

(2022) 03 BOM CK 0032

In the Bombay High Court

Case No : Writ Petition No. 21 Of 2021-F

Usha Kerkar And Anr

APPELLANT

Vs

Rajaram V. Kalangutkar (Dec) Thr. His Lrs. And 2 Ors

RESPONDENT

Date of Decision : 09-03-2022

Acts Referred:

Goa Buildings (Lease Rent & Eviction) Control Act, 1968 — Section 22(2)(a)
Bombay Rents Act, 1947 — Section 21, 32(4)
Code Of Civil Procedure, 1908 — Section 47

Citation : (2022) 03 BOM CK 0032

Hon'ble Judges : Manish Pitale, J

Bench : Single Bench

Advocate : P. Rao, M. Naik, S. Usgaonkar, Marie Rosette Pereira

Final Decision : Disposed Of

Judgement

Manish Pitale, J

1. The petitioners have challenged order dated 26.8.2020, passed by the Court of Ad-hoc District Judge-I, FTC, Mapusa, Goa (hereinafter referred to as the District Court), whereby an appeal filed by respondent no.1 through legal representatives (hereinafter referred to as the contesting respondents) has been allowed and order passed by the Court of Civil Judge, Junior Division, Mapusa (hereinafter referred to as the Executing Court), has been quashed and set aside. The Executing Court had rejected the objections raised by the contesting respondents to the execution of the decree and warrants were issued.

2. The facts leading to filing of the present Writ Petition are that one Franklin de Mello i.e. predecessor of the proforma respondent nos.2 and 3, filed an application for eviction of the predecessor of the contesting respondents from the property in question under Section 22(2)(a) of the Goa Buildings (Lease, Rent & Eviction) Control Act, 1968. The application was filed on 26.2.1973, on the ground that the predecessor of the contesting respondents i.e. the tenant had failed to pay rent from February, 1967. The tenant filed a reply denying the

existence of tenancy and instead claimed that he was staying in the premises as a mundkar for last 15 years and on this basis, it was stated that the Rent Controller did not have jurisdiction to entertain the application for eviction.

3. Since the issue of mundkarship was raised, the Rent Controller directed the tenant to seek a declaration from the Mamlatdar concerning such status of being a mundkar. When the tenant failed to obtain such a declaration and he also did not deposit arrears of rent, the Rent Controller took up the proceedings for eviction. The Rent Controller was also informed that a mundkar declaration case filed by the tenant was dismissed in default by the Mamlatdar. Thereafter, the Rent Controller passed an order in the eviction proceedings, dated 28.10.1975, directing the tenant to hand over possession of the suit premises within three months to the aforesaid Franklin de Mello.

4. Against this order, the tenant filed appeal before the Administrative Tribunal. The said appeal was allowed and the order of the Rent Controller was set aside. The proceedings before the Rent Controller were further directed to be stayed till the Mamlatdar decided a revival application filed by the tenant. On 11.12.1980, the Mamlatdar dismissed the application for revival, holding that the premises were indeed tenanted and that the tenant was not a mundkar. At this stage, the said Franklin de Mello filed an application under Section 32(4) of the aforesaid Rent Act, stating that the tenant had not deposited the rent without any sufficient cause and that therefore, appropriate action ought to be taken against the tenant.

5. In reply to the said application, the tenant denied the relationship of the landlord and tenant and further denied his liability to deposit the rent.

6. The Rent Controller treated this as denial of title and ordered an inquiry under Section 21 of the Rent Act. After recording evidence and hearing arguments in the matter, on 30.1.1996, the Rent Controller allowed the application for eviction, holding that the tenant had denied the title without any bonafide and accordingly the tenant was directed to handover possession of the premises.

7. It is an admitted position that the Mamlatdar had dismissed the application for declaration of mundkarship and the appeal filed against the same was dismissed by the Additional Collector by judgment and order dated 4.2.1982. Hence, the findings on the issue pertaining to mundkarship had attained finality against the tenant.

