
(2012) 10 BOM CK 0024
In the Bombay High Court
Case No : Writ Petition No. 573 of 2006

Vasant Krishna Palyekar and Another	APPELLANT
Vs	
Mrs. Agneta Figueira and Others	RESPONDENT

Date of Decision : 12-10-2012

Acts Referred:

Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 — Section 8A

Citation : (2013) 1 ABR 271 : (2013) 2 ALLMR 643 : (2013) 3 MhLj 625

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

Bench : Single Bench

Advocate : J.P. Mulgaonkar, for the Appellant; C.A. Ferreira, for the Respondent

Judgement

F.M. Reis, J.—Heard Shri J.P. Mulgaonkar, learned counsel appearing for the petitioners and Shri C.A. Ferreira, learned counsel appearing for the respondents. The above petition challenges the common judgment and order dated 5.9.2006 passed by the learned Administrative Tribunal dismissing the Mundkar Revision Application Nos. 21/2005 and 22/2005 filed by the petitioners and judgment and order dated 27.4.2005 passed by the learned Dy. Collector of Bardez in case No. DC/MND/MAP/REV/ 61/2002 and case No. MND/MAP7/APL/REV/58/02, THE whereby the order of the Joint Mamlatdar dated 30.9.2002 rejecting the preliminary objections raised by the respondents to the application for declaration u/s 8-A of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 hereinafter referred to as "the said Mundkar Act" was set aside.

2. Briefly the facts of the case are that late Krishna Palyekar filed an application for registration as Mundkar before the Mamlatdar of Bardez, at Mapusa bearing case No. MND/GUIRIM/371/87. On receipt of the notice, the petitioner No. 1 appeared before the learned Mamlatdar and informed that the said Krishna Palyekar has expired in the year 1980. The learned Mamlatdar passed an order that the said applicant stood abated for failure to bring the legal heirs of the deceased on record. Thereafter, the widow of the said Krishna and mother of the

petitioner No. 1, Parvati Palyekar filed a fresh application for registration as a mundkar which was registered as case No. MND/GUIRIM/12/88. After holding an inquiry, by an order dated 29.12.1992, the learned Mamlatdar held that she was not a mundkar but a caretaker of the suit dwelling house and dismissed the application for registration. In the meantime, the said Parvati Palyekar, also expired and the legal heirs of Parvati including the petitioner Nos. 1 and 2 preferred an appeal before the learned Collector of North Goa which the learned Collector after hearing both the parties by judgment and order dated 24.9.1996 dismissed the said appeal holding that the original applicant Parvati was not a mundkar of the suit dwelling house. Aggrieved by the said judgment of the Collector, the legal heirs of Parvati including the petitioner Nos. 1 and 2 filed a Mundkar Revision Application No. 4/99 before the learned Tribunal which was dismissed by coming to the conclusion that the petitioners were not mundkars of the suit dwelling house but caretakers. The legal heirs of Parvati preferred a Writ before this Court being Writ Petition No. 115 of 2001 which was dismissed by this Court summarily by an order dated 20.4.2001 thereby confirming the order passed by the authorities below. The respondents thereafter filed a Special Civil Suit No. 248/98 in the Court of the learned Civil Judge Senior Division, Mapusa, for eviction of the legal heirs of the said Krishna Palyekar which was decreed by judgment and decree dated 9.11.2001. However, the petitioners thereafter, filed an application u/s 8-A of the said Mundkar Act for a declaration in their favour of Mundkarial rights in respect of the dwelling house bearing No. 42/2(old) and 268(new) registered as case No. MND/SR/NOV/4/2001 in the Court of Mamlatdar of Bardez at Mapusa. In the said application filed u/s 8-A of the Mundkar Act, the respondents raised preliminary objections dated 21.12.2001 contending that the application is hit by doctrine of res judicata and limitation and therefore, the same is to be rejected. The learned Mamlatdar after hearing the arguments on behalf of both the parties dismissed the preliminary objections by order dated 30.9.2002. The respondents preferred two revisions before the learned Dy. Collector who by a common order dated 27.4.2005 held that doctrine of res judicata is applicable and allowed the preliminary objections by setting aside the order of the learned Mamlatdar dated 30.9.2002. The petitioners thereafter preferred two revision applications before the learned Administrative Tribunal which came to be disposed of by a common judgment dated 5.9.2006 whereby the learned Tribunal dismissed the revision applications. Being aggrieved by the said judgment, the petitioners have preferred the present petition.

