(2013) 03 BOM CK 0243

Bombay High Court (Goa Bench)

Case No: Letters Patent Appeal No. 02 of 2009 in Writ Petition No. 282 of 1999

Mr. Madhukar		APPELLANT
	Vs	
Khandeparkar, (since deceased) and Mrs. Madhukar Khandeparkar Vs Administrative Tribunal, Goa and Others		RESPONDENT

Date of Decision: March 6, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115, 27
- Constitution of India, 1950 - Article 226, 227
- Representation of the People Act, 1951 - Section 83(1)

Citation: (2013) 2 BomCR 493

Hon'ble Judges: V.M. Kanade, J; U.V. Bakre, J

Bench: Division Bench

Advocate: S.D. Lotlikar, with Mr. H. Kankonkar, for the Appellant; V.P. Thali, Advocate for Respondents no. 2 to 5, for the Respondent

Final Decision: Allowed

Judgement

U.V. Bakre, J.

By this Letters Patent Appeal, the Judgment dated 14/11/2008 passed by the learned Single Judge of this Court in Writ Petition No. 282 of 1999 has been challenged. Facts which are relevant for the purpose of disposal of this appeal, in short, are as follows:

Eviction proceedings were initiated against the deceased appellant no. 1 and his wife, the appellant no. 2 (defendants) by respondents no. 2 to 7 and two others (plaintiffs), by way of Regular Civil Suit No. 267/1975 in the Court of Civil Judge, Junior Division, Panaji. The suit house is the house bearing Village Panchayat No. 525 situated at Taliegao. The Plaintiffs contended that the suit house was built up by one Radhabhai Khandeparkar alias Odlem, in the property of the plaintiffs with their

permission and she was residing there alone as licensee and died in 1975 without leaving any heirs and upon her death, the suit house remained closed. The plaintiffs further claimed that on or about 28/07/1975, the defendants who were residing in a house bearing Village Panchayat No. 560 in the same Village started illegally occupying the suit house and refused to vacate it when called upon to do so. Therefore, the plaintiffs filed the said suit. In their written statement, the defendants claimed that Radhabai was a Mundkar along with her two brothers namely Vithal and Babuso. The defendants denied that the suit house had remained closed after the death of Radhabai. It was alleged that the defendant no. 1, resided along with Radhabai and his uncle Babuso, in the suit house till the age of 20 years and after his marriage, he went to stay in a neighbouring house, but did not lose contact with his uncle and after the death of uncle with Radhabai and was frequently visiting the suit house in order to help her in her old age. It was alleged that the defendant no. 1 and his family members were living with Babuso and Radhabai during their last illness.

2. On the basis of the pleadings in the said Civil Suit no. 267/75, issues were framed by the learned Civil Judge, Junior Division and one of the issues was whether the defendants were staying in the suit house as Mundkars? The said issue of Mundkarship was referred to the Mamlatdar under the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (Mundkars Act, 1975, for short).

3. The Mamlatdar of Tiswadi, by Judgment and order dated 31/05/1983, in Case No. MUND/JM/(II)/78, held that the defendants are the mundkars of the suit house. The plaintiffs filed an appeal against the said Judgment and Order before the Collector, North Goa at Panaji and Additional Collector, by Judgment and Order dated 03/03/1988, in case No. MUND/AC/APL/87/83, dismissed the appeal by upholding the Judgment and order passed by Mamlatdar. Against the said Orders, the plaintiffs preferred Mundkar Revision Application No. 33 of 1998 before the respondent no. 1 and respondent no. 1 by Judgment and Order dated 11/10/1991 set aside the Orders passed by the Additional Collector and Mamlatdar and held that the defendants are not mundkars. Against the said judgment and order, the defendants preferred Writ Petition No. 55 of 1992, before this Court, which was disposed of by Judgment and Order dated 23/01/1992. This Court, by the said judgment, set aside the order passed by the respondent no. 1 and sent back the Revision Application to the respondent no. 1 to decide it afresh by keeping in mind that it has to exercise its powers within the scope and ambit of Section 115 of the Code Of Civil Procedure. After remand, the respondent no. 1 heard both the parties and by Judgment and Order dated 04/01/1999 again allowed the said Revision Application and answered the issue of mundkarship in the negative. Aggrieved by the said Judgment and Order of the respondent no. 1, the defendants filed Writ Petition no. 282 of 1999, under Articles 226 and 227 of the Constitution of India. The defendant no. 1 expired and his legal representatives have been brought on record. By Judgment dated 14/11/2008, the learned Single Judge of this Court dismissed the Petition by holding

