



Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.621/2022 (F)

VASUDHA VASANT DABHOLKAR,
Wife of Vasant Dabholkar aged 76 years,
Indian National, residing at 202 A wing,
Pratik Building, Near Kabutar Khana,
Bhavani Shankar X Road, Dadar (West),
Mumbai 400028.

... APPELLANT

Versus

1. SUDESH GOVEKAR, son of late
Vassudev Govekar, (since dec.) and his
wife,

... RESPONDENTS

2.SMT. SUSHILA SUDESH GOVEKAR,
Housewife, residing at House No. 123/ C,
c/o. Mr. Vasant Naik, Deulmol Housing
Board, Margao, Goa.

3. SMT. ARTI GOVEKAR, major,
daughter of late Vassudev Govekar, major
in age, occupation business, and her
husband,

4.SHRI SANJEEV SINAI USGAONKAR,
s/o. Mr. Sachidanand Usgaonkar, major in
age, occupation unemployed, residing at
Dr. Almeida Complex, C-F-01, 4" Floor,
Ponda, Goa
(Res No. 4 deceased through his legal heir)

4(a) SHRI NILESH SINAI
USGAONKAR, Age 22 years, bachelor,
resident of Dr. Almeida Complex, C-F-1,
4" Floor, Ponda, Goa.

5. SHRI RAMDAS GAONKAR, s/o late Govind Gaonkar, residing at Tirumala Housing Society, Flat No.C-8, Padmanagar, Gogol, Margao, Goa.

6. SHRI VISHRAM ALIAS PRASAD GOVEKAR, s/o. late Jagannath Govekar, major in age, occupation service.

7. SMT. SUNITA GOVEKAR, wife of Shri Vishram alias Prasad Govekar, major in age, occupation housewife.

8.SMT. LILAVATI GOVEKAR (Deceased) wife of Jagannath Govekar,

9. SHRI. HARSHAD GOVEKAR, s/o. Mr. Vishram alias Prasad Govekar, major in age,

Respondent Nos. 6, 7 and 9 are residents of House No. 1653, Chivar, Devalvadi, Anjuna, Bardez, Goa .

Mr. Pranav Desai with Mr. Vibhav Amonkar, Advocates *for the Appellant.*

Mr. S. D. Lotlikar, Senior Advocate with Ms. S. Kenny, Advocate *for Respondents No.1 to 5.*

CORAM: M. S. SONAK, J.

Reserved on: 14th October 2022

Pronounced on: 15th October 2022

ORDER:

1. Heard Mr Pranav Desai for the Appellant and Mr S. D. Lotlikar, learned Senior Advocate, who appears along with Ms. S. Kenny for respondents no.1 to 5.

2. This appeal challenges orders dated 14.12.2021 and 05.03.2022 dismissing the Appellant's Application under Order 21, Rule 97 r/w 101 of the Civil Procedure Code (CPC). Such orders are deemed to be decrees. Hence this Second Appeal.

3. The records bear out that respondents no.1 to 5 had instituted a Regular Civil Suit No.226/2006/E for an injunction and consequential reliefs concerning the suit property. This suit was dismissed by Judgment and Decree dated 30.03.2012. The First Appellate Court, in Regular Civil Appeal No.86/2012, reversed the Trial Court and decreed the suit on 24.07.2012. Second Appeal No.138/2012 was dismissed by this Court on 29.11.2013.

4. The defendants in the above Regular Civil Suit No.226/2006/E, who are incidentally the brother/sisters-in-law of the present Appellant, carried the matters to the Hon'ble Supreme Court in Civil Appeal Nos.12068 to 12070 of 2016. By Judgment and Order dated 14.12.2016, the appeal was dismissed with costs after finding the same to be without any merits. However, the following direction was issued under Article 142 of the Constitution of India to do complete justice in the matter and to see that the defendants also do not suffer and the structure they

