

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.125 OF 2017**

Mrs. Maria Isabel Rebelo & Anr. ...Petitioners
vs.
Mr. Rafael Gomes and 7 Ors. ...Respondents

Shri A. F. Diniz with Mr. Ryan Menezes Advocate for the Petitioners.
Shri T. Pareira, Advocate for the Respondent Nos.1 & 2.

CORAM :- C. V. BHADANG, J

Pronounced on : 16th March 2017

ORDER :

. On 30/1/2017 a notice for final disposal was issued in this case. The Petition is accordingly being disposed of finally.

2. The Petitioners who are the decree holders are challenging the order dated 25/11/2016 passed by the Executing Court in Regular Execution Application No.45/2016/D. The Respondent Nos.1 and 2 are the only contesting parties.

3. The brief facts necessary for the disposal of the Petition may be stated thus:

The Petitioners filed the aforesaid Execution Application for execution of a decree dated 19/3/2014 passed in Regular Civil Suit No.121/2013. The aforesaid suit was decreed in the following terms:

“ Plaintiffs Suit stands decreed. The defendants, their agents, servants or anyone claiming through or under them are permanently restrained from carrying out any construction in

the suit property.

It is ordered to demolish illegal construction/extensions done by the defendants in the suit property and shown on the sketch at Exhibit 18 colly., identified as RCC structure (G+1) shown in red colour, RCC structure (ground) shown in yellow colour and temporary structure shown in blue colour on the plan.

Parties shall bear the costs.

Decree shall be drawn up accordingly.

Proceedings closed.

Pronounced in the Open Court.”

4. The Respondent Nos.1 and 2 filed an application before the Executing Court for stay of the execution proceeding on the ground that they have filed an application under section 29 r/w 8(A) of Goa Daman & Diu Mundkar (Protection from Eviction) Act 1975 (for short, “the said Act”) before the Mamlatdar seeking declaration as mundkars in respect of the subject premises. It was contended that these Respondents were induced not to contest the aforesaid Civil Suit on the basis of a promise of amicable settlement with regard to their mundkarship. In short, according to the Respondent Nos.1 and 2 they are the mundkars of the Petitioners in respect of the suit dwelling house bearing House No.422.

5. The Petitioners opposed the said application. It was contended that the execution is not required to be stayed on the ground of the judgment debtors having filed an application under section 29 read with section 8A of the said Act. It was contended that the application for stay of the proceeding is beyond the scope of Order 21 Rule 26 and 29 of the Civil Procedure Code (for

short, CPC) . It was contended that the only remedy available to the judgment debtors was to challenge the judgment and decree dated 19/3/2014. It is submitted that for want of challenge, the said decree has attained finality. It was also pointed out that the judgment debtors had withdrawn the earlier proceedings under the said Act and in that view of the matter the prayer is not bonafide.

6. The learned Executing Court has found that there is a dispute as regards the area of the mundkarial house. The Executing Court further noticed that the question as to what is the area of mundkarial dwelling house prior to the appointed date has to be decided only by the Mamlatdar under the Mundkar Act and the demolition of the part of the house would amount to eviction of judgment debtor from the dwelling house, in as much as the term 'eviction' as used under the Act, would also include, part eviction. The Executing Court has ultimately found that since the proceedings are pending before the “Designated Statutory Court”, it would not be proper to demolish the part of the dwelling house as the Respondent Nos.1 and 2 would suffer irreparable loss. It is, in these circumstances that the Executing Court has stayed the execution proceedings.

7. I have heard Shri A. R. Diniz, learned counsel for the Petitioners and Mr. Tarshish Leo Pareira, learned counsel for the Respondent Nos.1 and 2. With the assistance of learned counsel for the parties, I have gone through the impugned order.

