

HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.587 OF 2018

- 1 Shri Jose Martins Fernandes,
Son of Dumalina Maria Fernandes,
Married, major of age, service,
- 2 Mrs. Perpetua Fernandes,
d/o. Dumalina Fernandes,
major of age, domestic,
status unknown.
- 3 Shri Milagres Fernandes,
d/o. Dumalina Fernandes,
major of age, Chicken and fish
Chopper, status unknown
- 4 Ms. Brigida Fernandes,
d/o. Dumalina Fernandes,
major of age, domestic,
status unknown.
- 5 Ms. Marlind Fernandes,
d/o. Dumalina Fernandes,
major of age, domestic,
status unknown.

All presently r/o. D'Mello Building, ... Petitioners
Dayanand Bandodkar Marg, Panaji,
Goa

V/s.

- 1 Shri Luis Caetano Guilherme
Wellington Fernandes, also known
as Wellington D'Mello, s/o. Late
Abel Francisco Xavier Jose Fillipe
Augusto da Rocha e Melo and of lae
Smt. Julia Leocardia Lucrecia
Fernandes, married, major of age,
landlord, r/o. H.No.25, D'Mello
building, D.B. Marg, Panaji Goa.
- 2 Mrs. Doris D'Mello
w/o Mr. Wellington D'Mello,

major of age, landlady, residing at
H.No.25, D'Mello Building, D.B.
Marg, Panaji Goa.

... Respondents.

Shri Anthony D'Silva, Advocate for the petitioners.

Shri Abhay Nachinolkar, Advocate for the respondents.

Coram : NUTAN D. SARDESSAI, J.

Reserved on :- 27th March, 2019.

Pronounced on:- 29th March, 2019.

JUDGMENT:

1. Heard Shri Anthony D'Silva, learned Advocate for the petitioners and Shri Abhay Nachinolkar, learned Advocate for the respondents.

2. Rule.

3. Shri Abhay Nachinolkar, learned Advocate waives service on behalf of the respondents.

4. The petitioners are invoking the jurisdiction of this Court under Article 227 of the Constitution of India calling in question the order dated 06/05/2018 passed by the Civil Judge, Panaji in the Execution Proceedings whereby it allowed the application dated 28/08/2016. The petitioners are the original defendants while the respondents, the plaintiffs before the Trial Court.

5. Heard Shri Anthony D'Silva, learned Advocate for the petitioners who submitted that in the Second Appeal No.64/2017 filed at the instance of the predecessor of the petitioners, a challenge was offered to the judgments passed by the Courts below as the suit filed by the respondents came to be decreed directing the eviction and restoration of the subject properties to the respondents. This Court on considering the contentions of the learned Advocates for both the parties had concluded that the appellants i.e. the predecessor of the petitioners had no right to occupy the suit house and failed to establish their claim that they were permitted to occupy the suit house. This concurrent finding of fact arrived by the Courts below on the basis of the material on record could not be faulted and it was an outcome of an appreciation of evidence on record and the documentary evidence produced by the parties. In that view of the matter the learned Single Judge of this Court found no perversity in the findings which could call for an interference and having concluded that no case was made out for any interference in the impugned judgment concluded that no substantial questions of law arose in the appeal before it.

6. Shri D'Silva, learned Advocate for the petitioners however chose to draw respite from the findings recorded by the learned

Single Judge at paragraph 6 wherein it was recorded that the jurisdiction to decide whether a person is a mundkar or not was exclusively of the Mamlatdar and not of the Civil Court and reproducing the import of Section 38 of the Mundkar Act. He sought to take benefit of the observation made by the learned Single Judge that there was no basis for the apprehension of the learned Advocate appearing for the appellants that any findings to that effect would come in their way in the proceedings initiated by them and which proceedings should be considered on its own merits and in accordance with law. He submitted that the execution proceedings were at large before the Executing Court and the proceedings were pending simultaneously before the Mamlatdar where the issue of mundkarship was at large.

7. Shri D'Silva, learned Advocate for the petitioners submitted that the order passed by the Trial Court i.e. the impugned order allowing the execution application and directing the petitioners to remove the structure was perverse and which called for an interference in exercise of the supervisory jurisdiction of this Court. He placed reliance in **Baburao Vishnu Naik v/s. Ramchadra Vishnu Naik** [1989 (1) GLT (175)], **Baburao Vishnu Naik v/s. Ramchander Vishnu Naik and another** [1989 (2) GLT (132)], **Shantaram Babani Xete Curtorkar and another v/s. Vishnu Babani Xete Curtorkar and another** [1989 (2) GLT

(167)], **Subha Venkatesh Kamat v/s Vasu Naik and others** [2001(1) Goa L.T.3] and **Jagmittar Sain Bhagat and others v/s. Director, Health Services, Haryana and others** [(2013) 10 SCC 136] apart from adverting to the provisions of Section 38 of the Mundkar Act and pressing for an interference with the order under challenge.

