



Shakuntala

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL REVISION APPLICATION NO.1 OF 2011

1. Shri James Pegeot Faria,
About 45 years of age, and his wife

2. Smt. Olinda alias Pedeot Faria,
About 40 years of age, both r/at
Zambaulim, Sanguem, Goa APPLICANTS

Versus

Gopalkrishna Govind
 Savoikar(deceased), 84 years of
 Age, landlord, residing at H.No.116,
 Zambaulim, Sanguem, Goa, represented by,
 His legal representatives:

- (a) Mr. Mohan Gopalkrishna Savoikar, major bachelor,
- (b) Miss Bharati Gopalkrishna Savoikar, major,
unmarried,
- (c) Miss Maktamala Gopalkrishna Savoikar, major,
Unmarried,(deceased)
- (d) Miss Madalasa Gopalkrisna Savoikar, major,
unmarried
- (e) Mrs. Shamla Ramesh Kulkarni, major, unmarried,
- (f) Mr. Ramesh G. Kulkarni, Major,
- (g) Miss Usha Gopalkrishna Savoikar,
Major, unmarried,
- (h) Miss Aruna Gopalkrishna Savoikar, major,
Unmarried, (Deceased)
 All r/at Zambaulim, Sanguem, Goa.
- (i) Mr. Mihir Atre, s/o Late Ms. Aruna Savoikar
 @ Ms. Aruna Atre, R/o 153, Beecroft Rd,
 Unit 1810, Toronto, Ontario,
 Canada, M2N-7C5 RESPONDENTS

Mr. Nitin Sardessai, Senior Advocate with Mr. Gaurang Panandikar, Mr. Siddharth Sardessai and Mr. Kabir Sabnis, Advocates for the Applicant.

Mr. Parikshit Sawant, Advocate for the Respondent.

CORAM: BHARAT P. DESHPANDE, J.

RESERVED ON : 24th JULY 2024

PRONOUNCED ON 02nd AUGUST 2024

JUDGEMENT

1. Heard, Nitin Sardessai, Senior Advocate with Mr. Gaurang Panandikar, Mr. Siddharth Sardessai and Mr. Kabir Sabnis, learned Advocates for the Applicant and Mr. Parikshit Sawant learned Advocate for the Respondents.
2. The present revision is filed challenging the order passed by the Executing Court thereby directing the Applicant, first of all, to remove the structure within a period of 30 days and thereafter to be detained in civil imprisonment on payment of subsistence allowance.
3. The Applicants are the Judgement Debtors against whom a Judgment and Decree is passed and confirmed by the Higher Courts including this Court while deciding Second Appeal No. 24/1993. Though the Second Appeal was partly

allowed wherein the eviction order of the Judgment Debtors is quashed and set aside, the injunction order passed by the Courts below was maintained.

4. The relevant portion of the Injunction Order passed by the Courts below and more particularly against the Judgment Debtors reads thus:

“Suit is partly decreed. The defendants, their servants, agents and or their family members are restrained by permanent injunction from carrying out any repairs or making any extension to the suit structure or from using the same for residential purpose.”

5. The second part of eviction was quashed and set aside in Second Appeal No. 24/1993 decided on 10/01/1997. Thus, the only relief that is available to the Decree Holders is the one granted with regard to Injunction and as quoted above.

6. The Judgement Debtors accordingly filed an execution application before the learned Civil Court vide Execution Application No. 5/2002 wherein it has been claimed that the Judgement Debtors in spite of the Decree, replaced local tiles

of the structure with Mangalore tiles thereby substituting the existing roof. The Decree Holder further claimed that the Judgement Debtors further converted the *Baguela* into Mangalore Tiles structure at the rear side and raised a wall of bricks on the western side. The Judgement Debtors removed the barbed wire fencing around the suit structure, replaced the door on the western side, and constructed a structure for a water meter on the northern side in the *Baguela* which was converted into a Mangalore tile roof. The Judgement Debtors further replaced wooden props. All these repairs were done without permission and authority from the Decree Holders and in violation of the Decree.

7. The Judgement Debtors filed reply to the execution proceedings and thereafter, inquiry was conducted. The Decree Holder as well Judgement Debtors led evidence. The learned Executing Court vide the impugned order dated 02.03.2009 directed the Judgement Debtors to remove mud bricks piled up one over the other upto one cubic and near the Western *Baguela*, to remove the Pedestal or Meter structure and put pot tiles on the roof of the main structure by removing existing Mangalore Tiles but excluding Mangalore Tiles on the

Veranda and the rear projection within 30 days. The Judgement Debtor No. 1 was ordered to be detained in civil imprisonment after completion of 30 days from the date of order and on payment of subsistence allowance.