3. Shri J.P. Mulgaonkar, learned counsel appearing for the petitioners has assailed the impugned judgment passed by the learned Tribunal as well as the judgment passed by the Dy. Collector on the ground that merely because the earlier application for registration came to be rejected by itself cannot bar the petitioners from filing an application for declaration u/s 8-A of the Mundkar Act. The learned counsel further pointed out that the order passed in the course of application for registration only creates the presumption and as such it was not open to the learned Tribunal as well as to the learned Collector to come to the

conclusion that the application for declaration was barred by principle of res judicata. The learned counsel further pointed out that in any event, it was not open to the authorities to dismiss the application for declaration without holding any inquiry as according to him an issue of res judicata is a mixed question of law and fact and the same could be decided only after evidence is recorded. The learned counsel further pointed out that it is well settled by the Division Bench of this Court that once an application for registration has been dismissed, it does not preclude a party to file an application for declaration of Mundkar u/s 8-A of the said Mundkar Act and as such, the authorities below were not justified to pass the impugned judgments. The learned counsel further pointed out that the contention of the respondents that the application for declaration as Mundkar is barred by principle of res judicata is without any substance and as such the impugned judgments passed by the learned Tribunal as well as the learned Dy. Collector deserve to be quashed and set aside. The learned counsel further pointed out that the petitioners have enough material to produce on record to substantiate their claim that the petitioners are Mundkars of the dwelling house and the authorities below were not justified to dismiss the application for declaration at the threshold. The learned counsel in support of his submissions relied upon the judgments of the Division Bench of this Court reported in 1995 (1) GLT 154 in the case of Smt. Gulabi Sangtu Devidas and others v. Smt. Prema Govinda Gaonkar and others, and made more emphasizes to paras 6 and 7 of the said judgment. The learned counsel as such submits that the authorities below were not justified to distinguish the said judgment as observations therein are binding on the authorities and as such the impugned judgments passed by the learned Tribunal as well as the learned Dy. Collector be quashed and set aside and the matter be remanded to the learned Mamlatdar to dispose of the application for declaration in accordance with law.

4. On the other hand, Shri C.A. Ferreira, learned counsel appearing for the respondents has supported the impugned judgments. The learned counsel has initially taken me through the original order passed by the Mamlatdar whilst disposing of the application for registration filed by the mother of the petitioner Nos. 1 and 2 and pointed out that the learned Mamlatdar had framed an issue as to whether the applicant therein was a Mundkar of the dwelling house. The learned counsel further pointed out that the authorities below upon holding an inquiry as contemplated under the Mundkar Act after considering the material on record has come to the conclusion that the petitioners were not Mundkars of the dwelling house but that their mother was only a caretaker and as such the question of proceeding with the inquiry and disposing of the application for declaration would be an exercise in futility. The learned counsel has taken me through the judgment of the Division Bench of this Court in the case of Smt. Gulabi Sangtu Devidas & Ors. v. Smt. Prema Govinda Gaonkar and Ors., and pointed out that the facts in the said case were different than the facts in the present case and as such the observations in the said judgment would not be applicable to the present situation. The learned counsel further pointed out that