that the defendants had not made out any case for interference with the impugned order in exercise of writ jurisdiction. It is against the said Judgment dated 14/11/2008 of the learned Single Judge in Writ Petition No. 282 of 1999 that the present Letters Patent Appeal has been filed.

4. Heard learned Counsel for the parties.

5. Mr. Thali, learned Counsel appearing on behalf of the plaintiffs submitted that LPA is not maintainable against the impugned Judgment. He has relied upon a few Judgments of this High Court. According to him, the learned Single Judge has exercised powers only under Article 227 of the Constitution of India and hence appeal would not be maintainable. He submitted that by going through the pleadings and findings, it is clear that the petition under Article 226 of Constitution was not justified.

6. The above submission cannot be accepted since the question is squarely covered by the decision of Full Bench of this Court in the Case of Advani Oerlikon Ltd. Vs. Machindra Govind Makasare and Others, . In paragraph 20 of the Judgment (supra) it is observed thus:

20. Upon this discussion, we now proceed to answer the questions formulated in the order of reference:

Re: 1: It is not a correct proposition in law that this Court cannot correct jurisdictional errors or errors resulting in miscarriage of justice committed by authorities which are subordinate to it by invoking powers under Article 226 of the Constitution.

Re: 2: It is not a correct proposition in law that jurisdictional errors or errors resulting in miscarriage of justice committed by subordinate Courts/Tribunal can only be corrected by this Court in exercise of powers under Article 227 of the Constitution. The writ of certiorari can be issued under Article 226 of the Constitution where the subordinate Court or Tribunal commits an error of jurisdiction. Where the subordinate Court or Tribunal acts without jurisdiction or in excess of it or fails to exercise jurisdiction, that error of jurisdiction can be corrected. Moreover when the Court or Tribunal has acted illegally or improperly such as in breach of the principles of natural justice the writ of certiorari is available under Article 226.

Re: 3: Where the facts justify the invocation of either Article 226 or Article 227 of the Constitution to correct a jurisdictional error or an error resulting in a miscarriage of justice committed by authorities subordinate to this Court, there is no reason or justification to deprive a party of the right to invoke the constitutional remedy under Article 226 of the Constitution.

Re: 4: It is open to the Court while dealing with a petition filed under Articles 226 and/or 227 of the Constitution or a Letters Patent Appeal under Clause 15 of the

Letters Patent arising from the judgment in such a petition to determine whether the facts justify the party in filing the petition under Article 226 and/or 227 of the Constitution.

Re: 5: The cause title, the averments and prayers in the petition can be taken into account while deciding whether the petition is one under Article 226 and/or 227 of the Constitution.

Re: 6: If the petitioner elects to invoke Articles 226 and/or 227 of the Constitution and the facts justify such invocation, a Letters Patent Appeal against the order of the Learned Single Judge would be maintainable even though the Single Judge has purported to exercise jurisdiction only under Article 227 of the Constitution. The fact that the Learned Single Judge has adverted only to the provisions of Article 227 of the Constitution would not bar the maintainability of such an appeal. The true test is whether the facts justify the invocation of Articles 226 and 227 and this has to be determined on the facts of each case having due regard to (i) the nature of the jurisdiction invoked; (ii) the averments contained in the petition; (iii) the reliefs sought; and (iv) the true nature of the principal order passed by the Single Judge. The true nature of the order passed by the Single Judge has to be determined on the basis of the principal character of the relief granted. The fact that an ancillary direction has been issued under Article 227 of the Constitution would not dilute the character of an order as one with reference to Article 226. What has to be ascertained is the true nature of the order passed by the Single Judge and not what provision is mentioned while exercising this power.

