

(2010) 09 BOM CK 0101

In the Bombay High Court

Case No : Second Appeal No. 75 of 2000

Mr. Kamlakant Roghuvir Sinai Bonsule ((since deceased) APPELLANT
represented by his legal representatives Mrs. Sufal R.
Porabhu, Mr. Vishnu K. Bhonsule and Mr. Ashok K. Bhonsule
and Miss Sushma K. Bhonsule)

Vs

Mr. Anthony Macarenhas RESPONDENT

Date of Decision : 17-09-2010

Acts Referred:

Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 — Section 13

Citation : (2011) 2 ALLMR 808 : (2011) 1 BomCR 666

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : S.D. Lotlikar and P.S. Lotlikar, for the Appellant; D.J. Pangam, for the Respondent

Final Decision : Allowed

Judgement

A.P. Lavande, J.—By this second appeal, the appellants take exception to judgment and decree dated 21.1.2000 passed by the Additional District Judge, Panaji, in Regular Civil Appeal No. 5/1993 allowing the appeal against the judgment and decree dated 18.12.1992 passed by the Civil Judge, Junior Division at Panaji, decreeing Regular Civil Suit No. 21/75/B filed by Kamlalakant Sinai Bhosule against the respondents. The appellants are the legal representatives of Kamlakant Raghuvir Sinai Bhonsule and they have been brought on record during the pendency of the appeal before the lower Appellate Court.

2. Briefly, the facts relevant for disposal of the appeal are as under:

The plaintiff filed the above referred suit against the defendant seeking eviction of the defendants from the suit house and for direction to hand over vacant possession of the same to the plaintiff. The plaintiff claimed to be the owner of the property known as " Guculem Bata" situated at St. Cruz by virtue of the sale

deed dated 9.5.1949. He claimed to be in possession and enjoyment of the suit property and he had his residential house and two more residential buildings in the said property. Just near his house, there was a small structure "Loja" admeasuring 5 x 4 metres with a height of 1.60 metres which was constructed by him and which was used for storing fire wood. The plaintiff claimed that few years prior to filing of the suit, he had permitted Smt. Ana Maria Joaquina Mergulhao, an old woman to stay in the suit house without any consideration on humanitarian grounds. Ana Joaquina expired on 12.11.1974, leaving no heirs. The plaintiff put a lock to the suit house on 23.11.1974. The defendant along with his wife and children broke open the lock and started residing in the said house. The defendant was asked to vacate the suit house, which he refused. Hence, the plaintiff filed the above suit.

3. The suit was contested by the defendants.

4. The defendants in the written statement claimed that the suit house was constructed by Ana Joaquina in the year 1951 with the permission of the plaintiff and his father. He further claimed that he was a close relative of Ana and was residing with her in the property as mundkar. The defendants denied that he had put any lock to the suit house. The defendant specifically pleaded that he was a mundkar in respect of the suit house.

5. By order dated 27.7.1976 learned Civil Judge, Junior Division, Panaji, transferred the suit to the Mamlatdar in terms of Section 13 of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act 1975 ("the Act" for short). The Mamlatdar after giving an opportunity to the parties to lead evidence held that the defendant was not a mundkar in respect of the suit house. The appeal preferred to the Collector by the defendant was also dismissed. The defendant preferred revision to the Administrative Tribunal at Panaji, challenging the order passed by the Collector, which was also dismissed. As such, the issue of mundkarship has reached finality as against the defendant.

6. Thereafter, the suit was taken up for trial. The plaintiff examined himself and one witness Ranganath Zoivonta Sinai Priolkar. On behalf of the defendant Luisa Macarenhas, the wife of the defendant was examined. The defendant also examined Doming C. Araujo. The learned trial Judge upon appreciation of the evidence held that the plaintiff had proved that the defendant was a trespasser in respect of the suit house and consequently decreed the suit. The Appellant Court reversed the decree and held that the plaintiff had not led any evidence regarding the exact time when the structure was constructed. The Appellate Court further held that the suit house was constructed by Ana Maria Joaquina Mergulhao in the year 1951. The Appellate court further held that the mere fact that the defendant was not a mundkar would not mean that he is a trespasser in the suit house. The Appellate Court further held that there was material on record to show that the defendant was residing with Ana Maria Joaquina and as such, the plaintiff had not proved that the appellant was a trespasser.

