
(1991) 11 BOM CK 0003
In the Bombay High Court
Case No : Writ Petition No. 283 of 1989

Monica Fernandes

APPELLANT

Vs

Suresh Shirodkar and Others

RESPONDENT

Date of Decision : 21-11-1991

Acts Referred:

Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 — Section 2

Citation : (1991) 4 BomCR 325

Hon'ble Judges : E.S. Da'Silva, J

Bench : Single Bench

Advocate : S.G. Dessai, for the Appellant; S.D. Lotlikar, for the Respondent

Final Decision : Allowed

Judgement

E.S. Da'Silva, J.—Some where in the year 1980 respondent No. 1 filed a civil suit against the petitioner for eviction in respect of a dwelling house situated in the property "Chirputcm" consisting of house and coconut trees situated at Alto Mapusa bearing Chalta No. 11 and 46 of P.T. Sheet 154 of City Survey of Mapusa. The property was originally belonging to one Joaquim Caetan D'Sa and by sale deed dated 3-4-1978 was purchased by the said respondent No. 1. It was an admitted position that prior to the sale deed the petitioner was occupying the house situated in the property but immediately after the purchase the said respondent No. 1 sent to her lawyer's notice dated 2-1-1978 calling upon the petitioner to vacate the house.

2. It is the case of the petitioner that it was not alleged by the respondent No. 1 in the said notice that the petitioner had forced herself in the suit house or that she was a trespasser. The said notice was however ignored by the petitioner and thereafter for period of two years no action was taken by the respondent No. 1 against her. It was only on 26-8-1980 that the civil suit bearing No. 189 of 1980 was filed by the respondent No. 1 at the Mapusa Court. In this suit it was alleged by the respondent that the petitioner had forced herself in the house in the year 1977 and that a notice dated 2-3-1978 was sent to her and that she was a

trespasser.

3. In her written statement the petitioner took the defence that she was a mundkar and therefore the Court had no jurisdiction to entertain the suit under the Mundkar Act. An issue was framed accordingly and referred to the Mamlatdar. The Mamlatdar decided the issue against the petitioner by judgment dated 30-6-1985 on the ground that she had claimed to be staying in the suit house from November, 1974 which claim was not established irrespective of the fact that admittedly the petitioner was acknowledged to be living in the suit house since March, 1977. The petitioner then appealed to the Collector who by judgment dated 14-2-1986 upset the Order of the Mamlatdar and declared the petitioner as mundkar. The respondent No. 1 then moved in revision the Administrative Tribunal which by its judgment dated 11-5-1989 allowed the same and affirmed the original Order of the Mamlatdar by holding that Explanation to section 2(p) was not attracted in her case once the petitioner was staying in the suit house since March, 1977.

4. It is against this judgment and Order of the Administrative Tribunal dated 11th May, 1989 in Case MID/REV/5/36 and the judgment and Order of the Joint Mamlatdar dated 30th June, 1985 in Case No. MUID/SR/KAS/14/82 that the petitioner has filed the present writ petition under Articles 226 and 227 of the Constitution.

5. Shri Dessai, learned Counsel for the petitioner, has raised a number of contentions while challenging the impugned orders of the learned mamlatdar and of the Administrative Tribunal. But I do not require to consider them all, since in my view, the matter can be conveniently disposed of on the strength of only one point which I deem it very important and is going to the very root of the jurisdiction exercised by both the courts below while dealing with the issue of mundkarship.

6. In order to better understand the scheme of the Goa, Daman & Diu Mundkar (Protection from Eviction) Act, 1975 (hereinafter called "the Act") it is pertinent to refer to some of its relevant provisions. The definition of mundkar is found in section 2(p) according to which "mundkar" means "a person who, with the consent of the bhatkar or the person acting or purporting to act on behalf of the bhatkar lawfully resides with a fixed habitation in a dwelling house with or without obligation to render any services to the bhatkar and includes a member" of his family..." Explanation to the aforesaid section which is a deeming provision reads that "a person shall be deemed to be lawfully residing with the consent of the bhatkar in a dwelling house if such person resides in it for a period exceeding one year prior to the appointed date and the bhatkar has not initiated any proceedings, during the said period of one year, to evict such person from the dwelling house, through a competent Court of law, on the ground that such person was a trespasser or, having so initiated such proceedings, does not succeed in obtaining a decree for the eviction of such person". Section 2(i) defines "dwelling house" as "the house in which mundkar resides with a fixed

habitation, whether such house was constructed by the mundkar at his own expense or at the bhatkar's expense or with financial assistance from the bhatkar..." In its turn the definition of "bhatkar" in section 2(f) says that "bhatkar" means a person who owns the land on which the mundkar has a dwelling house.

