

(1994) 06 BOM CK 0004

In the Bombay High Court

Case No : Second Civil Appeal No. 36 of 1988

Rajasab Kasim Sab and Another

APPELLANT

Vs

Prabhakar V. Shirodkar since deceased, through his legal
representatives

RESPONDENT

Date of Decision : 17-06-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 5
Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 — Section 2, 4
Transfer of Property Act, 1882 — Section 105, 106

Citation : (1995) 1 BomCR 271

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

Bench : Single Bench

Advocate : S.D. Lotlikar, for the Appellant; M.B. D" Costa, for the Respondent

Final Decision : Allowed

Judgement

E.S. Da Silva, J.—The appellants challenge in this second appeal the dismissal by the learned District Judge, North Goa, Panaji, by judgment and Order dated 22nd June, 1988 in Regulatar Civil Appeal No. 15/85, of the appeal filed by them against the judgment of the learned Civil Judge, Junior Division, Panaji, dated 29th January, 1985, in Civil Suit No. 190/83/B.

2. In short the relevant facts of the case are that the respondent by a written agreement dated 10-5-1975 leased to the appellant No. 1 a portion of his property admeasuring 32 square meters, known as "Oulem Morodd" situated at Tonca, Caranzalem, bearing registration No. 1260. The land was given on lease for the purpose of erecting thereon a structure (hut) of light materials of temporary character "for the purpose of residence of the tenant". The period of lease was for 12 months and the monthly rent was of Rs. 15/-. It was stipulated in the agreement that at the end of the period of 12 months the tenant agreed to pull down the hut and carry away its materials. It seems, however, that after the initial period of the agreement was over, the appellants continued to reside in the

aforesaid hut and were paying the amount of Rs. 15/- to the respondent which he also continued to accept. On 22-1-1983 the wife of the appellant No. 1, who is the appellant No. 2, by name Roshan Bi, filed a suit against the respondent alleging that her husband Rajasab had gone to work in the Middle East and that she was living in the hut constructed in the suit land with her seven minor children. It was further alleged by her that the respondent was trying to forcibly evict her from the hut threatening to demolish it by using force. She therefore prayed for permanent injunction seeking to restrain the respondent from forcibly evicting her from the property. This suit seems to have been filed after the respondent by notice dated 6-2-1983 purported to terminate the lease in favour of appellant No. 1 in respect of the suit land with effect from 31-3-1993. It was during the pendency of this suit of appellant No. 2 that the respondent filed his Suit No. 190/83/B against both the appellants on 20-7-1983.

3. The appellants resisted this suit on the ground that they were mundkars of the respondent as they were residing in the dwelling house constructed by them on the payment of ground rent of Rs. 15/- and that, in any case, the so-called notice terminating the tenancy was invalid. Thereupon the appellants requested the trial Judge that in view of the pleadings of the parties and the stand taken by the appellants in their written statement, an issue of mundkarship be framed and the same be referred to the Mamlatdar for the purpose of decision. The trial Judge by order dated 17-7-1984 held that the issue of mundkarship in their case did not arise and therefore, no purpose would be served by framing such an issue. According to the appellants the decision was given on the basis of the judgment of the learned Single Judge of this Court in the Special Civil Application No. 168/80 whereby the learned Single Judge had held that those who pay ground rent could not be declared as mundkars. However, the appellants state that this judgment of the learned Single Judge was upset by the Division Bench in Letters Patent Appeal No. 53/83 where by the said judgment was reversed. Therefore, in view of this decision given in the Letters Patent Appeal the appellants filed a fresh application before the trial Judge to frame the issue of mundkarship which application was again dismissed by the learned trial Judge on the ground that it would amount to a review of his earlier decision. Thereupon at the end of the trial the learned trial Judge was pleased to decree the suit of the respondent and dismissed the one filed by the appellant No. 2 by a common judgment and decree dated 29-1-1985. Aggrieved by this judgment and decree the appellants filed an appeal before the learned District Judge, South Goa, which was rejected by him on 22-6-1988 by his impugned judgment under challenge.

4. The appeal was admitted in this Court on the following substantial questions of law formulated by the appellants in the memo of appeal:

(a) Whether the failure of the appellants to challenge the order dated 17-7-1984 by an appeal or revision against the same would bar the appellants from challenging the same in the appeal against the final decree passed.

