

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1144 OF 2018**

1. Shri Shaikh Mohidin,
(since deceased represented by legal heirs)

1(a) Smt. Kulsum Bi Shaikh,
83 years of age,
Wife of late Shaikh Mohidin,
r/o H. No.257, Aquem,
Margao-Goa.

1(b) Shri Hussain Shaikh,
59 years of age,
Son of late Shakh Mohidin,
4/0 H. No. 257, Aquem,
Margao-Goa.

1(c) Smt. Hussain Shaikh
58 years of age,
Wife of Shri Hussain Shaikh,
r/o H. No.257, Aquem,
Margao- Goa.

1 (d) Shri Liyakat Shaikh,
55 years of age,
Son of late Shaikh Mohidin,
r/o H. No. 257, Aquem,
Marga-Goa.

1 (e) Smt. Nafisa Shaikh,
45 years of age,
Wife of Liyakat Shaikh,
r/o H No. 257, Aquem,
Margao-Goa.

1 (f) Shri Rafik Shaikh,
52 years of age,
Son of late Shaikh Mohidin,

1 (g) Smt. Rafik Shaikh,
48 years of age,

Wife of Rafik Shaikh,
r/o H. No. 257, Aquem,
Margao – Goa.

1 (h) Shri Anwar Shaikh (deceased)

1 (i) Smt. Anwar Shaikh,
48 years of age,
Wife of Anwar Shaikh,
r/o H. No. 257, Aquem,
Mrgao – Goa.

1 (j) Shri Shabbir Shaikh.
45 years of age,
Son of late Shaikh Mohidin,
r/o H. No. 257, Aquem,
Margao-Goa.

1 (k) Shaikh Imtiyza Shaikh,
35 years of age,
Son of late Shiakh Mohidin,
r/o H. No. 257, Aquem,
Margao-Goa.

..... Petitioners

V e r s u s

1. Mr. Octaviano Furtado and his wife
(since deceased through Lrs.)

1(a) Mrs. Nirmala Ana Maria Furtado,
Daughter of late Octaviano Furtado,
Major of age,
r/o Bundos, Curtorim,
Salcete-Goa

1 (b) Mr. Milagres Rodrigues,
Husband of Nirmaa Ana Maria Furtado,
Major of age,
r/o Bundors, Curtorim,
Salcete-Goa.

- 1 (c) Mr. Winston Mario Furado,
Son of late Octaviano Furtado,
r/o H. No. 642, Aquem Alto,
Margao, Salcete-Goa.
- 1 (d) Mrs. Ambita Pia Fernandes,
Wife of Winston Maria Furtado,
Major of age,
r/o H. No. 642, Aquem Alto,
Margao, Salcete-Goa.
- 1 (e) Mrs. Nilima Furtado,
Daughter of late Octaviano Furtado,
Major of age,
r/o H. No. 642, Aquem Alto,
Margao, Salcete-Goa.
- 1 (f) Mr. Sandeep Patil,
Husband of Nilima Furtado,
Major of age,
r/o H. No. 642, Aquem Alto,
Margao, Salcete-Goa.
- 1 (g) Mrs. Alfina Furtado,
Daughter of late Octaviano Furtado,
Major of age,
r/o H. No. 642, Aquem Alto,
Margao, Salcete-Goa.
- 1 (h) Mr. Alexander Gomes,
Husband of Alfina Furtado,
Major of age,
r/o H. No. 642, Aquem Alto,
Margao, Salcete-Goa.
- 1 (i) Mrs. Alvina Furtado,
Daughter of late Octaviano Furtado,
Major of age,
r/o H. No. 642, Aquem Alto,

Margao, Salcete-Goa.

1 (j) Mr. Rolando Fernandes,
Husband of Alvina Furtado,
Major of age,
r/o H. No. 642, Aquem Alto,
Margao, Salcete-Goa.

2. Mrs Filomena Furtado,
Major of age,
r/o H. No. 642, Aquem Alto,
Margao, Salcete-Goa.

..... Respondents

Shri A. D. Bhobe, Advocate for the Petitioners.

Shri Sudin Usgaonkar, Senior Advocate with Adv. Ms. Vinita Palyekar for
the Respondents.

CORAM: C. V. BHADANG, J.
Reserved on: 21/02/2019.
Pronounced on: 27/02/2019.

O R D E R:

By this petition, the petitioners/judgment debtors are challenging the order dated 3/11/2017 (below Exhibit D-35) passed by the Executing Court in Regular Execution Application no.28/1999/F and the order dated 19/9/2018 in Civil Misc. Application no.130/2017 refusing to review the earlier order dated 3/11/2017.