8. Aggrieved by the order dated 30.1.1996 passed by the Rent Controller, the tenant i.e. predecessor of the contesting respondents filed appeal before the Administrative Tribunal. The proforma respondents had already come on record before the Rent Controller and hence, they were parties in the said appeal filed before the Tribunal. In the said appeal, the predecessor of the contesting respondents took various grounds of challenge, stating that the said Franklin de Mello had filed the eviction case in his personal capacity, but he admitted to be power of attorney holder of the original owner, one Jose Anton D'Mello, who died

before filing of the eviction case and therefore, the eviction application was not maintainable. It was claimed that Franklin de Mello had no power to file the eviction case, which the Rent Controller failed to appreciate. It was further submitted that when Franklin de Mello died, his legal representatives i.e. proforma respondent nos.3 and 4 herein had no right to be added as parties as they were not the power of attorney holders. On this basis, it was claimed that the order passed by the Rent Controller was a nullity and it deserved to be set aside. It was further claimed that since the landlord tenant relationship was not proved, there was no question of payment of rent.

9. This appeal was resisted by the proforma respondents and the matter was contested before the Tribunal.

10. After considering the contentions raised on behalf of the rival parties, by judgment and order dated 28.11.2006, the Tribunal dismissed the appeal and confirmed the eviction order passed by the Rent Controller. No appeal or any form of challenge was raised against the said judgment and order of the Tribunal, either by the predecessor of the contesting respondents or the contesting respondents themselves. As a result, the eviction order attained finality.

11. An execution application was filed by the proforma respondents as legal representatives of said Franklin de Mello, before the Rent Controller, which was pending. On 24.1.2011, the petitioners purchased the property in question from the original landlord by way of Sale Deed. A Deed of Assignment pertaining to the said eviction order/decreed of eviction dated 7.7.2011, was also executed by the original landlord in favour of the petitioners. On this basis, the proforma respondents filed an application for permission to withdraw the execution application and the petitioners filed an application for execution of the decree of eviction. This application was filed on the strength of the Deed of Assignment and the Sale Deed executed in favour of the petitioners.

12. In this application, the contesting respondents, representing the original tenant raised objections on various grounds-that the original grant by the Comunidade in favour of the landlord was illegal; that Sale Deed dated 24.1.2011 executed in favour of the petitioners was illegal, null and void; that the original landlord had not appointed the said Franklin de Mello to administer the affairs of the property in question and that the proforma respondents were not parties to the Assignment Deed. These objections were taken into consideration by the Executing Court. The said objections were rejected. The Execution application was allowed and warrant of possession was issued through bailiff, directing him to take possession of the suit property and to hand over the same to the petitioners.

13. Aggrieved by the same, the contesting respondents filed appeal before the District Court raising various grounds of challenge. By the impugned judgment and order dated 26.8.2020, the District Court allowed the appeal and set aside the order passed by the Executing Court.

14. Mr. P. Rao, learned Counsel appearing for the petitioners submitted that the District Court completely misdirected itself in passing the impugned judgment and order. It was submitted that the extent of jurisdiction of the Executing Court was not appreciated by the District Court in the correct perspective. The contentions raised on behalf of the contesting respondents could not have been entertained, in view of the fact that the judgment and order passed by the Tribunal while dismissing the eviction appeal and confirming the eviction order passed by the Rent Controller, had attained finality. It was submitted that the District Court considered the contentions raised on behalf of the contesting respondents, as if it was sitting in appeal over the judgment and order dated 28.11.2006 passed by the Tribunal in the eviction appeal, which was impermissible. The District Court failed to appreciate that the Executing Court could have accepted the contentions regarding the alleged nullity of the eviction order, only if it was an order passed by the Rent Controller wholly without jurisdiction. A wrong or even an illegal order, once it had attained finality, could not be ignored by the Executing Court, which the District Court completely failed to appreciate while passing the impugned judgment and order. The learned Counsel appearing for the petitioners relied upon the judgments of the Hon'ble Supreme Court in the case of Harpal Singh Vs Ashok Kumar and another (2018) 11 SCC 113; Dhurandhar Prasad Singh Vs Jai Prakash University and others, (2001) 6 SCC 534 and Balvant N. Viswamitra and others Vs Yadav Sadashiv Mule, (2004) 8SCC 706.

