

(1992) 04 BOM CK 0010
In the Bombay High Court
Case No : Writ Petition No. 353 of 1991

Janardhan J. Shinkre

APPELLANT

Vs

Mrs. Ana Francisca Fernandes and Others

RESPONDENT

Date of Decision : 15-04-1992

Acts Referred:

Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 — Section 20, 27, 29, 29(4)

Goa, Daman and Diu Mundkars (Protection from Eviction) Rules, 1977 — Rule 14(13)

Citation : (1993) 2 BomCR 186

Hon'ble Judges : G.D. Kamat, J

Bench : Single Bench

Advocate : G.V. Tamba, for the Appellant; S.G. Dessai, for the respondent No. 1, for the Respondent

Judgement

G.D. Kamat, J.—This petition is styled as a petition under Articles 226 and 227 of the Constitution of India which prays for a writ of certiorari or any other writ, direction or order for quashing the three orders made by respondents 2, 3 and 4 in proceedings No. MAM/MUND/REG-PRIOL/539/86. Factual matrix is necessary to be stated for better appreciation of the grievance involved in the present petition. Respondent No. 1 Ana Francisca Fernandes is the widow of Josa Fernandes. As soon as the Goa, Daman and Diu Mundkars (Protection from Eviction), Act, 1975 was brought into force some time on 12th March 1976 the late husband of the first respondent made an application before the Joint Mamlatdar, Ponda Taluka for registering him as a Mundkar in the register to be maintained by the Mamlatdar under the provisions of section 29 of that Act. This application was registered as Case No. JM/MUND/PRIOL/192/85. Though it appears that the application was made some time in the year 1978, nothing was heard of this case. Jose Fernandes died some time in the year 1983. A notice addressed to Jose Fernandes by the Joint Mamlatdar was received some time in August 1985 by his widow and children calling upon the deceased to appear before him on 29th August 1985. It is common ground that the son appeared

before the Mamlatdar and told the Mamlatdar that his father died about a year ago. On that the Mamlatdar passed an order that since heirs are not brought on record the application filed by Joao Fernandes has abated.

2. On 30th August 1985 the first respondent Ana moved a fresh application for registration as a mundkar in terms of section 20 read with section 29 of the Mundkar Act. This was registered as a case bearing No. MAM/MUND/REC-PRIOL/539/86. However, it is relevant to note that in this application Ana mentioned that her husband had earlier filed an application but he was served with a notice after his death. No sooner a notice was issued on this application of Ana, the petitioner, who is Bhatkar, raised an objection that the application is not maintainable as the same is time barred. The Mamlatdar by the order dated 22nd June 1987 held that there is no bar for Ana filing a fresh application even though her husband's application was held to have been abated on his death. He held that such application does not attract the principle of res judicata because her husband's application was not decided on merits. This order was challenged by the petitioner before the Additional Collector in Case No. Mund/AC/Rev/185/ who dismissed the same by his order dated 29th August 1989 holding that he is unable to fault with the order of the Mamlatdar. The matter was thereafter taken in revision before the Administrative Tribunal in Mundkar Revision Application No. 62 of 1989 and the Tribunal by its order dated 20th September 1990 on an elaborate consideration held that the orders of the Mamlatdar and Additional Collector cannot be faulted with and the application of first respondent Ana is maintainable. This is how the three orders of the authorities below are now challenged in the present writ application.

3. Shri Tamba, learned Counsel appearing for the petitioner says that the doctrine of res judicata has been improperly invoked in holding that the application filed by the first respondent Ana is maintainable. According to him the sole question for the authorities to consider was after the proceeding abated on the death of her husband deceased Jose Fernandes, in the absence of heirs and legal representatives having been brought on record or obtaining an order for setting aside the abatement, the application of the first respondent was not maintainable and this, according to him, is a jurisdictional error committed by the three authorities. He now says that the application instituted by Ana dated 30th August 1985 cannot also be treated as an application for setting aside the abatement in the absence of prayer nor an application to bring Ana on record. He therefore, urged that whatever application filed by Ana on 30th August 1985 must also be held to be time barred.

4. The undisputed facts are that on or about 1st September 1978 Jose Fernandes the husband of first respondent filed an application in a proforma prescribed for registration as a mundkar. That application never saw the light of the day until a notice was directed to him to appear in person on 28th August 1985 at 11.00 a.m. Unfortunately this notice was much after the death of Jose, which occurred on 25th October 1983. In other words there was no inquiry in the application

filed by Jose and the question of deciding that application on merits did not arise. Since the notice was received by one of the family members, it appears that son of Jose appeared before Mamlatdar on 29th August 1985 and told the Mamlatdar that his father had expired more than a year earlier. On this statement itself the Joint Mamlatdar, Quepem made an order, which reads thus :

"29-8-1985. Case called out. Applicant's son remained present and stated that his father expired for about one year back and heirs are not brought on record.

