

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 52/2024

Shri. Durga Hotel,
A partnership firm registered
Under Indian Partnership Act,
Represented by its partner,
Sitakant Kashinath Parab,
66 years of age,
Residing at House number not known,
Malbhat, Margao, Goa 403 601. Petitioner

Versus

1. Ramdas M.P. Kakode,
Son of late Mohan Kakode, aged about
59 years, married, resident of
Bungalow No.1, House No.2/5241,
Behind Durga Petrol Pump, Fatorda,
Margao, Goa 403602,

2. Chandrakant Vishnu Phadte (since
Deceased) represented by L.Rs.

- (a) Mrs. Uma Chandrakant Phadte
(major),
- (b) Kapil Phadte (major),
- (c) Ms Ruhi Phadte,

All residing at First Floor,
Sukhavastu Apartments,
Behind Sunshine Laundry,
Comba, Margao, Goa 403601. Respondents

Mr Joaquim Godinho, Advocate for the Petitioner.

Mr Gaurish Agni, Advocate for the Respondents.

CORAM : VALMIKI SA MENEZES, J.

DATED : 22nd February 2024

ORAL JUDGMENT :

1. Heard Mr Godinho for the Petitioner, and Mr Agni for the Respondents.
2. Rule. The Rule is made returnable forthwith and at the request of the learned Counsel for the parties, the Petition is finally disposed of.
3. By this Petition filed under Article 227 of the Constitution of India, the Petitioner takes exception to an order dated 18/10/2023, whereby the Petitioner's objection to the maintainability of the Misc. Civil Appeal No. 27/2020 was rejected.
4. The facts that have led to filing of the present Petition, are as under :
 - (A) The Petitioner obtained a Judgment and Decree dated 23/2/1999 against one Chandrakant Phadte, who was the Defendant in Special Civil Suit No.24/84/A. In that suit, the Decree granted to

the Petitioner directed the Defendant to hand over possession of the suit hotel to the Petitioner. The Decree further directed the Defendant to pay a sum of ₹24,000/- together with interest at the rate of 6% per annum from the date of filing of the suit till realisation i.e. from 29/1/1985 till payment. In addition, the Decree further directed payment of mesne profits at the rate of ₹50/- per day from the date of the suit i.e. from 29/1/1985 till the possession was delivered of the suit hotel.

- (B) This Decree was challenged by the Defendant all the way to the High Court, which was ultimately upheld by this Court vide order dated 4/7/2013 passed in Second Appeal No. 40/2012. Consequently, the Decree dated 23/2/1999 came to be confirmed.
- (C) In execution proceedings bearing Execution Application No. 50/2013/A filed by the Petitioner before the Court of Civil Judge, Senior Division at Margao to execute this Decree, a Third Party, i.e. the Respondents herein filed objections in terms of the Order XXI, Rule 97 CPC. Without recording any evidence or conducting any inquiry on the objections which were at Exhibit D-11 of the Execution Application, the Executing Court, by its

order dated 29/2/2016, dismissed the application. Against this order, the Respondents preferred Misc. Civil Appeal No. 26/2016 before the District Court at Margao which, by its Judgment dated 9/3/2018, allowed the same remanding the objection back to the Executing Court, with a specific direction to the Executing Court to decide the application in terms of the provisions of Order XXI, Rules 91 to 103 CPC by conducting an inquiry into the same.

- (D) The Executing Court, despite the specific direction of the District Court, failed and neglected to conduct an inquiry in terms of the provisions of Order XXI, Rules 91 to 103 CPC and without recording any evidence, by its Order dated 24/6/2020, once again rejected the objections at Exhibit-D11. Needless to state, the rejection of objections in terms of Order XXI, Rules 91 to 103 CPC partakes of a Decree and since it operates as a Decree in the suit, the only remedy available to the Respondents, was to file a First Appeal before the District Court.
- (E) Instead of filing a First Appeal against the Decree, the Respondents filed an Appeal from Order in terms of Order 43 CPC, which was otherwise not maintainable. The Petitioner raised a preliminary

objection to the maintainability of this Appeal before the District Court which has, by the impugned order, dismissed this objection and proceeded to hear the Appeal from Order on its merits.

5. After hearing the rival submissions of the learned Counsel for some time, I am of the opinion that since the Appeal from Order bearing Misc. Civil Appeal No. 27/2020 is, obviously, not maintainable for the reasons that the order dated 24/6/2020 had the force of a Decree. Since the Appeal was not maintainable in terms of Order 43 CPC as no such remedy has been provided under Order 43, the impugned order dated 18/10/2023 cannot be sustained. Accordingly, the impugned order is quashed and set aside and the Appeal itself is hereby held not maintainable. Consequently, the Misc. Civil Appeal No. 27/2020, being not maintainable, is required to be dismissed and is, hereby, dismissed without deciding the same on merits.

6. Considering the fact that the District Court, by its Judgment and Order dated 9/3/2018 had clearly remanded the execution proceedings i.e. Exhibit D-11 back to the Executing Court for a decision after holding an inquiry in terms of Order XXI, Rules 97 to 103 CPC and the Executing Court not having followed the specific

direction contained in that Judgment, the order dated 24/6/2020 is required to be set aside. The order dated 24/6/2020 cannot be sustained since it has failed to follow the directions to conduct an inquiry in terms of Order XXI, Rules 97 to 103 C.P.C., which requires an inquiry/evidence to be led by the parties on Exhibit D-11. The decision was required to be rendered on the merits of the objection raised by the Respondents, but has instead been passed with material irregularity in that it has not followed the direct mandate of a superior Court of Appeal. This would be a clear case which requires interference in the supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

7. Consequently, the order dated 24/6/2020 is, hereby, quashed and set aside. The Executing Court shall strictly follow the direction set out in the impugned Judgment and Order dated 9/3/2018 i.e. to conduct an inquiry on Exhibit D-11 in terms of Order XXI, Rules 97 to 103 CPC. The Executing Court is required to complete the inquiry in the above terms within a period of 6 (six) months from today and render its decision in terms of Order XXI, Rules 97 to 103 CPC, within that period.

8. The impugned order dated 18/10/2023 of the District Court is, hereby, quashed and set aside. Misc.

Civil Appeal No. 27/2020, being not maintainable, is dismissed.

Order dated 24/6/2020 passed by the Executing Court on Exhibit D-11 is set aside. The Executing Court (Civil Judge, Sr. Division, Margao) is hereby directed to comply with the direction set out in Judgment dated 9/3/2018 i.e. to conduct an inquiry on Exhibit D-11 in Regular Execution Application No.50/2013/A in terms of Order XXI, Rules 97 to 103 CPC.

The Executing Court is requested to complete the inquiry in the above terms within a period of 6 (six) months from today and render its decision in terms of Order XXI, Rules 97 to 103 CPC, within that period.

Needless to state, all contentions of the parties are left open and the Application at Exhibit D-11 shall be decided on their own merits, and in accordance with law, after inquiring into the same.

9. Rule is made absolute in the above terms.

VALMIKI SA MENEZES, J.

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MHAMAL

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SANTOSH S MHAMAL
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