

(2017) 09 BOM CK 0138
In the Bombay High Court
Case No : 269 of 2014

Mr. Alfredo M. Rodrigues, & Ors.

APPELLANT

Vs

Mr. Gokulanant Bascara Naik, (since deceased), through his
legal heirs: Mr. Vinayak alias Pandarinath B. Naik, & Ors.

RESPONDENT

Date of Decision : 15-09-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Goa, Daman and D

Citation : (2017) 09 BOM CK 0138

Hon'ble Judges : Nutan D. Sardessai

Bench : SINGLE BENCH

Advocate : R. Menezes, A. Agni, M. Shaikh

Final Decision : Dismissed

Judgement

1. Heard Shri R. Menezes, learned Advocate for the petitioners and Ms. A. Agni, learned Senior Advocate for the respondent no.1(a)(i & ii).

2. This petition takes exception to the judgment and order dated 22.10.2013 passed by the learned Administrative Tribunal in Mundkar Revision Application No.20/1992 dismissing the Revision Application and the judgment dated 13.03.1992 passed by the learned Additional Collector, North Goa, Panaji, setting aside the order passed by the learned Mamlatdar in Mundkar case No. MUND/22/1973 by invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. It was the contention of Shri Menezes that the suit was filed by the predecessor of the respondent no.1 being Civil Suit No.30/1969 for his eviction which was decreed. The second suit bearing Civil Suit No.116/1969 was filed against him again by the predecessor of the respondent no.1 in respect of the suit hut and which came to be decreed in 1973 followed by the Execution Proceedings in 1974. He had moved an application declaring him as a mundkar on 26.10.1973 under the Mundkar Act of 1971 and in which he

came to be declared as a mundkar vide the judgment dated 23.12.1980. The appeal filed against this judgment was dismissed while the revision came to be allowed vide the judgment dated 05.11.1986 giving rise to the petition before this Court when an order was passed on 27.01.1989 remanding the matter to the learned Administrative Tribunal. The respondent preferred a Letters Patent Appeal which was partly allowed remanding the matter to the learned Additional Collector who allowed the respondent's appeal and set aside the declaration in the petitioner's favour vide the impugned judgment dated 13.03.1992.

3. The petitioner challenged this order in revision before the learned Administrative Tribunal which came to be dismissed vide the judgment dated 22.10.2013. It was his contention that he had moved an application for mundkarship carving his right to the suit hut and appropriate findings given by the learned Mamlatdar in his favour. The order passed by the learned Additional Collector of remand did not properly consider the issue of mundkarship nor the case of the petitioner in its proper context and allowed the appeal filed by the respondent. The learned Tribunal too rendered the findings which were dehors the case of the petitioner even though he had set out his case in his application for declaring him as a mundkar. The learned Mamlatdar in his order had clearly discussed the case and rendered the findings and there was no basis in the findings of the learned Administrative Tribunal taking exception to the order of the learned Mamlatdar when it was the requirement of law that the respondent lead evidence first and then the petitioner. The learned Additional Collector too had to consider the entire evidence in view of the order of remand. The learned Administrative Tribunal had not rendered any finding that there was a jurisdictional error committed by the learned Mamlatdar holding in the petitioner's favour. The orders of the learned Additional Collector and the learned Administrative Tribunal were bad and therefore it was a fit case to exercise the jurisdiction under Article 227 of the Constitution of India and decide in the petitioner's favour.

