

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1 OF 2018**

PREMANAND NAIK, THR. HIS NEXT
FRIEND, SAJU MAHADEV NAIK

... PETITIONER

Versus

PRABHAKAR PANDURANG KAMAT
SATOSKAR & 2 ORS.

... RESPONDENTS

Shri E. Dias and Shri Arjun Naik, Advocates for the Petitioner.

Shri S.D. Lotlikar, Senior Advocate with Shri Prasheen Lotlikar
and Ms. Neelam Patil, Advocates for the Respondent Nos. 1 and
2.

CORAM : C.V. BHADANG, J.

Date : 4th January, 2018

ORAL ORDER:

The challenge in this petition, under Article 227 of the Constitution of India is to two orders, both dated 15.09.2017, passed by the Executing Court in Execution Proceedings No. 3/2014/C. By the impugned orders, the Executing Court has disposed of three applications, namely, (i) an application (Exhibit-16), filed by the respondents (decree holders), (ii) an application (Exhibit-22), filed by the original defendant nos. 2 and 3 (judgment debtor nos. 2 and 3) and (iii) an application (Exhibit-21) filed by the third party applicant on behalf of the petitioner.

2. The petitioner happens to be the original defendant no. 1 (judgment debtor no. 1). The petitioner and the co-defendants have suffered a decree passed in Regular Civil Suit No. 40/1986/C dated 08.11.2013, by which, while decreeing the suit, filed by the respondents, the petitioner and the co-defendants have been declared as trespassers in the house (which is subject matter of dispute), which is situated at Candola and the possession of the same is directed to be handed over to the original plaintiff no. 1. Undisputedly, neither the petitioner nor the co-defendants have challenged the said decree in appeal and thus, the decree has attained finality.

3. A perusal of the record shows that the petitioner and the defendant nos. 2 and 3 had filed a common written statement, before the Trial Court *inter alia* raising a plea of mundkarship. The mundkarial issue was accordingly framed and referred to the Mamlatdar, who answered the same in the negative i.e. against the petitioner and the co-defendants. Undisputedly, the said order was challenged by the petitioner, initially, before the Administrative Tribunal and thereafter, before this Court in Writ Petition (Stamp) No. 2719/2012, of which registration was refused for want of removal of office

objections. Be that as it may, after the mundkarial issue was answered in the negative, the respondents (plaintiffs) filed an application before the Trial Court for decreeing the suit, as according to the plaintiffs, except the mundkarial issue, no other issue was involved. It appears that the learned Trial Court dismissed that application on 03.04.2013, which was challenged by the respondents before this Court in Civil Revision Application No. 21/2013. That Civil Revision Application was allowed by this Court vide judgment and order dated 08.08.2013, thereby directing the learned Trial Court to decide the application (Exhibit-55) afresh. A perusal of the judgment and order dated 08.08.2013 clearly shows that the present petitioner was represented by an Advocate before this Court. It is also a matter of record that the petitioner has verified the pleadings on oath before the Trial Court.

4. The respondent no. 1 filed the aforesaid Execution Application No. 3/2014/C, for execution of the decree, in which the judgment debtor nos. 2 and 3 filed an application (Exhibit-22), seeking time to take appropriate steps, as according to the judgment debtor nos. 2 and 3, the petitioner was of unsound mind and was unable to protect his interest. In the submission of the judgment debtor nos. 2 and 3, it was necessary to appoint

a guardian or a next friend to act on behalf of the petitioner. It was also contended that the decree, which is sought to be executed is null and void as it was passed against the petitioner, who was of unsound mind and who was unable to protect his own interest. The judgment debtor nos. 2 and 3 for this purpose relied upon two certificates, one, dated 05.11.2004 and the other dated 25.06.2014, issued by the Institute of Psychiatry and Human Behaviour, Bambolim, Goa, certifying that the petitioner is suffering from “moderate mental retardation”.

5. The Executing Court noticed the earlier order dated 23.10.2015, passed by the Executing Court on an application filed by the judgment debtor nos. 2 and 3, in which, the Executing Court had come to the conclusion that there are no circumstances to substantiate that the petitioner on account of his mental retardation is incapable of taking care of his interest. The Executing Court in its order dated 23.10.2015 has further noticed that the verification of the pleadings/filing of affidavit has been done before the competent Government authorities and none of the competent authorities found that the petitioner needed any guardian or next friend to protect his interest. Finally, the Executing Court found that the petitioner after a long drawn litigation, dating back to 1986, has now sought to rely

upon the two certificates. The Executing Court after noticing the order dated 23.10.2015, has dismissed the application (Exhibit-22), filed by the judgment debtor nos. 2 and 3. The petitioner who is acting through the next friend, (who claims to be his neighbour), filed an application (Exhibit-21) for appointing the neighbour as his guardian and that application has been dismissed by the Executing Court by separate order dated 15.09.2017, for similar reasons.

6. I have heard the learned Counsel for the petitioner and the learned Senior Counsel for the respondent nos. 1 and 2. With the assistance of the learned Counsel for the parties, I have gone through the record.

7. It is submitted by the learned Counsel for the petitioner that the decree passed against a person of unsound mind, who is unable to protect his interest would be void *ab initio*. It is submitted that in such circumstances, it was obligatory on the Trial Court as well as the Executing Court to have conducted an enquiry under Order XXXII, Rule 15 of CPC and then to appoint a guardian *ad litem*. It is submitted that non conduction of the enquiry and non appointment of a guardian, has vitiated the decree, which cannot be executed. The learned

Counsel was at pains to point out that the petitioner could not challenge the earlier order dated 23.10.2015, as it was passed on the application (Exhibit-22), filed by the judgment debtor nos. 2 and 3 and even otherwise, in the submission of the learned Counsel for the petitioner, the petitioner is incapable of protecting his own interest on account of his mental condition.