8. Shri A. Nachinolkar, learned Advocate for the respondents invited attention to the order passed by the learned Single Judge of this Court in the same Second Appeal and submitted that the findings had received a quietus and there was no scope to agitate otherwise. He next adverted to the relief claimed by the petitioners in the application moved under Section 8(a) of the Goa, Daman and Diu (Protection from Eviction) Act, 1975 ('Act' for short) and submitted that there was no independent claim of mundkarship by the petitioners and who was seeking a declaration to the effect that the father / father in law of the applicants namely Simon Fernandes was the mundkar in respect of the dwelling house in question. He next adverted to the judgment passed by the Adhoc District Judge and pointed to the various observations made by the learned Judge in his judgment to belie the case of the petitioners. The application under Section 8(a) of the said Act was primarily moved and a false statement was made therein to overcome the findings of the Appellate Court. There was no right in the petitioners as a Mundkar

prior to the appointed date and therefore their claim of Mundkarship was without any basis. He placed reliance in *Pedro Antonio Fernandes and 4 others v/s. James Fernandes alias James Francisco Fidelis Fernandes and 7 others* [Writ Petition No.42 of 2008] which had considered the judgments relied upon by the petitioners in **Baburao Naik, Shantaram Curtorkar and Subha Kamat** (supra) and contended that no error was committed by the Trial Court in passing the order as it did. There was no basis to exercise the power of superintendence under Article 227 of the Constitution of India nor any basis to interference with the order under challenge and therefore the petition had to be dismissed.

9. i would consider their submissions, the judgments relied upon and decide whether there is any scope for interference with the order under challenge after discussing the judgments relied upon supra.

10. **Baburao Naik** (supra), challenged in revision the order passed by the Civil Judge, Junior Division, Panaji upholding the objection filed under Section 47 CPC by the judgment debtors in the proceedings for execution of the decree dated 30/04/1984 and which gave rise to an interesting question of law whether the expression "dwelling house" as defined in Section 2(i) of the Act connotes a separate or independent structure or building or

whether it also brings within its fold a part or a portion of a building where a person who alleges to be a mundkar resides with fixed habitation. In the brief facts, the applicant had averred that he was the owner in possession of the dwelling house situated in the property "Zorichem Tolem" at Batulem, Panaji and he had permitted the first respondent to take a shelter in a part of the said house consisting of two rooms since he had requested him to give him temporary shelter undertaking to vacate the premises within six months. However the respondents inspite of repeated requests to vacate the portion of the house had neglected and failed to do so and started to create nuisance everyday giving a cause to the applicant to serve a notice on the first respondent to vacate the house. The respondent took a stand in the written statement that the house in question was belonging to them, never having raised a question of mundkarship. The Trial Court negatived the stand and as such the suit was ultimately decreed. It was only at the stage of the execution proceeding did the respondents file their objection under section 47 CPC claiming for the first time that the facts as disclosed in the pleading indisputably established that the respondents were the mundkars of the suit property and that a portion of the house occupied by them was their dwelling house. Therefore they came out with the case that decree sought to be executed was a nullity as passed by the Court lacking inherent jurisdiction.

11. In **Baburao Naik** (supra), the learned Single Judge considered the definition of dwelling house as contained in Section 2(i) of the Act and held in his view that it also included a part of a house provided that this part of the house constitutes an entity by itself. In the said facts it was also observed that from the facts of the case it became clear that admittedly the respondents had been occupying two rooms of the suit house with the consent of the petitioners from 1970, they were not paying any rent or compensation for such occupation, they had been continuously residing in the said room with fixed habitation upto 15/04/1977 and that no eviction proceedings had been instituted against them within one year immediately preceding the day on which the Act came into force and the respondents seem to be mundkars of the petitioner and the rooms in their occupation are their dwelling house. In the facts of their case and on a consideration of the judgment of the Apex Court that it was entirely open to the learned Executing Judge to go beyond the decree sought to be executed and to examine the question as to whether or not such a decree was a nullity and unsustainable of being executed. The learned Single Judge also considered Section 32 of the Act which provides that if any suit instituted in the Civil Court involves any issues which are required to be settled, decided or dealt with by the Mamlatdar or the Collector, the Civil Court shall stay the suit and

refer such issue to the Mamlatdar or the Collector as the case may be for determination and in the result partly allowed the revision and set aside the impugned order.

12. The Judgment in **Baburao Naik** (supra), was taken in appeal before the Hon'ble Apex Court but which dismissed the Special Leave Petition thereby confirming the judgment of the learned Single Judge.