8. The Applicant/ Judgement Debtors challenged such an order by filing Misc. Civil Appeal No.17/2009 before the learned District Court which was allowed vide Judgement dated 21.08.2009. However, the Respondent/Decree Holder challenged such order passed by the District Court by filing a Writ Petition No. 688/2009 which was decided by this Court on 15.07.2010. This Court observed that since there is no provision of filing of appeal against the order passed by the Executing Court, more specifically, under Order XXI Rule 32 of the Civil Procedure Code, 1908 (C.P.C. for short), quashed and set aside the order passed by the District Court in MCA No. 17/2009. As a result, the order passed by the Executing Court on 02.03.2009 was restored and became operative. Accordingly, the present revision is filed challenging the order passed by the Executing Court dated 02.03.2009 on various grounds.

9. Mr. Sardessai learned Senior Counsel appearing for the Applicants would submit that the relief claimed in the execution application is beyond the relief claimed in the suit. Similarly, the Applicant is a Tenant and the suit was decreed on the allegation that the Applicant has carried out repairs of the said structure which is used for business purposes. The Decree was passed after leading evidence to show that even the old tiles were replaced with Mangalore tiles even prior to the filing of the suit and more so, before passing the Decree.

10. Mr. Sardessai would submit that even during the pendency of proceedings, with permission of the Respondent/Decree Holder, some repairs including change of rafters of the roof were carried out. He submits that when rafters were changed, it is a normal consequence of removing of the tiles and in that process, the possibility of damaging old tiles is but natural. He submits that while replacing rafters, only the damaged tiles were replaced, and that too in the presence of the Decree Holder.

11. Mr. Sardessai was fair enough in admitting that one wooden door was replaced, however, he submits that such an

aspect would not be considered as disobedience or with an intention to violate the orders of injunction so as to direct the Judgement Debtor No. 1 to be sent to civil imprisonment. He submits that as per the directions of this Court, the Applicants are depositing an amount of Rs.7500/- (Rupees Seven Thousand Five Hundred only) every three months, and at the most, some amount could be handed over to the Decree Holders by way of compensation.

12. Besides Mr. Sardessai submits that the allegations regarding changes or replacement of the tiles erecting of the wall, removal of the fencing, and constructing the wall for the purpose of a water meter, would not in any manner be considered as disobedience since such portions are not at all considered as suit property which is found mentioned in the plaint. He submits that disobedience must be restricted to suit property for which a Decree was drawn.

13. Mr. Sardessai would further submit that the learned Executing Court though agreed that some repairs were carried out as per the consent given by the Decree Holders and in their presence, opined only on the basis of two photographs

that the Judgement Debtors replaced the tiles. He submits that such photographs could not have been considered as conclusive evidence for showing the replacement of tiles and that too by disobeying the order of injunction. He submits that impugned order is passed on the surmises and conjectures and therefore, requires interference in the revisional jurisdiction

14. Per contra Mr. Sawant appearing for the Respondent would submit that the structure is used for business purpose and water meter was placed by erecting a wall which amounts to extension of the *Baguela* which is also used for commercial purpose. He would submit that the Judgement Debtor in his evidence admitted of replacement of the entire roof by converting into Mangalore tiles. He also admitted of replacement of door which is clearly in violation of the injunction order. Mr. Sawant would submit that the matter is going on since long and orders passed by the Executing Court needs no interference since the Judgement Debtors are not obeying the orders passed in the Civil Suit injuncting them from carrying out repairs.

15. Rival contention fall for consideration.
16. Though a detailed inquiry was conducted by the Executing Court by recording evidence, the suit filed before the Trial Court clearly described what is the suit property. Paragraph No. 3 of the plaint shows that the suit property is a structure bearing Village Panchayat No. 53 existing in survey no. 1/2 and near to the road leading from Zambhaulim to Rivona. Such a structure is a small structure with mud walls and local tiles roofing.
17. Thus, the suit structure is only a small structure bearing Panchayat Number 53 which was earlier consisting of mud walls and local tiles. It is also stated in the plaint that said structure was leased to Benedito Faria from Rivona for commercial purpose i.e. for running a Taverna on an annual rent of Rs.50/- (Rupees Fifty only). The Defendants/Judgement Debtors are claiming to be Legal Heirs and occupying the said structure. It is further claimed in the suit that the notice to vacate was issued to the defendants/Judgement Debtors since the structure requires repairs. It was also claimed that said Benedito tried to erect *pandal* at

the rear side of the structure against which a Civil Suit No.18/1984 was filed. The said Benedito expired on 05.03.1985 as a Bachelor. Soon after the death of Benedito, the Defendants/ Judgement Debtors started running the Taverna in the leased premises. Proceedings filed before the Rent Controller for handing over vacant possession of the leased premises on the ground that the Defendants/ Judgement Debtors were not entitled to carry out such business as Benedito expired as a Bachelor.

18. Further pleadings show that the defendants repaired Coconut leaves protection on the rear side and replaced the Coconut leaves with Mangalore tiles. The Defendant also replaced the old country tiles and put Mangalore Tiles on the front *Veranda*. Such repairs were carried out without the permission of the Plaintiffs and somewhere in June 1986. Accordingly, the suit was filed for eviction and injunction.

