IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.759 OF 2012

Mrs. Antoneta Fernandes,
Major in age, Occupation
housewife,
Resident of House No.758,
Dandeavaddo, Chinchinim,
Salcete, Goa by her son and
Constituted Attorney,
Mr. Constancio Fernandes
(Since deceased through legal
representatives)

1 Sabina Succorinha Fernandes,
major, c/o. House No.758,
Dandeavaddo, Chinchinim,
Salcete, Goa.

2 Natalina @ Lucy Fernandes,
major, r/o. House No.667/A,
Dandeavaddo, Chinchinim,
Salcete, Goa.

3 Joao Jose @ Jose Fernandes,
major, c/o. House No.667A,
Dandeavaddo, Chinchinim,
Salcete, Goa.

4 Lily Fernandes,
major, c/o. Comba, Paricotto,
Cuncolim, Salcete, Goa.

5 Agnelo Fernandes,
major, c/o. Comba, Paricotto,
Cuncolim, Salcete, Goa.

6 Constancio Fernandes,
major, c/o. House No.758,
Dandeavaddo, Chinchinim,

Salcete, Goa.

7 Joslyn Fernandes,
major, c/o. House No.758,
Dandeavaddo, Chinchinim,
Salcete, Goa.

8 Jose Fernandes,
major, c/o. House No.758,
Dandeavaddo, Chinchinim,
Salcete, Goa. …. Petitioners

V/s

1 Mrs. Sonia Furtado Dias,
major in age, occupation
retired.

2 Mr. Noel Dias,
major in age, occupation
retired

Both residents of House No.759
Dandeavaddo, Chinchinim,
Salcete, Goa.

3 The Administrative Tribunal by
its Chairman, Panaji, Goa. …. Respondents

Shri A.F. Diniz, Advocate for the Petitioners.

Shri Nitin N. Sardessai, Senior Advocate with Ms. Gautami Kamat, Advocate for the Respondents.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on :-25th September, 2018

Pronounced on :- 9th October, 2018

JUDGMENT :

This petition under Article 226 and 227 of the Constitution of India takes exception to the order of the Administrative Tribunal dated 14/09/2012 on the premise that it discloses jurisdictional errors, is an outcome of the misconstruction of the scope of its revisionary jurisdiction under Section 26 of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975, 'the Act' for short hereinafter and in exercise of jurisdiction in interfering with the concurrent findings of the Authorities below. The Administrative Tribunal had misconstrued the scope of the pleadings in a Civil Suit to frame an issue of mundkarship and the facts to be stated in an application for the registration as a mundkar. The Tribunal had failed to address itself to the stand taken by the respondent no.1 in her cross-examination to the effect that the petitioner was a tenant paying rent of ₹4/- per month which was entirely contradictory to the respondents' case that the petitioner was engaged as a servant. The Tribunal had misconstrued itself in law and passed the impugned judgment which justifies interference. The Administrative Tribunal on an assessment of the evidence on record had not come to the conclusion that the findings

rendered by the Deputy Collector were perverse. It found that they were wrong and made beyond the scope of its revisional jurisdiction. The Tribunal also found that the Deputy Collector had not considered the evidence on record threadbare and if this was the case it ought to have remanded the matter to the Deputy Collector for a fresh decision and not by setting aside the concurrent orders passed by the Courts below. The order passed by the Administrative Tribunal was contrary to law and disclosed errors touching its jurisdiction and therefore was liable to be quashed and set aside.

2. Heard Shri A.F. Diniz, learned Advocate for the petitioner who submitted that an application was moved by the petitioner under Section 29 of the Act which was allowed by the Mamlatdar and confirmed in appeal by the Deputy Collector dismissing the appeal filed by the respondents. The Administrative Tribunal in revision however allowed the petition. In that context it was his contention at the outset that the revision was not maintainable against the order of the Deputy Collector and in that context placed reliance in **Telma Gonsalves V/s. Namdev Babuso Chodankar**

[2015 (5) Bom.C.R. 390]. He next referred to Section 29 of the Act read with sub-section 8 thereof and the power of an appeal and revision contained in Section 24 and 25 and submitted that there was no scope for revision when an order was passed in an appeal under Section 29(8) of the Act and a revision was maintainable only from an order passed in appeal under Section 24 of the Act. On that premise alone and for want of jurisdiction the order passed by the Tribunal had to be set aside.

