

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 317 OF 2016**

1. Mrs. Bernadette Maria C. Mascarenhas,
Age 51 years, Housewife.
 2. Mr. Arthur Anthony Michel Viegas,
Age 59 years, Business,
Both residing at House No.392,
Near Hotel Blue Bay,
Caranzalem, P.O. Ilhas, Goa.
- Petitioners

V e r s u s

1. Mr. Kanta N. Morajkar,
About Age 70 years,
House No.1575,
Grande Chinvar,
Anjuna, Bardez-Goa.
 2. Maria Bernadeth E. Macarnehhas (deceased)
Through legal heirs
 3. Stella Lucille Eithne Mascarenhas,
Age 66 years.
 4. Mr. Shaukat Mohammad Raham,
Age 65 years,
Residing at Dekhari Plantations,
Milon Nagar,
Dibrugarh,
Assam – 786 003.
- Respondents

Shri V. Menezes with A. Shirodkar, Advocates for the Petitioners.

Shri Rohit Bras De Sa, Advocate for the Respondent no.1.

Ms. N. Shirodkar, Advocate for Respondent nos. 3 and 4.

CORAM: C. V. BHADANG, J.
Reserved on 10th February, 2017.
Pronounced on 20th February, 2017

JUDGMENT:

Rule, made returnable forthwith. The learned counsel for the respondent nos. 1, 3 and 4 waive service. Heard finally by consent of parties.

2. The petitioners are challenging the judgment and order dated 5/11/2015 passed by the learned Adhoc District Judge-I (FTC) at Panaji in Tenancy Revision Application no.6/2014 by which, the order passed by the learned Deputy Collector, Mapusa, has been confirmed. The learned Deputy Collector by his order dated 26/6/2014 had set aside the order of the learned Mamlatdar, consequently upholding the preliminary objection raised on behalf of the respondent no.1 to the maintainability of the application under section 7 of the Goa, Daman and Diu Agricultural Tenancy Act 1964 (Tenancy Act for short).

3. The brief facts necessary for the disposal of the petition may be states thus-

That Maria Bernadeth, the respondent no.2 (since deceased) had instituted Regular Civil Suit no.93/1992 against the respondent no.1 and his

wife Mrs. Sunanda Morjekar. That was in respect of field survey no.429/10 of village Anjuna Bardez-Goa. The case made out by now deceased Bernadeth was that the said field was a rocky land not meant for cultivation for any paddy or allied crop. It was contended that her mother-in-law used to cultivate the suit field on experimental basis which was unsuccessful. It was the material case that during the survey, the name of the respondent no.1 was wrongly entered in the tenant's column of Form No. I and XIV of the said field and that was without the knowledge of the respondent no.1 Mrs Bernadeth. The suit was filed for a declaration that the respondent no.1 and his wife Sunanda have no right, title or interest in the suit field and the respondent no.2, Mrs. Bernadette, is the owner and is in possession of the suit field. The respondent no.2 (since deceased) also sought a direction to the survey authorities to delete the name of the respondent no.1, Kanta Morajkar from the tenant's column.

4. The respondent no.1 raised a claim of tenancy saying that he was cultivating the suit field as a tenant from the year 1964. The issue was referred to the Mamlatdar. The learned Mamlatdar by a judgment and order dated 6/6/1995 declared the respondent no.1 as a tenant of the suit field under section 7 of the Tenancy Act, which order was confirmed by the learned Deputy Collector. On 5/2/1996 the respondent no.2 (since deceased) sought

to challenge the order before the Administrative Tribunal in the year 2004 seeking condonation of delay of 8 years and 59 days. The learned Administrative Tribunal by an order dated 18/2/2005 refused to condone the delay. The respondent no.2, unsuccessful challenged the said order before this Court in W.P. No.270/2005, which was dismissed on 20/10/2005. Thus the order declaring the respondent no.1 as a tenant has attained finality. It is undisputed that in pursuance of the declaration the respondent no.1 has purchased the land under the provisions of the Tenancy Act and the purchase proceedings are finalized by the Mamlatdar.