Re: 7: Where a petition is filed under Articles 226 and 227 of the Constitution and the facts justify the filing of such a petition, it is not lawful for the Court to hold that jurisdictional errors or errors resulting in a miscarriage of justice committed by the subordinate Courts or Tribunals can be corrected only by exercising powers under Article 227 (and that the mentioning of Article 226 is redundant), thus depriving the party of a right of appeal under Clause 15 of the Letters Patent.

Re: 8: When a petition is filed under Articles 226 and 227 of the Constitution and the facts justify the filing of such a petition, it is not open to the Court to hold that Article 226 need not have been invoked, on the ground that Article 227 is clothed with the power to grant the same relief thus depriving the party of a right to elect or choose a remedy.

Re: 9: In a situation where a petition is filed under Article 227 of the Constitution and judgment is rendered in favour of the Petitioner, recourse to an appeal under Clause 15 of the Letters Patent is not barred to the Respondent before the Single Judge merely on the ground that the petition was under Article 227. In State of Madhya Pradesh vs. Visan Kumar Shiv Charanlal (supra), the appeal before the Division Bench was filed by the Respondent to the proceedings before the Single Judge in a petition which had been instituted under Article 227. Accepting the

submission that a nomenclature is of no consequence and it is the nature of the reliefs sought and the controversy involved which determine which Article is applicable, the Supreme Court held that the appeal before the Division Bench was maintainable. A similar position arose in the decision of the Supreme Court in M.M.T.C. vs. Commissioner of Commercial Tax (supra). The Division Bench of the High Court had held that since the petition before the Single Judge was under Article 227 of the Constitution, an appeal at the behest of the Respondent to the petition was not maintainable. The Supreme Court held that the High Court was not justified in holding that the Letters Patent Appeal was not maintainable since the High Court did not consider the nature of the controversy and the prayers involved in the Writ Petition.

The facts of the present case would squarely fall under answer to references no. 1 and 3 above. Hence, there is no force in the submission of the learned Counsel that L.P.A. is not maintainable.

7. Mr. Lotlikar, learned Senior Counsel appearing on behalf of the defendants, submitted that the learned Single Judge did not consider the submission made by him that the respondent no. 1 had repeated the same exercise which was undertaken by it while passing the previous Judgment and Order dated 11/10/1991 which was set aside by this Court in Writ Petition No. 55 of 1992, with specific direction that the Revision Application shall be decided within the scope and ambit of Section 115 of C.P.C.. He submitted that the Respondent no. 1 had exceeded its jurisdiction. He submitted that the learned Single Judge did not consider that the judgment and order dated 4/1/99 of the respondent no. 1 was virtually in violation of the order dated 23/1/1998 passed by this Court in Writ Petition no. 55/92. He pointed out that there was no finding given by the respondent no. 1 that the findings of the lower Courts were perverse entitling it to interfere with the same in the exercise of its revisional jurisdiction. According to the learned Counsel, the respondent no. 1 only purported to conclude that the evidence led by the defendants was in variance with the pleadings. He submitted that if the written statement of the defendants is read as a whole, it can be understood that the finding of variance of the evidence with the pleadings is wrong. According to learned Counsel, this aspect was not at all considered by the learned Single Judge.