7. Section 3 refers to rights of a mundkar in his dwelling house and provides that these rights shall be heritable although not transferable. Section 4 puts a bar for eviction of a mundkar from a dwelling house and provides for restoration of possession in case he was illegally evicted. As per section 38 the provisions of the Act are being given overriding effect notwithstanding anything in any other law or any other custom or usage or decree or order of a Court, or any agreement or contract, express or implied, inconsistent with the provisions of the said Act. It follows therefore, that in terms of the law the intention of the Legislature is to protect persons occupying dwelling houses located in the properties belonging to bhatkar as defined in the Act. This can be seen from the very object of the Act which expressly means to provide for better protection of mundkar against the eviction of their dwelling houses and for granting them the right to purchase the same and to make certain provisions connected therewith. It is not doubt a beneficial legislation which is therefore, to be enforced either in its letter and in the spirit as well according to the scope and the policy of the Act.

8. It seems therefore, that the striking feature of the definition of "mundkar" is the consent of the bhatkar given to the mundkar to occupy the dwelling house situated in his property. This consent according to the law need not be necessarily in writing and obviously such consent can be inferred or drawn from the very actual and factual situation arising out of the circumstances which a person claiming to be a mundkar is able to establish on the basis of evidence of his occupation. Therefore, whether consent is granted by the bhatkar or is deemed to have been given for a mundkar occupying or staying in a dwelling house situated in the property of a bhatkar is a question of fact which is to be proved when such issue is placed before the competent authority to decide whether a person is or not a mundkar. In the instant case it is seen that admittedly the petitioner was staying or living in the suit house from March, 1977 when the property was belonging to a different owner Joaguim Caetan D'Sa who by deed dated 3-4-1978 sold the property to the present respondent No. 1 Suresh Shirodkar. It is also not disputed that prior to this sale or even after that during the time of a least one year either the previous owner or previous bhatkar D'sa or the present one did not react or told anything to the petitioner to leave or vacate the suit house and the first reaction to its occupation flows from the notice dated 2-8-1978. Thereupon the subsequent reaction consists in the filing of the civil suit by the respondent No. 1 on 26-8-1980. This means that for a period beyond 3 years the petitioner continued to stay and live in the suit house without any effective or actual obstruction on the part of the owner of the property where the house was situated.

9. The main grievance of Shri Dessai is that both the judgments of the learned Mamlatdar as well as of the Administrative Tribunal did not consider the requirements of the law as laid down by the Act to define a person as mundkar. It was urged by Shri Dessai that in view of the express provision of section 2(p) it was necessary for both the courts below to consider all the three ingredients which were necessary to be looked into in order to arrive at the conclusion as to whether the petitioner was or not a mundkar under the definition of the Act, namely, (1) whether there was a house falling in the property of a person defined as bhatkar in the Act, (2) Whether the person claiming to be mundkar (in the instant case the petitioner) had entered the house with the consent of the bhatkar or any person purported to act on his behalf and (3) Whether the petitioner was residing permanently in that house with fixed habitation with the consent of the bhatkar.

10. A bare perusal of the judgments of the learned mamlatdar as well as the Administrative Tribunal patently shows that none of these requirements were expressly or elaborately dealt with by them. If one goes through the judgment of the Mamlatdar dated 30th June, 1985, it is not difficult to see that the Mamlatdar refused or declined to classify the petitioner as a mundkar only because she was unable to prove that she was residing in the suit house since 1974 as contended by her and instead the evidence was showing that she came to occupy the said house only in 1977 as per the say of the respondent No. 1. Similarly this finding was given by the Mamlatdar on the additional ground that the further contention of the petitioner that the house was belonging to one Maria Filomena Fernandes with whose permission she allegedly came to reside in the same could not be accepted as Maria Filomena Fernandes was not at all in the picture in relation to the suit house. Obviously both these findings are unacceptable and perverse in the sense that they do not deal with the crucial points which the Mamlatdar was supposed and expected to address while adjudicating the issue of mundkarship placed before him by the Civil Court for final determination. Apart from the fact that the said judgment reveals non-appreciation of the evidence adduced by the parties and as such non-application of mind on his part to the said evidence, the circumstance that the judgment patently discloses that the legal requirements of the definition of mundkar were not even considered by the Mamlatdar renders his judgment entirely bad, wrong and without jurisdiction.

