

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 28 OF 2015

MR.KASHINATH R. PALKAR (DECEASED)
THROUGH LRS., ... Applicants/Petitioners

Versus

MRS.LIBERATHA D'SOUZA E MARTINS
AND ANR., ... Respondents

Shri Ashwin D. Bhobe, Advocate for the Applicants/Petitioners.

Shri V. R. Tamba, Advocate for the Respondents.

CORAM:- C. V. BHADANG, J.

DATE:- 10th SEPTEMBER, 2015.

ORAL ORDER:

By this revision application the applicants/judgment debtors are challenging the judgment and order dated 10.07.2015, passed below Exhibit-53/D by the learned Civil Judge Junior Division at Mapusa in Execution Application No. 33/2001/F. By the impugned order, the Executing Court has rejected the application dated 24.04.2015, seeking dismissal of the Execution Case.

2. The brief facts are that the respondent no. 1 had filed Regular Civil Suit No. 158/98 against Mr. Kashinath Palkar (since deceased). That suit purportedly sought mandatory injunction, directing the defendant-Kashinath Palkar to vacate the suit house bearing House No. 385 situated in property bearing Survey No. 320/4 of village Salvador-do-Mundo. It appears that Kashinath Palkar died during the pendency of the suit and his legal representatives, being the applicants herein are brought on record.

3. The case made out in the plaint was that the plaintiffs own the suit house. Sometime in the year 1982, Kashinath Palkar was allowed to reside in the suit house, so as to keep it in habitable condition. The parties entered into an agreement to that effect on 01.05.1982. The period of the agreement was for 11 months. It was contended that the agreement was renewed on 29.11.1983 and thereafter, on 01.11.1984 for a period of eleven months each. The plaintiffs claimed that there was no renewal subsequent to agreement dated 01.11.1984. It was also contended that no rent was paid by Kashinath Palkar and he also failed to maintain the suit house in habitable condition. It is contended that Kashinath Palkar failed to vacate the suit house,

inspite of repeated requests, and a notice dated 15.03.1990, which led the plaintiffs to file the suit. It appears that Kashinath Palkar in his reply raised a defence that the suit house was given on a rent of Rs.90/- per month. It is contended that the Civil Court had no jurisdiction to entertain the suit. Subsequently, Kashinath Palkar and his legal representatives failed to appear in the suit and the matter proceeded ex-parte.

4. The respondent no. 1/plaintiff led her evidence and produced the lease agreement. The trial Court found that the suit house was given to the original defendant-Kashinath Palkar, without any rent with an object that he will maintain the house in a habitable condition. It was also found that the agreement was not renewed after 01.11.1984. The trial Court found that the defendants were illegally occupying the suit house and in the face of such finding, the suit came to be decreed, by judgment and order dated 21.03.2001. It is undisputed that the said judgment and decree was not challenged and has attained finality. Subsequently, the respondent/decreed holder filed Execution Application No. 33/2001/F, in which the applicants/judgment debtors filed an application for dismissal of the execution application. That application was filed on 24.04.2015. It was

contended that the decree is a nullity having been passed by a Court without any jurisdiction. Thus, the decree is not executable in law. It was contended that the suit was filed on the basis of the lease agreement dated 01.05.1982, which was subsequently renewed from time to time for a monthly rent of Rs.90/-. It was contended that the defendants were protected tenants and as such, the Civil Court had no jurisdiction. Reliance was placed on behalf of the applicants on Section 21 and Section 56 of the Goa Buildings (Lease, Rent and Eviction) Control Act, 1968 (the Act of 1968, for short) and the Rules framed thereunder. In short, it was contended that the decree holders ought to have instituted proceedings for eviction before the Rent Controller. It was contended that the issue of tenancy ought to have been referred to the competent Authority. It was next contended that in a proceedings, which the applicants had instituted, claiming mundkarial rights, the Joint Mamlatdar of Bardez has negatived the said claim, which was confirmed by the Deputy Collector, as also the Administrative Tribunal holding that the applicants were lessees, on payment of monthly rent. It was contended that once the competent Authority had held that the applicants were tenants, the impugned decree would be rendered inexecutable, being nullity.

5. The Executing Court found that the judgment and decree dated 21.03.2001, which was sought to be executed had attained finality. It was found that the same cannot be reopened. The Executing Court found that this was yet another attempt to delay the delivery of possession. It was also found that the applicants managed to keep the execution alive under a false claim of mundkarship, which has also been rejected. In that view of the matter, Exhibit-53/D came to be dismissed, with costs of Rs.2,500/-. Feeling aggrieved, the applicants are before this Court.