7. The appeal was admitted on the following substantial questions of law:

i) Whether, in view of the fact that the sole plea, which the respondent had raised in defence to the suit instituted by the appellants, for his eviction namely that he is a mundkar of the appellants, having been finally answered against the appellants, the suit instituted by the appellants for respondent's eviction was bound to be decreed?

ii) Whether, the fact that the suit structure was constructed by Mrs. Ana Joaquina Mergulhao in 1951, assuming, while not admitting that the said had been true, had any relevance, as far as the right of the respondent to reside in the suit structure, after his plea that he was residing therein as a Mundkar of the appellants, had been finally rejected?

8. Mr. Lotlikar, learned Senior Counsel appearing for the appellants submitted that the Lower Appellate Court has clearly erred in allowing the appeal in as much as, once the plea of mundkarship taken by the defendants was negated by three authorities and the same reached finality, the plaintiff was entitled to the decree since the only conclusion which could be drawn is that the defendant was a trespasser in respect of the suit house. According to Mr. Lotlikar, the lower Appellate Court misconstrued itself in law and posed itself questions that it ought not to have addressed. Mr. Lotlikar submitted that whether the plaintiff or Ana Maria constructed the suit house or not is totally irrelevant, having regard to the fact that the title of the plaintiff was admitted by the defendant and the defendant had set up a plea that he was a mundkar. Once, the plea of mundkarship was negated by the competent authorities, the trial Court ought to have decreed the suit even without recording any evidence in the suit, since once the plea of mundkarship taken by the defendant is negated, the only conclusion was that the defendant was a trespasser in respect of the suit house. Mr. Lotlikar further submitted that the defendant had not claimed any right through Ana Maria and as such, whether it was the plaintiff or Ana Maria who had constructed the suit house is totally irrelevant having regard to the controversy involved in the suit.

9. Per contra, Mr. Pangam learned Counsel appearing for the respondent/defendant supported the impugned judgment and decree. Mr. Pangam submitted that the lower Appellate Court has rightly held that it was Ana Maria Joaquina Mergulhao who had constructed the suit house in the year 1951 pursuant to the permission granted by the plaintiff and his father and as such, it was irrevocable licence which was granted to her and since the defendant was staying with Ana Joaquina Mergulhao, she had every right to transfer the interest in favour of the defendant. Mr. Pangam further submitted that the plaintiff having failed to prove that it was he who had constructed the suit house and the lower Appellate Court having given a clear finding that it was Ana Joaquina Mergulhao who had constructed the suit house in the year 1951, the lower Appellate Court was justified in dismissing the suit filed by the plaintiff. He further submitted that the weakness of the defendant does not entitle the plaintiff to any relief and it is the

plaintiff who has to prove his/her case in order to get relief from the Court. According to Mr. Pangam, Ana Joaquina Mergulaho had right to transfer her interest since the licence was irrevocable and it was for the plaintiff to prove the terms of licence. According to Mr. Pangam, the plea of irrevocable licence and mundkarship are neither inconsistent nor mutually destructive. In support of his submissions, Mr. Pangam relied upon the following judgments:

a) Punjab Urban Planning and Dev. Authority Vs. M/s. Shiv Saraswati Iron and Steel Re-Rolling Mills,

b) Ram Bharose Vs. Bishnath Prasad .