13. In **Shantaram Curtorkar** (supra), the respondent Vishnu had filed a suit for eviction of the petitioners from a part of the house situated at Sattari, the petitioner no.1 being the brother of said Vishnu. The Trial Court dismissed the suit by its decree dated 01/07/1985, however, in an appeal taken by the respondents before the District Court he succeeded and by the decree dated 05/02/1988 the petitioners' eviction was ordered. This decree was sought to be executed before the Trial Court which was resisted on the ground that the petitioners were mundkars by virtue of and under the provisions of the Goa, Daman and Diu Mundcar Act (Protection from Eviction) Act, 1975. The applicants resisting the execution proceedings prayed for a stay of the proceedings and for making a reference of the issue relating to mundkarship to the Mamlatdar for its determination. This application was rejected giving rise to the revision application. Once the warrant of possession was issued, the petitioners instituted the proceedings

before the Mamlatdar of Sattari for declaration that they were the mundkars of the premises from which they were sought to be evicted and at the same time, praying for further reliefs under Section 5 of the Mundkar Act, 1975. They also moved an application for interim relief to restrain the respondents from executing the decree and on refusal by the Mamlatdar, sought that relief before the Additional Collector with the result that the respondents were unable to execute the decree.

14. In **Shantaram Curtorkar** (supra), it was contended on behalf of the petitioners that since the Civil Court had no power to decide and adjudicate upon whether a person claiming to be a mundkar is or is not so, there could be no escaping for the executing Court but to stay the execution proceedings and refer the issue raised by the petitioners for its determination in terms of Section 32 thereof. This was resisted on behalf of the respondents on the premise that the suit was instituted much prior to the extension of the Mundkar Act, 1975 and that nowhere the petitioners had raised a plea that they were the mundkars in respect of the suit premises until the decree was passed for the eviction of the petitioners by the District Court on 05/02/1988. The plea of mundkarship had been raised malafide only to stall the decree passed for their eviction. Moreover, the petitioners having had an opportunity to raise such an issue once the Mundkar Act,

1975 was brought into force, it was not open to them to raise that issue in an execution proceeding. The learned Single Judge considered the judgment in **Pelicio Martins V/s. Cosme Matias Menezes and Anr.** [1988, Rent Control Journal 400] where the question was whether in an execution proceeding it was open to the party who was not impleaded in a suit to raise the issue of mundkarship and get the reference of the issue to the Mamlatdar. A learned Single Judge considering the law on the point and Section 32 of the Mundkar Act held that the execution was stayed though the plea of mundkarship was taken for the first time in the execution.

15. In **Suba Kamat** (supra), a learned Single Judge of this Court considered the judgment in **Baburao** and **Shantaram Curtordkar** (supra), and stayed the execution proceedings till the mundkarship issue was decided by the authority under the Act though objections were taken only for the execution about the mundkarship.

16. In **Jagmittar Bhagat** (supra), a two Judge Bench of the Hon'ble Apex Court observed at paragraph 9 as follows:

"9. Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a

decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a Court or Tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply. "

17. In **Pedro Fernandes** (supra), the petitioner took a plea that they were mundkars and therefore approached the Mamalatdar with their application dated 7/11/2007, filed under section 8(a) of the Goa, Daman & Diu (Protection from Eviction) Act, 1975 alongwith an application for temporary injunction dated 10/01/2008 after a warrant was issued against them. In the brief facts, the respondents had filed a suit for their eviction which was dismissed by the Trial Court by the Judgment and Decree dated 29/04/2000 but was decreed by the First Additional District Judge by the judgment and order dated 24/06/2004. The Second Appeal preferred by the petitioner came to be dismissed by the order dated 13/04/2006. The petitioner filed an application on 14/11/2007 in the execution proceedings under Section 151 CPC r/w. Section 31(2) r/w. 38 of the Act stating that their mundkar

case was pending before the Mamlatdar for adjudication and therefore the executing Court had no jurisdiction to provide that the execution proceedings filed by the respondents. Reliance was placed in **Baburao Naik** and **Suba Kamat** (supra) .

18. In **Pedro Fernandes** (supra), the Executive Court refused to stay the execution proceedings observing that it could not go into the pleadings of the parties and the High Court had declined to entertain their plea of mundkarship in the SA No.108 OF 2004. The petitioners had not challenged the findings of the High Court in the Second Appeal No.108 of 2004 which had become final. The learned Single Judge observed that the Trial Court had rightly distinguished the ratio in **Baburao Naik** and **Suba Kamat** (supra). In this case the plea of the mundkarship was taken for the first time in the execution proceedings and it was held that ""In my view, the defendants having not taken the plea specifically in the written statement but have taken a contrary plea of co-ownership of the suit premises, they cannot be permitted to raise it by way of an argument either before the first appellate Court or before this Court. If this was the case of the defendants on the pleadings of the plaintiff herself, an issue of mundkarship arose, the defendants ought to have insisted upon the framing of such an issue by proper pleadings. The defendants having not done so, in my opinion, they are not entitled to challenge the decree of eviction

