

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 899 OF 2018**

1. Shri Vishnu Babani Xete Kurtarkar,

2. Smt. Laxmi Vishnu Kurtarkar
(both since deceased)
Represened by their legal heirs.

a) Mr. Prasad Vishnu Curtorcar,
Son,

b) Mrs. Pranaya Prasad ,
daughter-in-law,

c) Mr. Vijay Vishnu Curtorcar,,
Son,

d) Mrs. Prajakta Vijay Curtorcar,
daughter-in-law,

e) Mr. Babni Vishnu Curtorcar,
Son,

f) Mrs. Shanti Babani Curtorcar,
daughter-in-law,

g) Mr. Santosh Vishnu Curtorcar,,
Son,

h) Mr. Anil Dattaram Pokle,
Son-in-law,

i) Mrs. Ananda Anil Pokle,
daughter,

All residents of Massordem, Valpoi-Goa.

... Petitioners

V e r s u s

1. Shri S. Shantaram Babi Xete Kurtarkar

(Since deceased through its legal heirs)

- a) Mrs. Jayeshri Shantaram Kurtarkar (expired)
- b) Mr. Mahesh Shantaram Kurtarkar,
- c) Mrs. Megha Mahesh Kurtarkar,
- d) Mr. Sandeep Shantaram Kurtarkar,
- e) Mrs. Madhuri Sandeep Kurtarkar,
- f) Mr. Prashant Shantaram Kurtarkar,
- g) Mrs. Trupti Prashant Kurtarkar,
- h) Mr. Vishant Shantaram Kurtarkar,
- i) Mr. Sushant Shantaram Kurtarkar,
(Since deceased through his legal heirs)
- 1 (i) (a) Smt. Sandhya Sushant Kurtarkar (wife)
- 1 (i) (b) Mst. Bhuvan Sushant Kurtarkar (son),
- 1 (i) (c) Mast. Kannak Sushant Kurtarkar (son),

All r/o Massordem, Valpoi, Sattari-Goa

- j) Mrs. Bharti S. Narvekar,
- k) Shri S. D. Narvekar,
Both r/o Bicholim-Goa.
- l) Mrs. Sulochana Khorjuvekar,
- m) Mr. Suresh P. Khorjuvekar,
Both r/o Aroba, Pernem, Goa
- n) Mr. Paresh Pandurang Kurtarkar,
R/o Valpoi, Sattari-Goa.

.... Respondents

Shri J. P. Mulgaonkar, with Advocate R. Banaulikar for the Petitioners.

Shri Amey Phadte, Advocate for the Respondents.

CORAM: C. V. BHADANG, J.

Reserved on : 22/1/2019.

Pronounced on: 29/01/2019.

ORAL JUDGMENT:

Rule made returnable forthwith. The learned counsel for the respondents waives service. Heard finally by consent of the parties.

2. By this petition, the petitioners are challenging the judgment and order dated 13/9/2017 passed by the Administrative Tribunal in Mundkar Revision Application no.21/2015. By the impugned judgment, the Tribunal while setting aside the order dated 29/9/2015 passed by the Deputy Collector and Sub Divisional Officer, Bicholim has restored the Mundkar Appeal on the file of the learned Dy. Collector, for disposal according to law.

3. The brief facts are that, Vishnu and his wife Mrs. Laxmi (predecessors of the petitioners) filed civil suit no.44/1973 for eviction of Shantaram Kurtarkar and his wife Jayashri (predecessors of the respondents) from a portion of the suit house situated at Massordem, Valpoi in Salcete Taluka. Incidentally Vishnu happens to be the real brother of Shantaram.

4. Mr. Shantaram and his wife Jayashri contested the suit on the ground that they are the co-owners of the suit house. The trial court dismissed the suit on 1/7/1985 which was challenged by the original plaintiffs before the learned District Judge. The learned District Judge allowed the appeal on 5/2/1989 decreeing the suit for eviction directing eviction of Shantaram and his wife Jayashri from the suit house.