15. On the other hand, Mr. Sudesh Usgaonkar, learned Counsel appearing for the contesting respondents submitted that the approach adopted by the District Court was in consonance with the position of law. It was submitted that the exercise carried out by the District Court, while examining whether the eviction order could be executed, could not be said to be an exercise going behind or beyond the decree. It was submitted that when the contesting respondents had demonstrated that the eviction order was a nullity and the decree could not have been passed, the District Court was justified in interfering with the order of the Executing Court while accepting the objections raised on behalf of the contesting respondents. It was further submitted that while resisting execution of an order, it was not permissible to show that the Court was mistaken in passing the order, but the objectors were certainly entitled to demonstrate that the Court had been misled in passing the order. The distinction between mistake and trickery was highlighted to contend that the impugned judgment and order passed by the District Court was justified. The learned Counsel appearing for the contesting respondents supported the findings rendered by the District Court to hold that the eviction order/decreed was a nullity. It was submitted that the petitioners, in any case, had no authority to seek execution of the order. Reliance was placed on the judgments of the Madras High Court in the case of L. Sundaresa Naickar Vs Baby Ammad, (1998)3 Mad LJ 561 and Muthuvel Nainar V. D. A. Hatheeraja Beebi, (1998)1 Mad LJ 476. The learned Counsel also placed reliance on the judgment of the Supreme Court in the case of A. V. Papayya Sastry and others Vs Govt. Of

A.P. and others, (2007) 4 SCC221.

16. Considering the rival contentions raised before this Court in the present case, it would be appropriate to refer to the position of law as regards the extent of jurisdiction of the Executing Court to examine the decree, of which execution is sought. The Supreme Court has held that while exercising jurisdiction under Section 47 of the CPC, the Executing Court exercises a narrow jurisdiction and it is in very limited circumstances, that the Executing Court can hold that the decree cannot be executed.

17. In the case of Dhurandhar Prasad Singh Vs Jai Prakash University and others (supra), the Supreme Court took into consideration earlier judgments on this aspect of the matter and held that the exercise of power under Section 47 of the CPC is microscopic and lies in a very narrow inspection hole. It was held that an objection under Section 47 of the CPC, could be allowed if the decree sought to be executed was passed by the Court which did not have inherent jurisdiction to consider the lis and pass a decree. The expressions void and voidable were considered and the limited scope of jurisdiction exercised by an Executing Court while considering the objections, was reiterated.

18. In the case of Balvant N. Viswamitra and others Vs Yadav Sadashiv Mule (supra), the Supreme Court considered the question as to when the decree passed by a Court could be said to be null and void and objections to its execution could be sustained. It was reiterated that Court executing the decree cannot go behind the decree. It was further reiterated that the Court had jurisdiction to decide wrong as well as right. If the Court decides in a wrong manner, the wronged parties can take recourse to remedies prescribed by law for setting the matter right and if that course is not taken, the decree howsoever wrong, cannot be disturbed in execution proceedings. It was noticed that as per precedents of the Supreme Court itself, if a party aggrieved does not take appropriate steps to have the wrong or error corrected, the erroneous decree will hold good and it will not be open to challenge on the ground that it is a nullity. Even a decree passed on wrong appreciation of law would be a wrong decision, which can be corrected in appellate proceedings, but it cannot be corrected by the Executing Court, which is bound by such a decree.

19. In the case of Harpal Singh Vs Ashok Kumar and another (supra), the Supreme Court reiterated the said position of law and held that the Executing Court could uphold an objection only if the decree was passed by the Court which did not have inherent jurisdiction to pass such a decree. It was reiterated that an Executing Court cannot go behind the decree and it also cannot question its legality or correctness.

