

Esha

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 576 OF 2023

1. Mr. Alfredo Fernandes, Indian National, Aged 49 Years, Son of Jakaria Fernandes and his wife,

2. Mrs. Arlette J.N. Carvalho, Wife of Mr. Alfredo Fernandes, Indian National, Aged 48 Years,

Both the above residents of H. No. 2/42/2, Naikavaddo, Calangute, Bardez-Goa.

Both the above represented through their Duly Constituted Power of Attorney, Mr. Aureo Carvalho.

... Petitioners

Versus

1. Mr. Alex Camilo Rodrigues, Son of Camilo Rodrigues, Major in Age, Indian National, Resident of H. No. 3/36, Mudda Vaddo, Saligao-Goa.

2. Mr. Shyam Chandrakant Bagli, Son of Chandrakant Bagli, Major in Age, Indian National, Resident of H. No. 22, Chawdewada, Parsem, Pernem-Goa, and his Wife;

3. Mrs. Saliksha Shyam Bagie, Wife of Mr. Shyam Chandrakant Bagi, Major in Age, Indian National, Resident of H. No. 22, Chawdewada, Parsem, Pernem-Goa.

4. Mr. Rajendra Pandurang Toraskar, Son of Pandurang Toraskar, Major in Age, Indian National Resident of House No.1237/1, Paina Wado-Tivim, Mapusa-Goa.

... Respondents

Mr. Dhaval Zaveri, Advocate for the Petitioners.

Ms. Vijeta Poulekar with Mr. Ambarish Gavandalkar,
Advocates for Respondent No. 1.

CORAM: BHARAT P. DESHPANDE, J.

DATED: 2nd JANUARY 2024

ORAL JUDGMENT:

1. Heard Mr. Dhaval Zaveri for the Petitioners and Ms. Vijeta Poulekar for Respondent No. 1.
2. Rule. Rule is made returnable forthwith. The matter is heard finally at the stage of admission with the consent of parties.
3. The issue involved in the present Petition is that the Application filed by the Petitioners/Plaintiffs under Section 151 of CPC, seeking directions from the Court against the Defendants to disclose their assets, is rejected. Such Application filed by the Plaintiffs was rejected by the Trial Court by the impugned order dated 12.05.2023, precisely on the ground that the Plaintiffs failed to prove that the Defendants are liable to pay the amount to the Plaintiffs.
4. Mr. Zaveri appearing for the Petitioners would submit that the Plaintiffs filed a suit for recovery of money against the

Defendants and during the pendency of the said suit, an Application was filed under Section 151 of CPC, seeking directions to the Respondents to disclose on affidavit their assets, so as to secure the interest of the Plaintiffs, in case, the suit is decreed in their favour.

5. Mr. Zaveri would submit that in the case of **Rahul S. Shah Vs. Jinendra Kumar Gandhi & Others, (2021) 6 SCC 418**, the Apex Court has laid down the guidelines under Articles 141 and 142 of the Constitution wherein it is mandatory for the Courts and more specifically, in the execution proceedings to demand such affidavit disclosing the assets of the Defendant/Judgment Debtor for the satisfaction of any decree.

6. Mr. Zaveri also placed reliance on the case of **Rupa Ashok Hurra Vs. Ashok Hurra & Another, (2002) 4 SCC 388**, wherein the Constitution Bench of the Supreme Court discussed in detail the impact of the orders passed by the Supreme Court including the directions and the same has the binding effect.

7. The learned Counsel for Respondent No. 1, on the other hand, submits that first of all the Application filed by the Petitioners was premature since the trial is still at the primary

stage and no evidence has been produced. She would further submit that there is absolutely no evidence against the Defendants and particularly Defendant No. 1 to show that he owes any money to the Plaintiffs. She submits that the decision of the Apex Court in the case of **Rahul S. Shah** (supra) also refers to the discretion of the Courts, which has been properly exercised by the Trial Court. She submits that the Petitioners, at the appropriate stage, may prefer such an Application, but, not at the present stage, when there is nothing on record to show about any liability of the Defendants to pay any amount to the Plaintiffs.

8. The rival contentions fall for determination.

9. The Petitioners/Plaintiffs filed a suit for recovery of money and other consequential reliefs against the Respondents/Defendants, praying the following reliefs:

“A. For a judgment and decree of direction to the Defendant No. 1 and Defendant No. 4, jointly and/or severally, to return, deliver and repay an amount of Rs.10,00,000/- with an interest of 18% per annum, unto the Plaintiffs; and the said Defendant No. 1, Defendant Nos. 2 and 3, jointly and/or severally, to return, deliver and repay an amount of Rs.2,48,30,300/- with an interest of 18% per annum, unto the Plaintiffs, from 05/04/2021, till the date of the actual payment;

B. For such other and further reliefs that this Hon’ble Court deems fit and proper;

C. For costs of the present suit.”

10. The Defendants contested the said suit by filing a written statement and the matter is pending before the Trial Court.

