtors was whether the agreement of sale was bad in law in view of the provisions of Article 1119 of the Portuguese Civil Code, namely, the agreement in question was not signed by the spouses of the different respondents. In dealing with such contention, the learned District

Judge extensively referred to the deposition of DW-1 by observing that the said deposition was very material. The learned District Judge observed that DW-1 clearly stated in his examination-in-chief that the plaintiff had booked a plot in survey no. 127/4 and gave to him an amount of Rs.10,000/- as advance. DW-1 also admitting that the price agreed was at the rate of Rs.40/- per square metre and the area was 1,000 square metres. The learned District Judge in paragraph 9 of the judgment extracted the statement of DW-1 as made in the cross-examination (noted in paragraph 7 hereinabove), in which DW-1 stated that the defendants/ judgment debtors had entered into an agreement with Gadnis (owner) to develop the said property. That 30-40 plots were carved out by them prior to 1995. He deposed that in the said agreement it was stated that the judgment debtors had the right to sell the said plots independently without the interference of the original landlord and about 25 plots were sold. The remaining plots were taken by the judgment debtors, which were about 10-15 plots. The learned District Judge accordingly observed that such deposition of DW-1 clearly went to show that the original owner was one Gadnis, which was also fortified from the record produced at Exhibit PW-1/G, wherein the name of

Vishwanath Sinai Gadnis along with others, who had subsequently purchased the said property have been shown in the occupant's column. It was also observed that in the agreement executed between the original owner and the developers, a right was given to the judgment debtors (defendant nos. 1 and 2) to sell the plots independently to the respective buyers.

40. Insofar as the question as to whether any interference is called for in the findings as rendered by the learned Trial Court were concerned, the learned District Judge observed that cross-examination of DW-1 has clearly shown that all the contents of the written statement were fully proved in the examination-in-chief itself, when DW-1 admitted that plots shown in Exhibit PW-1/B were identified as plots to be sold to the plaintiff. It was also observed that defendant no. 1 failed to prove that the plots were not identified. The learned District Judge ultimately made the following observations in dismissing the appeal of the defendants/judgment debtors:

“Coming back to the testimony of D.W.1, it is clear that the plots were identified and the amount of Rs.10,000/- was accepted by them for the purpose of earnest money and therefore the entire case of the plaintiff stands proved. On page 3 of the cross of D.W.1, he also admitted that the plot shown in exhibit PW1/B are the same plots which were

developed by him. Further this witness had tried to change his version from time to time but there is no support to such contention. From his testimony it is clear that no reliance could be placed on this witness. All these aspects have been rightly considered by the Ld. Trial Court while deciding the issues on merits. The grounds raised in the present appeal are of no substance since the findings given by the Ld. Trial Court are based on the material placed on record and no interference is called for with such findings. In the result I answer point no. 2 also in the negative.”

(emphasis supplied)

41. The judgment debtors thereafter approached this Court (in a second appeal), in assailing the concurrent findings of the trial Court as also, of the District Judge in the first appeal. The second appeal was decided on 6/13 December 2012 by a co-ordinate Bench of this Court. From the substantial questions of law as framed and as noted above, it is clear that no issue in regard to the identification of the suit plots was raised by the judgment debtors and the only substantial question of law was in regard to the valuation of the suit in terms of Section 7(X)(A) of the Court Fees Act, 1870. The second question of law was whether the Trial Judge had pecuniary jurisdiction to try and entertain the present suit. The third question was, whether a suit for declaration without claiming specific performance was maintainable and if so,

whether the plaintiff/respondent had averred and proved readiness and willingness to perform her part of the contract under Section 16(c) of the Specific Relief Act. In adjudicating the questions of law, it was seen from such decision of this Court, that there was no issue whatsoever in regard to the identification of the plots as also, there was no issue framed as to whether or not, the defendants/judgment debtors were not the owners of the suit property and hence, they cannot be compelled to transfer the suit plot to the plaintiff. This Court rejected the contentions urged on behalf of the judgment debtors/defendants that the defendants are not the owners of the suit plots and therefore, no decree for specific performance could be passed against them. It was observed that no issue has been framed by the Trial Court in that regard, however an issue was raised by the appellants before the appellate Court and the appellate Court dealt with this issue. It was also observed that in the absence of any specific pleadings, the defendants were not entitled to raise such issue. The Court also observed that there was an agreement between the original owners and developers in which rights have been given in favour of defendant nos. 1 and 2 to sell the plots independently to respective buyers and purchasers. It was observed that, moreover,

the evidence disclosed that some of the remaining plots were taken by the defendants pursuant to the agreement entered by the judgment debtors with the owners. For such reasons, this Court held that the question of non-suiting the plaintiff on the ground that the defendants have no title to the suit property did not arise.

