
(2013) 09 BOM CK 0227
In the Bombay High Court
Case No : First Appeal No. 101 of 2009

Bernardo and Others

APPELLANT

Vs

Mrs. Esperanza Miranda and Others

RESPONDENT

Date of Decision : 05-09-2013

Acts Referred:

Citation : (2014) 2 ABR 53

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Judgement

F.M. Reis, J.—Heard Shri Joseph Rodricks, learned Counsel appearing for the Appellants, Shri Menezes, learned Counsel appearing for the Respondent Nos. 1 to 7 and Shri Afonso, learned Government Advocate for the Respondent Nos. 10, 11 and 12. The above Appeal challenges the Judgment and Decree passed by the learned District Judge, South Goa, at Margao, dated 26.12.2008, whereby a suit filed by the Appellants for declaration and other reliefs came to be dismissed.

2. Briefly, the facts of the case are that the Appellants claiming to be co-heirs in the estate of Maria Florinda Cruz along with the Respondents herein filed the suit against the Respondents, inter alia, on the ground that the Respondent No. 4 had filed some tenancy declarations before the learned Mamlatdar without making the Appellants as parties and, as such, prayed inter alia that such Order of the learned Mamlatdar dated 23.02.2004 and the consequent purchase Sanad granted by the Mamlatdar to be declared null and void. It is the contention of the Respondent No. 4 in the written statement that even during the lifetime of said Maria Florinda, the father of the Respondent No. 4 was assisting her to carry out the cultivation of the suit paddy field and that consequently after her death, the Respondent No. 4 initiated proceedings to get herself declared as a tenant of the disputed property. The property which is under dispute is bearing chalta No. 9 sub-Divisions 9 and 10 of sub-division 1 of P.T. sheet No. 291 of Margao City. These sub-divisions admeasured an area of 2780 square metres and 3510 square metres. The learned Judge on the basis of the pleadings of the parties,

framed 13 issues. After recording of evidence and hearing the parties, the learned Judge deleted issue Nos. 1 and 2 and decided issue No. 3 in the affirmative. Whilst deciding the said issues, the learned Judge came to the conclusion that the Appellants have established that Smt. Florinda Cruz and her husband Roque Santana Miranda left behind as heirs the persons named in paragraph 8 of the plaint. The persons therein include the Appellants herein. The learned Judge has also deleted issue No. 4 but decided issue No. 5 in the affirmative. Whilst deciding the said issue, the learned Judge has come to the conclusion that there is no partition of the suit paddy field amongst the children of Florinda and her husband. The learned Judge has decided issue Nos. 6, 7, 8 and 9 in the negative. The learned Judge has found that the Appellants have failed to establish that the suit paddy field as per the oral understanding is being cultivated in the proportion of the respective shares. The learned Judge also came to the conclusion that the Appellants have failed to establish that the Judgment and Order dated 23.02.2004 passed by the Joint Mamlatdar-II of Salcete in Case No. JM-II/TNC/34/2003, was null and void. The learned Judge also came to the conclusion that the Appellants have failed to establish that tenancy purchase application was obtained by fraud and was null and void. The learned Judge also found that the Appellants have failed to establish that any construction activity was carried out by the Respondents and for the other reasons, the learned Judge dismissed the suit filed by the Appellants. On perusal of the findings of the learned Judge in connection with issue Nos. 6, 7 and 8, it is to be noted that the said issues were decided against the Appellants essentially on the ground that the Respondent No. 4 himself whilst filing an application before the learned Mamlatdar had in fact brought to the notice of the Mamlatdar that he was one of the heirs of the deceased Maria Florinda Cruz. The learned Judge on the basis of such statement of Respondent No. 4, has found that there was no suppression or any fraud committed by the Respondent No. 4 in disclosing the true facts before the learned Mamlatdar. The learned Judge as such found that as the Respondent No. 4 had disclosed that there were more heirs entitled to the estate of the said Maria Florinda, the Appellants have failed to establish that there was any fraud committed by the Respondent No. 4 in obtaining the said order. Merely because it was mentioned that there are other heirs to the estate by itself cannot mean that the exercise carried out by the respondent No. 4 in filing such proceedings to get the relief in his favour would not vitiate such exercise. It was incumbent upon the said respondent to make the appellants as parties and/or obtain a relief which would inhere to the benefit of the appellants. The devious manner in which such proceedings were initiated by the respondents have to be deprecated as by such exercise the appellants could have been deprived of their legitimate right over the suit property.

3. On perusal of the impugned Judgment, I find that considering that there was a claim of tenancy by the Appellant and as it is now well settled that the question of tenancy cannot be decided by the Civil Court and in case such issue arises, the issue has to be referred to the learned Mamlatdar. In the background of such

facts, the learned Judge was not justified to delete issue No. 2. Considering that the issue had already been framed and as the Civil Court had no jurisdiction to decide the said issue, the learned Judge ought to have referred the issue to the learned Mamlatdar for necessary adjudication. As the learned Judge found that the tenancy application filed by the Respondent No. 4 was for the benefit of the other heirs, I find that, in the interest of justice, this exercise would only prolong the litigation at this stage. In the facts and circumstances of the case and taking note of the findings of the learned Judge whilst deciding issue Nos. 5, 6, and 7, I find that the Appellants can always file an appropriate application before the learned Mamlatdar to get the survey holdings partitioned in accordance with law. In fact, considering the findings of the learned Judge, on issue Nos. 3 and 5 it cannot be disputed that the said Maria Florinda had other heirs besides the Respondent No. 4 and that the estate has not been partitioned. In the background of such findings of the learned Judge and the observations referred to hereinabove, I find that the Appellants can always file an application u/s 16 of the Agricultural Tenancy Act, 1964, to get their share partitioned. In case such measure is resorted to by the Appellants, the learned Mamlatdar would have to take appropriate measures in accordance with law taking note of the findings of the learned Judge whilst deciding issue Nos. 3 and 5 referred to hereinabove, which have become final. The declaration obtained by the Respondent No. 4 as well as the purchase certificate referred to hereinabove would inhere to the benefits of the legal heirs of the said Maria Florinda and this will not come in the way of the Appellants taking recourse to the provisions of the Agricultural Tenancy Act, 1964 to get their share partitioned in accordance with law. Keeping the liberty referred to hereinabove open to the Appellants, I find that there is no case made out for any interference in the impugned Judgment. The Appellants are as such entitled to resort to the measures in law in terms of the Agricultural Tenancy Act, 1964 to get their share partitioned in accordance with law.

4. Shri Rodricks, learned Counsel appearing for the Appellants, has submitted that the Respondents should be restrained from changing the nature of the suit property. The learned Judge whilst passing the impugned Judgment has come to the conclusion that the Appellants have failed to establish that any construction activity was carried out by the Respondents. In any event, in case of such cause of action arises, it is always open to the Appellants to take appropriate measures in accordance with law. In view of the above, I pass the following:

ORDER

(I) The Appeal stands disposed of by reserving the liberty to the Appellants to file appropriate proceedings before the learned Mamlatdar in terms of Section 14 of the Goa Agricultural Tenancy Act, 1964 or any other law if so advised in accordance with law.

(II) The impugned Order of the learned Joint Mamlatdar dated 23.02.2004 and the purchase certificate would not come in the way of the Appellants to seek such reliefs in view of such findings of the learned Judge in the impugned

Judgment referred to hereinabove.

(III) Appeal stands disposed of accordingly.