(b) Whether the fact that appellant No. 2 approached the Civil Court with a suit for injunction against the respondent on the basis of the written agreement would estop her from raising the defence of mundkarship in the case filed by the respondent.

(c) Whether the so called notice of termination which did not expire with period of tenancy was valid merely because it gave 15 days clear notice or more than 15 days clear notice.

While dealing with these points it was firstly submitted by Shri Lotlikar, learned Counsel for the appellants, that the rejection by the trial Court to frame the competent issue on the basis of their plea of mundkarship made in the written statement filed in the suit instituted by the respondent does not constitute res judicata and therefore, this plea could have been raised by them at any stage including in the first appellate Court. Therefore, the learned District Judge while holding the contrary and refusing to entertain the grievance of the appellants in this respect did not even consider for that purpose the provision of section 105 of the Civil Procedure Code. The learned Counsel has drawn my attention to the said section 105 which reads that "save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal." The learned Counsel contended that the order of the trial Court refusing to frame an issue at the first instance was obviously not appealable. Similarly the second order rejecting his prayer to re-consider the decision after the judgment in the Letters Patent Appeal was also not appealable. Therefore, the learned Counsel urged, he had only two courses open in the circumstances being one to directly file a revision against these orders or to wait till the final decree was passed by the trial Court and challenge thereafter the said orders in appeal u/s 105. The learned Counsel submitted that having chosen this option the appellants were within the four corners of the law and the learned District Judge could not take an exception against the opportunity availed of by the appellants to challenge the orders of rejection of the trial Court declining to frame the issue of mundkarship raised by them in their written statement filed in the respondent's suit.

5. The next submission of the learned Counsel was that the notice of termination purportedly given by the respondent was a notice u/s 106 of the Transfer of Property Act which on its own face was invalid and inoperative. The learned Counsel contended in this respect that two requirements are prescribed in the said section 106 being one that 15 days' notice is to be given by the landlord and that this notice of 15 days should expire or coincide with the termination of the month of tenancy. In this connection the learned Counsel has invited my attention to the very wording of section 106 according to which the termination of the lease had to be done by 15 days' notice expiring with the end of the month of tenancy. Reliance was also placed by the learned Counsel in the

decision of (Akbaralli Hasan Alli (by his heirs) Rukiyabai Akbaralli Hasanalli and others v. Ramchandra Narayan Karande (by his heirs) Lilabai Ramchandra Karande and others), 1980 Bom.C.R. 620. In the said ruling which deals with sections 105 and 106 of the Transfer of Property Act a Division Bench of this Court has held that since the notice of termination of tenancy did not coincide with the end of the month of tenancy and instead the notice was given on 20th February, 1965 terminating tenancy with effect from 30th April, 1965, there was no valid termination of tenancy. It was further held that section 106 requires 15 days" notice expiring with the end of a month of tenancy.

6. The learned Counsel also urged that the learned District Judge in his turn has wrongly cited the judgment in the case of Mangilal Vs. Suganchand Rathi, which was not attracted at all because admittedly in the aforesaid ruling the Supreme Court did not consider the aspect of the end period of the notice coinciding with the end of the month of tenancy. Apart from that the learned Counsel submitted that admittedly the respondent approached the trial Court for the eviction of the appellants under the provisions of the Transfer of Property Act. The ground for eviction was termination simplicities of lease deed dated 10-5-1975 u/s 106 of the Act and therefore the appellants were bound to vacate the hut and leave the suit land. The learned Counsel contended that it was not the Transfer of Property Act that would run the field in this case but instead the Decree No. 43525 dated 7-3-1961 which did not provide for similar ground of eviction of the tenant. It was also urged by the learned Counsel that the learned Civil Judge has taken one more factor against the appellants and this was the fact that before the suit of the respondent was filed against them, the appellant No. 2 had filed a suit against the respondent to restrain him from interfering in the possession of the suit hut on the ground that the appellant No. 1 was the lessee of the land wherein the hut was situated which suit was ultimately dismissed by the trial Court vide common judgment allowing the suit of the respondent. The District Judge then held that in such circumstances the appellants were estopped from raising the plea of mundkarship once they had already claimed to be the lessees of the suit land. The learned Counsel took strong exception of this finding of the learned District Judge which according to him was faulty on two grounds. First of all the learned Counsel submits that when the appellants approached the Civil Court there was a decision of the learned Single Judge of this Court holding that persons paying ground rent could not be called as mundkars. Being so it was not open to the appellants to claim to be mundkars of the respondent in such a situation when the law had been defined by the High Court in that way. However, even assuming that the appellants inspite of being mundkars had wrongly invoked the jurisdiction of the Civil Court for seeking protection of their status by claiming to be lessees still there could be no estoppel against them as far as the law is concerned because there is no estoppel against law and thus they could not be precluded from raising the plea of mundkarship at the first opportunity which was available to them when they filed the civil suit against the respondent. Shri Lotlikar relied on section 4 of the Goa, Daman and Diu Mundkars (Protection