4. Ms. A. Agni, learned Senior Advocate for the respondent no. 1(a)(i & ii) submitted that the subject matter of the suit initiated by the respondent no.1 being Civil Suit No.116/1969 was for the suit hut which was the same as in the Mundkar case No. MUND/22/1973 initiated by the petitioner himself. Consequent to the decree in the suit, the hut came to be demolished by the order of the Civil Court and the proceedings did not survive. She relied in *Jai Singh and others vs Municipal Corporation of Delhi and Another* [(2010) 9 SCC 385] to buttress her contention that the power of the High Court had to be exercised under Article 227 of the Constitution of India in exceptional manner and when there was complete perversity and grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice by the Court below and not otherwise. She relied upon the plaint, the written statement and the judgment in the Civil Suit No.116/1969 to buttress her case that there was no case of two huts even set out by the petitioner in his written statement and which was sought to be canvassed in the proceedings before the learned Mamlatdar. There was ample

clarity on the suit hut which was the subject matter of the civil suit and the application for declaration as a mundkar.

5. It was further the contention of Ms. Agni, learned Senior Counsel that the learned Mamlatdar had not at all looked into the pleadings in the said suit while rendering the judgment and giving the findings at page 51 that there were two houses i.e. one shop and one hut in occupation of the petitioner and the latter was evicted by the Court's order from the shop where he was selling wine and he had failed to prove his case as far as his suit hut was concerned. This was a clear error in judgment on the part of the learned Mamlatdar in properly appreciating the pleadings and partly in the light of the pleadings in the Civil Suit No.116/1969 which were produced before the learned Mamlatdar. There was no proper appreciation of the evidence by the learned Mamlatdar who had not considered the ingredients of the Mundkar Act even accepting for a moment that the 1975 Act applied to the case of the petitioner. The findings of the learned Mamlatdar that the hut was not the subject matter of the Civil Suit No.116/1969 was not borne out from the pleadings and that the learned Mamlatdar had mechanically conceded to the submissions of the learned Advocate for the petitioner that the hut was not the subject matter of such suit. The learned Mamlatdar had not given any finding on the lawful residence of the petitioner.

6. Ms. Agni, learned Senior Advocate further submitted that there was no justification on the part of the petitioner to contend that the learned Additional Collector had not properly considered the case and quite on the contrary he had considered the case of the petitioner and on an appreciation thereafter had rendered his findings. There was no perversity in the judgment of the learned Additional Collector and therefore the criticism of the judgment was unjustified. There was no justification for questioning the judgment of the learned Administrative Tribunal and therefore on all these counts and the law laid down in Jai Singh (supra), there was no basis to allow the petition.

7. i have considered the submissions of Shri R. Menezes, learned Advocate for the petitioner and Ms. A. Agni, learned Senior Advocate appearing for the respondent no.1a (i & ii). i would first deal with the judgment in Jai Singh (supra), where the Hon'ble Apex Court considered the nature and scope of the power of the High Court under Article 227 of the Constitution of India being supervisory and observed at para 15 as below.

"15..... Undoubtedly the High Court, under this Article, has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi - judicial tribunals, exercise the powers vested in them, within the bounds of their authority. The High Court has the power and the jurisdiction to ensure that they act in accordance with the well established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this Article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, well to remember the well known

adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well recognized constraints. It can not be exercised like a "bull in a china shop", to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice."

8. In that context, it was incumbent upon the petitioner to show from the orders assailed by him that the Court below had committed jurisdictional error and that this Court was required to exercise its supervisory jurisdiction in terms of Article 227 of the Constitution of India to correct the orders purportedly passed in grave dereliction of duty or in flagrant abuse of the fundamental principles of law or justice.

9. The Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 defines a "mundkar" in terms of the Section 2(p) being a person who with the consent of the bhatkar or the person acting or purporting to act on behalf of the bhatkar lawfully resides with a fixed habitation in a dwelling house with or without obligation to render any services to the bhatkar and includes a member of his family but does not include- (i) a person paying rent to the bhatkar for the occupation of the house, (ii) a domestic servant or a chowkidar..... (iii) a person employed in a mill, factory, mine, workshop..... (iv) a person residing in the whole or part of a house....., as a care-taker of the said house or for purposes of maintaining it in habitable condition. It would have to be seen therefore from the available material whether the petitioner falls within the definition of "Mundkar" as contemplated under the 1975 Act accepting the position that though he had filed an application in 1973, prior to the enactment of this Act and when 1971 Act was applicable, the Act of 1975 would apply when the substantial part of the evidence was recorded thereafter and the findings rendered by the learned Mamlatdar on his application as late as 1980.