in the said proceedings there was no inquiry held but however in the present case there was a full fledged inquiry and after appreciating such evidence the learned Mamlatdar came to the conclusion that the petitioners were not entitled to be registered as Mundkars. The learned counsel further pointed out that these findings of the learned Mamlatdar while dismissing the application for registration have attained finality as according to him, the present application for declaration is barred by principle of res judicata. The learned counsel further pointed out that the judgment of the Division Bench of this Court is per incuriam as according to him the facts therein were different. Apart from the observations made therein, cannot be considered to be part of the Statute. The learned counsel in support of his submissions has relied upon the judgment of the Apex Court reported in M. Nagabhushana Vs. State of Karnataka and Others, , Union of India (UOI) and Others Vs. Dhanwanti Devi and Others, , Abdul Gani and Another Vs. Nabendra Kishore Roy and Others, , Sumtibai and Others Vs. Paras Finance Co. Regd. Partnership Firm Beawer (Raj.) Thru Smt. Mankanwar Chordia (Dead) and Others, and Daryao and Others Vs. The State of U.P. and Others, . The learned counsel as such submits that considering the ratio laid down by the Apex Court in the said judgments the observations in the judgment of the Division Bench of this Court referred to in the case of Smt. Gulabi Sangtu Devidas (supra) would not be applicable to the facts of the present case and as such the authorities below were justified to pass the impugned judgments.

5. I have carefully considered the submissions of the learned counsel appearing for the respective parties. I have also gone through the relevant provisions of the Mundkar Act as well as the judgments relied upon by the learned counsel appearing for the respondents. I have also gone through the judgments passed by the authorities below while disposing of the application for registration filed by the mother of the petitioner Nos. 1 and 2 namely Parvati. From the material on record, it cannot be disputed that the mother of the petitioner Nos. 11 and 2 had filed an application for registration; under the provisions of Section 29 of the Mundkar Act as a Mundkar of the suit dwelling house. The said application came to be rejected by the learned Mamlatdar and order, passed by the learned Mamlatdar was upheld by the learned Dy. Collector, the learned Administrative Tribunal as well as by this Court. Hence, the application for registration came to be decided against the petitioners.

6. Thereafter, the petitioners filed an application u/s 8-A of the Mundkar Act for declaration of their claim of Mundkarship. The respondents filed their written statement disputing the claim put forward by the petitioners. The respondents also filed an application to contend that the application filed by the petitioners was barred by principle of res judicata. The said application was rejected by the learned Mamlatdar but however the order of the learned Mamlatdar was set aside by the learned Dy. Collector and confirmed by the learned Administrative Tribunal. The consequence thereof is that the application for declaration" as a Mundkar u/s 8-A of the Mundkar Act came to be dismissed as being barred by principle of res judicata. The Division Bench of this Court in the case of Smt.

Gulabi Devidas (supra) has held at paras 6 and 7-thus:--

6. The learned single Judge held that once an application is made for entering the name in the register of Mundkars and such application is dismissed for whatever reason, it is not open for the person claiming right of mundkar to seek a declaration u/s 8-A of the Act. The learned Judge held that the provision of Section 29 requires the Mamlatdar to hold an inquiry after notice to the Bhatkar and on such inquiry when the Mamlatdar records a finding adverse to the person claiming right of Mundkar, then the remedy is to file appeal as prescribed u/s 29(8) and not seek a declaration u/s 8-A of the Act. It is not possible to share the view taken by the learned single Judge. The object of maintaining a register of Mundkar u/s 29 of the Act and the effect of the order passed by the Mamlatdar u/s 29 is required to be borne in mind before concluding that the order of the Mamlatdar bars the right of the mundkar to seek a declaration u/s 8-A of the Act. The entries made in the register of mundkars u/s 29 of the Act are not conclusive but have merely presumptive value as set out u/s 30 of the Act. The specific wording of Section 30 provides that the entries made u/s 29 shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted thereafter. The expression "until the contrary is proved" clearly sets out the intention of the Legislature that the entries made after the inquiry conducted by the Mamlatdar u/s 29 of the Act do not conclude the right of the parties in respect of Mundkarship. The fact that it is open for the party who is aggrieved by the entry in the register to prove that the entry is incorrect clearly establishes that the decision of the Mamlatdar u/s 29 is not the final verdict. The perusal of Section 29 makes it clear that the inquiry conducted by the Mamlatdar is only for the purpose of making entries in the register and though the order of the Mamlatdar and the entries made in consequence thereof have presumptive value, such exercise does not conclude the right of an aggrieved party to seek a declaration. Section 8-A confers a substantive right upon a party to seek declaration of right conferred by the Act and the substantive right cannot be ousted by reference to the inquiry made by the Mamlatdar for making entries in the register. Mr. Usgaonkar very rightly submitted that the entries made in the register u/s 29 are in the nature of entries made by revenue officers under the provisions of the Land Revenue Code and such entries can by no stretch of imagination determine the substantive rights of the parties. Mr. D''Costa apprehended that in case a person is permitted to seek a declaration u/s 8-A of the Act after adverse order is passed by the Mamlatdar u/s 29 of the Act then it would amount to duplication of proceedings. The learned counsel wondered how the Mamlatdar, who had previously conducted inquiry u/s 29 can again undertake the inquiry u/s 8-A of the Act. The submission overlooks the fact that though the authority conducting the inquiry u/s 29 as well as u/s 8-A is identical the scope and ambit of the two inquiries are different and distinct. The scope of the inquiry u/s 29 is only to make entries in the register and which entries are only presumptive in nature while the declaration u/s 8-A of the Act conclude the rights of the parties finally. Mr. D''Costa then submitted that while holding the inquiry u/