5. The petitioners filed an application for a negative declaration under section 7 of the Tenancy Act before the Mamlatdar on 10/9/2009. The case made out by the petitioners was that the suit field was the property possessed and enjoyed by the parents of the petitioner no.1. It may be mentioned that Antao Feliciano Succorro Mascarenhas, (the father of the applicant no.1 and the respondent no.3) died on 12/9/1983, while his wife i.e respondent no.2 died on 19/2/2010. The case made out was that the suit field is the ancestral property of the petitioners and the respondent nos.3 and 4. It was contented that the petitioner no.1 was at Calcutta. The respondent no.2 was not keeping well and was not in a position to manage the affairs and taking disadvantage of this fact the respondent no.1 obtained a declaration in

his favour without arraying the petitioners or the respondent nos.3 and 4 as party respondents before the Mamlatdar. In short, it was claimed that the respondent no.1 managed to obtain a declaration by misrepresentation.

6. It was contended that the petitioners came to know of the order passed by the Mamlatdar on 12/6/2008 when the respondent no.2 delivered a copy of the judgment in the purchase proceedings to the petitioner no.1. In para 13 of the application, the petitioners averred that they filed an appeal before the Deputy Collector and at that time they came to know that the respondent no.2 had already challenged the order of the learned Mamlatdar before the Collector in which she could not succeed. In these circumstances it was contended that the order passed by the Mamlatdar is a collusive order and is void and is not binding on the petitioners. The petitioners sought a declaration that the respondent no.1 is not a tenant of the suit field and is seeking deletion of his name from the tenant's column of the revenue record.

7. The respondents raised a preliminary objection on the ground of the application being hit by principles of res judicata. It was also contended that the application is hit by delay and laches. It was contended that the petitioners have no locus standi to file the application as they are claiming through “the same persons”.

8. The learned Mamlatdar by an order dated 30/9/2010 found that the petitioners were not claiming through the same persons and that the order declaring the respondent no.1 as a tenant was not binding on the petitioners. In that view of the matter, the learned Mamlatdar dismissed the preliminary objection.

9. This was challenged by the respondent no.1 before the learned Deputy Collector, who by his order dated 26/6/2014 has allowed the revision upholding the preliminary objection. This was unsuccessfully challenged by the petitioners before the learned District Judge, who dismissed the revision on 5/11/2015 which brings the petitioners to this Court.

10. I have heard Shri Menezes, the learned counsel for the petitioners, Shri Da Sa, the learned counsel for the respondent no.1 and Ms. Shirodkar, the learned counsel for respondent nos.3 and 4.

11. The learned counsel for the petitioners submitted that the Mamlatdar had no jurisdiction to dismiss the application on the basis of a preliminary objection and without any inquiry being held. The learned counsel has referred to the provisions of the Tenancy Act and the Rules

framed thereunder, in order to submit that such a power to entertain a preliminary objection cannot be conceded to the Mamlatdar under the provisions of the Tenancy Act. The learned counsel has referred to section 53 of the Tenancy Act and Rule 10 of the Goa, Daman and Diu Agricultural Tenancy Rules 1965 (Rules for short) in order to submit that the Mamlatdar cannot decide the application on the basis of a preliminary objection. It is next contended that after the death of Antao, the petitioners and the respondent nos.3 and 4 were together the moiety share holders, in the subject land and the application could not have been decided in their absence. It is submitted that the respondent no.1 was aware of the legal heirs of Antao, however, he chose to make only the respondent no.2 (since deceased) as a party to the application. It is submitted that the petitioners and the respondent nos. 3 and 4 being necessary parties, the application could not have been decided in their absence. On behalf of the petitioners reliance is placed on the decision of this Court in the case of **Smt. Maria Tecla Goes Pereira Vs. Denzyl Lobo** and another MANU/MH/0613/1992.

12. The learned counsel for the respondent nos.3 and 4 has supported the petitioners. It is submitted that the petitioners and the respondent nos.3 and 4 being the necessary parties, the order declaring the respondent no.1 as tenant cannot bind the petitioners. It is submitted that the

learned Dy. Collector was in error in interfering with the order of the learned Mamlatdar by which the preliminary objection was rightly rejected by the learned Mamlatdar.

13. On the contrary, the learned counsel for the respondent no.1 has contended that the respondent no.2.(since deceased) was claiming to be the exclusive owner and had sought a declaration of title in respect of the suit field in the civil suit filed against the respondent no.1 and his wife. It is submitted that it cannot be accepted that the petitioners and for the matter of that the respondent nos.3 and 4 were unaware of the proceedings pending before the Mamlatdar right from the year 1993. It is submitted that once the Mamlatdar has granted a declaration of tenancy in favour of respondent no.1 which has attained finality and the respondent no.1 having purchased the land, it is not open to the petitioners to claim a negative declaration. It is submitted that nothing prevented the Mamlatdar from deciding the matter on preliminary objection.

