

(2013) 09 BOM CK 0244
In the Bombay High Court
Case No : Writ Petition No. 151 of 2012

Miss Aura Serafina Crispina de Souza and Another	APPELLANT
Vs	
Mr. Vitorino Mendonca and Another	RESPONDENT

Date of Decision : 27-09-2013

Acts Referred:

Citation : (2014) 1 ALLMR 658 : (2014) 2 MhLj 605

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

Bench : Single Bench

Judgement

F.M. Reis, J.—Heard Shri S.D. Lotlikar, learned Senior Counsel appearing for the Petitioners and Shri J. Vaz, learned Counsel appearing for the Respondent No. 1. The above Writ Petition, inter alia, seeks to quash and set aside by a writ of certiorari or any other writ or direction, the Order dated 05.08.2011, passed by the learned Civil Judge, Senior Division, at Mapusa, in Execution Application No. 3/05/B.

2. Briefly, the facts of the case as stated by the Petitioners are that the Petitioner, who is the owner of a property bearing survey No. 311/3, situated at Anjuna Village, filed a suit in the Court of the learned Civil Judge, Senior Division, Mapusa, against the Respondent No. 1 seeking eviction of the house bearing No. 513, situated in the said property.

3. Upon service of summons, the Respondent No. 1 filed the written statement and opposed the said suit. On the basis of the pleadings of the parties, the learned Judge framed several issues one of them being as to whether the Respondent No. 1 proves that he is residing as a Mundkar in the suit house. As the Respondent No. 1 had already initiated proceedings before the learned Mamlatdar to claim to be a Mundkar, the trial of the suit came to be stayed and the said issue was referred to the Mamlatdar for adjudication. The application filed by the Respondent No. 1 was dismissed by the learned Joint Mamlatdar by Order dated 31.08.1987 holding that the Respondent No. 1 was not a Mundkar in respect of the said house. An Appeal was preferred by the Respondent No. 1

challenging the Order of the Joint Mamlatdar which also came to be dismissed on 24.09.1998. Thereafter, Respondent No. 1 filed a Writ Petition before this Court challenging the Order of the Administrative Tribunal being Writ Petition No. 236 of 1999, which came to be dismissed by Order dated 06.09.1999. A Latter's Patent Appeal preferred challenging the Order of the learned Single Judge also came to be dismissed. Hence, the plea of the mundkarship was ultimately rejected. The Respondent No. 1 thereafter filed an application for amendment of the written statement, inter alia, seeking to delete the plea that he was occupying the said house as mundkar from the written statement and to add a plea that he was in open, exclusive and uninterrupted possession of the suit house since the year 1959 and, therefore, had become owner by adverse possession. The amendment application filed by the Respondent No. 1 was dismissed by Order dated 21.09.2000. In the Appeal filed by the Respondent No. 1 challenging the Decree of eviction passed by the learned Trial Court, the Respondent No. 1 challenged the Order dismissing the application for amendment. The learned Appellate Court allowed the said amendment and permitted the Respondent No. 1 to also raise the plea of adverse possession. Based on the available evidence on record, the Lower Appellate Court allowed the Appeal preferred by the Respondent No. 1 and set aside the Judgment and Decree passed by the learned Trial Court. Aggrieved by the said judgment, the Petitioners preferred a Second Appeal before this Court being Second Appeal No. 44 of 2002, which came to be admitted and ultimately allowed by Judgment and Decree dated 02.12.2004. Consequently, the suit filed by the Petitioners came to be decreed. Subsequently, the Petitioners preferred an application for execution of the Judgment and Decree being Execution Application No. 3/05. The said execution was allowed by the Executing Court by its Order dated 24.03.2009 and the contention of the Respondent No. 1 opposing the said Execution Application, came to be rejected. Being aggrieved by the said Order, the Respondent No. 1 filed an appeal before the learned District Judge, being Regular Civil Appeal No. 45/2009, which also was dismissed by Judgment and Order dated 28.07.2009. The Respondent No. 1 filed an application for stay of the execution proceedings in which he contended that he has filed an application u/s 8A read with Section 5 of the Mundkar Act to declare himself as a Mundkar of the suit dwelling house and that the application which was earlier dismissed by Order dated 31.08.1987 was only for registration u/s 29 of the Mundkar Act. Thereafter, an application filed by the Respondent No. 1, came to be dismissed by the learned Mamlatdar. Against the said Order, the Respondent No. 1 preferred an Appeal before the learned Deputy Collector, Bardez, being Mundkar Appeal No. DC/MUND/APL/3/2009 in which an ex parte Order of temporary injunction was granted on 29.12.2009. The application for stay of the execution proceedings in the said Execution Application No. 3/05 before the learned Executing Court filed by the respondent No. 1 was allowed by Order dated 05.08.2011 which is challenged by the petitioners in the above petition along with the said ex-parte order dated 29.12.2009 passed by the respondent No. 2.