8. Learned Counsel appearing on behalf of the defendants further submitted that previously there was Goa, Daman and Diu (Protection from Eviction of Mundkars, Agricultural Labourers and village Artisans) Act, 1971 (Mundkars Act of 1971, for short) under which though there was no specific provision like Section 3 of the Goa, (Protection from Eviction) Act, 1975 (Mundkars Act of 1975, for short), saying that rights of Mundkar were heritable, however, rights which were vested in mundkar, under the Mundkars Act of 1971, were such as to create estate in the mundkar which would be heritable upon his death. He submitted that under the Mundkar Act of 1975, a person who resides in the property of Bhatkar, with his consent, with

fixed habitation, with or without obligation to render any services, is a Mundkar. According to him, the above was the only relevant question and since the Mamlatdar and the Collector held that the defendants are mundkars since they were residing in the suit house with fixed habitation, the said authorities did not address themselves to the question of inheritance. He further submitted that under the Mundkar Act of 1975, the Mundkarial right is heritable and the defendants had laid a factual foundation in their pleadings as well as in evidence, insofar as their claim of right by inheritance. He submitted that the defendants had claimed through Radhabai @ Oidem and even otherwise had fixed habitation in the suit house. He submitted that the Respondent no. 1 could not have exercised jurisdiction contrary to the well settled principles governing the exercise of revisional jurisdiction and this aspect was overlooked by the learned Single Judge. He further submitted that the plea of inheritance was alive and had to be considered in the light of evidence on record. He submitted that the pleadings were mofussil pleadings and could not have been read in isolation. He submitted that the issue was framed about mundkarship and was referred to the Mamlatdar and Mamlatdar took evidence on the said issue and held that the defendants were Mundkars. He further submitted that the pleadings in Civil Court were sought to be contradicted in Mamlatdar''s Court, which was not strictly permissible. According to him the said pleadings could not have been taken in formalistic manner and that the pleadings of both the parties had to be read as a whole in order to know the controversy in the proceedings. He relied upon the case of Smt. Manjushri Raha and Others Vs. B.L. Gupta and Others, and Kidar Lall Seal and Another Vs. Hari Lall Seal, . He pointed out that the evidence led by the defendants, on the main question of mundkarship, was not at all considered by the respondent no. 1 on the ground that there was variance between evidence and pleading. He therefore prayed that the Letters Patent Appeal be allowed and the impugned Judgment of the learned Single Judge be quashed and the said Writ petition be allowed and the judgment of respondent no. 1 be set aside or the matter be remanded to respondent no. 1 to decide the matter afresh by considering the evidence led by the parties on the issue of Mundkarship.

9. Per Contra, Mr. Thali, learned Counsel appearing on behalf of the plaintiffs, submitted that issue was framed on the basis of pleadings before the Civil Court and the same was referred to the Mamlatdar and therefore the pleadings in the civil Suit cannot be given a go by and were relevant. He submitted that in the present case, there is complete variance between the pleadings and the evidence and that pleadings and evidence are self-contradictory, which renders the evidence unreliable. He relied upon following Judgments:

(1) Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc.,

(2) Kashi Nath (Dead) through Lrs. Vs. Jaganath,

(3) Ravinder Singh Vs. Janmeja Singh and Others,

(4) "Shri Jeronimo Dias and others V/s. Shri Jose Jeronimo Menezes and others" [1997(1) Goa L.T. 119]

10. Mr. Thali took us through the plaint as well as the Written Statement and contended that there is no specific plea that there was fixed habitation. He further submitted that there is no specific denial that the defendant no. 1 was residing in another house bearing no. 560, in the same village. He pointed out that in the written statement there was no denial to the fact pleaded in the plaint that Radhabai had constructed the house of her own but in the evidence, the defendant no. 1 stated that it was constructed by his father. He further submitted that there was no evidence about consent and lawful habitation and there is complete change in the stand in the evidence led by the defendants. He further submitted that no case of inheritance was argued before the Mamlatdar or the Deputy Collector and the same was argued for the first time before the Administrative Tribunal. He submitted that in the Mundkars Act of 1971, there was no provision of inheritance whereas under the Mundkars Act of 1975, the mundkarship can be inherited only by members of the family and since defendant no. 1 is not a member of the family of Radhabai, he cannot inherit mundkarship. According to Mr. Thali, the ingredients of mundkarship were not at all proved. He therefore submitted that there is no merit in the Letters Patent Appeal and the same deserves to be dismissed.

