

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.441 OF 2021

Comunidade of Margao,
Represented by the Procurdar/ Attorney,
of its Managing Committee,
Mr Savio Xavier Rodrigues, 46 years of age,
Son of late Martinho Rodrigues,
Married, Teacher,
Having its Office at
Old Market, Margao, Taluka Salcete,
Goa, 403601.

... Petitioner

Versus

Jairam Babusso Sirodcar (since deceased)
Through his legal representatives;
1. Mrs. Shama Vivek Parab (Daughter),
Major in age, married,
Service, Housewife,
And her Husband,

2. Mr. Vivel Parab,
Major in age,
Service,

3. Mrs. Geeta Hemant Mayekar (daughter),
Major in age, married,
Service, housewife,
And her husband,

4. Mr. Hemant Mayekar,
Major in age,
Service,

5. Miss Sulaksha Jairam Shirodkar (daughter),
Major in age, spinster,

Service, unemployed,

6. Mr. Sushant Jairam Shirodkar (son),
Major in age, bachelor,
Service,

7. Mrs. Jairam Babussao Sirodkar,
Widow of Respondent No.1,
Major in age,
Service, Housewife,

All residents at c/o. late Jairam Babusso
Shirodkar,
Furam Dongar, Gogol, Margao,
Taluka Salcete, Goa, 403601

... Respondents

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Pooja Naik and
Mr. S. Usgaonkar, Advocate for the Petitioner.

Mr. Deepak Gaonkar, Advocate for Respondent Nos.1 to 5.

Mr. Shailesh Redkar with Ms. K. Desai, Advocates for Respondent
Nos.6 to 7.

CORAM: BHARAT P. DESHPANDE,J.

DATED : 9th FEBRUARY, 2023

ORAL JUDGMENT:

Correction carried out
as per order dated
16/02/2023 passed in
MCA No.351/ 2023(F)
Sd/-

1. Heard Mr. Sudin Usgaonkar, learned Senior Counsel with ~~Mr.~~ ^{Ms.}
Pooja Naik and ~~Ms.~~ ^{Mr.} S. Usgaonkar, learned Counsel for the petitioner,
Mr. Deepak Gaonkar, learned Counsel for respondent Nos.1 to 5 and
Mr. Shailesh Redkar with Ms. K. Desai, learned Counsel for
Respondent Nos.6 to 7.

2. Rule. Rule is returnable forthwith with the consent of the learned Counsel for the parties. Matter is taken up for final disposal.

3. The petitioner is challenging the impugned order passed by the learned Executing Court dated 24/01/2019 below Exhibit-14 in Regular Execution Application No.95/2016/F whereby preliminary objections raised by the judgment debtor to the maintainability of the execution proceedings have been up held and execution proceedings have be dismissed as filed beyond the period of limitation.

4. Learned Senior Counsel Shri Usgaonkar appearing for the petitioner would submit that the suit filed by the petitioner was for restoration of possession of the suit land by demolishing the illegal structure erected by the ~~decree holder~~ ^{judgment debtors}. The suit was decreed as per the Judgment dated ~~17/10/2021~~ ^{17/10/2011} in Regular Civil Suit No. 248 of 1975.

Correction carried
out as per order
dated 16/02/2023
passed in MCA
No.351/ 2023(F)
Sd/-

5. The petitioner then filed execution proceedings before the trial Court wherein judgment debtor raised objection claiming that the decree is only for grant of mandatory injunction and since execution proceedings filed beyond the period of three years, the same are barred by limitation.

6. The learned Senior Counsel would submit that the Executing Court has completely misconstrued the decree and arrived at an incorrect conclusion. Article 136 of the Limitation Act is attracted and not Article 135 as the decree is combined for restoration of possession by demolishing the illegal structures. He therefore submits that the

order impugned in the present petition is perverse and illegal and therefore needs to be quashed and set aside.

7. Per contra, learned Counsel Shri Gaonkar would submit that the decree passed by the learned trial Court has to be considered as the document for the purpose of executing the decree which is for demolition of illegal structures. He would submit that unless illegal structures are demolished, the restoration of possession of the suit land is not permissible.

8. Mr. Gaonkar has placed reliance in the case of ***Maheboob Sahab through L.R.s v/s. Shivrajappas/o. Maharudrappa Wadje*** in Writ Petition No.9281 of 2014 decided by the learned Single Judge sitting at Aurangabad Bench.

9. Rival contentions fall for the consideration.

10. The petitioner is the original plaintiff who filed the suit bearing No. 248 of 1975 wherein following relief is claimed in prayer clause:

“Free and vacant possession of the suit land by ordering the Defendants to remove the construction and plantation from the same.”