s 8-A of the Act, the Mamlatdar is entitled to take into consideration the fact of order passed u/s 29 of the Act. It is obvious that the Mamlatdar conducting inquiry u/s 8-A of the Act will bear in mind the order passed while disposing of application u/s 29 of the Act. The provisions of Section 30 of the Act makes it clear that the entries made in the register in pursuance of order passed u/s 29 of the Act have presumptive value and the Mamlatdar while holding inquiry u/s 8-A of the Act will presume that the entries made in the register in pursuance to the inquiry u/s 29 of the Act are correct and true until the parties seeking declaration u/s 8-A of the Act prove contrary. The burden upon the party who seeks a declaration u/s 8-A of the Act after an adverse order is passed in proceedings u/s 29 is quite substantive and heavy but the right to seek declaration is not lost merely because an adverse order is passed u/s 29 of the Act. It is possible that a person may seek a favourable order of being a Mundkar u/s 29 of the Act because the Bhatkar may not be able to appear in the proceedings but in such cases it is open for the Bhatkar to seek a declaration u/s 8-A of the Act though the entries made u/s 29 are not correct and a negative declaration should be granted that a person claiming Mundkarship is not entitled to that right. There is one more circumstance which is required to be noticed. Section 30 of the Act provides that the entries made in the register shall be presumed to be true until a new entry is lawfully substituted. Both the counsel state that there is no provision under the Act which entitles the Mamlatdar to substitute the entry already made in the register in pursuance of proceedings u/s 29 of the Act. Such eventuality arises of substituting the entry when the Mamlatdar gives a declaration u/s 8-A of the Act which is contrary to the order passed u/s 29 of the Act against which case Mamlatdar would be required to substitute a new entry in place of the entry made earlier while disposing of the application u/s 29 of the Act. In our judgment the view taken by the learned single Judge that the application u/s 8-A of the Act for declaration of right is not maintainable after an order is passed by Mamlatdar u/s 29 is not accurate. It is not correct to suggest that the only remedy of an aggrieved party against the order passed by the Mamlatdar u/s 29 of the Act is to file an appeal. The fact that the aggrieved party has not resorted to filing an appeal does not conclude the right to seek a declaration u/s 8-A of the Act.

7. Mr. D"Costa referred to the decision of the learned single Judge in *Leao Vitorina D'Souza and another v. Silvestre Loyola Fernandes and another*, reported in 1989 (1) GLT 62. In paragraph 6 of the judgment the learned Judge observed that a harmonious construction of Sections 8-A, 29 and 30 of the Act suggest the solution that the presumption of truth of the entries made in the register of mundkars can be rebutted only if the said entry was made on the basis of the decision of the Mamlatdar or by superior authority in appeal or revision. The learned Judge observed that the appeal provided under subsection (8) of Section 29 is only in respect of entries and particulars thereof and not in respect of finding as to whether a person is not a mundkar. The observations made by the learned single Judge indicate that the right to seek a declaration u/s