put up was not wasted. The relevant para in this regard reads as follows:-

"22. However, before we part with, we have to take into consideration one more development. As noted above, the defendants have made new construction on the property of the plaintiffs. Demolition of the said construction is not going to help any party. It would result in wastage of the expenditure incurred on the construction. No doubt, the structure is constructed illegally by the defendants. Nevertheless, plaintiffs can make use thereof. Therefore, equities can be balanced if the plaintiffs take possession of the house in question without its demolition, but, at the same time, compensate the defendants by paying the cost of construction. In these circumstances, in the execution petition which is filed, or ought to be filed by the plaintiffs, the executing Court shall appoint a Surveyor/Valuer who would fix the cost of construction that would be reimbursed by the plaintiffs to the defendants.

23. We are giving these directions in exercise of our powers under Article 142 of the Constitution of India in order to do complete justice in the matter and to see that the defendants also do not suffer and the structure put up by them is not wasted."

5. Respondents no.1 to 5, i.e. the decree holders in the above suit, had already instituted execution proceedings in 2014. However, even after the Hon'ble Supreme Court disposed of the appeal, for some reason, the execution did not proceed at the desired pace. Therefore, the decree holders instituted proceedings

before this Court which were disposed of by Order dated 20.06.2022. Accordingly, this Court directed the Executing Court to dispose of the pending execution proceedings as expeditiously as possible and, in any case, within three months.

6. At this stage, the Appellant, who is the sister/sister-in-law of the judgment debtors in Regular Civil Suit No.226/2006/E, filed Obstructionist Proceedings invoking the provisions of Order 21, Rule 97 r/w 101 of the CPC. By Order dated 14.12.2021, the Executing Court dismissed the Application. The First Appellate Court dismissed the appeal on 05.03.2022. Hence the present Second Appeal.

7. Mr Pranav Desai, the learned counsel for the Appellant, submitted that the parties to the suit played a fraud on the Hon'ble Supreme Court by representing the late Jagannath Govekar was survived by only two sons, namely Vasudev and Vishram. He submits that the factual and undisputed position is that Jagannath was survived by two sons and three daughters, including the present Appellant. He offers that if the correct family tree were presented to the Hon'ble Supreme Court, perhaps, no orders would have been made affecting the right of the Appellant.

8. Mr Desai submitted that the finding recorded by the Hon'ble Supreme Court about Jagannath Govekar's claim being barred under the provisions of Section 4(2) of the Benami Transactions (Prohibition) Act, 1988, would not bind the present Appellant, who was not a party to the above suit and consequently to the appeal before the Hon'ble Supreme Court. He submits that the amendment to this Act which entered force on 01.11.2016, would apply to the Appellant's case because the plea about Jagannath being the actual owner of the suit property was raised by the Appellant much after 01.11.2016. Mr Desai, therefore, submits that the appeal court was not justified in non-suiting the Appellant based upon the findings/observations of the Hon'ble Supreme Court on the issue of the Benami Transaction.

9. Mr Desai submits that reliance on *Dolai Maliko v/s. Krushna Chandra Patnaik & Ors. - AIR 1967 SC 49* by the two Courts was misplaced. First, he presents that *Dolai Maliko (supra)* clarifies that the principle therein will apply in the absence of any fraud or collusion. He submits that in this case, the Appellant alleged fraud, if not collusion, and therefore, the principle in *Dolai Maliko (supra)* would not apply. Second, he submits that the observations in *Dolai Maliko (supra)* were in the context of abatement and sufficient representation of the estate, which is not the issue in the present case. Thirdly, he submits that

the Appellant had raised a claim that was independent of her brother or mother, which was not the position in *Dolai Maliko (supra)*. Finally, he submits that the two Courts did not consider all these distinguishing features.

10. Mr Desai submits that the provisions of Order 21, Rule 97 r/w 101 of the CPC contemplates a full-fledged trial after issues are framed. He offers that in this case, the Appellant's claim was independent of the claim raised by her brother or mother in Regular Civil Suit No.226/2006/E. He submits that in such circumstances, the Appellant's Application could not have been dismissed summarily without the Appellant being granted a full and adequate opportunity of leading evidence. Mr Desai submitted that in the plea raised by the Appellant, mixed questions of law and fact were involved, and the same could never have been dealt with in the absence of the opportunity to lead evidence.