20. In the present case, the contesting respondents raised objections against the eviction order/decreed passed by the Rent Controller, as confirmed by the Tribunal while dismissing the eviction appeal. The tenor of the objections was such that errors of facts and law were sought to be highlighted in the findings of the Rent

Controller and the Tribunal. Such grounds could have been raised for consideration, if at all a challenge was raised to the judgment and order dated 28.11.2006, passed by the Tribunal while dismissing the eviction appeal. Admittedly, neither the predecessor of the contesting respondents nor the contesting respondents themselves raised any challenge to the said judgment and order dated 28.11.2006, passed by the Tribunal in the eviction appeal. The findings of the Tribunal as well the Rent Controller attained finality and there can be no dispute about the same. The question is, whether the contesting respondents in the execution proceedings were entitled to claim that there were errors of facts and law in the orders passed by the Rent Controller and the Tribunal and that therefore, the eviction decree was not liable to be executed. It is significant that the eviction order/decreed was passed by the Rent Controller as far back as on 30.1.1996 and it is still not executed.

21. A perusal of the nature of objections raised on behalf of the contesting respondents would show that the entire emphasis was on how the said Franklin de Mello filed the eviction application, while he was power of attorney holder of the original landlord. It was claimed that the decree could not be executed because the original landlord who had executed power of attorney had died. It was further claimed that the proforma respondents as legal representatives of Franklin de Mello could not have been brought on record because the said Franklin de Mello had no interest in the estate and that the proforma respondents were not power of attorney holders of the original landlord. It was further claimed that the Sale Deed and the Deed of Assignment executed in favour of the petitioners were not valid.

22. A perusal of the judgment and order dated 28.11.2006, passed by the Tribunal while dismissing the eviction appeal of the predecessor of the contesting respondents, shows that the aforesaid grounds pertaining to the said Franklin de Mello, his legal representatives i.e. the proforma respondents, their status as regards the original landlord and other such aspects were all contentions specifically raised and recorded in the said judgment and order of the Tribunal. Yet, the Tribunal dismissed the appeal and confirmed the eviction order/decreed passed by the Rent Controller. It is an admitted position that the judgment and order dated 28.11.2006 passed by the Tribunal was never challenged and it attained finality. Thus, the contesting respondents, while raising objections in the Execution Proceedings, were raising grounds against execution of the decree as if they were arguing an appeal against the judgment and order dated 28.11.2006 passed by the Tribunal, which had admittedly attained finality.

23. The Executing Court rejected the objections. But, the District Court in the impugned judgment and order considered in great detail all such arguments sought to be raised on the merits of the matter. The approach adopted by the District Court clearly shows that the said Court misconstrued the extent of jurisdiction in Execution Proceedings. The arguments and the contentions raised on merits on facts and law, which could have been raised in a challenge to the

judgment and order dated 28.11.2006 passed by the Tribunal while dismissing the eviction appeal, were erroneously permitted to be raised by the District Court in the appeal arising from the order of Executing Court. As a consequence of such an erroneous approach, the District Court went into great detail and analysis of the arguments and counter arguments pertaining to such aspects concerning the merits of the matter, which was completely impermissible in the appeal arising out of the Execution Proceedings. As the approach of the District Court was erroneous from the very beginning, the detailed analysis of the contentions of the contesting respondents was completely misdirected, thereby rendering the order of the District Court erroneous and wholly unsustainable.

24. A bare perusal of the impugned judgment and order would show that the District Court at various places has found fault with the reasoning of the Rent Controller in the eviction order as well as the order of the Tribunal dismissing the eviction appeal. The contentions that were considered by the Tribunal while dismissing the eviction appeal on 28.11.2006 were revived and considered by the District Court in the impugned judgment and order, which was wholly impermissible. Although, the District Court has made a reference to the limited area of the jurisdiction available to an Executing Court concerning nullity of a decree and the decree being passed by a Court lacking inherent jurisdiction, the said principle has not been applied in the correct perspective in the present case.

25. The District Court at various places has made observations that the Rent Controller should have dismissed the eviction application at the stage when the said Franklin de Mello expired and his legal representatives were brought on record. The District Court also commented copiously on how the Tribunal erred on the merits of the matter in its judgment and order dated 28.11.2006, while dismissing the eviction appeal, being oblivious of the fact that such contentions pertaining to the merits of the matter could not have been entertained at all in the appeal arising from the Execution Proceedings. While wrongly considering the questions pertaining to the merits of the decree, the District further wrongly linked such defects in the decree to the decree itself being a nullity. The District Court failed to appreciate the cardinal principle that a decree which might be erroneous on the facts or law or one which could be said to be a decree wrongly granted, could still not be called a nullity, so long as it was passed by a Court having jurisdiction and the findings in such judgment and decree attaining finality. The Court having inherent jurisdiction to pass the decree could pass a wrong decree as well, but it would not be equivalent to being a nullity. This aspect was completely ignored by the District Court while passing the impugned judgment and order.