4. The Respondent No. 1 filed an affidavit in reply stating, inter alia, that the Petitioners have made a false statement to misguide this Court that his application for declaration of mundkarship was dismissed as otherwise it is pending for holding an inquiry before the learned Mamlatdar and what was dismissed was an application for temporary injunction by Order dated 29.10.2009, against which Mundkar Appeal has been preferred and is pending before the Respondent No. 2. It is further his contention that Order passed by the learned Deputy Collector is fully justified in view of the fact that the point considered by the authority is to address on the distinctive features of the proceedings u/s 8(A) of the Mundkar Act as distinct from the provisions of Section 29(4) of Mundkar Act. It is further his case that the occupation of the Respondent No. 1 dates back to the year 1959 during the lifetime of Lawry D'Souza, the original landlord of the said house. It is further his contention that the execution proceedings referred to herein initiated by the Petitioners becomes an exercise in futility. It is further his contention that execution proceedings initiated by the Petitioners are rendered infructuous despite of the voluminous background set out in the Petition history of the proceedings which continued to spread for number of years. Accordingly, it is contended that the Petition be rejected.

5. Shri S.D. Lotlikar, learned Senior Counsel appearing for the Petitioners, has assailed the impugned Order on the ground that the proceedings initiated by the Respondent No. 1 is an abuse of the process of the Court and, according to him, once the issue of Mundkar has been finally decided, the question of now filing any application for declaration is totally misplaced. Learned Senior Counsel further submits that after issue was framed in the Civil Suit, the same came to be referred to the learned Mamlatdar and as the proceedings initiated by the Respondent No. 1 were already pending, it was found fir that the reference by the Civil Court could be decided on the basis of such proceedings. Learned Senior Counsel farther pointed out that the findings which have been arrived at by the learned Mamlatdar in the said proceedings were in fact accepted as findings in the matter of declaration by the Respondent No. 1 which can be seen by his conduct in the Civil Court. Learned Senior Counsel further pointed out that on the basis of the findings of the learned Mamlatdar which remitted to the Civil Court, the issue of mundkarship framed by the learned Judge came to be decided and, in fact, the Respondent No. 1 sought to delete his claim of mundkarship and put up a claim that he was the owner by adverse possession. Learned Senior Counsel further submits that in the Judgment of this Court whilst dispose of the Second Appeal, there is a specific observation that the claim of mundkarship has been concluded by the Order of the learned Mamlatdar and it is not open to the Executing Court to stay the proceedings on the ground that some temporary injunction has been obtained from the learned Deputy Collector. Learned Senior Counsel further submits that the whole exercise of the Respondent No. 1 is to only delay the proceedings by raising such false vexatious claims. Learned Senior Counsel further points out that the learned Judge has acted with material

irregularity in exercising of its jurisdiction by staying the execution proceedings which is totally erroneous. Learned Senior Counsel in support of his submissions has relied upon the Judgment of the Apex Court reported in Rameshwari Devi and Others Vs. Nirmala Devi and Others, . Learned Senior Counsel as such submits that despite of obtaining an ex parte order from the learned Dy. Collector way back in the year 2009, the Respondent No. 1 has been delaying the proceedings by not taking steps to serve the Respondents therein and taking advantage of such ex parte order for the last many years. Learned Senior Counsel further pointed out that the parties who are not served are not at all necessary parties for deciding the temporary injunction application and that the Respondent No. 1 is delaying the proceedings, to deprive the petitioners the fruits of the Decree passed in their favour. Learned Senior Counsel as such submits that the impugned Orders be quashed and set aside.