11. Mr Desai relied on *Sameer Dattatraya Deshpande & Anr. V/s. Kishor Shamrao Jadhav – Second Appeal No.195/2022 decided on 20.06.2022* and *Sardar Hasanbhai Attar v/s. Usman Papamiya Attar Shaikh & Ors. - 2008 (1) Mh.L.J. 340* in support of the above contention.

12. Based on the above contentions, Mr Desai urged consideration of the following questions, which according to him, constituted substantial questions of law:

(A) The finding of the Learned District Court accepting the contention of Respondent Nos. 2, 3, 4(a) and 5 that the interest of the Appellant in the subject matter property was represented by the other legal heirs, relying on the Judgment of the Hon'ble Supreme Court in the case of *Dolai Maliko (supra)* is perverse in view of the fact that the said Judgment makes a categorical exception as to the cases of fraud and collusion between the parties on record - the Respondents in the present case. A bare perusal of the Judgment of the Hon'ble Supreme Court would demonstrate the fraud and collusion, which was specifically urged by the Appellant and has not been considered by the Learned District Court?

(B) Considering the scheme of Order XXI Rule 97, 101 and 103 CPC, it was incumbent on the Learned District Court to permit the Appellant to lead evidence thereby directing holding of an enquiry. However the Learned District Court has totally ignored that the Learned Civil Judge, Junior Division has summarily, in an arbitrary

manner and without following basic canons of natural justice, dismissed the said Application without giving an opportunity to the Appellant to lead evidence in order to prove her title or right to the said property. Such an approach is not only perverse but also violates the principles of natural justice?

(C) Whether the finding in respect of Benami Transaction which has been confirmed by the Hon'ble Supreme Court is binding on the Appellant who was admittedly not a party to the proceedings and specially when the Supreme Court has concluded its finding based on the fact that the Defendants in the said Suit (Respondent Nos. 6, 7 and 9 herein) have not produced any material to prove the real ownership of Late Jagganath Govekar and additionally in view of the change in the legal position?

(D) Whether the Application under Order 21 Rule 97 read with Rule 101 of the Code of Civil Procedure can be decided in a summary manner without affording an opportunity to the Appellant to lead evidence on the issues of possession, ownership and limitation, which fall for determination for the first time before any Court in execution under Order 21 Rule 97 r/w 101 CPC, more

specifically when the issues of ownership and possession are raised by the Appellant independently and not through the Judgment Debtors or Decree Holders?

13. Mr Lotlikar learned Senior Advocate for respondents no.1 to 5 (original plaintiffs) submitted that none of the proposed questions are questions of law. Further, he submitted that in any case, such questions are neither substantial nor do they arise in the present appeal.

14. Mr Lotlikar submitted that in the entire Obstructionist Application, there are no allegations of fraud. Therefore there is no question of going into the issue of any fraud allegedly played on the Hon'ble Supreme Court. He submitted that the suit was for injunction simpliciter. Under Article 142 of the Constitution of India, the Order required the plaintiffs to pay for the construction illegally put up by the defendants in the suit. However, the First Appellate Court, this Court and finally, the Hon'ble Supreme Court confirmed the injunction decree after holding that the plaintiffs were in possession of the suit property. Therefore the Application under Order 21 Rule 97 r/w 101 of the CPC was not maintainable.

15. Mr Lotlikar finally submitted that the Apex Court had conclusively held that Jagannath, i.e. the father of the Appellant, had no rights or interest in the suit property. Therefore, the claim was barred under the Benami Transactions Act. This finding has attained finality, and it is no longer open to the Appellant to urge otherwise. He submitted that there is no difference between the claim of the present Appellant and the claim of her brothers/sisters-in-law in the suit. He submits that it is in this context that reliance was placed on *Dolai Maliko (supra)*.

