

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 1149 OF 2016

SHRI. RAM KESHAV SHILKAR ... PETITIONER

Versus

SHRI. ANAND M. SINAI KAISORE
(DEC), THR. HIS LRS. AND 5 ORS., ... RESPONDENTS

Shri Sandesh D. Padiyar, Advocate for the Petitioner.

Shri Devidas J. Pangam, Advocate for Respondent No. 3(b).

Shri Vishnuprasad A. Lawande, Advocate for Respondent Nos. 5 and 6.

CORAM:- C.V. BHADANG, J.

DATE:- 21st JUNE, 2017.

ORAL ORDER:

Heard Shri Padiyar, the learned Counsel for the petitioner, Shri Pangam, the learned Counsel for the respondent no. 3(b) and Shri Lawande, the learned Counsel for the respondent nos. 5 and 6.

2. The petitioner is challenging the concurrent finding of dismissal of his application under Section 8A of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (the Act, for short).

3. The brief facts are that the petitioner had purchased 360 square metres of land from out of survey no. 41/1 of village Ponda, Goa under a registered Sale Deed dated 26.12.1985 from the respondent no. 1, Anand Kaisore (since deceased). It appears that one Prabhacar Sirvoicar (respondent no. 6), who is the brother-in-law of the respondent no. 1 filed Regular Civil Suit No. 146/2000/B (Special Civil Suit No. 2/88/A-old), against Anand Kaisore, Smt. Parvatibai Caissoro and the present petitioner, who was defendant no. 3 in the suit. That suit was filed for a relief of declaration that the sale deed dated 26.12.1985, is null and void and for the eviction of the petitioner.

4. Undisputedly, the suit was partly decreed on 31.12.2004, which was challenged by the petitioner before the learned District Judge in Regular Civil Appeal No. 26/2005. The said appeal came to be allowed and the judgment and decree of the Trial Court was set aside. That was in turn challenged by respondent no. 6 before this Court in Second Appeal No. 47/2006. The said Second Appeal came to be allowed by consent of parties on 07.03.2007 and the Regular Civil Appeal No. 26/2005, was remanded to the learned District Judge for deciding it afresh in accordance with law. After the remand, the

learned District Judge by judgment and order dated 27.03.2008 dismissed the appeal. It was now the turn of the petitioner to challenge the same before this Court in Second Appeal No. 78/2008, which was dismissed by this Court on 04.03.2009. Thus, the judgment and decree of eviction passed against the petitioner has attained finality, as the matter is not carried any further.

5. The respondent no.6-decree holder filed Execution Case No. 12/2005/B for execution of the decree, which is pending before the Executing Court. It is at this stage, that the petitioner approached the learned Mamlatdar under Section 8A of the Act, seeking declaration that he is the mundkar of the suit dwelling house. It appears that on behalf of the contesting respondents, a preliminary objection was raised before the learned Mamlatdar, saying that the application was barred on the principles of res judicata. The learned Mamlatdar by an order dated 16.11.2011, upheld the preliminary objection and dismissed the application for declaration filed by the petitioner.

6. The said order was confirmed in appeal by the learned Deputy Collector on 20.11.2014. The petitioner carried the matter further before the Administrative Tribunal in Mundkar

Revision Application No. 4/2015. The learned Administrative Tribunal by a detailed judgment, although, found that the principle of res judicata, cannot be attracted, however, confirmed the order of dismissal saying that the impugned judgment reflects due consideration “to the peculiar factual position of the case”. It was also urged before the learned Administrative Tribunal that the learned Mamlatdar was in error in following a defective procedure and the learned Mamlatdar could not have dismissed the application for declaration on the basis of a preliminary objection. The learned Administrative Tribunal while negating the said contention has dismissed the revision application by judgment and order dated 30.06.2016, which brings the petitioner to this Court.

7. I have heard Shri Padiyar, the learned Counsel for the petitioner and Shri Pangam, the learned Counsel for the respondent no. 3(a) and Shri Lawande, the learned Counsel for the respondent nos. 5 and 6. With the assistance of the learned Counsel for the parties, I have gone through the record.

8. It is submitted by Shri Padiyar, the learned Counsel for the petitioner that the learned Mamlatdar could not have decided the application on the basis of a preliminary objection.