8-A of the Act is not foreclosed by decision recorded by the Mamlatdar in proceedings u/s 29 of the Act. The reliance by Mr. D'Costa on the latter observation of the learned Judge that the finding recorded by the Mamlatdar u/s 29 has to be considered as a declaration made u/s 8-A of the Act is not accurate and is required to be overruled. Mr. D'Costa then invited our attention to two unreported decisions of single Judges of this Court. The first decision is dated November 6, 1990 in Civil Revision Application No. 10 of 1990 Gabriel Noronha and others v. Smt. Brasil Brigida Cardoso, the learned Judge who delivered the judgment in Civil Revision Application and held that application for declaration u/s 8-A of the Act is not maintainable after decision of Mamlatdar u/s 29 of the Act, followed the same view in the decision under appeal. Another learned single Judge by decision dated July 9, 1992 in Writ Petition No. 356 of 1989 Abilio D'Souza and another v. Court of Civil Judge, Senior Division, Sanguem and another, observed that on rejection of application by Mamlatdar u/s 29 of the Act it is not open for the aggrieved party to raise the issue of mundkar in a suit filed in the Civil Court. Both the decisions referred to by the learned counsel do not deal with the impact of the provision of Section 30 of the Act and in our judgment the view taken in these two decisions is incorrect and is specifically overruled. In our judgment the application for a declaration u/s 8-A is maintainable in spite of the decision recorded by the Mamlatdar u/s 29 of the Act and adverse to the party seeking a declaration u/s 8-A of the Act. It is also open for a party who is aggrieved by the decision of Mamlatdar u/s 29 of the Act to raise the contention about right created under the Act in a Civil Court and in case the Civil Court prima facie finds that the right claimed is bona fide and not raised mala fide only to delay the proceedings then the Civil Court is bound to raise an issue and made reference to the Mamlatdar in accordance with the provisions of Section 32 of the Act.

7. On perusal of the said judgment, the Division Bench of this Court has found that the application u/s 8-A of the Mundkar Act for declaration of Mundkarial right is maintainable after an order is passed by the learned Mamlatdar u/s 29 of the Mundkar Act. It has been further held that it is not correct to suggest that the only remedy of an aggrieved person against an order passed by the learned Mamlatdar u/s 29 of the Act is to file an appeal, the fact that the aggrieved person has not resorted to file an appeal does not conclude the right to seek a declaration u/s 8-A of the Mundkar Act.

8. From the said judgment of the Division Bench of this Court, it cannot be accepted that the application filed by the petitioners was not maintainable. In view of the ratio laid down by the Division Bench of this Court, the application filed by the petitioners for declaration u/s 8-A of the Mundkar Act was very much maintainable. The contention of Shri Mulgaonkar, the learned counsel appearing for the petitioners to the effect that an issue as to whether the application is barred by principle of res judicata is a mixed question of law and fact cannot be faulted. Considering that the application filed by the petitioners was maintainable in view of the judgment of the Division Bench of this Court, it would not be open

to the authorities below to dismiss the application filed by the petitioners at the threshold as being barred by the principle of res judicata.