6. I have heard Shri Bhobe, the learned Counsel for the applicants and Shri Tamba, the learned Counsel for the respondents.

7. It is submitted by Shri Bhobe, the learned Counsel for the applicants that once the issue of tenancy was raised, the trial Court could not have entertained the suit. It is submitted that the issue ought to have been referred to the competent Authority under the the Act of 1968. The learned Counsel also referred to the lease agreement in order to contend that the suit house was

given to the original tenant-Kashinath Palkar on rent. However, considering his financial condition, no rent was accepted and he was asked to look after the suit house. It is submitted that the claim of the applicants is based on their tenancy rights, which stand vindicated by the judgment of the Joint Mamlatdar, as confirmed by the Deputy Collector and the Administrative Tribunal in the mundkarial proceedings. It is submitted that thus, there would be inherent lack of jurisdiction in the Civil Court to entertain the suit, in view of the provisions of Section 21 and Section 56 of the Act of 1968. It is submitted that the agreement would clearly show the intention of the parties, to create their tenancy rights in favour of Kashinath Palkar and would entitle the applicants to get protection under the Act of 1968.

8. On the contrary, it is submitted by Shri Tamba, the learned Counsel for the respondents that the applicants are taking contradictory pleas, which itself would be sufficient to non suit them. It is submitted that in the written statement filed in the suit, a claim was made that Kashinath Palkar was a tenant on payment of monthly rent of Rs.90/-. It is submitted that the original defendant failed to contest the suit and also did not

challenge the judgment and decree passed in the suit, which has thus attained finality. It is submitted that subsequently, the applicants raised a claim of mundkarship, which would run contrary to the earlier claim of tenancy. It is submitted that the applicants are now reverting back to the claim of tenancy. It is submitted that the Executing Court has rightly refused to go behind the decree, which does not call for any interference. Reliance is placed on the decision of the Hon'ble Apex Court in the case of, **Mohd. Akram Ansari Vs. Chief Election Officer and Others**, reported in **(2008) 2 SCC 95** and a decision of the Division Bench of this Court in the case of **Chandrashekhar s/o Manohar Tanksale Vs. Pandharinath s/o Vithobaji Neware**, reported in **2013(6)Mh.L.J.**, in support of the submissions.

9. On hearing the learned Counsel for the parties and on perusal of the record, I find that no case for interference is made out. Undisputedly, the original tenant-Kashinath Palkar had set up a defence that he was a tenant on a monthly rent of Rs.90/-. The defendants did not pursue the defence and failed to substantiate the same. They remained absent in the suit and the suit was decreed ex-parte. Undisputedly, the said judgment and

decree has attained finality, as it was never challenged. The question is whether, in such circumstances, the applicants can be justifiably allowed to raise a defence that the decree is inexecutable, being passed by a Court without jurisdiction, on the ground that the issue was required to be decided by the competent Authority under the Act of 1968.

10. It is well settled that the Executing Court cannot go behind a decree, except where the decree can be said to be passed by a Court, which inherently lacks jurisdiction. The nature and extent of enquiry, which the Executing Court can conduct in such a case, has been subject matter of various decisions and the issue is no longer *res integra*. In the case of **Chandrashekhar Tanksale** (supra), the appellant/ landlord had filed a suit against the respondent/tenant before the Court of Small Causes for possession. The suit was ultimately decreed. That decree was affirmed by the Hon'ble Apex Court. In the execution proceedings, a contention was raised that under the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971, the decree would be inexecutable, as being without jurisdiction, as the disputed property was notified as a slum area under the Maharashtra Slum Area (Improvement,

Clearance and Redevelopment) Act, 1971. This Court after taking survey of various decisions including the decision of the Hon'ble Apex Court in the case of **Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others**, reported in **1970 (1) SCC 670**, held that where the objection so raised requires determination of the question, on the basis of evidence, which requires to be led by the parties, the Executing Court cannot undertake such exercise, in order to find out, whether the decree passed is without jurisdiction. It would be worthwhile to notice the observations of the Hon'ble Supreme Court in the case of **Vasudev Dhanjibhai Modi** (supra) as under:

"5. In this case the suit for ejectment against Munshi was instituted by Modi in the Court of Small Causes. No objection was raised that the Court had no jurisdiction to entertain the suit. The objection was not raised even in appeal, nor before the High Court. The Trial Court dismissed the suit on merits : the decree was reversed by the District Court and that decree was confirmed by the High Court. The objection was raised for the first time when the decree was sought to be executed.