from Eviction) Act, 1975 (hereinafter called "the Act") which puts a bar from eviction from a dwelling house of a mundkar and restoration of possession. He has also cited the provision of Order XIV, Rule 5 of C.P.C. which would enable the Court suo motu to frame the issue of mundkarship sought for by the appellants after the decision of the Letters Patent Appeal irrespective of the plea made by them for this purpose.

7. I have heard Shri M.B. D'Costa, learned Counsel for the respondents, on all the points canvassed before me by the learned Counsel for the appellants across the Bar and irrespective of what was submitted by the learned Counsel I do not think that it is necessary for me to deal with the various contentions and legal points raised by Shri Lotlikar throughout his submissions. In my view this appeal can be conveniently disposed of on a limited point which concerns with the question of as to whether the Civil Court was or not required to frame an issue of mundkarship when such plea was specifically raised by the appellants for the purpose of the same being finally decided by the competent Mamlatdar.

8. In this respect Shri Lotlikar has submitted that the appellants in paragraph 3 of the written statement in the suit filed by the respondent have clearly averred that the so-called agreement of lease entered between the respondent and appellant No. 1 was in fact the permission or consent given in writing by the respondent to the appellant No. 1 to construct his dwelling house in the said property and that ground rent of Rs. 15/- was being paid to the respondent towards rent for the occupation of the land. The appellants have further pleaded therein that they were mundkars of the said dwelling house and of an additional area of 200 square metres around forming part of their dwelling house and therefore, the suit being for the eviction of mundkars the Civil Court had no jurisdiction to try and decide the suit.

9. Mr. M.B. D'Costa does not appear to seriously dispute the right of the appellants to raise the plea of mundkarship in the subsequent suit filed by the respondent against them inspite of the previous suit instituted by the appellant No. 2 on the basis of the deed of lease dated 10th May, 1975. The learned Counsel also does not seem to be very much impressed with the argument advanced by the learned District Judge that the appellants are estopped from raising such plea on account of the refusal of the trial Court to entertain a similar request and framed an issue in this regard or because on account of such refusal which was not challenged by the appellants the question has become res judicata. His contention, by relying in a decision of this Court in the case of Pandu Dhondi Yerudkar and Another Vs. Ananda Krishna Patil, , is that the mere plea of mundkarship without some foundation laid down by the alleged mundkar is not sufficient to enjoin the Civil Court to frame the competent issue on the strength of the bare averments in this regard. In the aforesaid case the Single Judge of this Court while dealing with section 85-A of Bombay Tenancy and Agricultural Lands Act and the provisions of Order XIV, Rule 1 of CPC has observed that frequently the question of framing of issues arises and therefore a

little caution is required to be exercised before a Court actually frames an issue. Under Order XIV of the CPC an issue could only arise when a material proposition of fact or law was affirmed by one party and denied by the other. It was then held that when a vague plea is made by the defendant saying that he is tenant of land the Court should hesitate to frame an issue on such a vague plea unless the defendant is able to give particulars showing the time when the tenancy was created, the person by whom it was created and the terms on which it was created. If inspite of such particulars being asked for, the defendant is unable to furnish the same, the Court should not raise an issue on a vague plea that he , the defendant, is a tenant of any particular piece of land.