8. It is submitted by the learned counsel for the Petitioners that the Respondent Nos.1 and 2 did not choose to contest the suit and have also failed to challenge the decree passed therein. The learned counsel has referred to inspection report dated 20/10/2011 by the Structural Engineer along with the plan, in order to submit that the original house, as shown on the survey plan, has been extended, on the southern side and the old structure is easily identifiable at the location. He submits that the decree as sought to be executed only directs demolition of the illegal construction/ extension done by the Respondent Nos.1 and 2. It is submitted that the previous application filed by the judgment debtor under the Act has been withdrawn. It is submitted that the Petitioners have not shown any semblance of right on the basis of their mundkarial claim to the illegal structure which is by way of extension. He submits that the learned Executing Court, in such circumstances, was in error in staying the execution proceedings, pending disposal of the Mundkarial proceedings filed by the Respondents.

9. On the contrary, it is submitted by the learned counsel for the Respondent Nos.1 and 2 that the said Act grants protection to a Mundkar from illegal eviction. It is submitted that the claim of the Respondents about mundkarship under the said Act, can only be decided by the Mamlatdar and the Civil court would lack jurisdiction to decide the said issue. It is submitted that the Executing Court, has rightly come to the conclusion that the demolition of the structure pending the decision of the claim of the judgment debtors, would act to their prejudice.

10. I have carefully considered the rival circumstances and the submissions made. It is a matter of record that the Respondent did not contest the suit in which the ex-parte decree was passed. The inspection report from the Structural Engineer would clearly show that the original house is shown extended on the southern side which can be easily identified. The new structure which is by way of extension on the southern side consists of three parts, the front portion shown in blue colour on the plan ad-measures 3.20 x 3.40 meters which is said to be a temporary structure with wooden poles, with walls and roof of coconut leaves, central portion shown in red colour ad-measures 7.50 x 3.40 meters which is a RCC permanent structure consisting of Ground+ 1 structure. The back side portion shown in yellow colour ad-measures 2.90 x 1.30 meters which is a single storeyed structure of a permanent nature. The decree which is sought to be executed only pertains to demolition of illegal structure/extension as shown in the sketch at Exh.18 which is identified as RCC structure Ground+1 shown in red colour and RCC structure ground floor shown in yellow colour and temporary structure shown in blue colour on the plan.

11. The learned counsel for the Respondent Nos.1 and 2 was at pains to point out, paragraph 22 of the plaint, in which, the Petitioners have made out a case that the Defendants are not entitled to carry out any extension to the plinth area of the dwelling house without having purchased the area to which they are entitled and without obtaining sanction in accordance with

the provisions of law. Thus, according to the learned counsel for the Respondent Nos.1 and 2, the Petitioners are not disputing the mundkarial claim of the Respondent Nos.1 and 2.

12. In my considered view the submission cannot be accepted. It is evident that a Mundkar under the provisions of said Act can not make additions/alterations to the plinth area. In the present case, it has clearly come on record that there were additions and extensions made which have been directed to be demolished and which decree has attained finality. It is further a matter of record that the Petitioners had earlier filed Mundkarial proceeding which have been withdrawn. The learned counsel for the Respondent Nos.1 and 2 during the course of arguments at bar did not dispute that the Petitioners have not obtained any license/permission from the Competent Authority for effecting the construction. The Hon'ble Apex Court in the case of ***Jacinta D'Silva v. Rosarinho Costa and Others, 2014 4 SCC 534*** has held that raising of a plea of jurisdiction before the Executing Court is nothing but an attempt to stall the execution proceedings. It is now well settled that a Civil Court, even during the pendency of the suit, is not obliged to make a reference to the Mamlatdar on the basis of a claim made by the defendant of being a Mundkar for the asking. In other words, the Civil Court is entitled to see whether any genuine and triable issue under the said Act arises. Here is a case where the suit has been decreed and contention on the basis of a mundkarial claim is raised for the first time before the Executing Court. As noticed earlier, all that the impugned decree does is to direct demolition of the

illegal structure/extension which according to the report of the expert is clearly identifiable at the location.

13. For the aforesaid reasons, in my considered view the Executing Court was not justified in staying the execution proceedings pending disposal of the application under the Mundkar Act. In the result, the Petition is allowed. The impugned order is hereby set aside. The executing court shall proceed to execute the decree in accordance with law. Rule is made absolute in the aforesaid terms, with no order as to costs.

(C. V. BHADANG, J.)