19. As earlier discussed, the suit was decreed as far as injunction is concerned thereby restraining the Judgement Debtors from carrying out any repairs or making any extension to the suit structure. Thus, the suit structure which

is defined in paragraph 3 of the plaint is only one single structure consisting of mud walls and local tiles bearing panchayat no.53 as existing then.

20. The inquiry conducted by the Executing Court would clearly reveal that the Plaintiff admitted that some repairs were carried out prior to filing of the suit itself, which has been referred in the execution proceedings. It is also brought on record that even during the pendency of the execution proceedings, the Judgement Debtors were permitted to replace 13-14 rafters and some ribs, and that too with the permission of the Plaintiff. Thus, it is clear that the suit structure was even repaired during the pendency of the execution proceedings by replacing the rafters of the roof.

21. It is common knowledge that while replacing rafters the tiles existing on the roof are required to be removed. During that process, the possibility of damage to some of the tiles also cannot be ruled out. Thus, the contention that the Judgment Debtors replaced the roof tiles with Mangalore tiles and that too without the permission of the Decree Holders and specifically by breaching the Judgment and Decree is

doubtful. The Decree Holder also admitted that the *Baguela* on the rear side was earlier consisting of Palm leaves and was converted into Mangalore tile roofing prior to filing of the suit. This, admission clearly goes to show that said *Baguela* was repaired even prior to filing of the suit. Admittedly, the plaint is clearly silent about existence of *Baguela* by the side of the suit structure or any repairs carried out to it.

22. The second aspect is regarding the piling of some laterite stones one over the other only for the protection of the area and prevention of the Pigs from entering inside. Such piling of the stones cannot be considered as carrying out any construction or repairs. Even otherwise, said *Baguela* was not the part of suit structure as defined in paragraph 3 of the plaint and what was restrained is only the repairs against the suit structure. Thus, anything carried out beyond the suit structure cannot be considered as any disobedience of the Judgement and Decree. It includes piling up of stones, repairs of *Baguela*, or even, creating some protection for the water meter on the outer wall of the *Baguela*.

23. The Executing Court considered two photographs, produced during the inquiry and found that the tiles shown therein are new and therefore, held that Judgment Debtors repaired such roof without taking permission.

24. The proceedings are filed for disobedience of the order and the consequences are severe. Therefore, the burden to prove is heavily on the Decree Holder. It is also settled proposition of law that sending Judgement Debtor for civil imprisonment should be the last resort as it involves curtailment of personal liberty. For that purpose, the evidence must be clinching. Only because two photographs are produced inference cannot be drawn that the tiles seen in such photographs appears to be new tiles, specifically when the Decree Holder during cross examination admitted that 14-15 rafters of the roof were replaced with his permission. While replacing such rafters, replacing damaged tiles is a must so as to protect the structure.

25. The observations of the learned Executing Court in that regard needs to be considered as perverse and suffering from

conjectures and surmises. The evidence clearly shows otherwise.

26. Apart from it, the learned Executing Court directed the Judgment Debtors to remove the mud bricks piled one over the other which were placed near the western *Baguela* and also to remove the pedestal or the meter structure and put the pot tiles on the roof of the main structure by removing existing Mangalore tiles but excluding Mangalore tiles on the *veranda* and the rear portion, appears to be an order without support of any such evidence. It is difficult to identify each and every tile over the roof whether it was existing or replaced. Such a course to my mind is practically impossible to perform and that too after 7 years from the date of filing of the execution proceedings.

27. Apart from it, the western *Baguela* was not described as a suit structure in the suit, and thus, no orders could have been passed with regard to such a western *Baguela*. The meter structure is required for the purpose of protecting the water meter and for that purpose the Judgement Debtors cannot be directed to remove it. Such protection is necessary

as per the Rules and Regulations framed by the Department while allotting the meter.

28. There is absolutely no justification as to why there is a need to send the Judgement Debtor No.1 to civil imprisonment for a period of 30 days as found mentioned in paragraph 27 though it is not reflecting in the operative part of the order. As I have already stated that civil imprisonment should be the last resort.

29. Mr. Sardessai would submit that during the pendency of the present proceedings and as directed by this Court dated 19.01.2012, the Applicants are depositing an amount of Rs.7500/- every 3 months. He would submit that out of such amount, some amount could be transferred to the Respondent/Decree Holder by way of compensation.

30. Without prejudice to the rights of the parties and the order which is passed in the present matter, some amount could be handed over to the Respondents/Decree Holders. However, it is made clear that the impugned order requires interference.

31. For all the above reasons, the impugned order is quashed and set aside. The revision application stands allowed. Out of the amount deposited in this Court from time to time an amount of Rs.50,000/- (Rupees Fifty Thousand only) shall be paid to the Decree Holders whereas the remaining amount shall be refunded to the Applicants.

BHARAT P. DESHPANDE, J.