

(2008) 09 BOM CK 0106

In the Bombay High Court

Case No : Appeal from Order No. 83 2007

Smt. Sunita Karbotkar, Shri Sagar alias Krishna Karbotkar
and Shri Avinash alias Arjun Karbotkar

APPELLANT

Vs

Shri Satish Rajaram Nachinolkar and his wife, Smt. Swati S.
Nachinolkar and Smt. Subhdra Karbotkar

RESPONDENT

Date of Decision : 12-09-2008

Acts Referred:

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

Citation : (2009) 2 BomCR 398

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : J. Godinho, for the Appellant; M.S. Joshi, for the Respondent

Judgement

R.C. Chavan, J.—This appeal takes exception to an order passed by the learned Civil Judge, Senior Division, Panaji in Special Civil Suit No. 26/2007/B whereby the learned Civil Judge restrained the appellants/defendants from carrying out any construction in the suit property till further orders.

2. The facts which are material for deciding this appeal are as under:

There is no dispute that the respondents/plaintiffs are the owners of the property. The appellants claim to be the legal representatives of the person who claimed to be the mundkar of the suit property. It is not in dispute that the said person Arjun Karbotkar had been allowed by the plaintiffs to occupy one house as caretaker of the property which comprised of four houses. Arjun Karbotkar filed an application for registration as mundkar in respect of the property. The application was however, dismissed by the Mamlatdar (according to the learned Counsel for the appellants, in default). The appellants was sought to re-construct the house, prompting the respondents/plaintiffs to approach the Police and Panchayat authorities and eventually the Civil Court. The appellants are clamped with an injunction restraining them from carrying out any construction by the impugned order.

3. I have heard both the learned Counsel for the appellants and the respondents.
4. There is no doubt that the question whether the appellants are mundkars of the property has to be adjudicated by the competent authority. The contention by the learned Counsel for the appellants that the appellants could not have been excluded from being mundkar by recourse to Clause (iv) of the exception carved out in Section 2 (p) of the and Diu Mundkars (Protection from Eviction) Act, 1975 where mundkars have been defined. He submitted that a caretaker of the property and caretaker of the house has been distinguished in the case of Shri Gabriel de Sa v. Shri Babuso Pednekar and ors. reported in 1998 (1) GLT 406. Paragraph 4 of the plaint shows that the plaintiffs have four houses in the property and the appellants are occupying one house presumably as caretakers of the whole property. Therefore, it would not be prima facie possible to hold that the appellants are not mundkars being caretakers of one of the four houses.
5. Mr. Joshi, Advocate for the respondents submitted that howsoever looked at, the appellants are not entitled to carry on construction. He has relied on the judgment in Shri Vicente Cabral v. Smt. Sunandabai Dayanand Bandonkar reported in 1991(2) GLT 331 wherein a person claimed to be a mundkar. The District Judge held that the person could not be considered as a mundkar till he approached the Mamlatdar and was so adjudged. In addition to this, the learned Advocate Shri Joshi had some serious allegations about the appellants' conduct which need not be considered in this proceeding.
6. From the facts unfolded, it is clear that the appellant have been occupying a house, in the property owned by the respondents. The house, for whatever reason, gave way and the appellants had commenced re-construction after obtaining permission from the Panchayat to repair. The photographs filed on record show that walls to the extent of about 2 feet height with laterite stones are rebuilt. The roof is however of thatched leaves. The appellants seem to have suffered through two monsoons since the injunction had been clamped in this fashion. Since the decision of the suit may take time, it may be appropriate to modify the order of the Trial Judge to permit the appellants to lay cement/asbestos sheets in place of thatched leaves roof as seen in the photograph No. 17 at page 107. The appellants shall not fix any additional poles or raise any further construction taking advantage of this concession. The appellants would be at liberty to approach the Trial Court for leave to carry out any repairs during the pendency of the suit should a contingency arise and shall not carry on any activities without such leave. Any such activities shall be solely at the risk of the appellants. Any such repairs/reconstruction, including one permitted by the judgment will not create any equities in favour of the appellants.
7. The appeal is therefore, disposed off by modifying the order passed by the Trial Judge to the extent indicated above.
8. All pending Civil applications are disposed off.