11. The Plaintiffs filed an Application under Section 151 of CPC vide Exhibit-7 wherein it has been claimed that the suit has been filed for recovery of money together with interest and costs and that there are further allegations of fraud as well as siphoning of the Plaintiffs' money by the Defendants.

12. It is no doubt true that criminal complaints are filed and the matter is pending before the Trial Court. However, the Application at Exhibit-7 was filed basically relying upon the case of **Rahul S. Shah** (supra) wherein the Apex Court has given some directions.

13. The learned Trial Court though considered the decision of the Apex Court in the case of **Rahul S. Shah** (supra) [which is found in paragraphs 4 and 6 of the impugned order], refused to exercise such jurisdiction, firstly, on the ground that the power is discretionary and the only explanation from the Plaintiffs is that the Defendants may have caused wrongful loss to them. Secondly, the Trial Court observed that the Plaintiffs are yet to prove in the

suit that they are entitled to claim the said amount from the Defendants.

14. Mr. Zaveri would submit that such findings are in the teeth of the observations of the Apex Court in the case of **Rahul S. Shah** (*supra*), wherein directions have been given to the Courts, which are bindings and have the force of law as laid down by the Apex Court. He would, therefore, submit that in a case, which is a suit for recovery of money, it was the duty of the Trial Court to call upon the Defendants to submit the affidavit disclosing the assets on oath so as to secure the interest of the parties, in the event, the suit is decreed in favour of the Plaintiffs.

15. The Apex Court in the case of **Rahul S. Shah** (*supra*) was dealing with the issues mainly concerning the execution of the money decree and Order XXI of CPC. However, while dealing with such aspects, the Apex Court has considered the grounds raised in the said matter on behalf of the litigants about the malaise of constant abuse of procedural provisions which defeats justice i.e. frivolous attempts by unsuccessful litigants to putting up spurious objections and setting up third parties, to object, delay and obstruct the execution of a decree.

16. While considering the above aspects, directions have been issued to do complete justice, in the exercise of jurisdiction under Article 142 read with Article 141 and Article 144 of the Constitution in the larger public interest to subserve the process of justice so as to bring an end to the unnecessary ordeal of litigation faced by parties awaiting fruits of decree and in larger perspective affecting the faith of the litigants in the process of law.

17. The directions in paragraph 42 read thus:

42. All Courts dealing with suits and execution proceedings shall mandatorily follow the below-mentioned directions:

42.1. In suits relating to delivery of possession, the Court must examine the parties to the suit under Order 10 in relation to third party interest and further exercise the power under Order 11 Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third party interest in such properties.

42.2. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the Court, the Court may appoint Commissioner to assess the accurate description and status of the property.

42.3. After examination of parties under Order 10 or production of documents under Order 11 or receipt of commission report, the Court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit.

42.4. Under Order 40 Rule 1 of CPC, a Court Receiver can be appointed to monitor the status of the property in question as custodia legis for proper adjudication of the matter.

42.5. The Court must, before passing the decree, pertaining to delivery of possession of a property ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property.

42.6. In a money suit, the Court must invariably resort to Order 21 Rule 11, ensuring immediate execution of decree for payment of money on oral application.

42.7. In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The Court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.

42.8. The Court exercising jurisdiction under Section 47 or under Order 21 of CPC, must not issue notice on an application of third party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining any such application(s) that has already been considered by the Court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.

42.9. The Court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.

42.10. The Court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to sub-rule (2) of Rule 98 of Order 21 as well as grant compensatory costs in accordance with Section 35-A.

42.11. Under Section 60 of CPC the term "...in name of the judgment-debtor or by another person in trust for him or on his behalf" should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit or property.

42.12. The Executing Court must dispose of the execution proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.

42.13. The Executing Court may on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the concerned Police Station to provide police assistance to such officials who are working towards execution of the decree. Further, in case an offence against the public servant while discharging his duties is brought to the knowledge of the Court, the same must be dealt stringently in accordance with law.

42.14. The Judicial Academies must prepare manuals and ensure continuous training through appropriate mediums to the Court personnel/staff executing the warrants, carrying out attachment and sale and any other official duties for executing orders issued by the Executing Courts.”

