

(2000) 06 BOM CK 0106

In the Bombay High Court

Case No : Letters Patent Appeal No. 17 of 1999

Shri Jagannath Naik, since deceased through his heirs and
legal representatives

APPELLANT

Vs

Shri Bala Hegde, since deceased through his legal
representatives and others

RESPONDENT

Date of Decision : 07-06-2000

Acts Referred:

Constitution of India, 1950 — Article 227

Evidence Act, 1872 — Section 58

Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 — Section 4

Citation : (2000) 4 BomCR 743

Hon'ble Judges : V.C. Daga, J; F.I. Rebello, J

Bench : Division Bench

Advocate : G.V. Tamba, for the Appellant; Sudin M.S. Usgaonkar, for the Respondent

Judgement

F.I. Rebello, J.—The present appeal is directed against the order dated 15th January, 1999 passed in writ petition No. 431 of 1998 by a learned Single Judge of this Court. The petition was preferred against the order of the Administrative Tribunal, Goa, Panaji, in Miscellaneous Revision Application No. 16 of 1994. The Administrative Tribunal by its judgment dated 31st January, 1997 had quashed and set aside the order of the third respondent. The third respondent in an appeal before him had allowed the appeal setting aside the order of the second respondent. The second respondent had dismissed the application for declaration of mundkarship by the original applicant now represented by his legal representatives who are the appellants. The Administrative Tribunal while disposing of the petition held that the applicant had failed to establish that the applicant was residing with a fixed habitation, which is one of the requirements for a person to be declared as a mundkar.

2. At the hearing of this appeal on behalf of the appellants, their learned Counsel contends that the Administrative Tribunal could not in exercise of its revisional

power re-appreciate the evidence. Re-appreciation of the evidence, it is contended, is for the fact finding authorities. Revisional authority is not one such authority. It is further contended that the finding that the applicant was not residing with a fixed dwelling is perverse and consequently the order of the Tribunal cannot be supported. The learned Single Judge of this Court, it is contended, has merely accepted the findings recorded by the Tribunal regarding fixed habitation and considering the peculiar facts of that case and has dismissed the application. Once the finding on fixed dwelling itself was perverse, the learned Single Judge, though normally would not re-appreciate a finding of fact, ought to have exercised his jurisdiction under Article 227 of the Constitution of India.

3. On the other hand, on behalf of the respondent No. 1, now represented by the legal heirs, it is contended that the Tribunal has recorded findings of fact based on the evidence. Learned Single Judge of this Court has concurred with the said findings. In that view of the matter, no interference is warranted. It is further pointed out that there is no absolute bar in a revisional Court considering the material on record and re-appreciating the facts more so .considering the history of the case. In these circumstances, the exercise of power by the Tribunal in re-appreciating the evidence and recording findings on facts cannot be faulted with.

4. The original applicant had moved the second respondent by application dated 4th January, 1979. In the said application, the appellants had averred that the appellant was residing for the last 26 years in the dwelling house described in paragraph 2 with his mother and two brothers. The application was filed as the opponent and his son on 6th October, 1978 broke the fence around the suit premises and asked the applicant to vacate the house and had warned to put a band around the house on 10th January, 1979. Original respondent No. 1 filed written statement, which is dated 17th March, 1979. In the written statement in answer to paragraph 2 of the application, the original respondent No. 1 admitted the contents of paragraph 2 of the application. In other words, it was admitted that the applicant was then residing in the dwelling house with his mother and two brothers. Thereafter in paragraph 4 of the written statement the original respondent No. 1 has averred that the suit structure was constructed by the family of the original respondent and was used as a store-house. At the request of the appellant in the year 1957 he was allowed to reside and occupy the same at an annual rent of Rs. 30/-. In other words, the residence of the appellant, his mother and two brothers in the suit house was not denied. The dispute between the parties was, on one hand, the allegation by the appellant that he was a mundkar and, on the other, the plea by the respondent that the appellant was a tenant. No doubt the admission in paragraph 2 of the written statement was in answer to the averment in paragraph 2 of the application that the appellant was presently residing therein. We will consider the effect of this plea and admission hereinafter.

5. By order dated 27th February, 1985, the application for mundkarship was

dismissed. An appeal was preferred against the said order. By judgment and order dated 9th July, 1987, the appeal was allowed and the original applicant was declared to be a mundkar. In a revision preferred, the Administrative Tribunal by order dated 4th December, 1990 set aside the order of the Collector dated 9th July, 1987 and remanded the case to the Collector. On remand, the Additional Collector, Margao, allowed the appeal and declared the deceased original applicant as mundkar of the house. It is against this order that a revision came to be preferred to the Administrative Tribunal. The Administrative Tribunal in view of its earlier remand order and the subsequent order found that no reasons had been given by the Additional Collector. In these circumstances, the Administrative Tribunal thought it fit and proper to itself consider the matter. Reasons for this exercise of jurisdiction has been set out in paragraph 10 of the judgment.