On behalf of the petitioner, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Ram Chandra Arya Vs. Man Singh & Another, AIR 1968 SC 954**, the decision of this Court in the case of **Vanessa Fernandes Vs. Francisco Fernandes & Another, 1986 AIR (Bom) 89**, the decision of the Himachal Pradesh High Court in the case of **Vidya Devi Vs. Himachal Road Transport Corporation & Others, AIR 1990 Himachal Pradesh 19** and the decision of the Kerala High Court in the case of **Raveendran Vs. Sobhana & Another, AIR 2008 Kerala 137** and **Krishnankutty Madhavan Vs. Veena M.G., AIR 2012 Kerala 166**.

8. On the contrary, the learned Senior Counsel for the respondent nos. 1 and 2 has submitted that the petitioner had all along acted on his own behalf, while filing the written statement and while contesting the suit as also, while challenging the order passed in the proceedings before the Mamlatdar, where the

mundkarial issue was referred. It is submitted that not only that, the petitioner also engaged an Advocate before this Court. Thus, the plea now sought to be raised after a long drawn litigation is not bonafide and is only an attempt to frustrate the execution of the decree passed.

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

10. There cannot be any manner of dispute with the proposition that where a person who is sued, is either a lunatic or a person who is unable to protect his own interest, the Court has to appoint a guardian *ad litem*, under Order XXXII, Rule 15 of CPC. It is also well settled that conduction of such enquiry and appointment of a guardian, is a matter having serious consequences and the Court has the responsibility to safeguard the interest of the person, who on account of his mental condition is unable to protect and safeguard his own interest. At the same time, the Court has also the responsibility to ensure that a guardian is not thrust on a person, who is otherwise capable of protecting or safeguarding his own interest. The question in the present case is whether, the plea raised at this

distance of time can be said to be bonafide and whether, it can be favourably considered. It is a matter of record that the petitioner filed a joint written statement alongwith original defendant nos. 2 and 3 in the suit of the year 1986. The only defence raised was of mundkarship. The issue was referred to the Mamlatdar, which came to be answered in the negative that is against the petitioner and the co-defendants. That was challenged initially before the Administrative Tribunal. It was the petitioner, who approached this Court by engaging an Advocate and had filed Writ Petition (Stamp) No. 2719/2012. Unfortunately, the petitioner did not pursue the matter and the said petition was dismissed for want of removal of office objections. However, the fact remains that the petitioner was acting on his behalf while contesting the suit and also while challenging the order passed by the Mamlatdar in the mundkarial proceedings. Not only that, the petitioner also engaged an Advocate in Civil Revision Application No. 21/2013 before this Court.

11. At no point of time, a claim was made on behalf of the petitioner that on account of his mental condition, he is unable to protect his own interest. It is only after the execution was filed, the said contention is raised for the first time. On behalf of the

petitioner it was tried to be urged that the written statement was filed with a thumb impression, which might have been obtained by the defendant nos. 2 and 3. Such contention cannot be accepted at this distance of time, particularly when no such case has been made out at any point of time, including before the Executing Court. Although, the Court has obligation to conduct the enquiry, the record bears out that at no point of time, it was pointed out or urged before the Trial Court or in any of the proceedings, arising out of the said suit, as also the proceedings before the Mamlatdar that the petitioner on account of his mental condition was unable to protect his own interest. In the order dated 23.10.2015, the Executing Court on facts came to the conclusion that the petitioner was able to protect his own interest. Admittedly, that order was also not challenged. It would be thus preposterous to accept the said contention.

12. The decisions relied on behalf of the petitioner, turned on its own facts. For instance, in the case of **Ram Chandra Arya** (supra), there was a finding of fact recorded that one Mr. Ram Lal was insane, when the suit was instituted against him, as well as when the house was sold in execution of the decree passed in the execution proceedings.

13. In the case of **Vanessa Fernandes** (supra), the question was whether, the suit instituted for declaration that the plaintiff is not the father of a minor child, born to his legally wedded wife, while the marriage was subsisting, can validly be proceeded against, if, on the refusal of the appointed guardian *ad litem* to accept the appointment and to act on behalf of such child, the Court fails to make a fresh appointment. It can thus be seen in that case the mother of the child, who was appointed as guardian *ad litem*, had refused to accept the appointment and there was no attempt made to appoint another guardian *ad litem* in her place.

14. In the case of **Raveendran** (supra), there was a suit filed before the Family Court, seeking declaration that the order passed in maintenance proceedings, was null and void. It appears that the order dated 14.12.1999, passed in M.C. No. 231/1999, in that case, was passed on the basis of a consent where admittedly, the petitioner was a deaf and dumb person. The Kerala High Court found that when the petitioner was admittedly deaf and dumb, the Court could not have proceeded, purportedly on the basis of a consent and the decree would not be valid in the absence of appointment of a guardian.

15. In the case of **Krishnankutty Madhavan** (supra), a defence was raised before the Trial Court that the defendant was unable to protect his interest, on account of his medical condition. In that case, the concerned defendant had neither filed an affidavit nor a written statement, unlike in the present case. The written statement was filed by Ajithakumari, who was the wife of the defendant, which was not found to be proper. A perusal of para 8 would show that there was sufficient evidence to indicate that the defendant was suffering from mental retardation right from the beginning, till the filing of the petition.

16. In my considered view, the cases relied upon, cannot come to the aid of the petitioner in the peculiar facts and circumstances of the present case. I have carefully gone through the impugned orders and I do not find that they suffer from any infirmity, so as to require interference. The claim is not all bonafide and is only an attempt to have a second inning and obstruct the execution of the decree which has attained finality.

The petition is without any merit and is dismissed with no order as to costs.

C.V. BHADANG, J.