passed by the lower appellate Court.” Rightly or wrongly the issue of the mundkarship was set at rest by the High Court in Second Appeal which had attained finality and as such the ratio in **Shantaram Curtorkar, Baburao Naik** and **Suba Kamat** (supra) were not applicable to the case at hand. The learned Single Judge ultimately held that the learned Executing Court could not be faulted for not staying the proceedings so as to allow the petitioner to raise an issue of mundkarship before the Mamlatdar and dismissed the petition. This judgment which had considered those in **Shantaram Curtorkar, Baburao Naik** and **Suba Kamat** (supra) would clearly advance the case of the respondents unlike that of the petitioners that they were entitled to a stay of the proceedings in view of the plea of mundkarship raised in the execution proceedings.

19. A cursory perusal of the application moved by the petitioners under Section 8(A) of the Act would indicate that for the first time a plea was taken that One Julia Fernades was the owner of the property in question pursuant to a Deed of Gift dated 09/10/1958 and that the late father in law of the petitioner Simon Fernandes constructed a temporary shed behind the building in 1965 with her oral permission and started residing in the hut as a mundkar. The petitioner had otherwise never taken a plea of mundkarship in their written statement filed to the suit initiated by

the respondents nor was such a plea pursued in the appeal against the Judgment and Decree suffered by them. It is only in the course of the Second Appeal that a submission was made about an application under Section 8(A) of Mundkar Act being filed under the Act and inviting an observation of the learned Single Judge of this Court at paragraph 6 on the import of Section 31(2) and Section 38 of the Act and a further observation that any such proceedings shall be considered on its own merit in accordance with law. The fact of the matter however remains that the Second appeal came to be dismissed at the petitioner's instance thereby bringing a quietus to the entire proceedings and the petitioners having suffered a decree of eviction against them and of which execution was sought in the execution proceedings.

20. A plea taken on behalf of the petitioners that their predecessor Simon was the mundkar from 1965 was not substantiated by any material on record and for which the learned First Appellate Court while deciding the appeal duly considered an additional plea taken on their behalf that they were in occupation of the premises through Mamo Koya as a mundkar. The learned First Appellate Court had given clear findings that there was no denial of the specific pleading of the respondent that the petitioners started occupying the open space without their permission from 1980. The learned First Appellate Court had found

no substance in the case of the petitioners as to when they were residing in the suit premises or prior to the appointed date and that there was no disclosure at their instance that the said Mamo Koya resided in the suit premises in his individual capacity as a mundkar. The learned judge had not found favour with the plea raised on behalf of the petitioners that they were residing in the suit premises through Mamo Koya and when there was otherwise no material to establish that Mamo Koya and Simon Fernandes were one and the same person. Besides, the learned First Appellate Court considering the judgment in **Sadanand Vithal Naik and others v/s. Rashmi Dinesh Naik and others** [2010(4) Bom.CR 688] had clearly observed that the plea of mundkarship was not available to the petitioners after coming into force of the Act in 1976 since the Act was a measure of protection and not creation of new rights.

21. Shri Nachinolkar, learned Advocate for the respondents had also invited attention to the findings rendered by the learned First Appellate Court in which there was a clear admission that there was no house number to the structure used by the petitioners and that there was a clear admission at the instance of the petitioners that the issue of mundkarship raised by Mamo Koya was dismissed and the Civil Suit filed by the said Mamo Koya was also dismissed ultimately to hold that there was no substance in

the case of the petitioners that they were claiming right to the suit premises through Mamo Koya and/or that he was mundkar of the premises in question.

22. The learned Trial Court while disposing off the execution proceedings was clearly seized of the fact that the respondents were secured by the decree of the Civil Court which was upheld in appeal and further the Second Appeal filed by the petitioners had been dismissed thereby bringing a quietus to the status of the petitioners qua the suit premises and confirming that the respondents were entitled to their eviction from the suit premises. No error could be found in the order passed by the learned Trial Court as to exercise the power of superintendence under Article 227 of the Constitution of India. Thus having considered the judgment cited by Shri D'Silva and Shri Nachinolkar, learned Advocates for the parties and on considering the law on the point, there is no basis to invoke the jurisdiction of this Court under Article 227 of the Constitution of India.

23. In view thereof, i pass the following

ORDER

Rule is discharged.

The Writ Petition is dismissed with no order as to costs.

The operative part of the Trial Court order is extended by

30 days w.e.f. from 29/03/2019.

NUTAN D. SARDESSAI, J.

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