3. On merits it was the contention of Shri A.F. Diniz, learned Advocate for the petitioners that there were concurrent findings of facts on the petitioner's entitlement for registration as a mundkar and in that context referred to the application made by the petitioner, the reply filed on behalf of the respondents and the judgment passed by the Mamlatdar holding in the petitioner's favour that she was entitled to be registered as a mundkar in respect of the dwelling house in question. He next referred to the judgment passed by the Deputy Collector dated 09/12/2010 in the appeal filed by the respondents where the learned Deputy Collector had dismissed their appeal and thereafter to the judgment passed

by the Administrative Tribunal dated 14/09/2012 whereby the learned Tribunal had allowed the revision application and set aside the judgment of the Deputy Collector in appeal and consequently the order of the Mamlatdar passed in the petitioner's favour.

4. It was the contention of Shri A.F. Diniz, learned Advocate for the petitioner that a reading of Section 27 of the Act would convey that the powers exercised by the Mamlatdar, the Collector, the Administrative Tribunal or the Government as the case may be were equivalent to the powers exercised by the Trial Court, Appellate Court or a Court exercising revisional jurisdiction under Section 115 of the Civil Procedure Code. In that context, he placed reliance in **Shri Shankar Fatarpenkar, since dec. through LR's V/s. The Joint Mamlatdar of Bicholim & Ors. [1991 (2) Goa L.T. 23]**. It was his contention that the findings rendered by the learned Administrative Tribunal were erroneous and it had to restrict itself to the predicates of Section 115 of the Civil Procedure Code. The impugned judgment had therefore to be quashed and set aside.

5. Shri Nitin N. Sardessai, learned Senior Counsel for the respondents submitted at the outset that the judgment in **Telma Gonsalves** (supra) was per incuriam since it did not consider the previous judgments and the provisions of law. He next referred to Section 24 of the Act providing for "an appeal from every original order" and submitted that an appeal under Section 29(8) fell within the ambit of an appeal under Section 24 of the Act. If a contrary view was taken, Section 24 of the Act would be rendered otiose. In that context he also adverted to Rule 21 under the Act and submitted that the intention of the legislature to provide for an appeal/revision was inherent. To buttress his averment further on the maintainability of a revision, he placed reliance in **Leao Vitorina D'Souza & Anr. V/s. Silvestre Loyola Fernandes & Anr. [1989 (1) Goa L.T. 62]** in the matter of construction of the remedy of appeal and revision contained in Section 24 and 25 of the Act. He next referred to a Division Bench judgment in **Smt. Gulabi Sangtu Devidas & Ors. V/s. Smt. Prema Govinda Gaonkar & Ors. [1995 (1) Goa L.T. 154]** and submitted that there was no violence to the provision of appeal and revision while overruling the judgment in **Leao Vitorina D'Souza** (supra).

6. On merits, it was the contention of Shri Nitin N. Sardessai, learned Senior Counsel for the respondents that the application moved by the petitioner did not contain any details regarding the fixed habitation or that she was residing in the house with the consent of the Bhatkar to qualify as a mundkar nor had she produced any documents prior to the appointed date. It was his contention that in case the order of the Tribunal was set aside it would give rise to an illegal order and in that context placed reliance in the **State of Uttaranchal V/s. Ajit Singh Bhola & Anr. [2004 (6) SCC 800]** and that in **Maharaja Chintamani Saran Nath Shahdeo V/s. State of Bihar & Ors. [1999 (8) SCC 16]**.

7. Shri A.F. Diniz, learned Advocate for the petitioner submitted in reply that the judgment in **Leao Vitorina D'Souza** (supra) was clearly distinguishable being overruled expressly in **Gulabi Sangtu Devidas** (supra). Section 29(8) of the Act was a special provision of an appeal and did not fall within the ambit of the general provision of appeal contained in Section 24. It was his contention that the general provision of appeal had to yield to the special provision and in that context relied in **J.K. Cotton Spinning and Weaving Mills**

Co. Ltd. V/s. State of Uttar Pradesh & Ors. [AIR 1961 SC 1170]. Therefore, according to him, no revision lay against an order under Section 29(8) not being an appeal under Section 24 of the Act. It was otherwise his contention that an application under Section 29 could either be by the party in person or even pursuant to the report of the Talathi and therefore there was no scope to allege lack of pleadings. In his submission, the judgment in **State of Uttaranchal** (supra) was clearly distinguishable. Since written synopsis were filed on behalf of the petitioner, Shri Nitin N. Sardessai, learned Counsel for the respondents in further reply submitted that Section 29 of the Act merely prescribed the procedure for registration of the mundkar and not the procedure of an appeal and the recourse to an appeal was primarily under Section 24 of the Act. He conceded in fairness that the submission of Shri A.F. Diniz, learned Advocate for the petitioner that the general provision had to give way to a special provision applied only if there was no conflict between the specific provision and the general provision. In the present case, there was no conflict between the provision of an appeal contemplated under Section 24 and the general provision under Section 29(8) of the Act both of which

provided for the limitation in filing the appeal of sixty days and therefore the appeal as filed was under Section 24 of the Act. The judgment in **J.K. Cotton Spinning and Weaving Mills Co. Ltd.** (supra) was therefore clearly distinguishable.

