

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.496 OF 2019**

Shri Shaikh Mohidin (since dec.)
through LR's

....Petitioners

Versus

Octaviano Furtado & his wife
(since dec.) through LR's & Anr.

... Respondents

Shri Ashwin D. Bhobe with Ms. A. Fernandes, Advocate for the
Petitioners.

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

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 9 February 2021

ORAL ORDER :

In 1982, the 1st and the 2nd respondents' predecessor filed Regular Civil Suit No.302/1982/D before Civil Judge, Junior Division, 'F' Court, Margao, against the petitioners' predecessor. The suit was for eviction and restoration of possession. Through judgment and decree, dated 31.07.1997—that is, 15 years later—the trial Court decreed the suit.

2. Aggrieved, the respondents filed First Appeal before the District Court, Margao. It too was dismissed. To illustrate the antiquity of this case, I may note that neither party is aware of the appeal number, much less when it was disposed of.

3. After the dismissal of the first Appeal, further aggrieved, the petitioners filed Second Appeal No.39/1998. This Court, through judgment dated 12.03.1999, dismissed it. Thus, the eviction proceedings, one would think, attained finality; but they did not.

4. Pending the Second Appeal, in 1997 the petitioners applied to the Mamlatdar, invoking the provisions of the Goa Mundkars (Protection

from Eviction) Act, 1975. It was for registration and declaration that they had had the mundkarial rights over the 'dwelling house' and right to purchase it, too. Through an order, dated 23.09.2009, the Mamlatdar allowed the registration but refused declaration.

5. Then, the respondents, as the owners, challenged the Mamlatdar's order before the Deputy Collector, who is the appellate authority under the Act. Through an order, dated 27.07.2011, the appellate authority dismissed the appeal. Though the respondents no.1 & 2 went to the Goa Administrative Tribunal, they could not succeed. Thus, the revision too was dismissed on 27.07.2016.

6. At any rate, once the Second Appeal was dismissed in 1999, the respondents filed Execution Application No.28/1999/F before the Civil Judge, Junior Division, Margao. By then, the proceedings before the Mamlatdar were pending. So, eight years later, in 2007, the petitioners applied to the Execution Court and demanded that the execution proceedings be dropped. It was on the premise that as per Section 38 of the Act the proceedings under that Act have overriding effect. But soon thereafter, as we have already noted, September 2009, the Mamlatdar only allowed registration but not declaration. Thus, from then on, there had been no application pending before the Mamlatdar.

7. Under the above circumstances, through an order dated 03.11.2017, the Executing Court refused to drop the proceedings. Then the petitioners filed Writ Petition No.1144 of 2018. Eventually, this Court, through its judgment dated 27.02.2019, dismissed that Writ Petition.

8. Unrelenting, again on 16.04.2019, the petitioners filed another application before the Executing Court. This time, they wanted the Court to stay the execution proceedings until the Mamlatdar decided their application on their mundkarial rights. Here, we may note that when Writ Petition No.1144 of 2018 was pending before this Court, the petitioners

filed another application in 2019 before the Mamlatdar for a declaration. It was despite the fact that the same authority in 1999 dismissed the petitioners' application for declaration. Predictably, the Executing Court, again, refused to stay the proceedings. Aggrieved, the petitioners have filed this Writ Petition, invoking Article 227 of the Constitution of India.

Submissions:

Petitioners:

9. Shri Bhobe, the learned counsel for the petitioners, has submitted that once any mundkarial proceedings are pending before the Mamlatdar, no suit or other proceedings emanating from that suit shall be proceeded with; they must be stayed. According to him, the 1975 Act has an overriding effect, as is evident from Section 38 of that Act. To the question whether the expression 'suit' encompass even execution proceedings, the learned counsel has relied on *Shantaram Babani Xete Curtorkar & Anr. v. Vishnu Babani Xete Curtorkar & Anr.*¹. Shri Bhobe has also submitted that to have the mundkarial rights declared, the applicant suffers no time constraint. The party in possession of the property can always invoke the provisions and establish his rights—any time. In this context, he has also drawn my attention to Section 32 of the Act, which, according to him, requires the Courts to adjudicate the issue of mundkarial right before proceeding further in any other matter affecting the occupant of a house.

10. Shri Bhobe has also pointed out that even this Court, in its judgment in Writ Petition No.1144/2018, has acknowledged that the declaration proceedings are pending before the Mamlatdar. Therefore, he has urged this Court to allow this Writ Petition.