6. On the other hand, Shri J. Vaz, learned Counsel appearing for the Respondent No. 1, has supported the impugned Order. The learned Counsel has pointed out that the proceedings which were disposed of in the earlier proceedings are proceedings for registration of Mundkar in terms of Section 29 of the Mundkar Act and it is now well settled that proceedings for declaration are maintainable even though such application for registration has been dismissed. Learned Counsel further pointed out that the Order passed in registration application has only a presumptive value which can always be rebutted by the Respondent No. 1. Learned Counsel further pointed out that this Court has held that an application for declaration is maintainable despite of the disposal of the registration application in the Judgment reported in Smt. Gulabi Sangtu Devidas and Others Vs. Smt. Prema Govinda Gauncar and Others, . The learned Counsel has thereafter taken me through the Order passed by the learned Mamlatdar whilst disposing of the earlier proceedings and pointed out that such proceedings were in the course of registration proceedings and, as such, the application for declaration filed by the Respondent No. 1 cannot be said to be not maintainable. Learned Counsel further pointed out that this aspect has been dealt with by this Court in a number of Judgments and it has been conclusively established that in such situation, the Civil Court cannot proceed with the execution of the Decree when such issue is pending before the learned Mamlatdar. The learned Counsel in support of his submissions has relied upon the Judgment of this Court passed in Writ Petition No. 317 of 2004 in the case of Miss Adelia Albuquerque vs. Shri Vithal D. Dabholkar, dated 04.10.2011, Judgment dated 08.09.2006, passed in Writ Petition No. 347 of 2002 in the case of Baburao Vishnu Naik Vs. Ramchandra Vishnu Naik and another, in the case of Baburao Vishnu Naik vs. Ramchandra Vishnu Naik & Anr. and 2001 (1) GLT 3, in the case of Shri Subha Venkatesh Kamat vs. 1. Shri Vasu Naik & Ors. The learned Counsel has further pointed out that the Petitioners are taking diverse contentions inasmuch as at one breadth they do not dispute that the application for registration does not debar a party to file the application for declaration of mundkarship and considering the falsity of the claim of the petitioners, this Court should not interfere in the impugned

Order. The learned Counsel further submits that considering that the impugned Order is passed to advance the cause of justice, no interference is called for in the impugned Order. Learned Counsel also raised a contention that the Writ Petition itself is not maintainable as, according to him, the remedy available to the Petitioner is to file a revision in terms of Section 115 of the Civil Procedure Code. Learned Counsel as such submits that the above Petition be rejected.

7. On the basis of the submissions of the learned counsel and the records the facts suggest that the petitioners had filed a suit for eviction of the respondent No. 1 being Regular Civil Suit No. 272/83. In the said suit, in view of the defence taken by the respondent No. 1 an issue was framed as issue No. 8 as to whether the respondent No. 1 proves that he is residing as a mundkar in the suit house?. In terms of the provisions of Section 32 of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (herein after referred to as the "Mundkar Act"), the Civil Court stayed the suit and referred such issue to the learned Mamlatdar for determination. It appears that it was accepted that as the proceedings were already initiated by the respondent No. 1 to establish such claim, the issue referred would be answered on the basis of such determination. While disposing of the suit by judgment and decree dated 28.09.2000, the learned Judge recorded that the said issue has been disposed of in view of the findings rendered by this Court in Writ Petition No. 236 of 1999 on 06.09.1999. The said order was passed by this Court while disposing of the petition filed by the respondent No. 1 challenging the findings of the authorities below namely the Mamlatdar and the learned Administrative Tribunal rejecting his claim that he was a mundkar of the suit house. Section 32(2) of the Mundkar Act provides that on receipt of such reference from the Civil Court, the Mamlatdar or the Collector shall deal with and decide such issues in accordance with the provisions of the Act and shall communicate his decision to the Civil Court and such Court shall thereupon decide the suit in accordance with the procedure applicable thereof. This communication is found endorsed in the judgment of the Joint Mamlatdar dated 31.08.1987, a copy of which was submitted to the Civil Court in response to such reference. Section 31(2) of the Mundkar Act further provides that no Civil Court shall have jurisdiction to settle, decide or deal with any question or to determine any matter which is by or under the Act required to be settled, decide or dealt with or to be determined by the Mamlatdar or the Collector or the Government or the Administrative Tribunal and no order passed by such authority under this Act shall be questioned in any Civil or Criminal Court. As such, as far as the Civil Court is concerned, in view of the order passed in the reference made by the learned Judge, the findings with regard to issue No. 8 stands concluded and it is not open to the Civil Court now to anyway question the correctness of the said findings. The law clearly provides that the Civil Court has to proceed with the suit on receipt of such reference as per the procedure thereto. Even in the present case, the respondent No. 1 himself accepted the said position and moved the said application for amendment of the written statement inter-alia deleting the claim that he was a mundkar of the suit house