It is submitted that the impugned order is passed without conducting any enquiry. The learned Counsel has referred to the provisions of Section 21 of the Act read with Rule 14 of the Goa Mundkars (Protection from Eviction) Rules, 1977 (the Rules, for short), in order to contend that the procedure as prescribed, does not permit the Mamlatdar to entertain a preliminary objection or an objection in the nature of Order VII, Rule 11 of CPC. The learned Counsel has referred to the permission for repairs, which is granted on 07.12.1987, which refers to repairs of the existing house. It is thus submitted that the house was in existence and the learned Mamlatdar without holding any enquiry has dismissed the application. It is submitted that the Administrative Tribunal, although, came to the conclusion that the principles of res judicata are not attracted, still has proceeded to confirm the order of the Mamlatdar. It is submitted that the impugned orders are patently illegal, requiring interference.

9. On the contrary, it is submitted by the learned Counsel for the contesting respondents that the application filed by the petitioner is an dishonest attempt to forestall the execution of the decree passed by the Executing Court, which has attained finality. It is submitted that at no point of time,

during the course of the pendency of the suit, a plea was raised about the petitioner being a mundkar of the said house. It is submitted that it is only at the stage, when the respondents filed the execution application, the petitioner approached the learned Mamlatdar. The learned Counsel for the contesting respondents, have referred to the contents of the Sale Deed in order to submit that the Sale Deed does not make any reference to the existing dwelling house. It is submitted that ex-facie there was no material to come to the conclusion that the petitioner was in possession of the dwelling house, since prior to the appointed date i.e. 12.03.1976. Reliance is placed on Section 27 of the Act in order to submit that the Mamlatdar can exercise all powers of the Civil Court under the Civil Procedure Code, 1908 and as such, there was no prohibition from entertaining the preliminary objection.

10. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

11. The record clearly discloses that in the civil suit filed by the respondent no. 6, the petitioner never raised any plea about he being the mundkar, in possession of the dwelling house,

neither before the Trial Court nor before the First Appellate Court or in the Second Appeal. The petitioner moved the application for declaration only when the decree was sought to be executed. The Sale Deed of the year 1986 under which, the petitioner had purchased land from the respondent no. 1, does not make any mention about the existence of the dwelling house therein, much less, of the existence of any mundkarial rights in favour of the petitioner. The license granted by the Municipal Council on 07.12.1987 cannot take the case of the petitioner any further. This is because the said license cannot ex-facie show that the house was in existence since prior to the appointed date i.e. 12.03.1976. In the civil suit, one of the material issue framed (issue no. 6) was whether, the petitioner (defendant no. 3 in the suit) has purchased the portion of the suit property in good faith, wherein "he has constructed a shed and a structure". It can thus be clearly seen that all along, it has been the case of the petitioner that he had purchased the suit property and thereafter, constructed a shed and the structure thereon. The learned Administrative Tribunal while taking note of all these circumstances by a detailed judgment and order has confirmed the order passed by the learned Mamlatdar and I do not see any reason to interfere with the same.

12. Insofar as the contention that the application could not have been decided on a preliminary objection is concerned, no prohibition has been pointed out in the provisions of the Act or the Rules, which would permit the Mamlatdar to entertain the preliminary objection. That apart, Section 27 of the Act clearly envisages that the Mamlatdar, while conducting an enquiry can exercise all the powers as are available under the Code of Civil Procedure, 1908. However, I do not propose to lay down any binding precedent on this point, in as much as, there is one more reason, why the said contention cannot be accepted. Although, it cannot be disputed that the Mamlatdar will have to conduct the enquiry while deciding the application, the nature, scope and existence of the enquiry, would depend upon facts and circumstances of each case. Here is a case where there was a judgment and decree passed by the Civil Court, which is confirmed in Second Appeal, which was before the Mamlatdar, which clearly demonstrates that it was all along the case of the petitioner that he had purchased the said property and then constructed the shed and the structure thereon. Thus, no further enquiry as such, would have been competent in the matter. It would be significant to note that in the petition at para 3(e), the petitioner has claimed that in the front portion of the suit house, there are four shops, which are used for running

business and the same are given on lease for the last 25 to 30 years. A pointed query was made to the learned Counsel for the petitioner to show a single document, which would demonstrate that the petitioner was in possession of the existing dwelling house i.e. prior to the appointed date i.e. 1976 and no such document has been pointed out. Thus, on facts as obtaining in this case, the contention cannot be accepted.

13. For these reasons, I do not find that any interference is called for in the concurrent findings recorded by the Courts below. The petition is dismissed, with no order as to costs.

C.V. BHADANG, J.

EV