

Shakuntala

**IN THE HIGH COURT OF BOMBAY AT GOA**  
**CIVIL REVISION APPLICATION NO. 25 OF 2019**  
**WITH**  
**CIVIL APPLICATION NO. 85 OF 2019**  
**IN**  
**CIVIL REVISION APPLICATION NO. 25 OF 2019**

1. SMT. FATIMA COUTINHO,  
Widow of Shri Bossuet Coutinho,  
Major of age, Indian National;

2. MISS. PERCYLOU COUTINHO,  
Daughter of Shri Bossuet Coutinho,  
Major of age, Indian National,

Both residents of House no. 220/2,  
c/o Confidant, Behind Head Post office,  
Panaji-Goa, 403 001

3. MRS. YULETTE COUTINHO,  
Daughter of Shri Bossuet Coutinho,  
Major of age, Indian National, resident  
of Flat no. 201, Adwalpalkars Severina  
Apartments, Mesta Bhat, Mercês, Goa.

... APPLICANTS

Versus

1. SHRI ANTONIO XAVIER GOMES  
PEREIRA;

2. SHRI ARAVIN GOMES PEREIRA,  
Both of full age, Indian Nationals, residing  
at Vivenda Gomes Pereira, Gomes Pereira  
Road, Panaji-Goa, 403 001

...RESPONDENTS

Mr. G. Agni with Mr. J. P. Supekar and Mr. Roger D'Souza  
Advocates for the Applicants.

Mr. Sudin Usgaonkar, Senior Advocate with Rui Gomes  
Pereira, Advocate for the Respondents.

**CORAM: BHARAT P. DESHPANDE, J.**

**RESERVED ON: 26<sup>th</sup> OCTOBER 2023**

**PRONOUNCED ON: 02<sup>nd</sup> November 2023**

**JUDGMENT:**

**P.C.:**

1. Admit.
2. The matter was taken up for final disposal at admission stage itself with consent of parties.
3. Heard Shri Gaurish Agni with Advocate J.P. Supekar and N. D'Souza for the Applicants and Shri Sudhin Usgaonkar learned Senior Counsel with Shri Rui Gomes Perreira learned Advocate for the Respondents.
4. The applicant has challenged the impugned order dated 16.03.2019 passed by the learned Trial Court in Execution Application no. 26/2017 thereby postponing the question of maintainability of the execution proceedings on the ground that enquiry is necessary to decide such issue.
5. The applicant is the Judgement-debtor/Respondent in the said execution proceedings. The present Respondents are the Applicants.

6. The parties are hereinafter referred as the Applicants/Respondents as arrayed before the Executing Court for the purpose of convenience.

7. The Applicants who are the owners of the premises, filed an application as Rent Case no. 4/2017 before the Civil Court (the learned Rent Controller) under section 30 of the Goa Buildings (Lease, Rent and Eviction) Control Act, 1968, with the prayer of eviction of the Respondent temporarily from the said portion/tenanted portion in order to carry out the works of pest control, carpentry and repairs.

8. Both parties filed terms of settlement which were accepted by the Rent Controller while disposing of the proceedings under section 30 of the Rent Control Act, on 04.07.2017.

9. Since some dispute arose in executing the terms of settlement between the parties the Applicants approached the Civil Court by filing Execution Application no. 26/2017 asking assistance of the Court in executing the terms of settlement.

10. The Respondent objected to such execution proceedings including maintainability of it. Preliminary objections were considered and the same were argued before the Executing Court.

On 16.03.2019, the Executing Court instead of deciding preliminary objections, observed that the question of maintainability can only be decided after examining the facts pertaining to consent decree and thus enquiry has to be initiated in the proceedings. This order is challenged before this Court on two fold grounds.

11. Shri Gaurish Agni first of all contended that Execution Application is not tenable as it is not in the format as provided under Order XXI Rule 11 of Civil Procedure Code.

12. Secondly, he contended that such execution proceeding are premature. Thirdly, he contended that the Decree-holder did not specify the specific grounds of assistance required from the Executing Court. Fourthly, he claimed that the Executing Court is not empowered to order any enquiry so as to go beyond the consent terms. Finally, he claimed that the terms of settlement are required to be interpreted without holding any enquiry so as to consider whether Execution Petition is maintainable or not. He also claimed that the Decree-holder/Applicant did not specify as to which term of settlement stands violated.

13. Per contra, the learned Senior Counsel Shri Usgaonkar submitted that though consent terms were signed and the

proceedings under section 30 of the Rent Control Act were disposed of, the Respondent/Judgement-debtor was not co-operating and different interpretations were made with regards to the terms. Since the Decree-holder who is the owner of the property was unable to carry out repairs and the pest control treatment due to non-cooperation, he had to approach the Executing Court.