16. Mr Lotlikar submits that unless questions legally arise between the parties, there is no obligation upon the Executing Court, in every case, to hold a full-fledged trial while deciding an application under Order 21 Rule 97 r/w 101 of the CPC. He submits that the pleas raised by the Appellant were frivolous and only intended to delay the execution. He submits that the Appellant was completely aware of the suit and, after admitting this position, had merely pleaded that she was not bothered about its outcome because she was not a party to the suit. He relies on *Silverline Forum Pvt. Ltd. v/s. Rajiv Trust & Anr. – (1998) 3 SCC 723* and *Satyawati v/s. Rajinder Singh & Anr. - (2013) 9 SCC 491* to submit that the execution proceedings should not be permitted to be delayed in this manner.

17. For all the above reasons, Mr Lotlikar submits that this appeal may be dismissed with costs.

18. The rival contentions now fall for my determination.

19. The first contention about fraud being practised on the Hon'ble Supreme Court does not appear well taken. Firstly, there are no pleadings in the Application under Order 21, Rule 97 r/w 101 of the CPC on this aspect. For a serious plea of fraud, pleadings of material particulars are necessary. Mr Dessai says that evidence could always be led on this aspect. However, it is well settled that pleadings are a must before any evidence can be let in or considered. This is more so where fraud is alleged.

20. Secondly, in para 2 of its Judgment and Order dated 14.12.2016, the Hon'ble Supreme Court had merely transcribed the sketch of the family tree which *described the parties*. The Appellant, therefore, did not plead fraud but insisted on arguing it without pleadings. Thus, the purpose of the family tree was to describe the parties and not to create an impression that there were no other representatives.

21. Thirdly, even the Appellant's brothers, who were the appellants before the Hon'ble Supreme Court, did not deem it

necessary to refer to the present Appellant or the other two sisters, possibly because the case of the sisters was no different than their case. Finally, even the present Appellant, like her brothers, claims through her father, Jagannath.

22. In para 18 of the Judgment and Order dated 14.12.2016, the Hon'ble Supreme Court has held that Jagannath had no right or title in the suit property because such a plea was barred by Section 4(2) of the Benami Transactions Act. The relevant observations in para 18 read as follows:-

“18. In this context, the question of benami ownership also surfaced. There is no dispute that in the revenue records property stood in the name of Vassudev Govekar and not Jagannath Govekar. The first appellate court rightly held that the plea with regard to the real owner of the property being Jagannath Govekar could not be gone into as it was barred by the provisions of Section 4(2) of the Benami Act. Though we do not find any merit in the arguments of the appellants that the Benami Act is not applicable, in any case there is hardly any material produced by the defendants to support that real owner was Jagannath Govekar. This claim is made only on the ground that it is Jagannath Govekar who had got the suit property acquired in the name of his son Vassudev Govekar. That by itself would not make Jagannath Govekar as the owner of the suit property.”

23. Since Jagannath had no rights in the suit property, there is no question of the present Appellant, who is Jagannath's daughter, asserting that she has some rights to the suit property. Based upon such an assertion, in respect of which not even any *prima facie* case is disclosed in the Obstructionist Application, the Appellant was not justified in insisting upon a full-fledged trial. Such insistence appears only to frustrate or delay the execution of the decree in Regular Civil Suit No.226/2006/E, which has attained finality up to the level of the Hon'ble Supreme Court.

24. The contention based upon the amendment of the Benami Transactions Act that entered force on 01.11.2016 is also misconceived. The Appellant, in this case, has admitted that she was aware of the institution of Regular Civil Suit No.226/2006/E filed sometime in the year 2006 and to which the Appellant's mother and brothers were parties. The Appellant has, however, pleaded that she did not bother to do anything about this suit simply because she was not a party to the said suit. Thus, the Appellant chose to remain in the wings and take her chance until the First Appellate Court, this Court, and the Hon'ble Supreme Court decreed the said suit.

