

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 462/2022

SAYEEDA BI AND 4 ORS.

... PETITIONERS

Versus

SHAIKH SALAUDIN @ SHAIKH
SLAVODIN AND 4 ORS.

... RESPONDENTS

Mr Sarvesh Kamat Malyekar, Advocate *for the Petitioners.*

Mr A. D. Bhobe with Ms A. Fernandes, Advocates *for Respondents No.4 and 5.*

CORAM: M. S. SONAK, J.

DATED: 24th August 2023

P.C.:

1. Heard Mr Malyekar for the petitioners and Mr Bhobe for respondents no.4 and 5.

2. The challenge in this petition is to the order dated 05.04.2022 made by the Executing Court dismissing petitioners' application at Exh.D-15. By this application, the petitioners had urged that the execution proceedings should be dismissed because they were barred by limitation.

3. On perusing the impugned order and the decree which was sought to be put in execution, it is clear that the decree holders seek to execute a decree by which reliefs of permanent injunction and mandatory injunction were granted.

4. The Executing Court relied upon the decision of the Allahabad High Court in *Som Nath v/s. VIth Additional District Court, Bareilly - 2011 SCC OnLine All 180*, in which it is held that the period of limitation will not apply to a composite decree for permanent injunction and mandatory injunction.

5. Mr Malyekar, learned counsel for the petitioners, submitted that the period of limitation may not apply to a decree of permanent injunction but would certainly apply to the decree of mandatory injunction. He submitted that no execution proceedings are maintainable in respect of a decree made ex-parte and not on merits. He also submitted that the decree has, in fact, been fully executed, and therefore, there is no reason to continue execution proceedings any further.

6. At this stage, no firm opinion need be expressed on the issue about the period of limitation not being applicable to a composite decree of permanent injunction and mandatory injunction. However, execution can proceed. If, ultimately, any orders are made in respect of the relief of mandatory injunction, the petitioners are granted liberty to challenge the same notwithstanding the disposal of the present petition.

7. The above approach is adopted because the Executing Court will have to consider all the issues, including the issue of whether the composite decree is severable or not. At this stage, the Court need not have made any final observations on this issue of limitation. However, it must be noted that the view of the Allahabad High Court supports the view now taken by the Executing Court in this matter. Still, the issue of limitation qua the execution of the mandatory injunction decree is specifically left open.

8. Regards the petitioners' contention that an ex-parte decree cannot be put into execution, the same will have to be rejected. The petitioners neither challenged the ex-parte decree nor applied for setting aside the same. Therefore, there is no merit in the contention that an ex-parte decree can never be executed.

9. Regards the petitioners' third contention that the decree has already been executed, it is a matter for inquiry. The Executing Court must inquire into the issue as to whether the decree is already executed. Such an inquiry is contemplated in the execution proceedings itself. The impugned order is clarified to this extent.

10. By leaving the issue of limitation qua the execution of the decree of mandatory injunction open and clarifying that an inquiry must be held by the Executing Court on the petitioners' plea that the decree has already been executed, this petition is disposed of. Interim orders, if any, are vacated.

11. All concerned to act on an authenticated copy of this Order.

12. No costs.

M. S. SONAK, J.