10. I have carefully considered the rival submissions and perused the record and judgments relied upon. Indisputably, the defendant has taken up the plea that he was a mundkar in respect of the suit house. There is also no dispute that the issue of mundkarship was decided against the defendant by all three authorities under the Mundkar Act. Once the plea raised by the defendant was negated by the authorities under the act, in the absence of any other plea having been taken in the written statement filed by the defendant, the only conclusion which is to be drawn is that the defendant was a trespasser in respect of the suit house. Once the defendant claimed himself to be a mundkar of the plaintiff, the necessary sequitur is that he had admitted the title of the plaintiff in respect of the suit house. I am in complete agreement with the submission made by Mr. Lotlikar that once the defendant took up a plea of mundkarship in respect of the suit house and failed to prove the same, the plaintiff was entitled to get a decree of eviction of the defendant from the suit house. I am of the considered opinion that in the absence of any specific plea having been taken in the written statement regarding irrevocable licence, the respondent/defendant is not entitled to take such a plea in second appeal. Such a plea cannot be termed as a plea raising a pure question of law. Moreover, even on merits, the plea of irrevocable licence in favour of Ana Joaquina does not advance the case of the respondent/defendant. In the written statement, although the defendant made a vague plea that he was a relative of Ana Maria, the defendant had not claimed any right through her. Therefore, the issue as to whether any irrevocable licence was granted in favour of Ana Maria by the plaintiff has absolutely no relevance. The defendant having admitted title of the appellant to the suit house by claiming mundkarship in respect of the suit house and having failed to prove the issue of mundkarship, the plaintiff is entitled to seek eviction of the defendant from the suit house, in respect of which the defendant has absolutely no right. The necessary sequitur therefore is that the defendant/respondent is a trespasser in respect of the suit house.

11. The lower Appellate Court has addressed itself to questions which are not relevant for deciding the appeal and consequently came to the wrong conclusion by recording the finding that the plaintiff was not entitled to possession of the suit house.

12. Mr. Lotlikar is right in contending that whether the suit house was constructed by the plaintiff or by Ana Maria would have no relevance in deciding the suit filed against the defendant in which the the only plea taken by the defendant was that he was the mundkar of the plaintiff in respect of the suit house. The lower Appellate Court is also not right in holding that only because the issue of mundkarship was decided against the defendant, he could not be termed as a trespasser, more particularly having regard to the plea taken by the defendant in his written statement. It is pertinent to note that except for the plea of mundkarship, the defendant had not taken any other plea in the written statement. Therefore, the trial Court has rightly arrived at the finding that the defendant was a trespasser in respect of the suit house. In so far as the authorities cited by Mr. Pangam are concerned, the same do not advance the case of the respondent. In the case of Punjab Urban Planning and Development Authority (supra), the Apex Court held that the plaintiff/appellant must succeed or fail on his own case and he cannot take advantage of weakness of the defendants/respondent's case to get a decree. There can be no dispute about the said preposition but the same does not advance the case of the respondent having regard to the factual and legal position. In the case of Ram Bharose, (supra), the High Court held that the licensor should place terms of licence before the Court. The said authority does not advance the case of the respondent, in as much as I have already held that the appellant is not entitled to raise plea about irrevocable licence in the appeal and even on merits the said plea would not advance the case of the defendant/respondent.

13. In the light of the above discussion, I hold that the findings recorded by the lower Appellate Court are patently unsustainable in law. Once the issue of mundkarship was decided against the defendant, the plaintiff is entitled to the decree of eviction of the defendant.

14. The substantial questions of law are answered in favour of the appellants.

15. Consequently, the impugned judgment and decree dated 21.1.2000 passed by the Additional District Judge in Regular Civil Appeal No. 5/1993 is quashed and set aside and the judgment and decree dated 18.12.1992 passed by the Civil Judge, Junior Division, Panaji in Regular Civil Suit No. 21/75/B is restored. The respondent to vacate the suit house within one month.

16. The appeal is allowed with costs quantified at of Rs. 2500/- (Rupees two thousand five hundred only).