42. It is thus clear from the findings as recorded by the Trial Court, the Appellate Court and this Court in the second appeal, that adjudication qua the rights of the defendants/judgment debtors to sell the identified suit plot had stood concluded and could not have been reopened by the judgment debtors/respondents. It can be seen that now the attempt on the part of the judgment debtors before the Executing Court was nothing but to re-open such issue, which stood concluded in three prior adjudications, namely, of the suit, the first appeal and the second appeal, when the learned Trial Judge delved into the issue of the identity of the suit plots recording clear findings of facts that the same was a non-issue.

43. Thus, the Executing Court was in a patent error when it observes that the decree was not executable. The Executing Court in so observing, has in fact *sub silentio* set aside the findings as

recorded by the learned Trial Judge, by the first appellate Court and of the High Court in adjudicating the three proceedings as noted above. Certainly, the jurisdiction of the Executing Court under Section 47 of the CPC, in the facts of the present case, could not have been exercised to set at naught the findings which were recorded in the adjudication of the suit, which were based on material/evidence in adjudicating the substantive proceedings and as confirmed by the Appellate Court and this Court in a second appeal; purportedly on material which is stated to have fathomed in an enquiry under Section 47. It is required to be observed and as rightly pointed out on behalf of the applicant/decreed holder that point nos. 1 and 2 framed in the enquiry itself were totally misdirected, as no findings could have been recorded in the determination of such points, without the observations of the learned Trial Judge as categorically confirmed in independent reasoning in the first appeal and by the High Court being set aside, this can never be the jurisdiction of the Executing Court in deciding such points. In fact, the Executing Court has reached to a different conclusion from the findings as recorded by all the three previous forums. This was certainly not the scope of jurisdiction of the Executing Court under Section 47 of the CPC.

44. In the facts of the present case as it stands today, merely because the original defendant nos. 1 and 2 have expired and their legal heirs are brought on record that would neither change the complexion of the decree nor its enforcement, when the rights of the plaintiff stood crystallized to become entitled to the fruits of the decree. The legal heirs of defendant nos. 1 and 2 cannot defeat such rights on such specious plea. This is a classic case where the Executing Court has fallen into the trap of the judgment debtors to defeat the execution of the decree by raising contentions on the identification of the property, which were a non-issue and which had attained finality right up to the High Court when it rejected the second appeal of the original judgment debtors.

45. Insofar as the submissions as urged on behalf of the defendants/judgment debtors are concerned, I am not persuaded to accept any of the submissions for the above reasons. The submissions as canvassed are in a narrow compass and are untenable. In regard to the first submission that the decree is a nullity, it is well settled that a decree would be a nullity if it is rendered by the Court without jurisdiction or if it is so vitiated as the law may provide. It is certainly not a case that there is

material to hold that the decree in any manner is non-est in the eye of the law and hence, unexecutable.

46. The contentions as urged on behalf of respondents/judgment debtors even relying on the evidence on record of the inquiry under Section 47 of the CPC are untenable. As noted above, any contention on the basis of such evidence, which would be destructive of the concluded findings as recorded by the Court in adjudication of the suits and appeals cannot be accepted. In this regard, reliance placed on behalf of respondents/judgment debtors on the decision in **Sri Shivaji Balaram Haibatti** (supra) is not well founded in the facts of the present case, as in the said decision, the Supreme Court was concerned with a case of the appellant therein, who had filed a civil suit claiming possession of the suit shop from the respondent, which was in his possession. The High Court had decreed the appellant's suit. The first Appellate Court had dismissed the appeal and affirmed the judgment/decreed of the Trial Court. The High Court allowed the second appeal and while setting aside the judgment and decree of the two Courts, also decreed the appellant's suit. In these facts, the Supreme Court held that the High Court did not undertake an exercise to find out as to

whether findings of both the Courts below contain any legal error, so as to call for any interference in the second appeal. It was held that the High Court also did not consider it proper to frame any substantial questions of law. It is in such context of law, the Supreme Court held that the parties to the suit cannot travel beyond the pleadings so also the Court cannot record any finding on the issues which are not issues in the proceedings of the suit and that any finding recorded on an issue *de hors* the pleadings is without jurisdiction. I wonder as to how the ratio in this decision would be applicable in the present facts.

