

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 87 OF 2016

FRANCIS XAVIER RODRIGUES AND 4
ORS.

... Appellant

Versus

SHRI. RAYMOND CARLOS JOSEPH
FERNANDES AND 4 ORS.

... Respondent

Mr. Valmiki Menezes, Advocate for the Appellants.
Mr. Gaurish N. Agni, Advocate for the Respondent no. 1.

Coram:- F. M. REIS, J.

Date:- 23rd September, 2016

P.C.

Heard Shri V. Menezes and Shri Gaurish Agni, learned Counsel
appearing for the Respondent no. 1.

2. The above Appeal challenges the Judgments passed by the Courts
below whereby an application under Order 21 Rule 101 of the Civil
Procedure Code obstructing the execution of a Decree for possession
in favour of the Respondent nos. 1 to 4.

3. Briefly, the case put forward by the Petitioner is that the subject
dwelling house was being occupied by the grandfather of the
Appellant no. 1 who was a Mundkar. It is further submitted that
there were proceedings initiated by the uncle of the Appellant no. 1
for registration as a Mundkar in respect of the subject house which
came to be disposed of by the learned Mamlatdar by an Order passed
in the year 1998 registering the uncle Shri Pedro Rodrigues as a

Mundkar of the dwelling house. It is further pointed out that the said uncle expired somewhere in the year 2001 and thereafter the Respondent nos. 1 to 4 filed the suit against the Respondent no. 5 alleging that the Respondent no. 5 had trespassed into the subject house after the death of the uncle without any right. It is further pointed out that the suit came to be decreed in favour of Respondent nos. 1 to 4 in the year 2010. After such a Decree, the Respondent nos. 1 to 4 filed proceedings for execution before the learned Judge for handing over the possession of the subject house. In such proceedings, the Appellants filed an application under Order 21 Rule 101 of the Civil Procedure Code contending that the Appellants were Mundkars of the subject house and, as such, entitled to obstruct the execution of the Decree.

4. The Respondent nos. 1 to 4 disputed the said contention and pointed out that the Appellants have no right at all to raise such obstruction and, in any event, the claim of the Appellants that they were Mundkars of the subject house was also disputed.

5. The learned Judge, by the impugned Order dated 02.08.2014 dismissed the application filed by the Appellants herein. Being aggrieved by the said Judgment, the Appellants preferred Regular Civil Appeal no. 143 of 2014 which came to be disposed of by Judgment dated 19.04.2016 thereby dismissing the Appeal preferred by the Appellants. Being aggrieved by the said Judgment, the

Appellants have preferred the present Appeal.

6. Mr. Valmiki Menezes, learned Counsel appearing for the Appellants, has pointed out that the records clearly reveal that the grandfather of the Appellant no. 1 was a Mundkar of the dwelling house and, as such, according to him, such rights devolved upon the father and the uncle after the death of the grandfather. It is further pointed out that as the father had already expired and, as such, the application for registration was filed by the uncle who was a bachelor. The learned Counsel further pointed out that though the Appellants were in possession of the dwelling house, after the death of the father, the Appellants were residing in Mumbai on account of their work. It is further submitted that the Respondent nos. 1 to 4 taking advantage of the absence of the Appellants, purported to file the suit in the year 2004 only against the aunt of the Appellant no. 1 and obtained a fraudulent Decree in the year 2010. Learned Counsel further pointed out that the Decree under execution has been executed by fraud and suppressing of material facts in collusion between the Respondent nos. 1 to 4 and the Respondent no. 5. Learned Counsel has thereafter taken me through the Judgments passed by the Courts below and pointed out that as the Appellants had produced sufficient material to show the existence of a Mundkar in the dwelling house, the learned Judge was not justified to dismiss the objections raised by the Appellants in the execution proceedings filed by the Respondent nos. 1 to 4. It is further pointed out that as

the Appellants have a legal right to continue in possession of the subject dwelling house and by the collusive act of Respondent nos. 1 to 4 with the Respondent no. 5 are seeking to deprive the Appellants of their legitimate rights over the dwelling house. Learned Counsel further pointed out that the learned Judge ought to have stayed the proceedings and refer the issue to the competent authority to adjudicate in accordance with law. It is further submitted that in the meanwhile, the Respondent nos. 1 to 4 have removed the household articles of the Appellants and, as such, purported to illegally possess the subject house. Learned Counsel further pointed out that as the subject structure is no longer existing, the Appellants are entitled for a relief from this Court to restrain the Respondents from not putting up any structure in the subject plinth area of the dwelling house. The learned Counsel, as such pointed out that, on this ground, there are substantial questions of law which arise in the present Appeal for consideration.