11. Shri Usgaonkar, the learned Senior Counsel for the respondents no.1 & 2, has submitted that the respondents' predecessor filed the suit in 1982. The petitioners lost at every stage before every forum. Despite four

¹ 1989 (2) Goa Law Times (167)

decades having lapsed, still the respondents could not get the fruits of the decree. Thus, Shri Usgaonkar stresses that the petitioners have taken recourse to a gross abuse of process. Then, the learned Senior Counsel has drawn my attention to this Court's judgment, dated 27.02.2019, in Writ Petition No.1144 of 2018. It is to underline the fact that this Court granted three months' time to the petitioners to comply with the decree, dated 31.07.1987. The petitioners, however, have not complied with that directive; instead, they have come up with another application for having the execution proceedings stayed. Then, he has also pointed out that the application the petitioners are said to have filed before the Mamlatdar in 2019 suffers from principles of *res judicata* as well.

12. According to the learned Senior Counsel, way back in 2009, the Mamlatdar refused to grant the relief of declaration. That refusal has not been challenged. Instead, after a decade, faced with the inevitable eviction, the petitioners have come up with another application. Such a course of action has not been contemplated under the law. So, he has urged this Court to dismiss the Writ Petition.

13. Heard Shri A.D. Bhobe, the learned counsel for the petitioners; and Shri Sudin Usgaonkar, the learned Senior Counsel for the respondents.

Discussion:

14. Indeed, this case does not detain us long. It should not, for the procedural paralysis has already afflicted this case to death—almost. The 1st and the 2nd respondents' predecessor filed the suit in 1982. The suit culminated in a Second Appeal before this Court in 1999—17 years in all. All through, the Courts have concurrently held that the petitioners should be evicted. Even the execution application was filed in 1999. First, the petitioners do not seem to have taken a plea before any Civil Court up to the stage of Second Appeal that they had mundkari rights over the property. The judgment and decree have attained finality.

15. When the Second Appeal was about to end, the petitioners, in 2007, applied to the Mamlatdar for registration and declaration in terms of Section 8-A and 29 of the Act. In 2009, the Mamlatdar only allowed the petitioners' prayer for registration but not for a declaration. In other words, the petitioners' plea for declaration stood rejected. Then again a decade lapsed. Without any further application pending before the Mamlatdar, the petitioners applied to the execution Court, that was in 2009, that the execution proceedings should be dropped because the Mamlatdar has already allowed the petitioners to register themselves under Section 29 of the Act. That was notwithstanding the Mamlatdar's rejection of declaration. Rightly, the Executing Court did not entertain that application.

16. Then, the petitioners filed Writ Petition No.1144 of 2018. Pending that Writ Petition, they filed another application before the Mamlatdar for having a declaration that they have mundkarial rights over the property. This is in the face of an earlier rejection by the same authority. I reckon the principles of *res judicata* squarely affect the second application. This Court, in fact, refused to interfere. That apart, it granted three months for the petitioners to comply with the decree, dated 31.07.1997. Even this Court's direction does not deter the petitioners. Instead of complying with the judgment in Writ Petition No.1144 of 2018, they went back to the Executing Court; they filed another application for having the proceedings stayed. After failing there, they have come to this Court.

17. To sum up, if at all the petitioners had any mundkarial right, they ought to have taken that as a defence in the civil suit. Once they have not taken that defence, it is quite evident that the issue estoppel applies as much to the plaintiffs as to the defendants. Therefore, in any other collateral proceedings, they are estopped from raising any plea which they could have taken as defence in the suit.

18. That apart, even in execution proceedings, in 2009 the petitioners wanted the proceedings dropped. By then, they could have sought an alternative relief of having the proceedings stayed if not dropped. But they have not sought that relief. Instead, in a piecemeal manner, much later, that is in 2019, they sought that relief from the executing Court. Here, too, issue estoppel applies. Whatever plea the petitioners were entitled to take at the earliest point of time but had not taken should not be allowed to be taken subsequently.

19. This case, as many evictions cases do, reflects the sad state of litigious affairs in our redressal system. True, morality and litigation are not twins—not even distant cousins. Preaching is no part of a judgment. Adjudication is amoral. But unbridled reins to procedural prevarication sounds a death knell to the justice delivery system. People lose patience and, then, faith. They go to kangaroo courts, where musclemen rule the roost. We should stop this trend if we do not want mafia as an alternative adjudicatory forum. Judiciary ill affords such substitute to it.

Result:

I find no merit in the Writ Petition. As a result, I dismiss the Writ Petition with costs of ₹10,000/- to be paid to the respondents.

DAMA SESHADRI NAIDU, J.

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