11. Similarly the judgment of the Administrative Tribunal dated 11th May, 1989 suffers from the same infirmity to the extent that the said judgment seems to deal only with the question of non-applicability to the case in question of the Explanation to section 2(p) of the Act for the purpose of ruling that such Explanation is not attracted in this case because admittedly the petitioner has been occupying the suit dwelling house after the appointed date, that is to say after 1977, the reason why there is no question of the said Explanation or deeming provision with regard to the consent being attracted to such situation. There is no finding as to whether the records or evidence produced by the parties before the Mamlatdar show or reveal that any consent was given by the bhatkar

to the petitioner to occupy the suit house either from 1974 as contended by the said petitioner or even right from 1977 as admitted by the respondent No. 1. It was therefore, incumbent on both the Mamlatdar as well as on the Administrative Tribunal to find out as to whether on the basis of this admitted position of the occupancy of the suit house since 1977, the petitioner would be held as Mundkar and also to find out as to whether the petitioner had succeeded in establishing that her occupation has been consented or permitted by the previous bhatkar prior to the sale done by him to the respondent No. 1 in view of the notice dated 2-8-1978 wherein clearly the respondent No. 1 has not been able to say anything as to the capacity or character under which the petitioner came to stay in the said house. It is seen that only about two years thereafter when the suit was filed in 1980 the respondent No. 1 chose to assign to the petitioner the character of a trespasser at which item the petitioner raised the issue of munkarship. Thereupon this issue having been framed the matter was referred to the Mamlatdar in 1982. Therefore, whether there was consent or not would be a matter of fact to be established by the petitioner on the basis of evidence of her occupation in the suit house, if not right from 1974 at least from the time of its admitted occupation in the year 1977. Obviously such consent need not be proved by the petitioner has having been given in writing and instead an oral or implied consent would also do in the circumstances of the case.

12. It is pertinent to note that on a perfunctory glimpse of the evidence available on record in flows that the respondent No. 1 clearly indicates that he was not aware as to how the petitioner came to reside in the suit house in the year 1977. This means that there is a clear admission on his part that he was in the dark as to the arrangements which might have existed between the petitioner and the previous landlord Joaquim Caetan D'Sa whereby the petitioner came to occupy the suit premises in March 1977. Hence, it could not lie in the respondent No. 1's mouth to allege in the suit that the petitioner was a rank trespasser since March 1977 which fact having been pleaded by him in the suit was to be proved by respondent in an obvious shifting of the burden cast upon the parties to substantiate their contentions in this respect.

13. This being the position, the submission of Shri Dessai that both the judgments of the Mamlatdar as well as of the Administrative Tribunal are not based on the provisions of the Mundkar Act appear to be justified and as such deserves acceptance. I am therefore, inclined to hold that none of them were passed with the proper understanding of the law being therefore, bad and without jurisdiction. Ostensibly the judgments have failed to consider the legal requirements of the definition of Mundkarship as provided in the Act specially as against the case of the petitioner who has always claimed that she was occupying the suit premises since 1974. The learned Mamlatdar has miserably failed to discuss the evidence of both the parties and in this respect appears to have heavily relied only on the lease deed allegedly executed by the previous bhatkar with one Claudine Gonsalves irrespective of the merits or demerits of that lease and the admissibility of such evidence which was not brought on

record by proper means. According to the petitioner the said lease could not be the subject matter of any decision since it was not produced either by the lessor or by the lessee but instead by a third person.

14. The learned Mamlatdar has totally failed in his judgment to frame any relevant issue while dealing with the relevant aspect provided in section 2(p) to define the petitioner as a mundkar, namely the existence or absence of the consent of the bhatkar or the person acting or purporting to Act on his behalf, even assuming that the petitioner has not been able to prove that she was occupying the suit house since 1974 as contended by her but was admittedly staying therein since 1977 as conceded by the respondent No. 1. Similarly the Administrative Tribunal has also failed to deal at all with the question of the consent of the bhatkar for the residence of the petitioner in the suit house by looking only to the aspect of the inapplicability to the case in question of the Explanation to section 2(p) of the Act on the basis of a wrong assumption that the petitioner was staying in the suit house since 1977 and without a proper application of mind of the findings given by the Mamlatdar in his judgment dated 30th June, 1985. This means that the Administrative Tribunal has committed a gross error of law and also an error on the facts which are no doubt apparent on the face of the very judgment under challenge to the extent that the said judgment reveals that Tribunal completely ignored and failed to consider and apply to the said case the substantial part of section 2(p) of the Act.

15. In the result the petition has to succeed and is hereby allowed, although the relief to be granted to the petitioner is, in my opinion, to be molded to meet the ends of justice. Accordingly, the judgment of the learned Joint Mamlatdar dated 30th June, 1985 in Case No. MUND/SR/KAS/14/82 as well as of the Administrative Tribunal dated 11th May, 1985 in Case No. MND/REV/5/86 and as a consequence the judgment of the Additional Collector dated 14th December, 1986 in Mundkar Appeal No. 79/85 are hereby quashed and set aside. The case is remanded to the Mamlatdar of Bardez to adjudicate afresh the issue referred to him by the Civil Judge so as to decide whether the petitioner is or not a mundkar within the meaning of the definition and the legal requirements provided in the Act and in the light of the observations made by me in this judgment. The learned Mamlatdar is directed to give to the parties liberty to adduce additional evidence if they so desire in order to substantiate their conflicting claims. There will be no order as to costs in the circumstances of the case.