7. On the other hand, Shri Gaurish Agni, learned Counsel appearing for the Respondent no. 1, has pointed out that the Appellants have never resided with a fixed habitation in the said dwelling house. Learned Counsel further pointed out that the very fact that the registration was obtained in the name of the uncle of the Appellant no. 1, would itself suggest that the said uncle did not file any such application either on behalf of the father of the Appellants or their mother and, consequently, the claim of the Appellants is totally

farfetched. Learned Counsel further pointed out that the Respondent nos. 1 to 4 filed the suit on the premise that the Respondent no. 5 after the death of the said uncle had trespassed into the subject house in the year 2004. It is further pointed out that after the death of the uncle, the subject house was in a dilapidated condition and not occupied by any person and, thereafter, Respondent no. 5 started occupying such house. Learned Counsel further pointed out that the Respondent no. 5 contested the suit and raised contentions which were duly adjudicated by the learned Judge whilst passing the Judgment and Decree in the year 2010. Learned Counsel further pointed out that the Appellants have no right to the subject house and that the claim of Mundkarship is misconceived and deserves no consideration. Learned Counsel further pointed out that the Respondent nos. 1 to 4 have already executed the Decree and the subject house is not existing at loco. Learned Counsel further pointed out that there are no substantial questions of law for consideration in the present Appeal.

8. I have carefully considered the submissions of the learned Counsel and I have also gone through the records. It need not be emphasised that the jurisdiction to decide a claim of a Mundkar is exclusively vested on the Mamlatdar. In the present case, the Appellants relied upon a registration in favour of the uncle to claim that they are Mundkars of the subject house. The Appellants also contend that their claim of Mundkarship is independent of the claim

of the uncle. In such circumstances, as the Appellants are not claiming through the said uncle, it was incumbent upon the Appellants to obtain an appropriate relief before the competent authority to get their rights adjudicated as there is no conclusive material before the Executing Court to ex-facie accept that the Appellants were Mundkars of the subject house. As such, the finding of the learned Judge whilst dismissing the application filed by the Appellants, cannot be faulted.

9. The contention of Mr. Menezes, learned Counsel appearing for the Appellants, that the Decree under execution has been obtained by fraud and collusion are matters which can be decided on its own merits in appropriate forum. Apart from that, the records reveal that the Respondent no. 5 had defended the suit and after a detailed hearing and evidence being recorded, a Decree was passed. In any event, as the Appellants are raising an independent claim over the subject house that they are Mundkars of the dwelling house in question. The Appellants would have to get their rights adjudicated if they are so entitled before an appropriate forum under the Mundkar Act. These contentions would have to be adjudicated on its own merits by the learned Mamlatdar who has an exclusive jurisdiction with that regard.

10. Considering that the Appellants do not have any order in their favour from the learned Mamlatdar, I find that the findings of the

Courts below whilst dismissing the application filed by the Appellants, cannot be faulted. The Appellants, if so advised, would have to get their alleged claim of Mundkarship adjudicated in appropriate forum and obtain appropriate reliefs with regards to the dwelling house in question. Mr. Menezes, learned Counsel appearing for the Appellants, pointed out that the Appellants would initiate proceedings under the Mundkar Act to get their rights adjudicated and protected in accordance with law.

11. In such circumstances, I find that there are no substantial questions of law which arise in the present Appeal. Needless to say, the Appellants, if so entitled, are at liberty to initiate appropriate proceedings before the Court of the Mamlatdar who decides such proceedings on its own merits without being influenced with any observations in the present proceedings, in accordance with law. In case any such proceedings are initiated, the learned Mamlatdar shall dispose of such proceedings as expeditiously as possible and dispose of the injunction application, if any, within thirty days from the receipt of such application, in accordance with law.

12. Subject to the above, the Appeal stands dismissed.

F. M. REIS, J.

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