6. A Court executing a decree cannot go behind the decree : between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection

that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record : where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. In Jnanendra Mohan Bhaduri and another vs. Rabindra Nath Chakravarti, the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution proceeding that the decree was made without jurisdiction, since under the Indian

Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction.

8. *In the present case the question whether the Court of Small Causes had jurisdiction to entertain the suit against Munshi depended upon the interpretation of the terms of the agreement of lease, and the user to which the land was put at the date of the grant of the lease. These questions cannot be permitted to be raised in an execution proceeding so as to displace the jurisdiction of the Court which passed the decree. If the decree is on the face of the record without jurisdiction and the question does not relate to the territorial jurisdiction or under Section 11 of the Suits Valuation Act, objection to the jurisdiction of the Court to make the decree may be raised; where it is necessary to investigate facts in order to determine whether the Court which had passed the decree had no jurisdiction to entertain and try the suit, the objection cannot be raised in the execution proceeding.*

9. *The High Court was of the view that where there is lack of inherent jurisdiction in the Court which passed the decree, the executing Court must refuse to execute it on the ground that the decree is a nullity. But, in our judgment, for the purpose of determining whether the Court which passed the decree had jurisdiction to try the suit, it is necessary to determine facts on the decision*

of which the question depends, and the objection does not appear on the face of the record, the executing Court cannot enter upon and enquiry into those facts. In the view of the High Court since the land leased was at the date of the lease used for agricultural purposes and that it so appeared on investigation of the terms of the lease and other relevant evidence, it was open to the Court to hold that the decree was without jurisdiction and on that account a nullity. The view taken by the High Court, in our judgment, cannot be sustained."

(Emphasis supplied)

11. Turning to the present case, the trial Court by judgment dated 21.03.2001 has found that the agreement establishes the case of the plaintiff that the suit house was given to the defendant no. 1 without any rent, just to maintain it in habitable condition. The learned Counsel was at pains to point out that the agreement clearly makes out the fact, that it was executed at the instance of the tenant. I have carefully gone through the agreement. It is trite that the agreement has to be read as whole. Clause 2 of the agreement stipulates that the lease is for the payment of monthly rent, but due to the financial condition, the lessees had been excluded from making payment. It can thus be seen that although, in the lease agreement there

is a condition for payment of monthly rent, it goes on to provide that, actually no rent was payable. If we apply the test of the intention of the parties, no rent, as such was payable. That apart, the question would be whether the objection raised to the jurisdiction would appear on the face of the decree passed by the trial Court. The answer has to be in the negative.

12. It would appear that the applicants have set up a different case of them having mundkarial rights, when they approached the Joint Mamlatdar. The Joint Mamlatdar, as well as the Deputy Collector and the Administrative Tribunal had negated the claim as to mundkarship, incidentally holding that the agreement shows that they are tenants. It is not possible to envisage that this finding of the competent Authority under the Act of 1968 would override the finding by the Civil Court. In either case, the material issue before the competent Authority under the said Act of 1968 was whether the applicants had substantiated their claim of mundkarship. In any case, this entire exercise would require examination of the effect of the orders passed by the competent Authority under the Goa Buildings (Lease, Rent and Eviction) Control Act, 1968, which would be impermissible in the execution proceedings. It certainly

cannot be said that such want of jurisdiction appears on the face of the decree. In such a case alone, the Executing Court can decline to execute the decree, being void, as having been passed by a Court without jurisdiction.

13. I have perused the impugned order and I do not find that, it requires interference. In that view of the matter, the Civil Revision Application is hereby dismissed, with no order as to costs.

14. At this stage, Shri Bhobe, the learned Counsel for the applicants submits that the applicant no. 2(a) is a widow. It is submitted that the applicants have no alternate accommodation. It is submitted that reasonable time may be granted to the applicants to vacate the suit house. The learned Counsel for the applicants, on instructions from the applicant no. 2(a), who is present before this Court, submits that the applicants are willing to give an undertaking before the Executing Court that they will vacate the suit house within such time, as may be granted by this Court.

15. The learned Counsel for the respondents submits that some reasonable time may be granted to the applicants on condition of filing an undertaking.

16. Considering the submissions and the concession recorded, the applicants are granted three months time to vacate the suit house, on the condition that they will file an undertaking before this Court that they will vacate the suit house latest by 07.12.2015. The undertaking shall be filed before this Court within one week from today. It is made clear that in the event, the applicants fail to file such undertaking, the order granting time shall stand vacated automatically.

C. V. BHADANG, J.

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