5. It appears that the original plaintiff/decreed holder filed Execution application no.54/1988 for execution of the decree in which Shantaram and his wife Laximi raised a plea of mundkarship. The Executing Court by an order dated 13/1/1989 refused to stay the execution proceedings and to make a reference of the mundkarial issues to the Mamlatdar. Subsequently a warrant of possession was issued which led the respondent Shantaram and his wife to file a substantive application under section 8-A of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (Mundkar Act, for short) for declaration as Mundkars. They also sought interim relief restraining the petitioner from executing the decree, which was refused by the Mamlatdar. That order was challenged before the Additional Collector. The Additional Collector granted interim relief which was produced before the Executing Court requiring it to stay its hands and for suspension of the

warrant of possession. The Executing Court by an order dated 24/1/1989 rejected the said application. Both these orders i.e. dated 13/1/1989 and 24/1/1989 passed by the Executing Court were subject matter of challenge before this Court at the instance of the respondents in Civil Revision application being no.16/1989 and no.58/1989. This Court allowed both these revision applications on 19/6/1989 on the ground that the exclusive jurisdiction to decide the issue of mundkarship was with the Mamlatdar, (which decision is reported in the case of **Shantaram Babani Xete Curtorkar and anr. Vs. Vishnu Babani Xete Curtorkar reported in 1989 (2) Goa Law Times 167**). This Court directed the Mamlatdar to dispose off the application filed by the petitioners, within a period of six months from 19/6/1989. However, it is a matter of record that the Mamlatdar dismissed the application on merits only on 24/6/2008.

6. The respondents challenged the dismissal of their application in an appeal before the Deputy Collector. The Deputy Collector issued notices to both the parties and fixed the date of hearing on 27/4/2009, which appeal was subsequently adjourned to 10/6/2009, 2/7/2009 and 6/8/2009. On all these dates, there was no appearance on behalf of the present respondents (appellants before the Dy. Collector). The learned counsel for the petitioners (the respondent before the learned Dy. Collector) was, however present. The

learned Dy. Collector dismissed the appeal presumably for want of prosecution on 6/8/2009, a copy of which order was produced before the Execution Case in the Civil Court. According to the respondents, they came to know of the dismissal of the appeal when the said copy was produced in the Execution case. Hence they filed an application for restoration of the appeal on 11/9/2009. The learned Deputy Collector took his own time and decided a simple application for restoration seven years thereafter on 29/9/2015 and was pleased to dismiss the said application on the ground that the respondent did not take any steps for service of the petitioners although the notices were kept ready. The learned Dy. Collector also found that it is for the appellants to prosecute the appeal diligently which was not done.

7. It appears that the restoration of the appeal was sought mainly on the ground that the Dy. Collector had directed issuance of notice to both the parties which were made returnable on 27/4/2009 and the respondents were awaiting for such a notice being issued. Be that as it may, the respondents challenged the order of dismissal of their application for restoration of the appeal before the Administrative Tribunal in Mundkar Revision Application no.21/2015. Although the learned Tribunal came to the conclusion that after obtaining of the interim stay against the order of the learned Mamlatdar, the respondent did not collect any date for subsequent hearing and should have

taken appropriate steps to send the notices to the respondents, found that in every case where there is lapse on the part of the litigant or the counsel concerned, that itself is not enough to turn down the plea and shut the door of justice to the litigant. The tribunal having noticed the decision of the Delhi High Court in the case of **Padmavati Vs. Harijan Sewak Sangh (2008) 154 DLT 411** and the decision of the Hon'ble Supreme Court in the case of **Dnyandeo Sabaji Naik and anr. Vs. Mrs. Pradnya Prakash Khadekar and others 2017 (3) ALL MR 431 (S.C)**, that more often than not there is an abuse of the process of the court and the proceedings are dragged unnecessarily on one count or the other allowed the appeal on the ground that the inaction of the advocate should not prejudice the respondents. Evidently such a ground of inaction of the advocate was never made out by the respondent in the application for restoration. Be that as it may, feeling aggrieved by the said order, the petitioners have approached this Court.

8. I have heard Shri Mulgaonkar, the learned counsel for the petitioners and Shri Phadte, the learned counsel for the respondents. With the assistance of the learned counsel for the parties, I have gone through the record.