2. The brief facts necessary for the disposal of the petition may be stated thus:

That now deceased Octaviano Furtado and his wife Filomena Furtado filed Regular Civil Suit no.302/82/D against now deceased Shaikh Mohiddin and his wife Smt. Shaikh Mohiddin for eviction and compensation. The subject matter of dispute is a property better known as “Zaichachi Nomaxa or Zaixochi Nomaxa” situated at Aquem, within Margao Municipal area, admeasuring 492 sq.mts, under provisional no.4/253 which is more specifically described in the plaint. The petitioners are the successors of Shaikh Mohiddin and his wife Smt. Shaikh Mohiddin, while the respondents are the successors of the original plaintiff Octaviano and his wife Smt. Filomena Furtado. For the sake of convenience, the parties are referred to in their original capacity as plaintiffs and defendants.

3. The case made out by the plaintiffs is that their predecessor in title by an agreement of Leave and Licence dated 8/5/1968 had granted the suit property to the defendant no.1 Shaikh Mohiddin for the purpose of construction of a temporary structure thereon, admeasuring 20' x 16' to be used for the temporary residence of the defendants. The said agreement stipulated that the defendants pay monthly compensation of Rs.10/- and it was agreed that the defendants shall be paid Rs.200/- as compensation for the

structure, when the defendants are evicted. The plaintiffs claim that the defendants neglected to pay the monthly compensation, inspite of a legal notice dated 3/1/1979 and hence the suit was filed for eviction and for recovery of compensation.

4. The original defendants resisted the suit. It was contended that the agreement in so far as the payment of Rs.200/- as compensation for structure, or eviction of the defendants and the stipulation about the tenure of the agreement being of five years was waived. It was contended that the defendants continued to be in possession of the suit premises. It was contended that ground rent was enhanced from Rs.10 to Rs.15/- p.m. which was collected by late Antonio Rodrigues, even after the expiry of the initial period of five years. It was denied that there was any neglect in the matter of payment of compensation. It was contended that the plaintiffs never succeeded in establishing themselves as the successors in title of Antonio Rodrigues and they had no right to collect any arrears, if at all due, or to terminate the Leave and Licence Agreement. These were the only contentions raised in defence to the suit claim.

5. The learned trial court framed as many as nine issues. The parties went to trial. The learned trial court by a judgment and decree dated 31/7/1997

decreed the suit directing the defendants to vacate the suit premises and to restore the land to its original condition on receipt of Rs.200/- as compensation, for the structure along with a decree in the sum of Rs.965/- being arrears of compensation and mesne profits at the rate of Rs.150/- p.m. till the date of eviction. The defendants unsuccessfully challenged the said decree before the learned District Judge and thereafter before this Court in Second Appeal No.39/1998, which was dismissed on 12/3/1999.

6. In the meantime, the respondents/decreed holders filed regular Execution Application no.28/1999 for execution of the decree.

7. On 21/4/1997 i.e during the pendency of the suit, the petitioner filed an application before the Mamlatdar of Salcete seeking declaration and registration as a 'mundkar' under the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (Mundkar Act, for short), which was registered as Case No.MUND/MAR/15/1997. On 23/9/2009, the learned Mamlatdar allowed the application granting an order of 'registration', of the petitioner no.1 as a mundkar in respect of the house bearing no.257. The respondents challenged the same before the Dy. Collector in an appeal which was dismissed on 27/7/2011 which was further confirmed by the Administrative Tribunal in Mundkar Revision Application no.35/2011, which

was dismissed on 27/7/2016. The respondents did not carry the matter any further.

8. On 6/10/2017, the petitioners filed an application Exhibit 35-D for dropping the Executing proceedings, “being inconsistent with the provisions of section 38 of the Mundkar Act”. It was contended that the Mamlatdar has held that Mr. Shaikh Modhideen was residing in the suit house as a Mundkar with fixed habitation. It was pointed out that the learned Mamlatdar had not rejected the prayer for declaration as mundkar made by the judgment debtors. It was contended that the judgment debtors after obtaining the extract of the register of Mundkars, filed an application for purchase of the mundkarial house including the mundkarial area in the year 2017 which is pending disposal before the learned Jt. Mamlatdar at Margao. It was contended that the Execution proceedings were liable to be dropped in view of section 38 of the Mundkar Act.

9. The respondents opposed the application on the ground that mere registration as a mundkar does not entitle the judgment debtors to purchase the suit premises and the Mamlatdar cannot proceed with the purchase proceedings for want of a declaration and the decree continues to be executable.

10. The Executing Court by an order dated 3/11/2017 has dismissed the application Exhibit D-35. The petitioner filed Civil Misc. Application no.130/2017 for review of the said order which has been dismissed on 19/9/2018. Hence this petition.

11. I have heard Shri Bhobe, the learned counsel for the petitioner and Shri Usgaonkar, the learned Senior Counsel for the respondents. With the assistance of the learned counsel for the parties, I have gone through the record.

12. Shri Bhobe, the learned counsel for the petitioner has submitted that there is a finding by the learned Mamlatdar under the Mundkar Act that Shaikh Mohiddin was in possession of the suit dwelling house by way of fixed habitation, as a mundkar. It is submitted that the said finding has attained finality and the application for purchase is also pending before the Mamlatdar. It is therefore submitted that under section 38 of the Act, the decree of the Civil Court cannot be executed. The learned counsel has pointed out that after the filing of the present petition, the petitioners have also filed an application for declaration as a mundkar before the Mamlatdar which is pending. It is submitted that on either of these counts, the execution

case was liable to be dropped.