Hence the application is abated.

Announced in open Court."

On the very second day the first respondent Ana made an application in proforma prescribed and presented it to the Mamlatdar, this time soliciting that she be registered as a mundkar. What is however relevant to notice is that at the end of the particulars required to be filed by an applicant for registration of a mundkar, she held out to the Mamlatdar that her husband had earlier furnished an application and he expired much before the notice calling upon him to appear before the Mamlatdar on 28th August 1985 had been served. To consider the grievance of Shri Tamba, learned Counsel appearing for the petitioner, it is necessary in the first place to see the relevant rule concerning the state of affairs once a party in a proceeding before the Mamlatdar under the Mundkar Act, 1975 dies during the pendency of the proceedings. The relevant sub-rule is (13) of Rule 14 of what is known as the Goa, Daman and Diu Mundkars (Protection from Eviction) Rules, 1977. It reads thus :

"(13) In case of death of any party while the case is pending.

(a) If an application is made within one month of such death, the Mamlatdar shall determine summarily who is the legal representative of the deceased party and subject to the provisions of the Act shall enter on record the name of such representative.

(b) If no such application is made, the case shall abate as regards that party."

Sub-rule (14) says that where the Mamlatdar orders the name of any person to be added as opponent or enters on the record the name of any person as the legal representative of the deceased party, he shall issue to such person a notice as provided in sub-rule (7) and the trial shall proceed on the date fixed in such notice. These sub-rules (13) and (14) have come about in Rule 14 which starts under the subheading "Manner of conducting enquiries". Section 27 of the main Act empowers the Mamlatdar, the Collector, the Administrative Tribunal or the Government to exercise all powers of Civil Courts in the conduct of inquiries and proceedings under the Code of Civil Procedure, 1908. What is, however, required to be seen is if sub-rule (13) of Rule 14 of the Rules of 1977 had not been in the statute books, Order XXII of the CPC would have held the field along with all its Rules. But the fact is that a special provision has been enacted in the matter of abatement and also bringing of legal representatives within the time prescribed

therein. The matter would be undoubtedly governed by sub-rule (13) and to that extent Order XXII of the CPC shall stand excluded. What therefore stands out is that in case of death of a party in a case before the Mamlatdar, the question as to bringing heirs and legal representatives or the matter of abatement shall be totally governed by sub-rules (13) and (14). It is, therefore difficult to accept the submission of Shri Tamba that even when proceedings are abated before the Mamlatdar it is not open to the legal representatives or a widow of a mundkar to institute fresh proceedings and presently I will point out that I am supported by the construction of the provisions itself. Clause (b) of sub-rule (13) says if no such application is made as laid down in Clause (a) the case shall abate as regards that party. In other words the party referred to in Clause (b) is the deceased referred to in Clause (a). It is not mentioned in any of these sub-clauses that the proceedings shall abate, with a further rider that no fresh proceedings would lie either at the instance of the widow or heirs and legal representatives on the same cause of action as specifically stated under Rule 9, Order XXII of the Code of Civil Procedure. In my view, therefore, there is no bar either for a widow or heirs and legal representatives to file a fresh application even when the earlier filed proceedings have abated as regards the deceased party.

5. The second aspect of the matter is that it is said that the case shall abate as regards that party and that is the end of the matter as far as that deceased party is concerned and it is not that the case shall abate. I therefore see no reason as to why the application filed by the first respondent Ana on 30th August 1985 must be held to be not maintainable and on the contrary on an interpretation of sub-rule (13) there can be no bar for maintainability of such application.

6. The second grievance of Shri Tamba that needs to be examined is whether the application of first respondent dated 30th August 1985 is time barred. In fact I have not come across any provision in the Act or the Rules that there is any particular time limit fixed for a mundkar to seek registration in the register to be maintained by a Mamlatdar of a respective Taluka but it must be said in all fairness to Shri Tamba, learned Counsel for the petitioner, that by implication persons desiring to get themselves registered as mundkars are required to apply for such registration after the Mamlatdar publishes a notice in that behalf inviting applications from mundkars and that too to be presented on or before such a date as specified in the notice. Such provision is found in sub-section (4) of section 29. I have already earlier mentioned that section 29 of the Act of 1971 casts a duty on the Government to cause a register of mundkars in respect of every village to be prepared and maintained in the prescribed manner. Sub-section (2) speaks of the particulars to be mentioned in an application. Sub-section (3) casts a duty on the Mamlatdar in the matter of preparation and maintenance of a register and that too, after such inquiry as may be prescribed. Sub-section (4) reads thus:

"(4) The Mamlatdar shall, before the preparation of the register, publish a notice,

in every revenue village inviting applications from the mundkars for registration and to be presented before such date as may be specified in the notice or such further time as may be allowed by him :

Provided that if, at any time after the publication of the notice, it is found that a mundkar has failed to apply for registering his name the Talathi within whose jurisdiction the dwelling house is situated, may, after propose to the Mamlatdar to enter the name of such mundkar in the concerned register of mundkars and the Mamlatdar shall dispose of the same as provided under sub-section (5)."

Sub-section (5) says that on receipt of the application the Mamlatdar shall give a notice to the Bhatkar or person interested in the land in which the dwelling house is situated to file their objections and give notice in respect of inquiry in the matter. Coming back to sub-section (4) it is clear that when an application is presented by a person seeking to register himself as a mundkar it could be allowed or permitted to be filed even beyond the date specified in that behalf by the Mamlatdar in the notice published by him and this is clear from the expression "before such date as may be specified in the notice or such further time as may be allowed by him". Apart from this extension the proviso makes a further extension by way of latitude that even after the publication of the notice and when a mundkar has failed to apply for registration, the Talathi of the village after making such inquiry as he considers necessary can propose to the Mamlatdar to enter such names of left out mundkars for inclusion in the list of mundkars already prepared and thereafter it is mandatory that Mamlatdar shall dispose of such request of Talathi in terms of sub-section (5). What emerges from this is that even after the register of mundkars is prepared and even at the instance of Talathi a left out mundkar can be included, of course after due inquiry even at the instance of Talathi of the village concerned. When this be the position it is futile to accept the argument that it is not open to a party to do so. Therefore the sequitur of all this discussion is that there is no time limit fixed by a statute for making an application for registration of a mundkar under the Mundkar Act. This apart, what is required to be seen is that husband of first respondent Jose had moved an application. The same was pending since the year 1978. For the first time the notice it appears was issued to him calling upon him to appear before the Mamlatdar on 29th August 1985. He was long dead before the issue of the notice. There was no adjudication with regard to the claim made by Jose Fernandes by the Mamlatdar. Since there was no inquiry there was no adjudication of list between deceased Jose and the present petitioner. Even on this score, therefore, it must be held that when Ana moved her application in her own name on 30th August 1985, there is no question of the applicability of either the principle of res judicata or constructive res judicata. The story would have been different if there had been any negative declaration against Jose Fernandes. Take for instance if Mamlatdar had already decided the application that Jose had not been a mundkar or that he cannot be registered as a mundkar and if against such decision late Jose had preferred an appeal or revision before the authorities and during the pendency of those proceedings no application was made to set

aside the abatement or to bring heirs and legal representatives on record then Shri Tamba would have been justified in saying that a negative declaration made against Jose Fernandes would hold the field for all the time to come and thereafter his wife and children could not have reopened the issue, but such is not the case in the present petition.

7. Finally it cannot be forgotten that the Mundkar Act, 1975 is a welfare legislation. In fact it was preceded by the Mundkar Protection Order made in the year 1971 for a period of two years and again extended for a period of two years in the year 1973 to afford protection from eviction finally. This protection with additional rights are enacted under the present statute known as the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975. The preamble of the Act itself suggests that the statute has been enacted for better protection of mundkars against eviction from their dwelling houses and in that rights have been created in them to purchase the house sites with a further object of abolition of free services. Regard being had to the colour, content and context of this statute, the provisions must be construed in favour of mundkars and in consonance with the benefits sought to be given to them and this is how I have attempted to deal with the matter.

8. Shri Tamba indeed mentioned that the Administrative Tribunal has misdirected itself on Article 1119 of the Civil Code (Portuguese). The Tribunal has observed that under that Article the immovable properties of the couple cannot be alienated or charged without the consent or common agreement of the spouses. The Tribunal undoubtedly places reliance upon this article to suggest that mundkarship is a right in the immovable property, therefore, the wife of a mundkar will have title to half share in that right. It must, however, be pointed out that mundkarship is a status and not a right. It is a status in relation to the Bhatkar qua the dwelling house and under the statute that status has been conferred certain rights. I am in agreement with Shri Tamba that import of Article 1119 by the Tribunal is improper.

9. The petition for the reasons mentioned fails. Rule is discharged. There shall, however, be no orders as to costs.