14. Mr Usgaonkar would then submit that the assistance required is already disclosed in the application i.e. by appointing commissioner. He would then submit that even if enquiry is held, no prejudice is caused to the Judgement-debtor. He further submitted that no injustice is caused by the order impugned in the present Revision. According to him, the maintainability issue is still pending adjudication and therefore no illegality or perversity could be attributed to the decision of the Trial Court.

15. Mr Usgaonkar would then submit that even if there are defects in the Execution Application, the same could be amended and this ground is not available to reject the execution as not maintainable. Finally he submits that there is no error in the Order passed by the Trial Court requiring interference in the Revisional

Jurisdiction.

**16.** Rival contentions fall for determination.

**17.** It is now well settled that the provisions of Section 115 of the Civil Procedure Code by way of revision could be exercised by the High Court in connection with the Order passed by the Trial Court where it appears (a) to have exercised a jurisdiction not vested by it in law. (b) To have failed to exercise a jurisdiction so vested. (c) To have acted in exercise of its jurisdiction illegally or with material irregularity.

**18.** The aspects mentioned above in clause (a) and (b) are not claimed in the present proceedings. It is only their contention that clause 115(1)(c) of Civil Procedure Code is attracted. Mr Agni submits that the Trial Court acted with material irregularity in directing enquiry to decide preliminary objections.

**19.** First of all the contention of Mr. Agni that the application filed for execution of the consent terms not being in the format and thus required to be rejected, has no substance at all. The Decree-holder in its application discloses all the relevant aspects in its application which are required to be mentioned while filing application under Order XXI Rule 11(2) CPC. What is required in a

written application is disclosed in clause (2) of Rule 11 of Order XXI of the Civil Procedure Code which is clearly found in the present application. No doubt in the schedule appended to the Civil Procedure Code, Appendix E no. 6, of the written application under Order XXI Rule 11 a specific format for filing application for execution, the purpose of it is to provide all relevant information. However if the application is not filed in the particular format as provided in the Civil Procedure Code, it cannot be just thrown away on the basis of some objections raised by the party opposing it. The Executing Court is duty-bound to examine such application and in case of some defect, can grant permission to the Decree-holder to make good of it.

**20. In the case of M/s. T. A. Darbar & Company & others Versus Union Bank of India, reported in AIR 1994 BOMBAY 217, the division bench of this Court held in para no. 6 as under:-**

*“6. Shri Cooper contended that the application for execution presented under R. 11(2) of O. 21 on July 5, 1988 was not a valid application and should be treated as non est. The learned counsel urged that the application had not sought assistance of the Court in a manner prescribed under R. 11(2)(j) of the Code. The only relief sought was*

*service of notice under O. 21, R. 22 of the Code on the appellants and that is not the assistance which can be sought from the Court as prescribed under the Code. The learned counsel urged that as the assistance from the Court as prescribed under the Code was not sought, there was no valid application in the eyes of law and consequently it is impossible to suggest that the decree is still enforceable because of the pendency of the application. It is not possible to accede to the submission of the learned counsel. It is undoubtedly true that the relief sought was issuance of notice under O. 21, R. 22 of the Code and therefore execution application was defective as the mode in which the decree is to be executed was not specifically set out. The mere fact that the application was defective is not sufficient to warrant conclusion that the application presented could not be taken note of. The application for execution was presented within twelve years from the date of passing of the consent decree and the application was entertained by the registry of this Court and was numbered. The defect in the application was not noticed by the registry and notice under R. 22 was issued and was made absolute on the assumption that the application was free of any defect. It was always open for the Court, after noticing the defect, to permit the decree-holder to amend the application and on such amendment in accordance with R. 17(2) the application shall be deemed to have been presented on the date on which*

*it was originally presented. The principle that the party shall not suffer for the error committed by the Court is well recognised and we are not prepared to accede to the submission of Shri Cooper that merely because the registry numbered the application and directed issue of notice under R. 22, that cannot lead to the conclusion that the application presented was a valid application. We are not prepared to accede to the contention that the presentation of the application being defective, it should be concluded that the application for execution was not presented within period of twelve years.”*

21. Thus Order XXI Rule 17 of the Civil Procedure Code gives wide powers to the Court to examine such application and if found defective or lacking in any aspect to direct the Decree-holder to amend the application by rectifying the defects. This provision takes care of the submissions of Mr. Agni regarding the purpose of assistance claimed by the Decree-holder in the execution proceedings. If the Court or even the Decree-holder considers that there is some inconsistency or defect, the same could be cured by filing an amendment.

22. The ground which has been raised by Mr. Agni that the Execution Application is premature is yet to be decided by the Trial

Court. There is no decision given on this aspect including the maintainability. The reason by the Trial Court to conduct enquiry are clearly spelt out in para eight of the impugned order wherein it was observed that it is important to find out if all the clauses and the terms of settlement have been satisfied by the parties. In order to know if the terms of the consent decree are satisfied, an enquiry into the facts is necessary.