11. We have carefully gone through the material on record.

12. An issue whether the defendants prove that they are staying in the suit house as mundkars was referred to the Mamlatdar. Both the defendants examined themselves and four more witnesses whereas the plaintiffs examined the plaintiffs no. 2 and 6 and one more witness, before the Mamlatdar. The defendants were not confronted with the pleadings made in the written statement, for them to afford explanation regarding any contradiction or omission, in the pleadings. The Mamlatdar, by Judgment and Order dated 31/5/1983, held that from the evidence of the witnesses of the defendants, it appears that the defendants were residing in the said house no. 525 for at least 12 years i.e. much prior to the appointed date, with fixed habitation in a dwelling house constructed by the father of the defendant no. 1 and hence they are mundkars. The Additional Collector, in the Appeal, examined and scrutinized the evidence on record along with the pleadings and by Judgment and order dated 3/3/1988, upheld the judgment and order of the Mamlatdar. The respondent no. 1, in Revision Application, by Judgment and order dated 11/10/1991, inter alia, held that u/s 25 of the Mundkars Act, it had similar powers of revision provided u/s 50 of the Karnataka Rent Act which extend to correcting not only errors of law but also errors of fact, The respondent no. 1 then proceeded to re-assess the evidence on record, before the Mamlatdar, and found that the pleadings in written statement are at variance with the evidence led by the defendants and that the evidence led by defendants is also contrary to the pleadings in the written statement whereas the evidence led by the plaintiffs was in consonance with the

pleadings in the plaint. The revision Application was allowed and the orders of the Mamlatdar and the Additional Collector were set aside and the issue of mundkarship was answered in the negative. That order was challenged before this Court. This Court, by Judgment dated 23/01/1998, in Writ Petition No. 55 of 1992, held as follows:

The opinion held by the Administrative Tribunal as to its power of revision to the effect that it has more than what is described u/s 115 of the Code of Civil Procedure, in view of the aforesaid legal position now clarified by the Division Bench judgment, which in my opinion is otherwise writ large in Section 27, is not correct.

The Order of the respondent no. 1, passed in revision, was set aside by this Court and the matter was sent back to the respondent no. 1 to decide the Revision Application afresh keeping in mind that it has to exercise its power within the scope and ambit of Section 115 of the Code of Civil procedure.

13. However, it seems that unfortunately the message did not reach the ears of respondent no. 1. A bare reading of the fresh Judgment dated 04/01/1999 of the respondent no. 1 in Mundkar Revision Application No. 33 of 1988 reveals that it has committed the same mistake as was committed by it in the earlier judgment dated 11/10/1991 in the very same Revision Application. In fact, the order dated 04/01/1999 is virtually a reproduction of the said previous order dated 11/10/1991.

14. In the case of "Ravinder Singh" (supra), in paragraph 7 thereof, it has been observed that it is an established proposition that no evidence can be led on a plea not raised in the proceedings and that no amount of evidence can cure defect in the pleadings. However, the above case pertained to an election petition. It was found that there was no averment in the petition dealing with the alleged commission of corrupt practice which fell within the mischief of Section 123(4) of the Act, which was mandatory. Proviso to Section 83(1) of Representation of the People Act, 1951 provides for a mandatory requirement that the election petition shall be accompanied by an affidavit in prescribed form in support of the allegations. The affidavit was found to be not in consonance with the requirements. The above Judgment is therefore not applicable to the present case.

15. In the case of "Kashi Nath"(supra) it has been held that when there is variance between pleadings and evidence, the evidence cannot be relied upon. It has been further held that an adverse inference is to be drawn when pleadings and evidence are self-contradictory. In that case the inconsistency was concerning the main point involved in that case regarding the adoption. In the case of "Baldev Singh"(supra) it has been held that inconsistent defence can be raised by the defendants in the Written Statement although the same may not be permissible in the case of the plaint. Therefore, thrust is on self-contradictory or inconsistent pleadings. There is no quarrel about the principles laid down in the above judgments.