10. It was not disputed that the petitioner was in occupation of a shop belonging to the respondent no.1 and from which his eviction was sought pursuant to the Civil Suit No.30/1969 and decreed in favour of the predecessor of the respondent no.1. There was no dispute that the Civil Suit No.116/1969 was subsequently filed by the respondent no.1 and which came to be decreed in 1973. A cursory perusal of the pleadings in the suit would reveal that the predecessor of the respondent no.1 had clearly pleaded that the petitioner had fearing his eviction from the shop pursuant to the Civil Suit No.30/1969 had put up a roof of palm leaves to the palm leaf hut which was existing in the property of the respondent no.1 and started residing therein. On that basis the predecessor of the respondent no.1 had maintained the suit for a declaration that he was the owner and possessor of the suit hut and sought eviction of the petitioner from the suit hut. A reading of the written statement filed by the petitioner in answer to these

pleadings would be relevant inasmuch as he has taken a plea that he was residing in the said property as a mundkar in the hut belonging to him and earlier to him his forefathers and denying the case of the respondent no.1 that he had put up a roof to the palm leaf hut and only covered the roof of the hut with tiles. No case of assertion was set out by him that there was another hut in the said property in his occupation as a mundkar and his right whatsoever was restricted to the suit hut. A perfect reference is made to this respect since a valiant effort was made by Shri Menezes, learned Advocate for the petitioner to advert to the evidence recorded before the learned Mamlatdar and the findings rendered by him to canvas a plea that there were two huts or that a portion of the suit hut alone was demolished pursuant to the decree in the Civil Suit No.116/1969 and that there was still in existence a portion of the hut of which he was a mundkar and entitled to be protected qua its possession and enjoyment in the said capacity.

11. Ms. Agni, learned Senior Advocate for the respondent no.1 had also relied upon the judgment in the said suit where the learned Civil Judge (as His Lordship then was) had rendered the categorical findings that it was undoubtedly proved from the entire evidence that the petitioner herein had replaced the roof of the palm leaves of the hut by putting the manglore tiles and started residing in the suit hut after his eviction from the liquor shop. In the same breath, the learned Judge on the basis of the evidence had given clear findings that it was only subsequent to his eviction from the liquor shop that the petitioner had shifted his residence to the suit hut and ultimately in the absence of any cogent evidence by the petitioner decreed the suit in its entirety with costs in favour of the predecessor of the respondent no.1. In other words, there was no escape for the petitioner from the clear findings in the judgment which were not upset in the appeal and the decree was the subject matter of the execution pursuant to which the suit hut came to be demolished.

12. Coming now to the case of the petitioner, he has set out a case that he was residing in the hut located in the property of the predecessor of the respondent no.1, that it was constructed of palm leaves set up on the wooden poles and that it was in 1969 that he has changed the roof of the hut and put the manglore tiles and materially that the said work was done within the same old plinth area of the suit hut. He had also clearly set out that the predecessor of the respondent no.1 had filed the suit for his eviction from the suit hut bearing Civil Suit No.116/1969 and it being decreed in favour of the respondent no.1 in 1973 and on that premise of he being a mundkar he has sought for the declaration also that he was an agricultural labourer.