11. Vide a judgment dated 17/10/2011 the learned Civil Court decreed the said suit by passing the following order:

“ORDER

The suit stands decreed.

The defendants are hereby directed to remove and demolish the illegal construction situated in the said plot.

Decree to be drawn accordingly.”

- 12.** Accordingly a decree was drawn which reads thus:

“This is a suit for Eviction filed by Plaintiff against the Defendants and prayed as under:-

“Free and vacant possession of the suit land by ordering the Defendants to remove the construction and plantation from the same”

The suit coming on this 17th day of October 2011 for final disposal before Shri C. Fernandes, Civil Judge Senior Division at Margao, in the presence of Learned Advocate Shri E. Correia for the plaintiff and none present for defendants; it is ordered that the suit stands decreed.

The defendants are hereby directed to remove and demolish the illegal construction situated in the said plot.”

- 13.** The petitioner then approached the trial Court by filing the Execution Application No.95/2016/F. The mode by which assistance of the Court is required which found in paragraph 10 of the application which reads thus:

10. Mode of which the : By issue of notice to the Judgment Assistance of the Court Debtors (Defendants) to do the is Required. following:

(a) To hand over the Decree Holder (the original Plaintiff) free and vacant possession of the suit land by ordering the Judgment Debtor (the original defendants) to remove the construction and plantation from the suit land.

(b) The Decree Holder craves leave of this Hon'ble Court for seeking assistance of this Hon'ble Court for executing the Decree by any other mode of assistance in further, if it is not possible to obtain satisfaction of the Decree by the aforesaid modes of assistance.

(c) To appoint a Commissioner to vacate the Judgment Debtor from the suit property after removing the construction and plantation from the suit land.

(d) The Decree Holders leave of this Hon'ble Court for seeking assistance of this Hon'ble Court for executing the Judgment and Order to any other mode of assistance in future, if it is not possible to obtain satisfaction of the Decree dated 17/10/2011 by that aforesaid mode of assistance.

14. The judgment debtors appeared on receipt of notice from the Executing Court and raised preliminary objection for the maintainability of the execution proceedings vide their application at Exh.14.

15. The learned Executing Court decided such objections by the impugned order dated 24/01/2019 and by allowing such objections, observed that the decree is only on mandatory injunction and since it

is filed beyond three years as provided under Article 135 of the Limitation Act, dismissed the execution proceedings as barred.

16. On perusal of the judgment as well as decree passed in favour of the decree holder more specifically paragraph 10 of the execution application, the petitioners sought help of the Court to execute the said decree mainly for the restoration of possession by removing illegal structures erected by the judgment debtors. Thus, the suit as well as decree passed in favour of the decree holder is basically for the restoration of the suit property together with handing over of vacant possession and in that process to remove the illegal construction carried out by the judgment debtor.

17. The suit is for restoration of possession which is the main relief and not mandatory injunction, which is the consequential relief.

18. In the case of ***Maheboob Sahab***(supra),the decree passed in favour of the decree holder was only for mandatory injunction and there was no prayer for restoration of possession in favour of the decree holder. It is clear from paragraph no.8 of the said decision wherein the extracts from the appeal are quoted. In such circumstances, the decision in the case of ***Maheboob Sahab***(supra) is completely on the aspect of mandatory injunction and not applicable to the facts of the present petition.

19. The observations of the Executing Court show that the said Court failed to consider that the suit has been decreed in toto with a

restoration of possession as a main prayer. Only because there is prayer for mandatory injunction, the prayer for the restoration of possession cannot be ignored.

20. Article 136 of the Limitation Act stands attracted to the present proceedings and not Article 135 as tried to be projected by the judgment debtor/respondents herein. The limitation for restoration of possession of the suit property is clearly 12 years.

21. The learned Executing Court failed to consider the main relief granted in the suit and thereby came to a wrong conclusion which needs to be interfered with. The decision which the learned trial Court had relied upon in paragraph 8, though applicable with regard to the decree passed on mandatory injunction, would not affect as main relief in the present matter which was for restoration of possession.

22. Having said so, the impugned order cannot be sustained and needs interference.

23. Writ Petition stands allowed. The impugned order dated 24/01/2019 is hereby quashed and set aside. The execution proceedings No. 95 of 2016 are restored to the file of the Executing Court. The preliminary objection raised on behalf of the judgment debtor vide Exhibit-14 stands rejected.

24. Parties are directed to appear before the Executing Court on 27/02/2023 at 10.00a.m.

25. Parties shall bear their own costs.

BHARAT P. DESHPANDE, J.