47. It needs to be stated that, as seen from the nature of the contentions as urged on behalf of the respondents/judgment debtors an endeavour is to persuade the Court to disturb the concluded findings when a contention is urged on behalf of the respondents/judgment debtors that the findings as recorded by the learned Trial Judge as confirmed by the Appellate Court and this Court in Second Appeal are without jurisdiction is a totally untenable plea. The next contention as urged on behalf of the respondents/judgment debtors is that in the guise of interpretation of a decree, in the present facts, the applicant is intending to seek a

new decree as the decree in question is unexecutable, is also untenable. In such context, reliance is placed on **V. Ramaswami Aiyangar** (supra) and **Jai Narain Ram Lundia** (supra). There cannot be any quarrel as to proposition as laid down by the Supreme Court in **V. Ramaswami Aiyangar** (supra), that the duty of the Executing Court was to give effect to the terms of the decree that was already passed and beyond which the Executing Court would not go and further that the Executing Court examining it under the guise of the interpretation cannot make a new decree for the parties. Such proposition is not open to be canvassed by the respondents/judgment debtors in the present facts. This decision would in fact help the applicant. In the present case, as noted above in some detail, the Executing Court was in fact travelling beyond the scope of decree in passing the impugned order, forgetting that the Executing Court was required to exercise jurisdiction in terms of the decree. Further, the decision in **Jai Narain Ram Lundia** (supra) would also not be applicable as in the present case, as it is certainly concluded on facts that there is no dispute, as to the identity and substance of the suit property.

48. In the above context, it would be useful to refer to the decision of the Supreme Court in **Brakewel Automotive Components (India) Private Limited Vs. P.R. Selvam Alagappan**⁹ wherein the Supreme Court has observed that it is only in limited cases where the decree is by a Court lacking inherent jurisdiction or is nullity, the same would be rendered non est and unexecutable. It was held that an erroneous decree cannot be equalled with one which is a nullity. Section 47 of the CPC mandates determination by an Executing Court, questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of a Court of law, being sacrosanct in nature, the execution thereof ought not to be thwarted on mere asking and on untenable and purported grounds having no bearing on the validity or the executability of the decree. It was held that judicial precedents are to the effect that the purview of scrutiny under Section 47 of the CPC qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness are plethoric. The Court referring to the decision in **Vasudev Dhanjibhai Modi Vs.**

⁹ (2017) 5 SCC 371

Rajabai Abdul Rehman¹⁰ observed that in essence the law as enunciated holds that only a decree which is a nullity can be subject of objection under Section 47 of the CPC and not one which is erroneous either in law or on facts. The observations as made by the Supreme Court are required to be noted, which read thus:

20. It is no longer res integra that an Executing Court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardizing the rights of the parties thereunder. It is only in the limited cases where the decree is by a court lacking inherent jurisdiction or is a nullity that the same is rendered non est and is thus unexecutable. An erroneous decree cannot be equaled with one which is a nullity. There are no intervening developments as well as to render the decree unexecutable.

21. As it is, Section 47 of the Code mandates determination by an executing court, questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of court of law being sacrosanct in nature, the execution thereof ought not to be thwarted on mere asking and on untenable and purported grounds having no bearing on the validity or the executability thereof.

22. Judicial precedents to the effect that the purview of scrutiny under Section 47 of the Code qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness are plethoric . This

10 (1970) 1 SCC 670

Court, amongst others in *Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman*, (1970) 1 SCC 670 in essence enunciated that only a decree which is a nullity can be the subject matter of objection under Section 47 of the Code and not one which is erroneous either in law or on facts. The following extract from this decision seems apt.

“6. A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record. where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.”

23. Though this view has echoed time out of number in similar pronouncements of this Court, in ***Dhurandhar Prasad Singh vs. Jai Prakash University***, AIR 2001 SC 2552, while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree unexecutable after its passing. None of the above eventualities as recognised in law for rendering a decree unexecutable, exists in the case in hand. For obvious reasons, we do not wish to burden this adjudication by multiplying the decisions favouring the same view.