13. The Mamlatar while deciding his application was seized of the fact that the predecessor of the respondent no.1 had taken a specific plea that the suit hut was erected by the petitioner only after the eviction order was passed by the Civil Court in respect of the liquor shop-cum-residence in the Civil Suit No.30/1969 and that the Civil Suit No.116/1969 was also filed for his eviction

from the suit premises. The Mamlatdar on scrutiny of the evidence led by the parties had rendered an erroneous finding that there were two houses i.e. one shop and one hut in occupation of the petitioner and he was evicted by the Court order of the shop where he was selling wine. Quite on the contrary, the learned Mamlatdar shifted the burden on the predecessor of the respondent no.1 that he has not brought any evidence on record to prove that the suit hut was constructed without his consent or that it was raised after the Court had ordered his eviction from the liquor shop and that the petitioner was not residing as a mundkar when it was incumbent upon the petitioner to prove his case as pleaded by him. Moreover, as rightly pointed out by Ms. Agni, learned Senior Advocate appearing for the respondent no.1 that the reasoning of the learned Mamlatdar clearly indicated that he had not looked into the pleadings in the Civil Suit No.116/1969 as otherwise he could not render a finding that there were two houses, a shop and the hut in the occupation of the petitioner and that he was evicted by the Court's order of the shop where he was selling wine.

14. Shri R. Menezes, learned Advocate for the petitioner invited attention to the evidence led on behalf of the petitioner and more particularly one of his witnesses had reflected that the present residence was a part of the earlier big hut and a part of which was demolished by the Court's order and that he has filed the suit for seeking restoration of the portion of the hut which was demolished to advance the case that at the highest only the portion of the hut was demolished pursuant to the judgment and order in Civil Suit No.116/1969. A stray statement of the witness cannot enure to the benefit of the petitioner inasmuch as it was completely beyond the tenor of his pleadings in the mundkar application where he was clearly focused that the suit hut was the hut referred to by the predecessor of the respondent no.1 in his Civil Suit No.116/1969 and there was no such thing that there was a big hut and that a part of it was used for residence and that a part was demolished pursuant to the judgment of the Court in the said suit. For that matter an appraisal of the judgment of the learned Mamlatdar would reveal that he had contrary to the record concurred with the contention of the learned Advocate for the petitioner on the basis of the suggestion that there was a hut which was not the subject matter of the Civil Suit No.116/1969 where the petitioner was residing with his family. This shows that there was grave dereliction of duty by the learned Mamlatdar in assessing the material and ultimately arriving at a conclusion dehors the pleadings that the petitioner was evicted from one part of the dwelling house i.e. the demolished hut and no proceedings were initiated for his eviction from the demolished part of the dwelling house i.e. the suit hut and his conclusion that he was therefore constrained to declare him as a mundkar.

15. Shri R. Menezes, learned Advocate for the petitioner contended that the learned Additional Collector on remand had not considered the issue of mundkarship in the context of the old/new Act and that he did not consider the case of the petitioner in its proper perspective giving rise to a flawed judgment and magnified by the learned Administrative Tribunal in revision. Although an

attempt was made by Shri Menezes to advert to this contention on the applicability or otherwise of the old Act/new Act, no issue was joined on that point by Ms. Agni, learned Senior Advocate for the respondent no.1 and the contention of Shri Menezes, learned Advocate for the petitioner that no directions were given by this Court while remanding the matter in the Letters Patent Appeal whether the issue had to be decided as per the new Act or as per the old Act remained purely academic. That apart, the learned Additional Collector had in his wisdom found that it was not relevant at that stage to open the issue and to that extent had overruled the objections raised on behalf of the learned Advocate for the appellant. Nonetheless he was seized of the case of the appellant before him i.e. the predecessor of the respondent no.1 namely that the suit hut was constructed by the petitioner in the year 1969 when the eviction proceedings in respect of the liquor shop were going on and that the hut which was illegally constructed by him was also demolished. The learned Additional Collector had also taken note of the petitioner's case that the suit hut for which his application was filed in 1973 was existing in part and that it was pursuant to the order of the Civil Court in Civil Suit No.116/1969 that only the part of the suit hut was demolished and one portion was in existence. In that context he has examined the evidence led by the petitioner where his witnesses made a reference of two huts which was not even the case of the petitioner in the first instance. The learned Additional Collector rather had appraised himself of the fact that the person who claimed mundkarship had to establish the lawful residence with a fixed habitation and with the consent of the bhatkar. Therefore, it was incumbent upon the petitioner to prove that he was residing in the suit hut with the consent of the bhatkar and in a fixed habitation. However on going through the evidence he has found that the petitioner had miserably failed to establish such a case and had not produced any documentary evidence and moreover the oral testimony produced by him was not trustworthy. The learned Additional Collector for that matter was rightly not impressed with the case of the petitioner that only a part of the suit hut was demolished and the expression that he was unable to understand as to how an order of eviction was passed in respect of the Civil Suit No.116/1969 and the same was executed by demolishing it and as to how it could be demolished in part. The learned Additional Collector had therefore not committed any jurisdictional error unlike the contention of Shri Menezes in allowing the appeal on an appraisal of the material on record and set aside the order of the declaration of mundkarship granted in his favour by the learned Mamlatdar.