and went to the extent of even mentioning that the plea of mundkarship does not survive in view of the judgment of the Mamlatdar confirmed by the higher Court. As such, it is not open to the respondent No. 1 to try to delay the proceedings by reopening such plea in the civil proceedings.

8. Thus after receiving the findings on such issue and following the procedure laid down by law, the learned Judge decreed the suit filed by the petitioners. It would also be pertinent to note that the respondent No. 1 also sought to amend the written statement inter-alia to add another plea namely that the respondent openly, exclusively, uninterruptedly in peaceful possession of the suit house and the suit property adversely to the claim of the petitioners herein. The said application for amendment was dismissed but however the Lower Appellate Court allowed the said application for amendment and thereafter allowed the appeal filed by the respondent No. 1 and set aside the judgment of the learned Trial Court. The Second Appeal filed before this Court being Second Appeal No. 44 of 2002 came to be allowed and the judgment of the Lower Appellate Court dated 10.05.2002 was set aside and the judgment of the learned Trial Court dated 28.09.2000 was restored. It would also be appropriate to record some of the observations of this Court while deciding the said Second Appeal. This Court inter-alia had framed a substantial question of law as to whether in view of the categorical finding of the competent Court under the Mundkar Act, while determining the issue of mundkarship which was remitted to them for decision in view of the exclusive jurisdiction of the said authorities to decide the same, that the respondent was not a mundkar because he was caretaker of the suit house, it was permissible for the Civil Court to entertain a plea of adverse possession on the part of the respondent herein? At para 20 of the said judgment, this Court has further observed that "In my view, once it was held by the Mamlatdar, a Court of competent jurisdiction that the defendant was not a mundkar but was a caretaker and in the absence of any other plea having been taken by the defendant, defendant had no other straw to hold on to the suit house/property. In other words, the defendant had no other status to continue in occupation of the suit house/property against the wishes of the plaintiffs who had become the owners of the house/property pursuant to the said gift deed". The said observations of this court clearly show that the contention of Mr. Vaz, learned counsel appearing for the respondent No. 1 that the reference to the Mamlatdar by the Civil Court has not been answered cannot be accepted. This Court has conclusively held that the claim of the respondent No. 1 as to whether he is a mundkar of the suit house has been finally adjudicated and held the said question in the negative in view of the findings on the issue referred to the learned Mamlatdar. As such, as far as the Civil Court is concerned, merely because some proceedings have been initiated by the respondent No. 1 before the learned Mamlatdar and/or pending before the Dy. Collector would not preclude the Civil Court to proceed with the execution of the decree which has become final. The findings of the learned Mamlatdar on the issue rendered in the reference by the Civil Court cannot be reopened by the Civil Court. As such, the

learned Judge while passing the impugned order was not justified to refuse to proceed with the execution proceedings and/or keep the execution proceedings in abeyance in view of the proceedings initiated by the respondent No. 1 before such authorities.

