

(2011) 10 BOM CK 0043
In the Bombay High Court
Case No : Writ Petition No. 582 of 2008

Mahableshwar Pandurang Halankar	APPELLANT
Vs	
Damodar Pandurang Halankar and Others	RESPONDENT

Date of Decision : 18-10-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 3

Citation : (2012) 5 BomCR 312

Hon'ble Judges : Reis F.M., J

Bench : Single Bench

Advocate : A.F. Diniz, for the Appellant; J.J. Mulgaonkar, for the Respondent

Judgement

Reis F.M., J.—Heard Shri A.F. Diniz, learned Counsel appearing for the petitioners and Mr. J. J. Mulgaonkar, learned Counsel appearing for the respondents. The above petition challenges the Order dated 30.6.2008, passed by the learned Civil Judge, Senior Division at Mapusa, in Special Civil Suit No. 36/2002/II, whereby an application filed by the petitioner to strike of the issue No. 6 framed by the learned Judge on 2.5.2007, came to be rejected.

2. Shri A.F. Diniz, learned Counsel appearing for the petitioner, has assailed the impugned Order and pointed out that the law is well settled that the Court cannot mechanically frame an issue to oust its jurisdiction when no particulars have been furnished by such person in the pleadings to frame such issue. Learned Counsel further pointed out that the respondents are claiming to be the Mundkars of the suit house when, on the contrary, on the basis of the pleadings in the plaint of the petitioner, it has been clearly averred that the petitioner had purchased the property in the year 1980 from the Confraria of Church and, thereafter, in the year 1982, had carried out the reconstruction of a small structure existing therein. The learned Counsel further pointed out that at para 8 of the plaint, there is a specific averment to the effect that in the written statement filed in the suit filed by the Village Panchayat with regard to the construction put up by the petitioner, the respondents had clearly admitted the

fact that the suit house belongs to the petitioner. The learned Counsel further pointed out that at para 5 of the amended plaint, there is a specific averment that the structure which was existing in the property was a dilapidated structure having a width of 1.5 metres. Learned Counsel has further taken me through the written statements filed by the respondents and pointed out that the written statement is of a bare denial and no contrary averments have been made to specify either the actual area of the house nor the height thereof. The learned Counsel further pointed out that there is a vague allegation to the effect that the respondents were residing with a fixed habitation as on the date when the Mundkar Act came into force in the year 1975 though no particulars of such date of occupation have been specifically pleaded by the respondents in the written statement. Learned Counsel further pointed out that the learned Single Judge of this Court in the judgment reported in 2010 (4) Bom. C.R. 688(P.B.) in the case of (Sadanand Vithal Naik & ors. Vs. Rashmi Dinesh Naik & ors.)¹, has held that there can be no Mundkars created after the coming into force of the Mundkar Act in the year 1975. The learned Counsel further pointed out that considering that the suit house was constructed by the petitioner in the year 1982, this itself negates the alleged claim of the respondents that he is a Mundkar of the suit house. The learned Counsel pointed out that the respondent No. 1 is the brother of the petitioner and by no stretch of imagination, can it be considered that a brother who has an independent house can have a claim as a Mundkar of the other brother. Learned Counsel further pointed out that from the original owner the respondent No. 1 himself has purchased a piece of land adjoining to the plot purchased by the petitioner in the year 1979 wherein he has constructed his own house and residing therein. Learned Counsel further pointed out that the petitioner has also produced an application filed by the respondents way back in the year 1985 to seek for registration as a Mundkar in respect of another House No. 109/6 of the same Confraria. The learned Counsel further pointed out that the whole exercise indulged upon by the respondents is only to delay the matter by raising such dishonest claims to the detriment of the interest of the petitioners over his proprietary rights to the suit house. The learned Counsel as such has also relied upon the judgments of the Apex Court reported in Thomas Antony Vs. Varkey Varkey, Mitra of Archdiocese of Goa and Daman Vs. Mr. K. Vijayadharan, 1981 B.C.I. (soft) 25 in the case of (Pulmati Shyamlal Mishra & anr. Vs. Ramkrishna Gangaprasad Bajpai & ors.) and Uttam Sambha Deshmukh and others Vs. Yamunabai Bhoyar and others,

