

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.463/2015

1. SMT. EMERITA ANNA
JOAQUINA BARRETTO E
FERNANDES ALIAS EMERITA
BARRETTO E FERNANDES,
married, aged 74 years, widow of
late Rock Santan Fernandes,
resident of House No.659, Velim,
Salcete Goa.

... PETITIONER

Versus

1. NATIONAL UNION OF
SEAFARERS OF INDIA (NUSI)
Chinchinim, Salcete Goa.

2. ROQUE SANTAN
FERNANDES (Expired) Aged 72
years, resident of House No.659,
Velim, Salcete Goa - (since
deceased through legal heirs)

2(i) Mr. Sahajit Fernandes, major
in age, service, son of late Rock
Santan Fernandes

2(ii) Mr. Sanjay Fernandes, major
in age, service, son of late Rock
Santan Fernandes

2(iii) Mr. Sanjit Fernandes, major
in age, service, son of late Rock
Santan Fernandes

2(iv) Mrs. Shine Fernandes, major

in age, housewife, daughter of late
Rock Santan Fernandes,

All above permanent residents of
H. No.659, Velim, Saicete Goa
and temporary residents of 44,
Pickwick Road, London SE 21
7JW, England United Kingdom.

... RESPONDENTS

Mr S. S. Kakodkar, Advocate for the Petitioner.
Mr C. A. Coutinho, Advocate for Respondent No.2.

CORAM: M. S. SONAK, J.

DATED: 9th March 2023

ORAL JUDGMENT:

1. Heard Mr S. S. Kakodkar for the petitioners and Mr C. A. Coutinho for respondent no.1.
2. The petition is taken up for final disposal with the consent of the learned counsel for the parties.
3. The challenge in this petition is to the Order dated 17.01.2015 made by the Executing Court to the extent such Order does not explicitly direct the demolition of the portion of the compound wall blocking the free flow of water as seen in the Plan at Exh.32-C Colly. In short, the challenge in this petition is to the Order insofar as it does not fully allow the petitioner's

execution application in the context of Judgment, Order and Decree dated 29.12.2009 in Regular Civil Suit No.190/2004/II, which has admittedly attained finality.

4. This Court, whilst issuing Rule on 25.04.2016, made the following Order:-

“ Coram: C. V. BHADANG, J.

Date: 25th April, 2016

P.C.:

The petitioner/decreed holder had filed a suit for removal of obstruction to free flow of water. The obstruction was in two forms. As per the plan attached to the plaint it was contended that the respondents/judgments debtors had constructed a compound wall in between points "A" and "B" and constructed a barbed wire fencing in between points "C" and "D", which were sought to be removed. A perusal of the judgment and decree of the Trial Court shows that a specific issue in this regard vide issue no.1 was framed which was answered in the affirmative in favour of the petitioner. However, the operative part of the judgment and decree dated 29/12/2009 in R.C.S No.190/2004/III would show that the respondents/judgments debtors were directed to demolish that part of the compound wall blocking free flow of water, as seen in the plan at Exhibit 32-C at points "C" and "D" to clear the water way passage. This was challenged by the respondents in Regular Civil Appeal No.180/2010 which was dismissed on 18/12/2012.

2. When the petitioner sought to execute the decree, the learned Executing Court in Execution Case No.50/2012/III by the impugned Order dated 17/1/2015 directed the judgment debtors to remove/demolish the obstruction/ barbed wire fencing at points "C" and "D" to clear the water passage. The learned counsel for the respondents/ judgment debtors submits that the barbed wire fencing existing between points "C" and "D" had already been removed even prior to filing of this writ petition which is countered by the learned counsel for the petitioner. That apart, the main contention on behalf of the petitioner is that the Executing Court could not have disposed of the matter in the absence of the removal of the compound between points "A" and "B".

3. The learned counsel for the petitioner has placed reliance on the observations and findings recorded by the Trial Court as well as the Appellate Court in order to contend that a specific case about the existence of a wall between points "A" and "B" was raised and has been dealt with and answered in favour of the petitioner. The learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of RAJINDER KUMAR VS. SHRI KULDEEP SINGH & ORS. reported in 2015 (1) ALL MR 435 (S.C.), in order to submit that in such a case, the Executing Court can consider the judgment as a whole and the Execution case could not have been disposed of.

4. The learned counsel for the respondents/judgement debtors placed reliance on the decision of the Hon'ble Supreme Court in the case of D.Y. DIRECTOR LAND ACQUISITION VS. MALLA ATCHINAIDU AND ORS. reported in (2007) 0 A.I.R. (SC) 740, in order to submit that the Executing Court cannot go behind the decree. It is submitted that the petitioner had neither

sought correction before the Trial Court under section 152 of C.P.C nor had filed any cross objection. It is submitted that the Appellate Court has also not exercised power under Order 41 Rule 33 C.P.C to modify the decree passed by the Trial Court. In short, it is submitted that in the absence of any direction in operative part of the decree to remove the compound wall at points "A" and "B" nothing remained to be executed, after removal of the barbed wire fencing.