8. It was the contention of Shri Nitin N. Saredessai, learned Senior Counsel on behalf of the respondents that the intention of the legislature had also to be seen while construing this provision and submitted that the original Act namely the Goa, Daman and Diu (Protection from Eviction of Mundkars) Act, 1971 did not at all provide for the remedy of the appeal and what was contemplated was only a revision in terms of Section 10 thereof. The Act was amended with an object to provide for better protection to the mundkars against eviction, etc. and when the remedy of the appeal was provided for in terms of Section 24 of the Act apart from the revision under Section 25 thereof. Section 29(8) of the Act was not at all in conflict with Section 24 of the Act providing for appeals and in that context he brought about an analogy with the powers of revision conferred on the Sessions Court and on this Court and both being available to the party who had to elect between the two remedies depending on the fora. The

petitioner had not objected to the appeal filed by the respondents under Section 24 of the Act and even in the revision filed, there was no objection to the jurisdiction by the petitioner who had waived such a right. He placed reliance in **ITI Ltd. V/s. Siemens Public Communications Network Ltd. [(2002) 5 SCC 510]**, **The Commissioner of Income Tax, Paiala V/s. M/s. Shahzada Nand & Sons & Ors. [AIR 1966 SC 1342]** apart from that in **Bank of India V/s. Lekhimoni Das & Ors. [(2000) 3 SCC 640]** and pressed for the dismissal of the petition.

9. Shri A.F. Diniz, learned Advocate for the petitioner in rejoinder submitted that the provision of appeal contained in Section 24 of the Act was in direct conflict with Section 29(8) being a special provision for appeal. It was his further contention that Rule 14 referred to by Shri Nitin N. Sardessai, learned Senior Counsel for the respondents applying to inquiries could not supplement the provisions contained in Section 27 of the Act. In any event, the rules issued under the Act had to be in consonance with the Act and could not enlarge its scope. Further reliance was placed by him in **Henriqueta D'Souza (dec.) through LR's V/s. Mangesh**

D. Muishal & Ors. [2016 (3) Bom.C.R. 459] and that in a Division Bench judgment of this Court in **Shri Madhukar V. Khandeparkar & Anr. V/s. Administrative Tribunal, Goa, Daman & Diu & Ors. [Writ Petition No.55/1992]** on the exercise of power by the Tribunal while dealing with its powers of revision under Section 25 of the Act.

10. i would consider their submissions, the various judgments relied upon and in view thereof decide the petition appropriately initially dealing with the issue of the jurisdiction of the Administrative Tribunal while interpreting Section 24 and 29(8) of the Act.

11. The Act admittedly has been enacted to provide for better protection of mundkars against the eviction from the dwelling houses and ancillary rights and to make certain other provisions connected therewith. It was also not particularly in dispute that pursuant to the Act of 1971, there was no power of appeal contemplated thereunder and which finds due placement as Section 24 in the Act under consideration. Section 24 of the Act reads thus:

> "From every original order, other than an interim order, passed by the Mamlatdar or the

> Collector under this Act, an appeal shall lie to the Collector or the Administrative Tribunal respectively and the order of the Collector or the Administrative Tribunal, as the case may be shall subject to revision if any, under Section 25 of this Act, be final."

In other words, Section 24 provides for an appeal from every original order passed by the Mamlatdar or the Collector to lie to the Collector or the Tribunal as the case may be and which is subject to revision under Section 25 of the Act. Section 29 of the Act provides for the register of mundkars and provides in sub-section(1) that the Government shall cause a register of mundkars to be prepared and maintained in the prescribed manner containing the particulars, description and the location of the dwelling house prescribed in sub-section (2) and being prepared and maintained by the Mamlatdar after such inquiry as may be prescribed.