9. Mr. Vaz, learned counsel appearing for the respondent No. 1 during the course of his submissions has relied upon the judgment of the learned Division Bench of this Court in the case of Smt. Gulabi Sangtu Devidas (*supra*). The said judgment is no doubt would be applicable in the facts and circumstances of each case but however this Court in the judgment in Writ Petition No. 317 of 2004 has observed at paragraph 10 thus:

10. Considering that the application preferred by the respondent No. 1 for registration as a mundkar came to be finally decided against the respondent No. 1 in the earlier proceedings which were initiated at the instance of such respondent a presumption that the respondent is not a mundkar will have to be drawn in view of the earlier orders passed by the Authorities whilst deciding the application for registration in any subsequent proceedings initiated by such person u/s 8A of the Mundkar Act for a declaration that he is a mundkar of such house. Once such presumption is drawn the burden would heavily be on the respondents to establish that despite of the said orders the respondents are the mundkars of the suit house. On perusal of the impugned judgment passed by the Courts below, I find that the Authorities below have wrongly cast the burden on the petitioners to establish that the respondents are not the mundkars of the suit house. This approach is erroneous as considering the judgment of the Division Bench in the case of Gulabi (*supra*) it was incumbent upon the Authorities to consider the findings in the orders passed by the authorities whilst disposing of the application for registration of mundkar filed by respondent No. 1 as well as the orders passed by this Court while disposing of Writ Petition filed by the respondent No. 1 which came to be finally rejected.

10. Considering the said observations, even in such proceedings the presumption would be that such person is not a mundkar. The next judgment relied upon by Mr. Vaz, learned counsel appearing for the respondent No. 1 was passed in Writ Petition No. 347 of 2002 dated 08.09.2006 which is not at all applicable to the facts of the present case. The claim put forward therein was for a structure which had much bigger area than the structure which was the subject matter of the suit before the Civil Court which had a lesser area. On such facts, the learned Single Judge of this Court observed that the proceedings initiated by such person for declaration were maintainable. But however, the observations of the learned Single Judge at paragraph 12 would be relevant wherein it has been observed inter-alia that the decision in the petition shall not come in the way of the petitioner in getting the decree in the Civil suit duly executed through the Civil Court. This shows that as far as the suit house in the suit was concerned, there was no impediment to proceed with such execution. The judgment of the learned Single Judge relied upon by Mr. Vaz, in the case of Mr. Baburao Vishnu Naik

(supra) is on different facts of the case wherein the point for consideration was whether the dwelling house would also include a part of the house and whether the Executing Court could go behind the decree to examine whether the decree is a nullity and unsustainable in law. In the said case, the issue of mundkarship was not referred by the Civil Court in the suit as in the present case and as such the said judgment is not applicable to the facts of the present case. In the present case, as stated herein above the claim of the respondent No. 1 that he was a mundkar was duly determined by the learned Mamlatdar in a reference in terms of Section 32 of the Mundkars Act. Next judgment of the learned Single Judge in 1989 (2) GLT 167 in the case of Shantaram Babani Xete Kurtorkar & Anr. Vs. Vishnu Babani Xete Kurtorkar & Anr., would be considered herein below while disposing of the above Petition. In the subject matter of the said petition, there was no reference made to the learned Mamlatdar during the course of the suit as in the present case.

11. In view of the above, considering that the issue of mundkarship as far as the Civil Court is concerned has been concluded, it is not open to the respondent No. 1 to now put up a fresh claim with that regard in the execution proceedings and try to stay the execution of the decree. The Apex Court in the judgment in the case of Rameshwari Devi and Others Vs. Nirmala Devi and Others, has observed at paragraph 28 thus:

28. It is abundantly clear from the facts and circumstances of this case that the appellants have seriously created obstacles at every stage during the course of trial and virtually prevented the court from proceeding with the suit. This is a typical example of how an ordinary suit moves in our courts. Some cantankerous and unscrupulous litigants on one ground or the other do not permit the courts to proceed further in the matter.