26. Perhaps because the District Court found the decree, that had attained finality against the contesting respondents on merits, to be disturbing and wrong on facts and law, it erroneously crossed the line and held that the decree could be said to be one passed without jurisdiction and it could be termed a nullity. The entire approach of the District Court was not in consonance with the position of

law laid down by the Supreme Court from time to time, as a result of which the appeal filed by the contesting respondents was wrongly allowed. The entire discussion in the impugned judgment and order on the errors on facts and law committed by the Rent Controller and the Tribunal, was wholly misplaced and unwarranted, particularly because the findings had already attained finality and there was no scope in the Execution proceedings to go behind and beyond the decree.

27. It was surprising that the District Court held that the Executing Court ought not to be a mute spectator when fraud had nullified the decree. There is no material on record to justify the aforesaid findings rendered by the District Court in the impugned judgment and order. In the present case, there is nothing to show that either there were any pleadings pertaining to fraud or that there was otherwise any material on record to show that the eviction decree was obtained by fraud or by misleading the Court. The Rent Controller as well as the Tribunal had considered all the aspects of the matter, including the contentions that were sought to be re-agitated on behalf of the contesting respondents in the Execution Proceedings and findings were rendered against the said respondents while confirming the eviction decree, which had admittedly attained the finality.

28. In this backdrop, the learned Counsel for the contesting respondents is not justified in relying upon the judgment of the Supreme Court in the case of A. V. Papayya Sastry and others Vs Govt. of A.P. and others (supra). There can be no quarrel with the proposition that there is a distinction between mistake and trickery and that if the Court was misled into passing an order, such an order could be recalled. This is nothing but an aspect of fraud being played on the Court. But, in the facts and circumstances of the present case, reliance placed on the said judgment is misplaced because there is no substratum for the contesting respondents to allege fraud in respect of the eviction decree passed by the Rent Controller. For the same reasons, reliance placed on the aforesaid judgments of the Madras High Court can be of no avail to the contesting respondents.

29. As regards the right of the petitioners to pursue the eviction proceedings, the Executing Court correctly found that the contesting respondents were not entitled to merely claim that the Sale Deed and Assignment Deed executed in favour of the petitioners was null and void. No proceedings were initiated in respect of the said documents on behalf of the contesting respondents. So long as the Sale Deed and Assignment Deed executed in favour of the petitioners were not held by any competent Court or authority to be bad in law, the petitioners clearly had authority to pursue the Execution Proceedings, in accordance with law.

30. In the present case, the District Court clearly erred in proceeding to make comments on the entitlement of the petitioners to pursue the Execution Proceedings.

31. It is found that in the impugned judgment and order the District Court

rendered findings at some places that the eviction order/decreed passed by Rent Controller could be said to be without jurisdiction. But, no material is available on record for rendering such findings. In fact, the findings rendered by the District Court are by adopting a wholly impermissible approach, as if the District Court was sitting in appeal over the decree passed by the Rent Controller and the judgment and order dated 28.11.2006 passed by the Tribunal while dismissing the eviction appeal.

32. Hence, it is found that the very approach adopted by the District Court while considering the appeal filed by the contesting respondents and in passing the impugned judgment and order, was fundamentally flawed. As a result, the impugned judgment and order is found to be wholly unsustainable and liable to be set aside.

33. In view of the above, the Writ Petition is allowed. The impugned judgment and order passed by the District Court dated 26.8.2020, is quashed and set aside and order dated 1.10.2016 passed by the Executing Court i.e. the Court of Civil Judge, Junior Division, Mapusa, is restored.

34. The Writ Petition stands disposed of in above terms.