5. Having regard to the circumstances and the submissions made, Rule.

4. The learned counsel for the respondents waives service.

5. Hearing is expedited."

5. Mr Kakodkar, learned counsel for the petitioner, submits that the decree was quite clear in that there was a direction to demolish the portion of the compound wall blocking the free flow of water as seen in the Plan at Exh.32-C Colly. He points out that even the issue framed in this regard was explicitly answered in the affirmative by the Trial Court. He submits that the impugned Order by the Executing Order amounts to refusal to exercise jurisdiction vested in the Executing Court. He presents that there was no ambiguity as such in the decree. In any case, such ambiguity should have been resolved by exercising the powers under Section 47 of the Code of Civil Procedure (C.P.C.).

6. Mr Coutinho, learned counsel for the judgment debtor, submits that no relief was granted about demolition between points "A" and "B" on the Plan at Exh.32-C Colly. He submits that if no specific relief is granted in a decree, the same is deemed rejected. He submits that the petitioner neither applied for any correction under Section 152 of the C.P.C. nor appealed the dismissal of relief not explicitly granted to the decree-holder. He presents that the Executing Court can never travel beyond the decree. He, therefore, submits that there is no jurisdictional error in the impugned Order.

7. The rival contentions now fall for my determination.

8. The Trial Court, in its Judgment, Order and Decree dated 29.12.2009, had framed the following issue as Issue No.1 and, further, answered the same in the affirmative.

"1. Whether the plaintiff proves that the Defendant illegally constructed the compound wall blocking the flow of water completely on 6.11.2003 at Points A and B, C and D as shown in the plan?"

9. Based upon the above answer, the Trial Court issued the following operative Order in paragraph 27, which reads as follows:-

"

ORDER

This suit stands decreed with costs.

The defendants are directed to demolish the portion of compound wall blocking the free flow of water as seen in the plan at Exh.32-C colly, at Points C and D, to clear the water way passage passing through its property as per the directions seen in the said plan and by way of permanent injunction the defendants or any other person acting on their behalf are restrained from blocking any portion of the water passage shown in the said plan.

Decree shall be drawn up accordingly.

Pronounced in the Open Court."

10. The decree in the suit was directed to be drawn up accordingly, and the same follows the operative portion referred to above.

11. The material on record unambiguously indicates that the portion between C and D in the plan at Exh.32-C colly was barbed wire fencing. The material further unambiguously shows that the portion between A and B on the plan at Exh.32-C colly was "*a compound wall blocking the free flow of water*". This is evident from the plan itself and the evidence that is discussed in the Judgment, Order and Decree of which execution was applied for.

12. Although the operative portion does not specifically reference points A and B, the operative portion clearly refers to "*compound wall blocking free flow of water as seen in the plan at Exh.32-C colly*". After this, there is a "*coma*", followed by the directions to demolish at points C and D. The operative portion of the Order is thus quite clear in that it directs the demolition not only of the obstruction at points C and D but also the portion of the compound wall blocking the free flow of water. Reference to "*compound wall*" makes it clear that the reference was to the compound wall between points A and B. Admittedly, between points C and D, there was no compound wall but only barbed wire fencing, which was separately described.

13. Assuming, without accepting, that there was some ambiguity due to the non-reference to points A and B, such ambiguity stands fully resolved by reference to Issue No.1 and the discussion on Issue No.1. Therefore, this is not a case where the Executing Court was invited to travel beyond the decree. Instead, this is a case where the Executing Court was only requested to consider the decree in its proper perspective having regard to the discussion in the Judgment and Order, the plan and the operative portion. This exercise, the Executing Court, was bound to undertake. This is, therefore, a case of failure to exercise jurisdiction or the exercise of jurisdiction with material

irregularity warranting interference under Article 227 of the Constitution of India.

14. In matters of execution of decrees, the Courts must focus on the substance of the decree and not the form. Whilst the Executing Court is not expected to travel beyond the decree, every effort should be made to construe a decree reasonably and in the light of the dispute between the parties and the material placed on record by the parties for resolving such dispute. The Executing Court must not dismiss executions lightly and deprive the decree-holder of the fruits of the decree obtained after several years of litigation.

15. For the above reasons, the impugned portion of the Order dated 17.01.2015 is set aside, and the execution proceedings before the Executing Court are restored. Accordingly, the petitioner's execution application is allowed in its entirety. The respondent/judgment debtor is directed to demolish even the portion of the compound wall between points A and B in the plan at Exh.32-C colly, blocking the free flow of water.

16. Mr Coutinho, on instructions, states that the impugned Order, insofar as the obstruction between points C and D is concerned, is already complied with. Mr Kakodkar disputes this

position. This dispute is for the executing Court to resolve in the restored execution proceedings. Accordingly, the judgment debtor should now demolish the portion of the compound wall between A and B within three months from today and file a compliance report before the Executing Court. The compliance report should also make a statement regarding removing obstructions between points C and D. This compliance report must be filed after furnishing an advance copy to the decree-holder or the learned counsel for the decree-holder.

17. The parties must now appear before the Executing Court on 08.06.2023 and file an authenticated copy of this Order. By this date, the Judgement-debtor must file a compliance report as directed. In addition, the Executing Court should ensure that the decree is executed in its entirety, including demolishing the portion of the compound wall between points A and B blocking the free flow of water as depicted in the plan at Exh.32-C colly.

18. The rule is made absolute in the above terms without any cost order.

M. S. SONAK, J.

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