

CIVIL REVISION APPLICATION NO.167/2000

M/s. Siridao Estates Pvt.
Ltd., a registered company
having its office at Afonso
de Albuquerque Rd., Panaji,
represented by its Director,
Shri Laxminarayan V.S. Dempo,
r/o St. Cruz, Ilhas, Goa. ... Applicant.

Versus

Smt. Apolona Pires, wife
of Alex Pires, of full
age, r/o H.No.52/1,
Jesus Nazareth Vaddo,
Siridao, Ilhas, Goa. ... Respondent.

Shri Sudin Usgaokar, advocate for the applicant.

CORAM: P. V. HARDAS, J.

DATE: 22nd February, 2002.

ORAL JUDGMENT

This revision application has been filed by the applicant/original plaintiff against the Order dated 22nd July, 1999, passed by the Civil Judge, Senior Division at Panaji, in Special Civil Suit No.285/91/A, dismissing the application filed by the applicant/plaintiff under Order XIV Rule 5 of the Code of Civil Procedure, for striking the issues at sr. nos. 4 and 5.

In the aforesaid application it was averred by the applicant/plaintiff that issues no.4 and 5, as framed, do not arise because of the paucity of the pleadings in which the details regarding munkarship are not given. The learned trial Judge by his aforesaid Order held that it was the case of the defendant/respondent herein, that she

was a mundkar of the suit house, which was existing in the suit property for more than 30 years and she had denied having committed any encroachment. The learned trial Judge was, therefore, of the view that on the basis of the pleadings the issues were framed and though the suit was for removal of encroachment, in view of the defence of the defendant, no ground had been made out for striking of issues no.4 and 5.

2. The respondent/original defendant was issued with a notice by this Court before admission of the revision. The respondent remained absent, though she was served. Thereafter the revision was admitted on 30th November, 2000, on which date the respondent though served was absent. The respondent is also absent when the matter is taken up for hearing.

3. Mr. Sudin Usgaokar, learned counsel appearing for the applicant/plaintiff has submitted before me that in order to justify the framing of the issue in respect of a mundkar, it is necessary, to plead the consent of the bhatkar for lawfully residing at a fixed habitation, which is a dwelling house. Thus, according to Mr. Usgaokar, if the pleadings in this behalf are vague the civil court is not bound to frame the issue merely because the defendant alleges to be a mundkar. In other words, according to Mr. Usgaokar, learned counsel

appearing for the applicant/plaintiff, the particulars and ingredients of Section 2(p) of the Goa, Daman and Diu Mundkars (Protection From Eviction) Act, 1975, have to be pleaded by a defendant before he can successfully set up a plea that he is a mundkar, thus calling upon the Court to frame an issue in that behalf. In support of his contention Mr. Usgaokar, learned counsel appearing for the applicant/plaintiff, has relied upon an unreported judgment of this Court in **Zuari Real Estate Co. Pvt. Ltd. vs. Shri Thomas Souza**, in Civil Revision Application No.70/92, decided on 14th August, 1992. The learned Single Judge of this Court at para 6 of the aforesaid judgment has held:-

"6. On the facts pleaded, it is clear that the contesting respondent did not even plead that he is occupying the structure as a dwelling house. He does not even state as to which part of the property is under his occupation for his dwelling house. It is therefore difficult to accept that any plea viz. mundkarship of the contesting respondent is required to be decided based on the pleadings and facts and circumstances of this case as on record. It must be noted that the petitioners have come out with a case that the structure has been erected for the first time in June, 1986 supported on wooden pillars and thereafter it was improved and extended by substituting wooden pillars by masonry columns. It is therefore clear that if the petitioners prove the case as pleaded in the plaint, then the question as to whether the contesting respondent is a mundkar or not does not arise. In this view of the matter the revision application succeeds.
....."

The learned Single Judge therefore, struck down the issue

regarding mundkarship.

4. Mr. Usgaokar has then placed reliance on another judgment of this Court in **Mitra of Archdiocese of Goa and Daman vs. Mr. K. Vijayadharan**, 1999 (2) Goa L.T. 97. The learned Single Judge of this Court at para 12 has held:-

".....
However, there is no plea nor it is remotely disclosed in the original pleadings of the respondent that the occupation of the respondent in the suit house is or was of the nature of 'fixed habitation'. So also the respondent had not disclosed the exact date of the year 1975 since when he had been occupying the suit house. The Explanation clause clearly specifies that the occupation has to be for a period of one year prior to the appointed date. In other words, in order to avail benefit under the Explanation clause, the person claiming to be mundkar should have been staying from the date prior to 12th March, 1975. In the absence of disclosure of all the ingredients of the definition of the term 'mundkar' it cannot be said that the party has raised a plea of mundkarship. Mere reference to the year 1975 by itself cannot disclose that the respondent had been residing prior to 12th March, 1975."

The learned Single Judge has further held at para 14:-

".....
However, in order to enable a party to raise the issue, necessary particulars relating to plea of mundkarship must be disclosed in the pleadings filed by the person who seeks to raise the issue of mundkarship. As already seen above, the section 2(p) relates to the term 'mundkar'

and clearly requires the person to disclose the facts relating to the consent of the bhatkar to reside in the dwelling house, the facts regarding his lawful residence in the house and the facts in relation to his fixed habitation in such a house. Considering the ingredients as disclosed from the definition of the term 'mundkar' and taking into consideration the pleadings of the respondent in the unamended written statement it is apparent that the contents thereof do not disclose any fact regarding fixed habitation of the respondent in the suit house."

5. Mr. Usgaokar further submits that in the present case also a perusal of the written statement filed by the respondent/defendant would show that the respondent/defendant has not traversed the pleadings of the plaintiff/applicant, that the respondent/defendant has her own house. Similarly, the respondent/defendant has not stated that it was a dwelling house. All that the defendant says is that she was a mundkar in possession for the last 30 years. The trial Court thus had framed an issue on vague pleadings and the framing of the issue on the basis of the pleadings was, therefore, not justified.

6. Relying on the aforesaid two judgments of the learned Single Judges of this Court, which are binding on me, I am inclined to allow the revision application. Accordingly, the Order of the learned trial Court dated 22nd July, 1999, passed by the learned Civil Judge, Senior Division, Panaji, in Special Civil Suit No.285/91/A, is quashed and set aside. The plaintiff's application under Order XIV Rule 5 Code of Civil Procedure, is allowed and

the issues at serial nos. 4 and 5 are struck off the record.

7. This Civil Revision Application is allowed with no order as to costs.

P.V. HARDAS, J.