9. It is submitted by Shri Mulgaonkar, the learned counsel for the petitioner that there is a clear abuse of the process of the Court by the

respondents after having obtained the stay of the execution proceedings of the decree which is obtained in a suit instituted way back in the year 1973. It is submitted that the only ground raised was that the Deputy Collector had directed issuance of notice to both the parties and the respondents were awaiting such notice, which ground cannot be accepted, inasmuch as it is for the appellants to prosecute the appeal diligently. It is submitted that although the office of the Dy. Collector had kept the notices ready, the respondents did not take steps to serve the same. It is submitted that as the petitioners had urgency in the matter, as they are trying to obtain the possession of the suit house from the year 1973, they put in appearance suo motu, however the respondents or their counsel failed to remain present. It is submitted that the tribunal after having accepted that it was for the respondents to have diligently prosecuted the appeal, erred in allowing setting aside the order passed by the Dy. Collector, thereby restoring the appeal, on the ground that the party should not suffer for the lapse of their counsel, which ground was never made out by the respondents. It is thus submitted that the impugned order suffers from patent illegality and infirmity so as to require interference.

10. Mr. Phadte, the learned counsel for the respondent on the contrary has supported the impugned order. It is submitted that the respondents were under

a bona fide belief that the notices will be served of the appeal on both the parties as was directed. It is submitted that the respondents were absent only on three dates, i.e. on 27/4/2009, 10/6/2009 and 2/7/2009 prior to the impugned order being passed on 6/8/2009. It is submitted that this is not a case where the petitioners waited for long time to get the notices served. It is submitted that once the copy of the order about dismissal of the appeal was produced in the execution case, the application for restoration of the appeal was promptly filed. It is submitted that the tribunal has taken a broad view which is in consonance with the principles of natural justice and a fair opportunity to both the parties, which may not be interfered with.

11. On hearing the learned counsel for the parties, although I am not inclined to interfere with the impugned order passed, I propose to expedite the appeal before the learned Dy. Collector, as there are certain disturbing features which have come to the fore in this petition. The original plaintiff had instituted the suit to obtain the possession of the suit house in the year 1973 and has even obtained a decree in their favour way back on 5/2/1988, which is yet to be executed. This Court in the case **Shantaram Babani Xete Curtorkar (supra)**, has held that the Executing Court will have to await the outcome of the application for declaration filed by the respondent no.1 before the Mamlatdar and had directed the Mamlatdar to dispose off the application

within a period of six months from 19/6/1989. The record shows that the Mamlatdar decided the matter only on 24/6/2008 which was way beyond the period fixed by this Court. There is nothing on record to show that at any point of time any extension was sought or was granted by this Court. Be that as it may, after the Mamlatdar dismissed the application the respondent approached the Deputy Collector in appeal, which appeal was dismissed in default on 6/8/2009. An application for restoration of the said appeal was filed on 11/9/2009, which was decided on 29/9/2015, dismissing the said application. Two years thereafter, the Administrative Tribunal on 6/10/2017 while setting aside the order passed by the Dy. Collector has restored the appeal directing it to be decided within a period of three months. The appeal is still pending way beyond the period of three months. The facts to say the least depict a sorry state of affairs.

12. In so far as the challenge to the impugned order is concerned, the claim of the respondents that they were awaiting notices from the appellate court cannot be entirely accepted or approved. It is for the appellants to diligently prosecute the appeal. However, taking an overall view of the matter, the impugned order which takes a broad view in the interest of fair opportunity to the respondents, I am not inclined to interfere with the said order in the exercise of supervisory jurisdiction under Article 227 of the

Constitution of India. It is now well settled that the jurisdiction under Article 227 of the Constitution of India, is neither appellate nor revisional, but essentially supervisory in nature. It is aimed at ensuring that the Courts and Tribunals subordinate to the High Court, act within the bounds of their jurisdiction and authority and the orders so passed do not result into any manifest injustice (see the decision in the case of **Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil (2010) 8 SCC 329**). If the order is maintained, both the parties shall get a fair chance to contest the appeal. In that view of the matter, while declining to interfere with the impugned order, I propose to expedite the appeal pending before the learned Deputy Collector.

13. Considering the overall circumstances, the petition is disposed off in the following terms:

- (i) The petition is dismissed.
- (ii) The concerned Deputy Collector shall hear and decide the appeal as expeditiously as possible and in any event within a period of three months from the receipt hereof.
- iii) The Collector, North Goa in view of the observations made in para 7 of the above order shall personally look into the matter and shall ensure that the

direction about the expeditious and time bound disposal of the appeal is complied with in letter and spirit.

(iv) Rival contentions of the parties on merits before the learned Deputy Collector are left open.

(v) This petition shall be listed for reporting compliance on 29/4/2019.

(vi) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

Ap/