In our opinion, considering the facts and circumstances, the exercise of the jurisdiction cannot be faulted with. The object of proceedings before the Court is to render justice. In the course of rendering justice a Court in the exercise of its revisional jurisdiction and to cut down cost and litigation and to obviate fresh remand, as was done in the present case, re-appreciated the facts, we find no reason why this Court should interfere on that count with the order of the Administrative Tribunal. Even otherwise, in a case of a perverse finding or no finding on given facts and circumstances, it was open to the Tribunal to re-appreciate the facts.

6. The question however, is, whether the Administrative Tribunal, on the material before it, was right in holding that the applicants had failed to establish that they were residing with a fixed habitation. It is no doubt true that the burden of proving residence of fixed habitation lay on the applicants. In the instant case insofar as the dwelling house is concerned, there is no dispute that the applicant was residing therein. Whether the house was constructed by the appellants or by the respondent would be immaterial as long as the house was constructed and was being occupied by the original applicant. The learned Tribunal has proceeded to set aside the order of the third respondent considering the evidence of the brother of the applicant and one witness Meera Kassar. On a perusal of the said finding on the aspect of fixed habitation, in our opinion, the findings are totally perverse. If the findings are totally perverse, there is no difficulty for this Court in exercise of its jurisdiction under Article 227 to interfere with the said findings. A conclusion of law based on a perverse finding of fact will amount to an error apparent on the face of the record.

The reasons for saying are that the admission by the respondents that the applicant was residing at the time of the application, that is, in 1979 in the structure alongwith his mother and two brothers was admitted. Secondly the defence was that the original applicant was residing in the structure as a tenant. In other words, occupation of the structure and lawful residence therein was not disputed. This has been totally lost sight of by the learned Tribunal. Thereafter

the Tribunal proceeded in setting out what are so called inconsistencies in the evidence. In the case of Meera Kassar, the Tribunal has totally mis-read the evidence. Even in the evidence of the brother of the original applicant there was no dispute that for the purpose of employment he had his residence at Borim. The question, however, is that it was not the brother, but the applicant who had come to the Court for a declaration of mundkarship. In the evidence of Shri Satchit Vithu Naik, the brother, he has deposed that he is residing in the suit house with his wife, 4 children, mother and brother. In 1978 the opponent started constructing mud walls in front of the house. In these circumstances, his brother moved an application for declaration. The brother is the late Jagannath Naik the applicant. In the cross-examination apart from a general suggestion that they are not residing in the suit house, no specific question was put that the late applicant was not residing therein but was residing somewhere else. Witness Meera Kassar had clearly deposed that the applicant was residing in the suit house. In cross-examination it seems a question was put to her whether the wife of the applicant was residing with the applicant. To that the answer has been that the applicant was not staying in the suit house with his wife. This could not have been construed to mean that the applicant was not residing in the suit house. The Tribunal has further observed based on some statement by Meera Kassar that the applicant was residing at Margao. The brother of the applicant was examined as his power of attorney, as the applicant was suffering from ill-health. This case that the applicant was residing in Margao was not put to the witness. There was only a bald suggestion that they do not presently reside in the suit house. There was, therefore, no inconsistency whatsoever insofar as the applicant's evidence is concerned.

Even the opponent in his evidence has stated that it was the applicant who was residing or occupying the suit house and the brother of the applicant was working at Borim. This witness was examined on 17th March 1983. All that he has further said in his examination-in-chief is that the applicant is not permanently occupying the suit house and that for the last 10 to 12 years he rarely visits the suit house. No evidence has come on record that the original applicant had shifted his residence permanently and was residing at some other place. The entire case of the opponent was that the applicant was a tenant. Similarly witness Anant Poi Kakode has stated that applicant's father has been staying there since 1957 and thereafter the applicant has been staying in the suit premises. He has of course stated that to his knowledge no one is staying there permanently. In his cross-examination he has stated that it may be true that the family members of the applicant have been residing in the suit premises at present but he has not seen them. Witness Vaman Krishna Audi has also deposed that after the death of the applicant's father, the applicant came to reside in the suit house. He, however, states that on the date of the deposition, which is 5th April, 1984, neither the applicant nor any other member of the family stays in the suit premises. This would be irrelevant as the date for declaration would be the appointed date. This evidence was not at all considered

by the Administrative Tribunal.

7. In these circumstances, in our opinion, the original applicant had established that he was residing in the suit premises with a fixed habitation on the appointed date. The Tribunal itself has given a finding that the respondent has been unable to establish that the original applicant was residing therein as a tenant. Once it is established that the applicant was residing in the house, apart from the admissions in the written statement, the oral evidence supported the case of the applicant that he was residing therein. In our opinion, the applicant had established that he was residing in the suit house on the appointed day. Once that be the case, the case of the applicant fell within the definition of mundkar and he was entitled for a declaration. In these circumstances and though normally this Court would not have re-appreciated the evidence, in its exercise of jurisdiction under Article 227 of the Constitution of India, considering the perversity of findings recorded by the Tribunal and to obviate and to avoid further remand and litigation, interference by this Court is warranted.

8. Having said so, in our opinion, the appeal has to be allowed. Consequently the appeal is made absolute in terms of prayer Clause (a). Needless to say that the order of the third respondent stands restored.

9. In the circumstances of the case, there shall be no order as to costs.

10. Appeal allowed.