13. On the contrary Shri Usgaonkar, the learned Senior Counsel for the respondents has placed reliance on the decision of this Court in **Smt. Gulabi Sangru Devidas & Others Vs. Smt. Prema Govinda Gaonkar and others 1994 (3) BomCR 328**, in order to submit that the inquiry under section 29 of the Mundkar Act (for registration as a mundkar) being a summary inquiry, the said finding does not confer any right on the person in whose favour the order of registration is granted, except that it has a presumptive value. It is submitted that it is only an order under section 8A of the Mundkar Act i.e. for declaration, which confers substantive rights, on the party to seek purchase. It is submitted that on the date, when the impugned orders were passed, the petitioner had not filed any independent application for declaration, which is filed subsequent to the filing of the present petition. Reliance is also placed on the Division Bench judgment of this Court in the case of **Mrs. Agnela Figueira Vs. Shri Vasant Krishna Palyekar and anr (Letter Patent Appeal No.4 of 2013)** decided on 25/9/2018, which has further elaborated the legal position emanating from the decision of this Court, in the case of **Smt. Gulabi Devidas (supra)**. It is submitted that, this is only an attempt to frustrate the execution of the decree obtained by the respondent, in a suit of the year 1982. It is submitted that the Executing Court, is justified in

dismissing the application, as well as the application seeking review.

14. I have carefully considered the submissions made.

15. In this case in the suit filed by the respondents way back in the year 1982 there was no claim based on any mundkarial right raised in the suit which is apparent from the issues framed in the suit. The trial court has answered issue nos.1 to 4 in the affirmative and in favour of the plaintiffs, while the issue nos. 5 to 8 have been answered in the negative i.e. against the original defendants. In short, the trial court has held that the predecessor of the plaintiffs had by an agreement granted Leave and Licence to the defendants, the land, for constructing a structure thereon which further provided that the defendants shall be paid Rs.200/- as compensation whenever they are required to vacate the land by removal of the structure. The record discloses that it was only on 21/4/1997 that is, during the pendency of the suit, the original defendant no.1 Shaikh Mohiddin filed an application for registration as well as declaration as a mundkar, which was allowed by the Mamlatdar on 23/9/2009 only to the extent of granting an order of registration under section 29 of the Mundkar Act. In other words, the declaration contemplated under section 8A of the Mundkar Act was not granted. It is true that the order of the Mamlatdar does not specifically say

that it is refused. However, the fact remains that the original defendant no.1 had prayed for both registration as well as declaration as a mundkar and the Mamlatdar in his discretion had only granted an order of registration. The Executing Court has relied upon the decision of the Supreme Court in the case of **Plasto Pack, Mumbai V. Ratnakar Bank Ltd. (2001) 6 SCC 683**, wherein it is held that the such of the prayers as were not granted would be deemed to have been refused and to that extent the suit shall be deemed to have been dismissed. The Executing Court on the basis of the same, appears to be of the opinion that the relief of declaration is refused as the Mamlatdar has only granted an order of registration. Be that as it may, the said order was only challenged by the plaintiffs. It is not in dispute that the original defendant no.1 did not carry the matter in appeal, on the ground of non grant of a declaration, which in fact confers a substantive right to purchase the dwelling house. It is now well settled that merely on the basis of an order of registration, the party is not entitled to seek purchase. In other words, unless and until the party has a declaration of a mundkarial right in his favour, the party is not entitled to obtain an order of purchase of the dwelling house. The learned counsel for the petitioner points out that the application for declaration has now been filed subsequent to the filing of the present petition. I have given my anxious consideration to the circumstances and the submissions made. As noticed earlier, although the defendant no.1 filed and

application before the Mamlatdar as far back in the year 1997 both for registration as well as declaration as a mundkar and although the Mamlatdar only granted an order of registration in the year 2009, the defendants did not carry the matter in appeal to the extent of the non grant of order of declaration, and has now filed an application for declaration after filing of the present petition. Although it cannot be disputed that where an issue of mundkarial right is genuinely raised, the Civil Court would be required to stay its hands and the finding of the Mamlatdar and other authorities under the Mundkar Act would bind the Civil Court, however, this does not mean that the Civil Court is even precluded from examining the matter, to find whether the execution case needs to be stayed or dropped awaiting the decision of the Mamlatdar. At the cost of repetition it is necessary to mention that the original defendant having failed to obtain an order of declaration in the year 2009 on the basis of an application filed in the year 1997, cannot now seek dropping of the execution proceedings. The respondents are seeking the Execution of a decree passed in the year 1997 in a suit of the year 1982 which has attained finality up to this Court. Thus considering the overall circumstances, I do not find that any case for interference in the impugned order is made out. The petition is without any merit and is accordingly dismissed with no order as to costs.

16. The respondents are granted time of three months to comply with the decree dated 31/7/1997.

C. V. BHADANG, J.

Ap/