14. The learned counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Custodian of Branches of Banco National Ultramarino Vs. Nalini Bai Naique (1989) Supp (2) SCC 275**, in order to submit that the respondent no.2 (since deceased) could represent

the estate as legal representative, in as much as a the legal representative would include a person who represents the estate or intermeddles with the same, though without a title (to the extent of the moiety share). Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of **Dolai Maliko (dead) Represented by His Legal Representatives and Others Vs. Krushna Chandra Patnaik and others (1966) Supp SCR 22: AIR 1967 SC 49.**

15. I have carefully considered the rival circumstances and the submission made.

16. I would first propose to deal with the submission that the Mamlatdar could not have entertained a preliminary objection. In my considered view, the submission cannot be accepted. Section 53 of the Tenancy Act provides that subject to the other provisions in that behalf the procedure to be followed by the Mamlatdar shall be such, as may be prescribed. Rule 10 of the Rules of 1965 set out the procedure to be followed by the Mamlatdar when an application is presented to him. A bare perusal of Rule 10 (1) to 10 (4) would show that the rules do not envisage strict procedure to be followed in such a case. On the contrary, they envisage that the Mamlatdar shall assist the applicant in properly filing the application.

This would be evident from Rule 10 (1) which inter alia provides that the application need not be in any specific form and where the application contains sufficient particulars on the subject matter, which appears to fall within the scope of the Act and within his jurisdiction, but does not clearly set out the relief, the Mamlatdar shall explain to the person presenting the application the nature of the relief available under the Act and shall inquire whether the applicant desires to obtain any such relief. Under sub rule 2 of Rule 10 also, if the Mamlatdar finds that the application does not contain the particulars or is unnecessarily prolix, the Mamlatdar shall forthwith examine the applicant on oath and ascertain from him such of the particulars specified in section 46, as are not clearly and correctly stated in the application and shall reduce the examination to writing in the form of an endorsement or an annexure. Sub rule 4 then provides that once the application is presented, if necessary, the Mamlatdar shall require the applicant to verify the application in his presence. Thus looking to the fact that the tenancy Act is a piece of beneficial legislation, the rules attribute a proactive role to the Mamlatdar in assisting the applicant to file the application. Thus the proceedings before the Mamlatdar cannot be said to be governed by strict procedural rules.

17. The learned counsel for the petitioners has taken me through Rule 10 of the Tenancy Rules, in order to submit that the aforesaid rules do

not permit the Mamlatdar to entertain a preliminary objection or to decide the application on the basis of preliminary objection. In my considered view, having regard to the fact that the provisions of the Act and the Rules do not envisage strict procedural rigor applicable to the proceedings before the Mamlatdar, it cannot be accepted that the Mamlatdar cannot entertain any preliminary objection. It is evident that the power to decide the application would include a power to decide the application on the basis of a preliminary objection. The question would obviously depend upon facts and circumstances of each case. For instance, if the application and the relief claimed therein turns upon a pure question of law or turns upon facts which are not disputed, it would be preposterous to say that the Mamlatdar would be required to conduct an inquiry. The nature and extent of such an inquiry would again depend on the facts and circumstances of each case. In my considered view, no prohibition can be read in the Act or the Rules to say that the Mamlatdar cannot decide the application on the basis of a preliminary objection.

18. That apart, I find that while examining the order in the exercise of supervisory jurisdiction under Article 227 of the Constitution of India, the scope in the wake of such an objection would still be limited. While deciding the application on the basis of a preliminary objection, certainly it cannot be

said that the Mamlatdar had traveled beyond the jurisdiction conferred on him by law. To put it otherwise, the act of the Mamlatdar in entertaining a preliminary objection in my humble view cannot tantamount to a jurisdictional error or an error where the Mamlatdar had acted without jurisdiction. In that view of the matter, I am unable to persuade myself to uphold the contention raised on behalf of the petitioners that the Mamlatdar could not have entertained the preliminary objection. In fact, there is nothing on record to show that such a contention was raised before the Mamlatdar. In fact the Mamlatdar was with the petitioners when the preliminary objection was rejected. It is only after the learned Dy. Collector allowed the preliminary objection that this contention is raised. Be that as it may, the contentions in this regard cannot be accepted.

