

(2015) 08 BOM CK 0071
In the Bombay High Court
Case No : Writ Petition No. 635 of 2015

Tanay Raghoba Mandrekar

APPELLANT

Vs

Sol Rio Resorts Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 27-08-2015

Acts Referred:

Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 — Section 24

Citation : (2015) 08 BOM CK 0071

Hon'ble Judges : C.V. Bhadang, J

Bench : Single Bench

Advocate : V.A. Lawande and F. Cardozo, for the Appellant; V.P. Thali, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

C.V. Bhadang, J—Rule. Rule made returnable forthwith. Shri Thali waives service for the respondent. Heard finally by consent.

2. By this petition, the petitioner who is the original defendant is challenging the order dated 23/4/2015 passed by the learned Civil Judge Junior Division, Bicholim in Regular Civil Suit No. 39/2006/B, by which the Civil Court has refused to refer the issue no.7 to the Mamlatdar for the second time. The petitioner is also challenging the order dated 29/6/2015 passed by the learned Mamlatdar thereby refusing to set aside the order of dismissal of default and refusing to restore reference to file.

3. The brief facts are that in a suit filed by the respondent, the petitioner raised a contention based on his alleged mundkarial rights. On the basis of the rival pleadings, the Trial Court framed as many as 11 issues. Issue no.7 which is relevant for the present purpose, reads as under:

Whether the defendant proves that his late father Raghoba Krishna Mandrekar was the mundkar of the house no.391 New and 265 (old) in the survey no.48/14 in the suit property of village Naroa, Taluka Bicholim and at present at the

defendant?

4. It is a matter of record that the said issue was referred for the decision of the Mamlatdar on 20/1/2009. However, it so happened that on account of the absence of the petitioner the reference came to be dismissed in default on 6/8/2013 and it was accordingly intimated to the Civil Court. It appears that on 29/11/2013 the petitioner filed an application before the Mamlatdar for condonation of delay along with an application for restoration of the reference bearing Case No. JM-II/MUND/ISSUE/03 2009. It is undisputed that the application for condonation of delay was allowed. However by subsequent order dated 29/6/2015, the Mamlatdar has dismissed the application for restoration presumable for want of jurisdiction.

5. In so far as the Civil Suit is concerned, the petitioner filed an application on 18/8/2014 for re-referring the issue no.7 to the Mamlatdar. The learned Civil Judge has dismissed the said application by an order dated 23/4/2015. The learned Civil Judge is of the opinion that referring the issue again for the second time would amount to undue interference with the order of the reference Court which cannot be done by the Court "within the legal ambit" Thus having being unsuccessful, both before the learned Civil Judge as well as before the Mamlatdar in getting the issue re-referred as also in getting the proceedings restored, the petitioner is before this Court.

6. I have heard Mr. Lawande, the learned counsel for the petitioner and Mr. Thali, the learned counsel for the respondent. With the assistance of the learned counsel for the parties, I have perused the record.

7. It is submitted by Shri Lawande that the reference having been dismissed in default, it was open to the learned Civil Judge to re-refer the issue to the Mamlatdar. It is submitted that the jurisdiction to decide the said issue exclusively lies with the Mamlatdar and thus was necessary for the decision of the suit. It is submitted that the reference was not answered on merits and as such, there was no bar in referring the issue again. The learned counsel has placed reliance on the decision of the learned Single Judge of this Court in Bhaskar Pandurang Prabhu Desai and others Vs. Gajanan Arjun Salgaonkar and others, AIR 1997 Bom 177 , in order to submit that there is no prohibition in re-referring the issue. He, therefore, submitted that the impugned order passed by the learned Civil Judge needs to be set aside.

8. It is next submitted that the reference was not answered on merits and the dismissal of the application for restoration on the ground of want of jurisdiction is not legal and proper. It is submitted that in either case if the petitioner can file a fresh application for such declaration, there was no impediment in restoring the reference to file.

9. On the contrary, it is submitted by Shri Thali, the learned counsel appearing for the respondent, that even if the reference is answered in favour of the petitioner it will have no bearing on the controversy involved in the suit. He

submitted that thus, no interference is called for in the order of the learned Civil Judge, refusing to refer the issue again.

10. It is next submitted that the petitioner has a remedy of filing an appeal under section 24 of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (Act, for short) for challenging the order of the Mamlatdar. It is submitted that the petitioner has not chosen to challenge the initial order of dismissal in default as well as the order refusing to restore the reference. It is submitted that thus, it would not be open to the petitioner now to challenge the said order in these proceedings. It is submitted that the petitioner is only attempting to prolong the suit by one way or the other. There are also laches in filing the application for restoration before the Mamlatdar.

11. I have considered the rival circumstances and the submission made. At the outset, it is needs to be mentioned that in the present proceedings, the respondent cannot be heard to say that the issue no.7 does not arise in the matter. The only question is whether the order of the learned Civil Judge refusing to refer the issue for the second time and/or the order passed by the Mamlatdar in refusing to restore the reference (which was dismissed in default), would need interference. I find that the petition has to succeed on the second issue.

12. A perusal of the order passed by the Mamlatdar would show that the only ground on which the Mamlatdar has refused to restore the reference is that according to the Mamlatdar he lacks jurisdiction. It is clear that the reference was not answered on merits and therefore, merely because the fact of the reference being dismissed in default was communicated to the Civil Court, the Mamlatdar cannot be said to be lacking the jurisdiction to entertain the application for restoration. It is well settled that the jurisdiction to consider a prayer for restoration is implicit in jurisdiction to pass an order of dismissal in default. In other words, it cannot be said that a Court or Tribunal would have jurisdiction to dismiss a particular petition in default. but would lack jurisdiction to restore the same. Although it has not been stated in so many words by the Mamlatdar, the mere fact that the order of dismissal in default, was communicated to the Civil Court would not be sufficient to hold that the Mamlatdar lacked jurisdiction to restore the reference.

13. In so far as the submission based on alternate remedy of an appeal under section 24 of the Act is concerned, it is well settled that the existence of an alternate remedy, is not an absolute bar to the jurisdiction of this Court to entertain the petition. It is a rule of self restraint. In the present case the proceedings before the Mamlatdar were initiated on the basis of a reference by the Civil Court and not independently by the petitioner. The reference was not decided on merits. For these reasons the existence of the alternate remedy would not come in the way. In my considered view, it would be open to the Mamlatdar to go into the question of restoration, of the reference, albeit on facts and circumstances of the case. In that view of the matter, the petition is partly allowed. The impugned order passed by the Mamlatdar dated 29/6/2015 is

hereby set aside. The learned Mamlatdar shall consider the application for restoration filed by the petitioner on its own merits and in accordance with law. The learned Mamlatdar shall decide the application for restoration as expeditiously as possible and in any case within a period of one month from the receipt of this order.

14. All the rival contentions of the parties are expressly kept open. Rule is made absolute in the aforesaid terms with no order as to costs.