3. On the other hand, Shri J.J. Mulgaonkar, learned Counsel appearing for the respondents has supported the impugned Order. The learned Counsel has further pointed out that there are specific pleadings raised by the respondents in the written statements to the effect that the respondents were residing with a fixed habitation with the consent of the Bhatkar i.e. the Confraria of Church at the time of the appointed date and, as such, the respondents are the Mundkars of the suit house. The learned Counsel has taken me through the written statements and pointed out that there are sufficient pleadings in the written

statement which would raise the plea to the effect that the respondents are the Mundkars of the suit house. The learned Counsel has further pointed out that it is well settled that the Civil Court has no jurisdiction to decide the issue of Mundkarship and as such once such plea is taken, it is incumbent upon the Civil Court to stay the suit and refer the issue to the learned Mamlatdar. The learned Counsel further pointed out that this Court has held that such plea of Mundkar can be raised even at the stage of execution. Learned Counsel further submitted that there is no infirmity committed by the learned Judge whilst passing the impugned Order whereby the application filed by the petitioner to strike off issue No. 6 came to be rejected.

4. Having heard the learned Counsel and on perusal of the records, before I go into the merits of the rival contentions raised by the Counsel appearing for both the parties, it would be appropriate to consider the judgments relied upon by the learned Counsel appearing for the petitioner. The Apex Court in the judgment reported in *Thomas Antony Vs. Varkey Varkey* (supra) has held at para 16 thus:

16...While making a reference to the Tribunal mandatory the legislature cannot be said to have intended that even a patently frivolous, mala fide and illegal plea of tenancy taken by a party merely to delay the proceeding and to remain in possession of the property is also to be referred to the Tribunal. The statutory provisions, in our considered view, envisage a case where a bona fide and legally sustainable plea of tenancy is taken by the party, that question shall be referred to the Tribunal.

5. The Division Bench of this Court in the judgment in the case of *Pulmati Shyamlal Mishra & anr. Vs. Ramkrishna Gangaprasad Bajpai & ors.* (supra) has held at Para 34, 35 and 36 thus :

34. It is also not correct to assume that the Court is under any obligation to frame and remit the issue of tenancy mechanically, merely on of its necessity and justification. Cases can be conceived, when tenancy plea may appear to be patently frivolous, fraudulent and part of the dilatory strategy, and may not by itself attract sections 85 and 85-A of the Tenancy Act. The remittance of any such tenancy issue and the trial thereof by the Mamlatdar and higher authorities in appeal and revision, is known to have become a long winding and time consuming process. This delay enures for the benefit of the person in possession of the land. This, not unnaturally, prompts and tempts him to claim to be the tenant out of sheer anxiety to perpetuate his unmerited possession, even if no basis exists for the claim. Nothing can thus prevent a defendant from claiming to be tenant (1) even if his plea to that effect is overruled specifically or constructively by the Tenancy Court in some earlier proceedings in between himself and the landlord or their predecessor-in-title or (2) even if the plea so set up happens to be irreconcilably inconsistent with his defence of being mortgagee, purchaser or owner of the land by inheritance or adoption, in the earlier stage of the same proceedings or in the earlier round of another litigation. A plea to that effect as an integral part of any other fraudulent defences is yet another specie

of the same category. Unwarranted remittance of such issue for trial in literal and mechanical compliance with the above provisions, enables the litigants to abuse the process of the Court and cause grave miscarriage of justice. This indeed makes mockery of the judicial process causing damage to the confidence of the litigating public in its efficacy and utility.

35. This only highlights the danger of any literal or mechanical construction of these provisions in disregard of their content and context and any casual approach in the matter. Order 14 of the CPC contemplates framing of issues by the Court on application of mind, not only to the pleading but also to the documents produced, while Rule 4 thereof empowers it to examine any person and enforce production of additional documents for that purpose. These provisions thus enable the courts to (1) seek clarification of the bald pleadings, (2) insist on production of documents in doubtful cases, and (3) get explanation for the adverse factors even where the litigant is driven to rely on oral evidence, with a view to frame correct issues and restrict the trial of the case only to the same. There is nothing in section 85 or 85-A or in any other provisions of the Tenancy Act, robbing the Courts of these powers so indispensable for the effective adjudication and, relieving it or its duty imposed thereunder. These sections provide for remittance of issues only if and when the same are framed on being found to arise on such scrutiny and it is after that stage that the Civil Court ceases to have jurisdiction with regard to the same till the finding is certified by the Tenancy authorities. The process contemplated under Order 14 does not contemplate any trial of such issue but it does involve nipping of any such plea in the bud, if the Court, subject to any" contrary decision in appeal and revision, judicially concludes against its framing and raising. This is implicit in the separate provision for framing issues and the trial thereof. This process does not thus involve any conflict between Order 14 of the CPC or section 85 and 85-A of the Tenancy Act nor any question of any lack or excess of jurisdiction. Such scrupulous compliance with these provisions alone can prevent such possible abuse of its process.