16. The learned Tribunal for that matter while deciding the Revision Application at the instance of the petitioner had briefly alluded to the case of the petitioner, the written statement filed by the predecessor of the respondent no.1, the order passed by the learned Mamlatdar as also the appeal preferred by the respondent which was dismissed in the first round giving rise to the revision at their instance and then the spate of the petition before this Court, the remand of the matter to the learned Administrative Tribunal followed by the Letters Patent Appeal before

the Division Bench and ultimately the appeal being partly allowed modifying the earlier judgment of the learned Single Judge and instead remanding the matter to the learned Additional Collector therefore in the light of the directions made therein.

17. The learned Administrative Tribunal had considered the contention on behalf of the petitioners and the respondent where completely a new case has been set out of there being two huts, one used for residence and another for storing materials, the suit filed by the respondent being Civil Suit No.30/1969 for eviction of the petitioner from the shop in the same property leased to him and it being decreed followed by his eviction and followed by the subsequent Civil Suit No. 116/1969 alleging the change of roof of the hut and seeking his eviction once again. The learned Tribunal had observed that the petitioner had not taken up a plea in the initial Civil Suit No. 30/1969 claiming the existence of a hut and it is only in the second suit being filed for his eviction that he had conceded on the identity of the suit hut but carved a case that it was existing since a long time and that only a change of the roof was made with mangalore tiles for their residence. The learned Administrative Tribunal on the basis of the record and the contentions canvassed by the Advocates for the parties had found that in this circumstance too was the suit decreed and the Execution Proceedings were filed in which a warrant of demolition was issued and thereafter the petitioner had himself demolished the hut. The petitioner at the cost of repetition had referred to only one hut in the suit property being their residence and that it was the suit hut referred to by the respondent in the Civil Suit No.116/1969.

18. The learned Administrative Tribunal had considered in detail the case as set out before him. For that matter, he was aware of the fact that the subject structure of the mundkar was demolished on 01.02.1975 in Execution Proceedings and that what was referred to by him in the Mundkar Application No.22/73 was only one structure and not two structures in the suit property as was the case sought to be developed by adverting to the evidence of some witnesses before the learned Mamlatdar. The learned Tribunal for that matter had clearly recorded the findings that the Mamlatdar as well as the learned Additional Collector had not taken cognizance of the pleadings made by the petitioner in his application for declaring as a mundkar. On considering all the materials at large the learned Tribunal held that the order of the Joint Mamlatdar was perverse since he has considered all the suggestions in the cross examination of the witnesses of the petitioner and quite on the contrary the learned Additional Collector has considered the aspect from all angles and rightly came to the conclusion holding otherwise. Neither the learned Additional Collector nor the learned Administrative Tribunal had committed any jurisdictional error or of such a grave nature so as to warrant an exercise of jurisdiction conferred on this Court in terms of Article 227 of the Constitution of India.

19. In view thereof, i pass the following : O R D E R

The Writ Petition is dismissed with no order as to costs.