49. In **Rahul S. Shah Vs. Jinendra Kumar Gandhi & Others**¹¹, the Supreme Court noting the plight of the execution proceedings being misused by preventing timely implementation of orders and execution of decrees, it was observed that in respect of execution of a decree, Section 47 of the CPC contemplates adjudication of limited nature of issues, as Section 47 of the CPC is intended to prevent multiplicity of suits. It was observed that it simply lays down the procedure and the form whereby the Court reached a decision. It was held that for the applicability of the section, two

¹¹ (2021) 6 SCC 418

essential requisites have to be kept in mind. Firstly, the question must be one arising between the parties and secondly, the dispute should relate to the execution, discharge or satisfaction of the decree. Thus, it was held that the objective of Section 47 was to prevent unwanted litigation, and to dispose of all objections as expeditiously as possible. The relevant observations of the Supreme Court are required to be noted, which are apt in the present context, read thus:

22. These appeals portray the troubles of the decree holder in not being able to enjoy the fruits of litigation on account of inordinate delay caused during the process of execution of decree. As on 31.12.2018, there were 11,80,275 execution petitions pending in the subordinate courts. As this Court was of the considered view that some remedial measures have to be taken to reduce the delay in disposal of execution petitions, we proposed certain suggestions which have been furnished to the learned counsels of parties for response. We heard Mr. Shailesh Madiyal, learned counsel for the petitioner and Mr. Paras Jain, learned counsel for the respondent.

*23. This court has repeatedly observed that remedies provided for preventing injustice are actually being misused to cause injustice, by preventing a timely implementation of orders and execution of decrees. This was discussed even in the year 1872 by the Privy Counsel in **The General Manager of the Raja Durbhunga vs. Coomar Ramaput Sing, 1872 SCC Online PC 16**, which observed that the actual difficulties of a litigant in India begin when he has obtained a decree. This Court made a similar observation in **Shub Karan Bubna vs.***

Sita Saran Bubna, (2009) 9 SCC 689, wherein it recommended that the Law Commission and the Parliament should bestow their attention to provisions that enable frustrating successful execution. The Court opined that the Law Commission or the Parliament must give effect to appropriate recommendations to ensure such amendments in the Code of Civil Procedure, 1908, governing the adjudication of a suit, so as to ensure that the process of adjudication of a suit be continuous from the stage of initiation to the stage of securing relief after execution proceedings. The execution proceedings which are supposed to be handmaid of justice and subserve the cause of justice are, in effect, becoming tools which are being easily misused to obstruct justice.

24. In respect of execution of a decree, Section 47 of CPC contemplates adjudication of limited nature of issues relating to execution i.e., discharge or satisfaction of the decree and is aligned with the consequential provisions of Order XXI. Section 47 is intended to prevent multiplicity of suits. It simply lays down the procedure and the form whereby the court reaches a decision. For the applicability of the section, two essential requisites have to be kept in mind. Firstly, the question must be the one arising between the parties and secondly, the dispute relates to the execution, discharge or satisfaction of the decree. Thus, the objective of Section 47 is to prevent unwanted litigation and dispose of all objections as expeditiously as possible.

25. These provisions contemplate that for execution of decrees, Executing Court must not go beyond the decree. However, there is steady rise of proceedings akin to a re-trial at the time of execution causing failure of realisation of fruits of decree and relief which the party seeks from the courts despite there being a decree in their favour. Experience has shown that various objections are filed

before the Executing Court and the decree holder is deprived of the fruits of the litigation and the judgment debtor, in abuse of process of law, is allowed to benefit from the subject matter which he is otherwise not entitled to.

26. The general practice prevailing in the subordinate courts is that invariably in all execution applications, the Courts first issue show cause notice asking the judgment debtor as to why the decree should not be executed as is given under Order XXI Rule 22 for certain class of cases. However, this is often misconstrued as the beginning of a new trial. For example, the judgment-debtor sometimes misuses the provisions of Order XXI Rule 2 and Order XXI Rule 11 to set up an oral plea, which invariably leaves no option with the Court but to record oral evidence which may be frivolous. This drags the execution proceedings indefinitely.