12. The facts of the case at hand clearly disclose how the respondent has been creating objections only to frustrate the execution of the decree by raising untenable objections. I need not enter into the validity of the proceedings initiated by the Respondent No. 1 before the Mamlatdar and are stated to be pending before the learned Dy. Collector. Suffice it to say that as far as the Civil Court is concerned, the question of deferring the execution proceedings merely on the basis of some proceedings pending before the authorities under the Mundkar Act is not at all justified. Thus, I need not go into the merits and/or maintainability of such proceedings in the present petition. However, it appears that the application for temporary injunction filed by the respondent No. 1 before the learned Mamlatdar in the proceedings initiated by him came to be dismissed by order dated 19.10.2009. The respondent No. 1 preferred an appeal before the Dy. Collector, Mapusa and upon hearing the respondent No. 1, an ex-parte temporary injunction restraining the petitioners from taking possession and evicting the respondent from the suit house came to be granted. The disturbing factor is that though such ex-parte orders apparently passed in the year 2009, has not been disposed of up to this date.

13. Mr. Lotlikar, learned Senior Counsel appearing for the petitioners has also pointed out that the said order is without jurisdiction as according to him the appeal is not maintainable as the order impugned therein is an interim order. This aspect would have to be dealt with by the Dy. Collector on its own merits. It is further pointed out that the respondent No. 1 is unnecessarily delaying the proceedings. Considering the peculiar facts of this case, necessary directions can be given to expedite the proceedings pending before the Dy. Collector. Mr. Lotlikar, learned Senior Counsel has further pointed out that the respondent No. 1 has not taken appropriate steps to serve the other respondents who are the predecessor in title of the petitioners. The said parties in any event are not at all necessary for deciding the application for temporary injunction which is essentially against the petitioners. Mr. Vaz, learned counsel fairly accepts that the injunction sought by the respondent No. 1 is essentially as against the petitioners herein. As such not serving the other respondents cannot detain the learned Dy. Collector to proceed to decide the application for temporary relief sought by the respondent No. 1 in the said appeal. Considering the observations of this Court in the said judgment of the learned Single Judge in the case of Shantaram Xete Kurtorkar (supra), I find it appropriate to direct the learned Civil Judge Senior Division, Mapusa, to issue the warrant of possession of the suit house and the suit property to be delivered to the Petitioners in terms of the decree and keep such warrant suspended until the exparte ad-interim order passed by the Dy. Collector dated 29.12.2009 is in operation in connection therewith. In the facts and circumstances of the case and considering that the proceedings are being delayed before the learned Dy. Collector, I find it appropriate to also direct the learned Dy. Collector to dispose of the Appeal No. DC/MND/APL/3/09 and/or the application for interim relief filed in the said appeal as expeditiously as possible irrespective as to whether the other formal parties are served or not after hearing the petitioners and respondent No. 1 in accordance with law within one month from the date of the receipt of this order. The contention of Mr. Vaz, learned counsel appearing for the respondent No. 1 that the impugned order can be challenged in a revision cannot be accepted as in case the impugned order is set aside it would not finally dispose of the execution proceedings in terms of the proviso to Section 115 of the Civil Procedure Code. In view of the above, I pass the following:

ORDER

(i) The impugned order dated 05.08.2011 passed by the learned Civil Judge Senior Division, Mapusa, in Execution Application No. 3/05/B is modified and the learned Civil Judge Senior Division, Mapusa, is directed to issue the warrant of possession in respect of the suit house and suit property in terms of the decree and keep it suspended until the order dated 29.12.2009 passed by the Dy. Collector is in operation in connection therewith.

(ii) The learned Dy. Collector is directed to dispose of the Appeal No. DC/MND/APL/3/09 and/or the application for interim relief after hearing the petitioners

and the respondent No. 1 in accordance with law within one month from the receipt of this order. The learned Dy. Collector shall file a compliance report immediately thereof in this court.

(iii) The Parties are directed to appear before the learned Dy. Collector on 04.10.2013 at 3.00 p.m.

(iv) Rule is made absolute in above terms with costs.

(v) The Petition stands disposed of accordingly.