25. The execution, in this case, was delayed. Therefore, the Learned Single Judge of this Court, by Order dated 20.06.2022,

directed the conclusion of execution proceedings within three months. It is only at this stage that the Appellant filed the Obstructionist Application before the Executing Court in a bid to frustrate or delay the execution proceedings. Therefore, the Appellant is not justified in contending that the 2016 amendment allowed her to lead evidence that the actual owner of the suit property was Jagannath and not Vasudev Govekar, the records notwithstanding. As observed by the Hon'ble Supreme Court in para 18, there is no dispute that in the revenue records, the suit property stood in the name of Vasudev Govekar and not Jagannath Govekar.

26. The Courts properly relied on *Dolai Maliko (supra)* because, in this case, there is no appreciable distinction between the belated plea of the Appellant and the plea raised and contested by her brothers and mother by filing a joint written statement in a Regular Civil Suit No.226/2006/E. The Appellant, her mother and her brothers also ultimately claim through Jagannath Govekar. Accordingly, the claim was barred under the provisions of the Benami Transactions Act.

27. Merely because there is a reference to the brothers producing hardly any material in support of the plea that the real owner was Jagannath, the Appellant cannot insist upon a second

innings in this regard. If this were to be permitted, then the execution of the decree would be frustrated or, in any case, undoubtedly delayed. Besides, such a course of action would run counter to the clear finding recorded by the Hon'ble Supreme Court in para 18 referred to above.

28. Though the abatement issue is not involved in this case, the observations about the estate being sufficiently represented apply. This principle of sufficient estate representation will not apply where fraud or collusion is alleged. However, as noted earlier, there are no pleadings of fraud or collusion. Merely because this point was urged before the First Appellate Court without backing any pleadings is not sufficient to distinguish *Dolai Maliko (supra)*.

29. Mr Desai did urge that the Appellant's claim was independent of the claim of her brothers or even her mother. However, but for such an assertion, he was not able to demonstrate how or why such a claim was independent, particularly when the Appellant and her brothers claim through their father, Jagannath. As noted earlier, in clear terms, the Hon'ble Supreme Court has held that there is no merit in the claim that Jagannath was the real owner of the suit property. Such

a plea was barred by law, and further, no material was produced in support of such a plea. Both these findings have attained finality.

30. Considering the close relationship between the Appellant and her brothers and the circumstance of the Appellant waiting in the wings all along and filing the obstructionist application only after the execution proceedings were ordered to be expedited, the unsubstantiated plea of the independent claim could not be a valid ground to delay or obstruct the execution any further.

31. In *Sameer Deshpande (supra)*, the learned Single Judge of this Court found that the obstructionists claimed independent right, title and interest to the suit property as coparcenary property. Based on this distinguishing feature, the Court observed that the Executing Court should have adjudicated upon all the issues, including the issue of fraud that was squarely raised in the matter. Therefore, the facts and circumstances in *Sameer Deshpande (supra)* differ from the facts in the present case.

32. *Sardar Hasanbhai Attar (supra)* may be an authority for the proposition that under Rule 97 of Order 21, it is not as if only the party in possession of the suit property can object to the execution. Even a third-party objector can seek adjudication of his claim to avoid multiple proceedings. In the present case, this is

not the basis on which the Appellant has been declined relief. Therefore, even this decision does not assist the case of the Appellant.

33. The suit, which was decreed by the First Appellate Court, this Court and the Hon'ble Supreme Court, was a suit for injunction. The three Courts have concurrently held that the decree holders were entitled to a decree of injunction, which presupposes the possession of the decree holders. Therefore, there can be no dispute about possession of the property surrounding the suit structure in the suit property. Even about the structure, the three Courts have adjudicated such structure to be an illegal structure put up by the judgment debtors. Not even an argument was urged about the legality of the structure before me.

34. The First Appellate Court and this Court had ordered the demolition of such an illegal structure. The Hon'ble Supreme Court confirmed the finding of illegality. However, in exercising its powers under Article 142 of the Constitution of India, the decree holders were directed to pay for such a structure rather than demolish the same.