23. The Consent terms were admittedly filed by both the parties in the rent case and thereafter some dispute arose with regards to executing such terms and the manner in which such terms could be executed to fulfil the decree.

24. Mr. Agni tried to submit that while conducting the pest control treatment, the fixtures affixed to the wall were never to be removed. Basically this is the controversy which the Executing Court will have to consider and for that purpose Trial Court found that an enquiry is necessary.

25. Mr. Usgaonkar rightly pointed out the provisions of Section 47 of the Civil Procedure Code wherein all questions arising between the parties to the proceedings/suit in which decree was passed and relating to the execution, discharge or satisfaction of

decree shall be determined by Court executing decree and not by a separate suit. Such provisions clearly gives powers to the Executing Court to decide all questions between the parties arising out of the decree to be decided in the execution only. Thus when the Executing Court observed that even maintainability of the proceedings cannot be decided only on submissions as enquiry is necessary, such finding cannot be faulted with and that too in the Revisional Jurisdiction. The Trial Court has exercised jurisdiction and the discretion by which such jurisdiction is exercised cannot be termed as illegal or with material irregularity.

26. In the case of **Mrs. Saroj Goenka and others Versus T. Nariman Point Building Services & Trading Private Ltd. and others, 1994 -2 -L.W. 342**, the Madras High Court was dealing with a Letters Patent Appeal against the Order of Company Law Board. In that matter maintainability of petition was raised claiming that the Company Law Board should have heard the question first before proceeding to decide the other aspects. In that circumstance it was held that the issue relating to maintainability cannot be held to be a pure question of law and that being so the Company Law Board cannot be held to have committed any error of law in holding

that the issue relating to maintainability of the petition shall also be decided along with other issues. The Division Bench of Madras High Court observed that the learned Single Judge held that the Company Law Board should have heard the question of maintainability first before proceeding to decide other questions involved in the petition. Accordingly, questions were framed and question no. 2 reads thus:- “Whether there is a case in which question of maintainability should have been decided as a preliminary issue?”

27. While deciding this question and more specifically in para 4 the Division Bench observed that if the question of maintainability involves pure question of law the same have to be treated as preliminary issue, however if it involves mixed question of law and facts, it would again depend upon the facts and circumstances of each case, whether such an issue could be tried as preliminary issue. It cannot be laid down as trite proposition of law that no such issue can be tried as a preliminary issue because there may be cases in which large number of issues may arise. In such case maintainability question has to be decided along with other several issues arising in the case. However, it was further observed that in

cases where the issue as to maintainability or lack of jurisdiction involves mixed question of law and fact, they can also be decided as preliminary issue depending on the facts and circumstances of each case.

28. Thus there is no hard and fast rule that each issue regarding maintainability of the proceedings has to be decided only on the basis of submissions. If the Court is of the opinion that for deciding such issue of maintainability, some enquiry is necessary, the Court acts within its jurisdiction. By doing this the intention is to afford opportunity to the parties to put forth its case clearly with sufficient material. This is precisely observed by the Trial Court in the impugned order.

29. As rightly pointed out by Mr. Usgaonkar that the issue of maintainability is still open and even if any enquiry is conducted, no prejudice is going to be caused to the Judgement-debtor.

30. The impugned order, therefore suffers from no irregularity, Impropriety or illegality so as to interfere with the Revisional Jurisdiction.

31. In the case of **Mahant Shanta Nand Gir Versus Basudeva**

**Nand Gir**, A.I.R. 1934, Allahabad 986, the Executing Court Order to decide the question of law together with other aspects, was challenged in revision under Section 115 of the Civil Procedure Code. While dealing with this, the Allahabad High Court has observed that apparently there is an irregularity in the Order of the Court not expressing any opinion whether the case could or could not be disposed of on the question of law, however the defendant could not claim as of right that the Court should decide these questions of law in the first instance as it was a matter for the Court to take up only when it was of the opinion that the suit could be disposed of on the issue of law only under Order XIV Rule 2. Since the Order passed is not a Final Order, it is still open to the Court at the later stage to decide on the question of law regarding maintainability.

32. Considering the observations in the impugned order and the fact that the question of maintainability is still open, to be decided after the enquiry is over, no fault could be found with the impugned order. However, directions could be given to the Trial Court to conduct an enquiry as expeditiously as possible. Similarly, all the parties to the proceedings must cooperate with the Trial Court in

deciding such aspect and during the enquiry itself.

33. In sum and substance revision must fail. Hence the following order:

**ORDER**

Civil revision application stands rejected.

The Trial Court is directed to hold the enquiry as expeditiously as possible and decide the issue of maintainability in accordance with law.

Parties shall bear their own costs.

**BHARAT P. DESHPANDE, J.**