9. In this context, I shall now consider the submissions of Shri C.A. Ferreira, the learned counsel as to whether as an issue was framed in the course of the application for registration u/s 29 of the said Mundkar Act by itself would mean that the petitioners are not entitled to now re-agitate whether the petitioners are the Mundkars or not of the dwelling house. To consider the submissions of Shri C.A. Ferreira, learned counsel appearing for the respondents, it would be appropriate to consider what would be the effect of an order for registration passed by the learned Mamlatdar u/s 29 of the said Mundkar Act. The effect of an order u/s 29 was to make an entry in the register of mundkars as provided u/s 30 of the Mundkar Act. Section 30 of the Act provides that an entry made in the register of mundkars prepared in accordance with the provisions of this Act and the rules made thereunder shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted thereafter. Hence, entries in the registration of Mundkar would only create a presumptive value. Reading the provisions of Sections 29 and 30 of the Mundkar Act, it can be safely assumed that the Legislature did not intend to give proceeding u/s 29 of the Mundkar Act. The character of finality which will make the judgment to operative as res judicata. The Act itself provides that the effect of an order passed u/s 29 of the Mundkar Act only draws a presumptive value which shows that the Legislature did not intend to give finality to an order passed in the course of an application for registration of Mundkar. Hence, merely because during the course of the application for registration of Mundkar, a person has been treated to be not a mundkar, by itself would not disentitle such a person to file an application u/s 8-A of the Mundkar Act for declaration and such application cannot be dismissed as being barred by principle of res judicata. No doubt, any incidental findings given by the learned Mamlatdar while disposing of the application for registration of Mundkar can always be considered as to whether such findings have attained finality. But however, such exercise can be done only after evidence is recorded and inquiry is held in the application u/s 8-A of the Mundkar Act. This Court in a judgment whilst disposing of Writ Petition No. 317 of 2004 by judgment dated 4.10.2011 in the case of Ms. Adelia Albuquerque and others v. Shri Vithal B. Dabholkar & others, after taking note of the judgment of the Division Bench of this Court in Gulabi (supra) has held at paras 9 and 10 thus:--

9. Considering the said judgment of the Division Bench of this Court, it cannot be disputed that once an application u/s 29 of the Mundkar Act has been disposed of a person is not precluded from filing an application u/s 8-A of the Mundkar Act for a declaration as a Mundkar but however the Division Bench has also held that Bhatkar can also file an application for negative declaration in case he is aggrieved by any such order. The Division Bench has also considered that under the provisions of Section 30 of the Mundkar Act, the entries are presumed to be true until the contrary is proved. In the present case, it cannot be disputed that after an inquiry under the provisions of Mundkar Act an application for

registration as a Mundkar filed by the respondent No. 1 came to be rejected. Even this Court while disposing of the Writ Petition has refused to interfere in the conclusions arrived at by the Authorities below that respondent No. 1 was a caretaker of the suit house. The respondents have chosen to dispute the said findings before the authorities below and considering the judgment of the Division Bench in *Gulabi* (supra) the burden on the respondents is quite substantive and heavy.

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 8-A 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 judgment of this Court, the learned Mamlatdar would have to take note of the findings therein whilst deciding the application u/s 8-A of the Mundkar Act for declaration filed by the petitioners. Any incidental findings arrived at by the learned Mamlatdar whilst disposing of an application for registration would be considered by the learned Mamlatdar whilst deciding the application for declaration filed by the petitioners. The effect of such findings arrived at by the learned Mamlatdar would also be taken note of by the learned Mamlatdar whilst deciding the application u/s 8-A of the said Act. In view of the above, the contention of Shri Ferreira, learned counsel appearing for the respondents to the effect that the judgment of the Division Bench of this Court would not be applicable to the facts of the present case cannot be accepted. Taking note of the view taken by me hereinabove, I find that such contention of Shri Ferreira cannot be accepted. The judgments of the Apex Court relied upon by Shri C.A. Ferreira, learned counsel appearing for the respondents would not be applicable to the present case considering the view taken by me hereinabove.

11. Taking note of the fact that the dispute between the parties is pending for the last more than 15 years, I find it appropriate in the peculiar facts of the case to direct the learned Mamlatdar to expeditiously dispose of the application for

declaration filed by the petitioners u/s 8-A of the Mundkar Act preferably within a period of one year from the date of the receipt of this order. Subject to the above, I pass the following:--

ORDER

- (i) Rule is made absolute in terms of prayer
- (ii) The learned Mamlatdar is directed to dispose of the application u/s 8-A of the Mundkar Act filed by the petitioners as expeditiously as possible in the light of the observations made hereinabove preferably within a period of one year from the date of the receipt of this order.
- (iii) Parties to appear before the learned Mamlatdar on 30.11.2012 at 3.00 p.m.
- (iv) The petition stands disposed of accordingly.