The learned Counsel submitted that by analogy this judgment was to be applied in the instant case wherein, according to the learned Counsel, the appellants had raised a mala fide plea of mundkarship in the suit filed by the respondent when prior to that the appellant No. 2 herself, who is the wife of appellant No. 1, had already claimed to be a tenant of the respondent on the basis of the lease deed dated 10-5-1975. Hence the learned Counsel urged that the decision of the Division Bench of this Court in the Letters Patent Appeal which had upset the judgment of the learned Single Judge could not have had any bearing in the subsequent plea of mundkarship made by the appellants which was also rejected by the trial Court because the real controversy between the parties in this litigation was whether the Court was bound or not to frame the issue of mundkarship in such vague circumstances as pleaded by the appellants in their written statement. Besides, according to the learned Counsel, there was no bar for the Civil Court to decide as to what the appellants claimed to pay to the respondent in respect of the lease was in fact a lease rent or a ground rent obviously claimed by the appellants as an afterthought. Therefore, the learned Counsel contended, the trial Court was justified in refusing to frame an issue of mundkarship on the strength of the appellants' mere pleading that they were paying ground rent to the respondent and for this reason they were to be held as mundkars of the said respondent as per the ratio laid down in the judgment of the Division Bench in the Letters Patent Appeal.

10. Shri M.B. D'Costa took me through the provisions of the Mundkar Act, namely, its section 2(p) which defines mundkar as the person who, with the consent of the bhatkar or a person acting or purporting to act on behalf of the bhatkar lawfully resides with a fixed habitation in a dwelling house located in the land belonging to the bhatkar The said definition shows that requirements of the law are that a mundkar should reside in a dwelling house situated in the property of bhatkar with his consent with a fixed habitation in the said dwelling house. The learned Counsel thus urged that the appellants should have pleaded at least broadly as to why they were claiming to be mundkars of the respondent by averring not only that their occupation of the hut in the land belonging to the respondent was lawful and with his consent but also that they were occupying the said hut as their dwelling house with a fixed habitation in the said hut. Only then they would be entitled and justified to claim to be mundkars and except

that the Court should frame an issue on such plea in order that the same could be adjudicated by the competent Mamlatdar. Further the learned Counsel also contended that the wife of appellant No. 1, who is appellant No. 2 in the first suit had already claimed the right through her husband on the strength of an agreement which clearly shows that the said appellant No. 1 was a lessee of the respondent. There was no denial on the part of the appellants that with regard to that agreement the husband of the appellant No. 2 had signed the same or any averment that when he signed the said agreement he did it without knowing its full implications.

11. I have no difficulty in accepting the propositions advanced by the respondent's learned Counsel, otherwise elaborately laid down in this regard in the aforesaid decision of the learned Single Judge of this Court. However, I am afraid that, on facts, the ratio of the said ruling does not seem to be attracted in the instant case. Ours is a case wherein the appellants have expressly pleaded the substantial details which would enable them to claim that they were mundkars of the respondent. For that purpose suffice is to refer to the plea made by them that the so-called agreement of lease entered into between the respondent and the appellant No. 1 on 10th May, 1975 was in fact a permission or consent in writing given by the respondent to the said appellant No. 1 to construct his dwelling house in the suit property. The further averment that the amount of Rs. 15/- was being paid by the appellant No. 1 to the respondent towards the ground rent and therefore the appellants were mundkars of the dwelling house along with an area of 200 square meters around forming part of their dwelling house appears to be enough to hold that the appellants have laid down in their pleadings the necessary foundation to enable the trial Court to frame the issue of mundkarship raised by them in the written statement. Being so it does not seem to me that the learned respondent's counsel is not justified in contending that such plea of mundkarship was eminently vague and that nothing material could be found in that plea to sustain that an issue of mundkarship should be framed on the strength of such type of claim. Obviously the above mentioned ruling of the learned Single Judge does not go to help the learned Counsel in his objection that an issue of mundkarship be framed by the trial Court to be properly adjudicated in the competent forum.

12. In this view of the matter and keeping alive all other legal submissions advanced by the learned Counsel I hold that the judgment of the first appellate Court which has affirmed the judgment of the learned trial Judge is wrong and is thus bound to be unsettled. Accordingly I allow this appeal and quash and set aside both the judgments dated 22-6-1988 and 29-1-1985 and remand the case to the learned Civil Judge with a direction that an issue of mundkarship be framed in the suit to be adjudicated on its merits by the competent Mamlatdar as per the rules.