36. The Court has thus a duty to examine the substance and refuse to frame and remit any such issue if the same appears to be demonstrably frivolous and mala fide. It is obviously not easy to draw a dividing line between such frivolous and mala fide pleas on the one hand and the ones turning out to be false at the end of the trial on the other. Facts of a given case, however, would rarely fail to furnish the required indication to the judicially trained mind. Facts of the present case, in our opinion, leave no manner of doubt that tenancy plea is a part of the fraudulent defence strategy and does not call for any remittance for trial. The approach could not have been different even if the defendant No. 5 had pleaded the tenancy specifically. The same picture would have emerged in the careful scrutiny at the preliminary stage contemplated under Order 14 of the Code of Civil Procedure.

6. The learned Single Judge of this Court in the case of Mitra of Archdiocese of

Goa and Daman Vs. Mr. K. Vijayadharan (supra) has held at Para 14 thus :

14. Section 32 of the said Act clearly provides that if any suit instituted in Civil Court involves any issue which is required to be settled, decided or dealt with by the Mamlatdar under the said Act, the Civil Court shall stay the suit and refer the issue to the Mamlatdar for the determination. In other words, whenever an issue of mundkarship arises in a civil suit, the Court will have to stay the suit and refer the issue to the concerned Mamlatdar. However, in order to enable a party to raise the issue, necessary particulars relating to plea of mundkarship must be disclosed in the pleadings filed by the person who seeks to raise the issue of mundkarship. As already seen above, the section 2(p) relates to the term "Mundkar" and clearly requires the person to disclose the facts relating to the consent of the bhatkar to reside in the dwelling house, the facts regarding his lawful residence in the house and the facts in relation to his fixed habitation in such a house. Considering the ingredients as disclosed from the definition of the term "Mundkar" and taking into consideration the pleadings of the respondent in the unamended written statement it is apparent that the contents thereof do not disclose any fact regarding fixed habitation of the respondent in the suit house. Likewise, the respondent has not disclosed the date of the year 1975 since when the respondent had been residing in the suit house. In other words, the pleadings do not disclose all the necessary ingredients of the definition of the term "Mundkar" and therefore it cannot be said that the pleadings in the original unamended written statement are sufficient to disclose that the respondent was claiming mundkarship in relation to the suit house. Even in the proposed amendment there is no disclosure as to the date of the year 1975 since when the petitioner claims to have been residing in the suit house as also the facts relating to his fixed habitation in the suit house. Applying the test laid down by the learned Single Judge in the case of Pandu Dhondi Yeurdkar (supra) it cannot be said that the original pleadings disclose the plea of mundkarship. The learned Advocate for the petitioner is therefore justified in submitting that by the proposed amendment the respondent had sought to introduce a totally new case in the pleadings.

7. The learned Single Judge of this Court in the case of Uttam Sambha Deshmuch & ors. Vs. Yamunabai & ors. (supra) has held at Para 3 thus :

...However, a bald statement that Sambha was tenant of the suit land previous to sale deed dated 20-4-1959, has been made. However, material facts constituting the plea of tenancy, have not been pleaded, viz. as to when the tenancy commenced; who was the landlord; what were the terms and conditions of the tenancy; what was the rent fixed etc. are absent in the pleading. Apart from this, it will be evident that no documentary evidence viz. revenue record and/or rent receipts have been produced on record to show the relationship of the deceased Sambha as the tenant of the said land.