(Emphasis supplied)

18. The above directions are issued under Article 142 read with Article 141 of the Constitution of India and therefore, the same are binding on all the Courts in view of the law laid by the Apex Court. Particularly in paragraph 42.7, the Apex Court has observed that in the suit for payment of money and before settlement of issues, the Defendant may be required to disclose his assets on oath, to

the extent that he is being made liable in a suit. The Court may further, at any stage, in appropriate cases during the pendency of the suit, using powers under Section 151 of CPC, demand security to ensure the satisfaction of any decree.

19. It is no doubt true that the entire judgment in the case of **Rahul S. Shah** (*supra*) deals with the execution of the decree. However, the directions issued in paragraph 42.7 specifically deal with the suit for payment of money. It is no doubt true that the word “may” in the said paragraph 42.7 is a discretion of the Court. However, it is an equally well-settled proposition of law that discretion has to be used judicially and for the purpose of securing justice. Only because the suit is filed and evidence is yet to be produced, the discretion cannot be used to deny the claim of the parties in suitable cases. On satisfaction of facts, on case to case basis, the Court is entitled to exercise such discretion. The powers under Section 151 of CPC are wide enough. The Apex Court has specifically referred to Section 151 of CPC in paragraph 42.7 of the above decision only with a view to do justice at the given stage and to secure the assets of the Defendants so as to satisfy the decree, if passed, in favour of the Plaintiffs. The only purpose of the above directions is to secure the assets while the suit is pending so that

during such pendency, the attempt on the part of the Defendants to dispose of such assets could be curtailed.

20. The Petitioners/Plaintiffs in the Application [Exhibit-7] specifically mentioned that Defendant Nos. 1 and 4 are liable to pay Rs.10,00,000/- with interest of 18% per annum whereas Defendant Nos. 2 and 3 are liable to pay Rs.2,48,30,300/- with interest at 18% per annum. The issues are framed. However, the evidence is yet to commence.

21. The Trial Court though considered that the directions issued by the Apex Court could be exercised before settlement of issues for the purpose of disclosure of assets on oath, however, rejected such Application only on the ground that the Plaintiffs are yet to prove that they are entitled to recover such claim. As rightly pointed out by Mr. Zaveri such observations of the learned Trial Court are in the teeth of the findings and directions issued by the Apex Court in the case of **Rahul S. Shah** (supra). The discretion is given to call upon the Defendant to file the affidavit disclosing assets, prior to settlement of issues in the matter. At that stage, the parties are yet to lead evidence, the said stage i.e. prior to settlement of issues is the stage of pleadings of the parties. The pleadings including documents are required to be considered by

the Trial Court while considering the issues. Thus, the Apex Court observed that such an Application could be filed even prior to settlement of issues, which clearly shows that the Application could be disposed of only on the basis of the pleadings of the parties and not the evidence. Accordingly, the observations of the Trial Court in paragraph 7 of the impugned order are contrary to the observations of the Apex Court in the case of **Rahul S. Shah** (*supra*) and therefore, the impugned order cannot be sustained.

22. The explanation given by the Plaintiffs in their Application for seeking directions to the Defendants to disclose the assets on oath is only with the view of the possibility of frustrating the decree and that the Defendants have siphoned the hard-earned money of the Plaintiffs and have caused wrongful loss to them. The Trial Court arrived at a finding which is contrary to the directions of the Apex Court and thus, the same cannot be sustained.

23. On the other hand, even if the Defendants are directed to disclose the assets on oath, no prejudice is going to be caused to them. This is because in case they succeed in the suit, the question of considering such an affidavit at the relevant stage could be taken into account by the concerned Court while deciding the suit.

The powers under Section 151 of CPC as observed by the Apex Court in the case of **Rahul S. Shah** (supra) are wide enough mainly to secure justice. Thus, the impugned order requires interference as the same is unsustainable.

24. The impugned order is therefore quashed and set aside. The Application [Exhibit-7] filed by the Plaintiffs under Section 151 of CPC stands allowed in terms of prayer clause (b), which reads thus:

“B. Consequently, for directions to the Defendant No. 1 and Defendant No. 4, to the extent of their joint and several liability, to disclose on Affidavit their Assets to secure an amount of Rs.10,00,000/- with an interest of 18% per annum; to the Defendant No. 1, Defendant No. 2 and 3, to the extent of their joint and several liability, to disclose on Affidavit with Assets to secure an amount of Rs.2,48,30,300/- with an interest of 18% per annum.”

25. Rule is made absolute in the above terms.

26. The Petition stands disposed of.