16. In the case of "Smt. Manjushri Rahi"(supra), it has been held that pleadings have to be interpreted not with formalistic vigour but with latitude or awareness of low legal literacy of poor people. In the case of "Kedar Lal Seal"(supra), it has been held that the Court would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded.

17. A perusal of the plaint in Regular Civil Suit No. 267 of 1975 reveals that according to the plaintiffs, the suit house was constructed by one Oidem or Radhabai Khandeparkar with the permission of family of the plaintiffs and she was residing alone in the suit house till she died in March, 1975 without leaving any descendents or heirs. It was further alleged that after the death of Oidem, the suit house remained closed and on or about 28/07/1975 the appellants who were residing in another house bearing Village Panchayat No. 560 situated at Vaddo Bhorbath of Talegaon, suddenly started illegally occupying and residing in the suit house. In the Written Statement, the defendants claimed that the issue involved in the suit was whether or not the defendants are mundkars in respect of the suit house and therefore Civil Court had no jurisdiction. It was pleaded by the defendants that they are mundkars of the suit house within the meaning of Mundkars Act. That was the main and relevant pleading of the defendants, in the said suit filed by the plaintiffs. No doubt, there was no specific denial in the Written Statement that the suit house was built by Radhabai @ Oidem. But there was also no specific admission regarding that averment made by the plaintiffs. It is true that in the evidence, however, the defendant no. 1 stated that he was residing in the suit house along with his father, two uncles and aunty and his father brought Radhabai to the suit house after the death of her husband. The respondent no. 1, by order dated 11/10/1991, held that the case set up in the evidence led by the defendants was totally at variance and in some respect almost contrary to the one set up in the pleadings and was not acceptable. It was exactly the above finding of the respondent no. 1 that was set aside by this Court by Judgment dated 23/1/1998, in Writ petition No. 55/1992 and the case was sent back to it to decide the Revision Application afresh by keeping in mind that it has to exercise its power within the scope and ambit of Section 115 of the Code of Civil procedure. Since the main pleading of the defendants was that they are Mundkars of the suit house, the question whether the house was built by the father of defendant or by Radhabai was not of much relevance and in any case it was duly considered by the Mamlatdar and the collector, both of which were fact finding Courts. This Court, in Writ Petition No. 55/1992, had held that the respondent no. 1 ought not to have gone into that question in view of the limitations, on exercise of powers, in a Revision Application. For ascertaining the issue of mundkarship, the respondent no. 1, after remand, could not have gone into the same exercise of finding out whether there was variance between the evidence brought on record by the defendants and the pleadings. In fact, the evidence on record, on the issue of mundkarship, was to be discussed to find out whether the

finding of the Additional collector and the Mamlatdar, to the effect that the defendants are mundkars, was perverse. Unfortunately, the respondent no. 1 did not keep the same in mind and repeated the same mistake in the order date 04/01/1999, which was there in the earlier order dated 11/10/1991, which aspect, in our view, is also not being considered by the learned Single Judge. The respondent no. 1, on remand, proceeded to find out only whether there is variance between the evidence brought on record by the defendants and the pleadings of the parties before the Civil Court. On account of the above, we are of the view that the matter requires a fresh remand to the respondent no. 1 to decide the matter afresh in the light of the Judgment dated 23/01/1998 passed by this Court in Writ Petition No. 55 of 1992 and in the light of the observations made now by us above. In view of the above, we pass the following:

ORDER

(a) The impugned Judgment dated 14/11/2008 in Writ Petition No. 282 of 1999 passed by the learned Single Judge of this Court and also Judgment and Order dated 04/01/1999 passed by the Administrative Tribunal in Mundkar Revision Application 33 of 1988, are quashed and set aside.

(b) The matter is remanded to the Administrative Tribunal to decide the said Mundkar Revision Application No. 33 of 1988 afresh in the light of the observations made above.

(c) The parties shall appear before the Administrative Tribunal on 25/03/2013 at 10.00 a.m.