8. The learned Single Judge of this Court in the case of Sadanand Vithal Naik & ors. Vs. Rashmi Dinesh Naik & ors. (supra) has held at para 17 thus :

17. The plaintiffs have clearly stated that the farm house itself was constructed in the year 1977. Similarly, the plaintiffs stated that the defendants entered the suit house in May, 1988. The defendants have not specifically denied the said statements as required in terms of Order 8, Rule 3, of C.P.C. and, therefore the said statements that the suit house was built in the year 1977 and the defendants entered it in May, 1988 are deemed to be admitted. The defendants without specifically denying the said statements have vaguely stated that they were allowed to reside in the suit house little prior to 1970. If the suit house was built in the year 1977, no plea of mundkarship would have been available to the defendants after coming into force of the Mundkar Act on 12.3.1976. The Mundkar Act was meant to be a measure of protection and not creation of new rights. If the plaintiffs succeed in their claim that they constructed the farm house in the year 1977, then the plea of the defendants is bound to fail. That apart, the plea taken by the defendants in respect of the entire house appears to be totally dishonest and mala fide with a view to prolong the litigation. On facts of the case, the pleas taken by the defendants have to be considered as vague, frivolous and dilatory.

9. Taking note of the well settled principles of law as enumerated by the Apex Court as well as this Court referred to herein above, let us consider as to whether there is any material placed by the respondents to substantiate his alleged claim of Mundkarship. When a pointed question was put to the learned Counsel appearing for the respondents as to whether there was any material adduced by the respondents to substantiate his contention that he was occupying the suit house with the consent of the said Confraria and as to the date when the consent was obtained and when he actually started residing in the suit house, the learned Counsel was unable to point out any such material produced or pleaded by the respondents. The learned Counsel has pointed out that he only realised in the pleadings in the written statement for the purpose of substantiating his alleged claim that the respondents are the Mundkars of the suit premises.

10. After going through the written statements filed by the respondents, I find that there are no particulars whatsoever mentioned by the respondent to enable the Court to frame an issue as to whether the respondents are the Mundkars of the suit premises. Order 14 of the CPC clearly contemplates framing of an issue on application of Mundkar by the Court not only on the pleadings but also on the documents produced by the parties. The material on record establish that the respondents themselves have filed an application to be registered as Mundkars in respect of a different house existing in the same property of the Confraria other than the suit house way back in the year 1985. Apart from that, the pleadings suggest that the suit house was reconstructed by the petitioner in the year 1982 very much to the knowledge of the respondents. Besides that, in the suit filed by the Village Panchayat, the respondents clearly admitted in para 3 of the said written statement that the petitioner was the exclusive owner of the suit house. The conduct of the respondent further discloses that the alleged claim of the

respondents that they are the Mundkars of the suit house is of dishonest, vague and not legally sustainable. Admittedly, the Mundkar Act came into force sometime in the year 1976 and up to the date when the suit was filed in the year 2002, the respondents did not chose either to file an application for registration as a Mundkar in respect of the suit house either against the said Confraria nor did he chose to file an application to declare as a Mundkar under the provisions of a Mundkar Act up to this date. The alleged claim of the respondents that they are the Mundkars of the suit property is demonstratively frivolous which is raised with a strategy to delay the disposal of the suit to the detriment of the interest of the petitioner over the suit house.

11. The principle laid down by the Division Bench of this Court referred to above clearly applies to the facts of the present case and it was not open to the learned Judge to mechanically frame the issue merely on the basis of the alleged vague claim as a Mundkar which was not supported with any material on record. It is also to be noted that the respondents are not claiming to be the Mundkar of the petitioner in respect of the suit house, but that of the Confraria of the Church, and no material is on record to prima facie establish that such claim is bona fide.

12. The other aspect which is also borne out from the pleadings is that the respondent No. 1 himself has purchased an adjoining plot of the same Confraria and that there is no reference to any claim of the so called mundkarship in respect of the suit house. Considering that there is no supporting material produced by the respondents to substantiate his claim that he is a Mundkar of the suit house, the learned Judge was not justified to frame the issue No. 6. The issue has been framed mechanically without adverting to the well settled principles of law as enumerated herein above. As such, the learned Judge erroneously refused to allow the application filed by the petitioner to strike off issue No. 6. In view of the above, I pass the following:

ORDER

- (i) The impugned Order dated 30.6.2008 is quashed and set aside.
- (ii) Issue No. 6 in Spl. Civil Suit No. 36/2002/II stands deleted.
- (iii) Rule in the above terms.
- (iv) Petition stands disposed of accordingly with no orders as to costs.