19. This takes me to the merits of the matter. The material facts are not in dispute. Admittedly, the respondent no.2 (since deceased) had filed a civil suit in her personal capacity as widow of Antao Mascarenhas and had sought a declaration that she is the owner in possession of the suit field. It is a matter of record that an issue of tenancy was raised in the suit which was referred to the Mamlatdar. On the basis of an application filed under section 7 of the Tenancy Act, the Mamlatdar declared the respondent no.1 as a tenant which order has attained finality. It is further a matter of record that as per the

order dated 21/4/2008 in the purchase proceedings, the respondent no.1 has purchased the land by paying a sum of Rs.1140/- as the purchase price.

20. The case made out in the application filed by the petitioner before the Mamlatdar is that the petitioner became aware of the order passed by the Mamlatdar on 12/6/2008 when the respondent no.2 delivered a copy of the judgment in the purchase proceedings to the petitioner no.1. The application before the Mamlatdar for negative declaration is filed on 10/9/2009. In para 9 of the application it is contended that the respondent no.2 was not keeping well and was not in a position to manage the affairs and thus the respondent no.1 managed to get the declaration by misrepresentation, in the absence of the petitioners and the respondent nos.3 and 4. It would be significant to note that while dismissing writ petition no.270/2005, this Court had refused to accept that the respondent no.2 (since deceased) was prevented from properly prosecuting the matter. Although there are certain allegations made about the order of declaration being a collusive order, there are no specific averments of collusion between the respondent no.1 and the respondent no.2. In fact the contents of para 9 of the application would show that the case of collusion between the respondent no1. and 2 (since deceased) cannot go along with the contents of para 9 of the application.

21. The preliminary objection was raised mainly on four grounds, namely, the application for negative declaration being hit by principles of res judicata (2) there being delay and laches, (3) the Mamlatdar lacking jurisdiction to grant a negative declaration in the face of the earlier order of grant of declaration in favour of the respondent no.1 and (4) the petitioners having no locus standi to claim a negative declaration.

22. A perusal of the order of the Deputy Collector would show that the Deputy Collector had accepted the ground of the bar of res judicata. The Deputy Collector has observed that the general principles underlying the doctrine of res judicata are ultimately based on considerations of public policy and one important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities and no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice. The law behind the doctrine of res judicata is to prevent abuse of the process of Court. It has thus been found that the attempt by the petitioner to re-agitate the same issue which was considered by the Mamlatdar earlier and which has attained finality is barred by the principles of res judicata.

23. The learned District Judge has noticed that the respondent no.2 (since deceased) had strongly contested the earlier proceedings and under such circumstances grant of negative declaration would not arise. The learned District Judge has found that the learned Dy. Collector had correctly held that the petitioners cannot re-agitate the same issue of tenancy which was considered and decided by the competent authority, without getting the earlier order set aside. It has further been held that the earlier order of the Mamlatdar is binding on the petitioners and the respondent no.3, who are the children of the respondent no.2 (since deceased). It has been held that the petitioner no.1 and respondent no.3 being daughters are claiming their rights to the property through their parents and have no independent rights. It has lastly been found that since the petitioners have not challenged the earlier order, they are not entitled to get a negative declaration as “the same Court cannot pass two conflicting orders”.

24. The contention of the petitioners is that the respondent no.2 being the widow of Antao, had only 50% of the share in the suit field and the remaining 50% was inherited by the petitioner no.1 and the respondent no.3. The petitioner no.2 and the respondent no.4 would become co-shares on account of their marriage. It is thus contended that the previous application could not have been decided in the absence of the petitioners and