27. This is antithesis to the scheme of Civil Procedure Code, which stipulates that in civil suit, all questions and issues that may arise, must be decided in one and the same trial. Order I and Order II which relate to Parties to Suits and Frame of Suits with the object of avoiding multiplicity of proceedings, provides for joinder of parties and joinder of cause of action so that common questions of law and facts could be decided at one go.

50. The second contention as urged on behalf of the judgment debtors is that the documents as brought on record in the proceedings under Section 47 before the Executing Court would not go to show that the suit property belonged to the judgment debtors. Such contention needs to be out rightly rejected, as all these issues were examined, in prior adjudications and there were

categorical findings recorded, that there was no dispute as to the identification of the plots. Considering the evidence on record, such contention of the judgment debtors in this regard was rejected by the Courts as discussed in detail hereinabove. It needs to be observed that these issues as sought to be raised by the judgment debtors/respondents, in fact stands concluded in the adjudication of the suit and the appeals as noted above. Thus, the judgment debtors/respondents raising such issues in execution proceedings, in my opinion, is an exercise in futility and/or an unwarranted hair-splitting, by the judgment debtors before the Executing Court, which has misdirected itself, in going behind the decree.

51. In any event, what would go to the root of the matter is the fact that it was absolutely not available to the judgment debtors to raise such issues, which stood concluded before the Trial Court, appellate Court and finally, before the High Court in the second appeal. Merely because defendant nos. 1 and 2 are not surviving, that would not give any license to their legal heirs, namely, respondent nos. 1(a) to 1(f) and 2(a) to 2(e) to re-open the decree or to raise contentions which were either raised or could have

been raised in prior proceedings leading to the finality of the decree, and that too in execution proceedings. Admittedly, the respondents/judgment debtors cannot be regarded as third parties, they have stepped in the shoes of the defendants and it would be their duty to honour and oblige the decree. It seems that the whole attempt of the judgment debtors was to create immense confusion on the identity of the property so as to wriggle out of the decree, when the identification itself was a non-issue.

52. In the above circumstances, Mr. Pereira, learned Senior Counsel for the applicant/decreed holder has rightly placed reliance on the decision in **Rafique Bibi** (supra), wherein the Supreme Court has observed that the order of a superior Court such as the High Court, must always be obeyed no matter what flaws it may be thought to contain. It was observed that a distinction exists between a decree passed by a Court having no jurisdiction and consequently being a nullity and not executable, and a decree of the Court which is merely illegal or not passed in accordance with the procedure laid down by law. It was observed that a decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the Executing Court and the remedy of a

person aggrieved by such a decree, is to have it set aside in a duly constituted legal proceedings or by a superior Court failing which, he must obey the command of the decree. It was also observed that a decree passed by a Court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings. These observations are apt in the context of the present proceedings.

53. In **Century Textiles Industries Limited** (supra), the Supreme Court has observed that there cannot be any quarrel with the general principle of law and indeed, it is unexceptionable that a Court executing a decree cannot go behind the decree. It must take the decree according to its tenor and it would have no jurisdiction to widen its scope and is required to execute the decree as made. It was observed that on such principles under Section 47 of the CPC, all questions arising between the parties to the suit in which the decree was passed, or their representatives, relating to the execution, discharge or satisfaction of the decree, need to be determined by the Court executing the decree.

54. In **C. Gangacharan** (supra), the Supreme Court while setting aside the order of the High Court held that it is now well settled

that the Executing Court cannot go behind the decree of a Court of competent jurisdiction except when the decree is void *ab initio* or without jurisdiction.

55. It thus needs to be concluded that the Executing Court has exercised jurisdiction with material irregularity, by totally overlooking the evidence on record. It has also totally misconstrued the scope of its jurisdiction under Section 47 of the CPC in passing the impugned order.

56. For the above reasons, the present Civil Revision Application needs to be allowed. The same is allowed in terms of the following order.

O R D E R

(i) The impugned order dated 27 March 2017 passed by the Executing Court is set aside.

(ii) The applicant is entitled to relief in terms of prayer clause (b), which reads thus.

(b) For an appropriate Writ, direction and/or Order ordering the grant of the Application dated 03-03-2004 filed by the petitioner for execution of the

Judgment and Decree dated 28-12-2001
passed by the Civil Judge Junior Division
at Quepem in Regular Civil Suit No.
17/1998/B.

57. Ordered accordingly.

58. Disposed of in the above terms. No costs.

G. S. KULKARNI, J.