35. In the above circumstances, therefore, it is doubtful whether the Application under Order 21, Rule 97 r/w 101 of the

CPC was maintainable. However, this appeal was heard and decided based on the premise that such an application was maintainable. Upon consideration, however, the conclusions drawn by the two Courts, on merits, warrant no interference.

36. On the aspect of a full-fledged trial, it is not as if a full-fledged trial is a must no sooner the obstructionist approaches the Executing Court with an application under Order 21, Rule 97 r/w 101 of the CPC. However, at least a *prima facie* case raising some serious issue to be tried must be made out. The questions raised should have legally arisen between the parties to the proceedings. Further, they must be relevant to the adjudication. The Hon'ble Supreme Court so holds this in *Silverline Forum Pvt. Ltd. (supra)*. Merely asserting that the plea raised was independent of the plea raised by the judgment debtors is insufficient. The independence has to be demonstrated at least *prima facie*. No parties have a vested interest in drawing mileage from the unfortunate delays in the legal process.

37. Mr Lotlikar, the learned Senior Advocate for the decree holders, pointed out that while the present Appellant's sister was pressing the Application under Order 21, Rule 97 r/w 101 of the CPC, the other sister had instituted a separate suit, again to

frustrate the execution of the decree that had attained finality up to the level of the Hon'ble Supreme Court.

38. In this appeal, the Appellant pressed for interim relief, which was rejected by a speaking order by Brother S. K. Shinde, J. on 20.06.2022. Soon after that, the Appellant instituted a Review Petition which was heard for a considerable period and dismissed by my Order dated 13.10.2022. The learned counsel for the Appellant then requested that the Second Appeal be taken up for admission on 14.10.2022. Accordingly, the matter was taken up for admission, and the learned counsel for the parties were heard for a considerable time.

39. In *Satyawati v/s. Rajinder Singh (supra)*, the Hon'ble Supreme Court, began its Judgment by referring to the decision of the Privy Council in *General Manager of the Raj Durbhunga v/s. Coomar Ramaput Sing, (1871-72) – 14 MIA 605*. In this 1872 case, the Privy Council observed that the difficulties of a litigant in India begin when he has obtained a decree. The Court observed that even in 2013, the position has not improved, and still, the decree-holder faces the same problem encountered in the past.

40. The Court referred to the 1925 Judgment of the Privy Council in *Kuer Jang Bahadur v/s. Bank of Upper India Ltd.* – AIR 1925 Oudh 448 (PC) that the Courts in India have to be careful to see that Judgment-debtors do not abuse the process of the Court and the law of procedure in such a way as to make courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.

41. In *Babu Lal v/s. Hazari Lal Kishori Lal – (1982) 1 SCC 525*, the Hon'ble Supreme Court held that procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree-holder starts in getting possession in pursuance of the decree he obtained. The judgment debtor tries to thwart the execution by all possible objections.

42. In *Marshall Sons & Co. (I) Ltd. v/s. Sahi Oretrans (P) Ltd.*, the Hon'ble Supreme Court held that proceedings are dragged for a long time on one count or the other and, on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage. A person in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also known that its execution takes

a long time after obtaining a decree for possession of the immovable property.

43. Finally, after considering the above decisions, the Hon'ble Supreme Court in *Satyawati v/s. Rajinder Singh (supra)* held that it strongly felt that there should not be an unreasonable delay in the execution of a decree because if the decree-holder cannot enjoy the fruits of his success by getting the decree executed, the entire effort of the successful litigant would be in vain.

44. For all the above reasons, this appeal is dismissed because none of the questions proposed arise in this appeal. In any case, the contentions raised in support of the above questions cannot be accepted in the facts and circumstances of the present case.

45. Accordingly, this appeal is dismissed. Interim orders, if any, are vacated. The miscellaneous applications, if any, do not survive the dismissal of this appeal. Accordingly, even such miscellaneous applications, if any, are hereby dismissed.

46. However, there shall be no order for costs.

M. S. SONAK, J.