the respondent nos.3 and 4 as they were the necessary parties. Strong reliance in this regard is placed on the decision of this Court in **Smt. Maria Tecla G. Pereira**. That was a case in which the respondent Denzyl Lobo had filed a suit for declaration that he has tenancy rights in respect of an area admeasuring 37 sq.mts in a building which was already completed belonging to the applicant/Maria Tecla G. Pereira. It was contended that the respondent/Denzyl was entitled to possession of an equal area in the new building erected in its place. The suit was filed by the respondent against the appellant Mrs. Maria Tecla G. Pereira and her father Pascoal Goes. It was claimed that the tenancy was created somewhere in the year 1966 by Pascoal Goes who was managing the buildings. The suit was partly decreed by the trial Court declaring the respondent Denzyl Lobo as a tenant in respect of two rooms with a carpet area of 37 sq.mtrs. The appeal filed by the appellant and Pascoal was dismissed by the appellate Court which was subject matter of challenge in the second appeal. One of the contentions was that the suit was bad for non joinder of Lourenco Manual Pereira, the husband of the appellant Maria Tecla. In that case admittedly the two buildings belonged to the appellant and her husband Lourenco and the respondent (original plaintiff) was fully aware at the time of the filing of the suit that the husband of the appellant was also the owner of the suit premises. It was in these circumstances found that having known this, it was his bounden duty to join

him in the suit.

25. In the present case, as noticed earlier, the respondent no.2 had filed the suit in her own name and had suffered a declaration which was in favour of the respondent no.1 which had attained finality. Although there is an admission which was referred to by the learned counsel for the petitioner made by the respondent no.1 that he was aware of the fact that the respondent no.2 was having two daughters, that has come on record only in the purchase proceedings and not before. Be that as it may, in my considered view the principle issue in the present case would be whether the 50% of the share of Antao Mascrenhas could be said to be represented by the respondent no.2. In this regard a useful reference may be made to two decisions of the Hon'ble Supreme Court, one of which arises out of proceedings under the Portuguese law. Firstly, I would propose to deal with the case of **Dolai Maliko (supra)**. In that case, Dolai Maliko (one of the appellants/plaintiffs) had died during the pendency of the appeal. After his death, his widow and a major son were brought on record as his heirs. The appellate Court eventually allowed the appeal and decreed the suit. In second appeal before the High Court it was discovered that Dolai Maliko had left three other heirs who were not brought on record. The High Court allowed the second appeal holding that the appeal before the first appellate court had abated. The High Court thus restored the

trial Court's order dismissing the suit and the matter reached the Hon'ble Supreme Court. The Supreme Court after taking a survey of various decision held that in a case where a person brought on record is a legal representative, it would be consonant with justice and principle, that in the absence of fraud or collusion, the bringing on record of such a legal representative is sufficient to prevent the suit from abating. In para 11 of the judgment it has been held that where the plaintiff or the appellant dies and all his heirs have not been brought on record because of oversight or because of some doubt as to who are the heirs, the suit or the appeal, as the case may be, does not abate and the heirs brought on record fully represent the estate, unless there are circumstances like fraud or collusion.

26. In the case of **Nalini Bai Naique (supra)** the appellant, bank had instituted a suit for recovery against Vinaique Naique. On the death of Vinaique Naique his widow Nalini Bai Naique was brought on record as his legal representative. The widow of the deceased defendant had admittedly half share in the property left by the deceased. It has been held that once she was brought on record within time, she represented the estate of the deceased defendant and the suit could proceed on merits. The Hon'ble Apex Court had held that the definition of 'legal representative' is inclusive in character and its scope is wide, it is not confined to legal heirs only, instead, it

stipulates a person who may or may not be the heir, competent to inherit the property of the deceased, but he should represent the estate of the deceased person. It has further been held that it includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. If there are many heirs, those in possession bonafide, without there being any fraud or collusion, are also entitled to represent the estate of the deceased (see para 4 of the judgment).

27. I am conscious of the fact that both these cases involve the issue as to abatement of the suit/appeal. However, the principle question is whether in such a case, the share of the deceased could be said to be represented by one of the heirs or the legal representatives. If the estate is represented and there is no fraud or collusion the order so passed would bind the heirs, and cannot be said to be vitiated. In my considered view, the estate in the present case can be said to be represented by the respondent no.2, even to the extent of 50% share of her husband Antao.

28. The learned counsel for the petitioners made an attempt to distinguish the judgment in the case of **Nalini Bai Naique (supra)** on the ground that it arose out of a suit for recovery of loan filed by the appellant/bank, while the present case involves propriety rights to the

property. I do not find that such a distinction can be justifiably made when question is about the scope and meaning of a legal representative and to what extent a legal heir represents the estate.

29. For the reasons stated above, I do not find that any case for interference is made out. The petition is accordingly dismissed. Rule is discharged with no order as to costs.

C. V. BHADANG, J.

Ap/