12. Section 29 of the Act casts a duty on the Mamlatdar before the preparation of the register to publish a notice in every revenue village inviting applications from the mundkars for registration circumscribed by the proviso that in case it is found that the mundkar has failed to apply for registration of his name after the publication of such notice, to authorise the Talathi after making such inquiry as he considers necessary to

propose to the Mamlatdar to enter the name of such mundkar in the concerned mundkar register. In other words, the register of mundkars is drawn up by the Mamlatdar either on an application from the party concerned or on the recommendation of the Talathi, as the case may be. Sub-section 8 thereof provides that any person aggrieved by the registration of a mundkar or by the refusal to register a person claiming to be a mundkar, as the case may be, to file an appeal to the Collector within sixty days from the date of the registration or refusal, as the case may be. The Collector in terms of sub-section (9) thereof and on receipt of an appeal may call for the records of any proceedings under sub-section (6) and may cause such inquiry and pass such orders thereon as deemed fit provided a reasonable opportunity of hearing is provided to the parties.

13. It is therefore to be seen whether the appeal provided for in terms of Section 29(8) is a special provision, is in conflict with the general provision of appeal contained in Section 24 of the Act and whether Section 24 would have to give way to this special provision. In **J.K. Cotton Spinning and Weaving Mills Co. Ltd.** (supra), the Hon'ble Apex Court

held that when there is a conflict between a specific provision and general provision, the specific provision would prevail over the general provision. The general provision applies only to such cases which are not covered by the special provision. The rule applies to resolve a conflict between different provisions in different statutes as well as in the same statute while interpreting clause 5(a) and Section 23 of the U.P. Industrial Disputes Act.

14. In the **Commissioner of Income Tax Patiala** (supra), the Apex Court while interpreting Section 34(1)(a) of the Income Tax Act, 1922 qua the amended provision sub-section (1A) proceeded to observe that it was convenient to notice the relevant rules of construction and considered the classic statement of Rowlatt, J., in **Cape Brandy Syndicate V/s. Inland Revenue Commrs. [(1921) 1 KB 64 at p. 71]** reads thus :

> "In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

It further held that :

> "The underlying principle is that the meaning and

> intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is just or expedient." The expressed intention must guide the court. Another rule of construction which is relevant to the present enquiry is expressed in the maxim, generalia specialibus non derogant, which means that when there is a conflict between a general and a special provision, the latter shall prevail."

15. Section 27 deals with the powers of the Civil Court to be exercised in the conduct of inquiries and proceedings under the Act and provides that the Mamlatdar, the Collector, the Administrative Tribunal or the Government shall exercise in all inquiries, proceedings, appeals or revisions, the powers as are exercised by the concerned Trial Court, Appellate Court or a Court exercising revisional jurisdiction, under the Code of Civil Procedure, 1908. Section 28 of the Act provides for the period of limitation being sixty days which would apply in respect of an appeal contemplated under Section 28 as also an appeal under Section 29(8) of the Act.

16. On a harmonious reading of Section 24 and 29(8) of the Act and considering the law on the interpretation of statutes, it cannot at all be heard on behalf of Shri A.F. Diniz, learned Advocate for the petitioner that an appeal provided under

Section 29(8) of the Act is a special provision and that the appeal provided under Section 24 has to yield to it as ultimately to project a plea that the remedy of revision was not available to the respondents and that revision was not maintainable against the order passed by the Deputy Collector in appeal. Rather, a reading of Section 25 which provides for a revision would show that the revision is tenable from every order, other than an interim order passed in appeal under Section 24 or under sub-section (2) to the Administrative Tribunal or the Government as the case may be and which decision shall be final. Sub-section (2) thereof provides that save as otherwise expressly provided under the Act, where no appeal lies under the Act, the Collector may, on his own motion or on an application made by an aggrieved person or on a reference made in this behalf by the Government, at any time, call for the record of any inquiry or proceedings of any Mamlatdar for the purpose of satisfying himself as to the legality or propriety of any order passed by the Mamlatdar and as to the regularity of the proceedings and pass such order thereon as he deemed fit.

17. The present case centers around the issue whether the

order passed in appeal under Section 29(8) of the Act is an appeal within the meaning of Section 24 and consequently whether such an order is amenable to challenge in revision under Section 25 of the Act. Having held on purposive interpretation of Section 29(8) and 24 of the Act, i cannot find myself in agreement with the contention of Shri A.F. Diniz, learned Advocate for the petitioner that Section 29(8) being a special provision weighs over the general provision of appeal contained in Section 24 of the Act. Otherwise, if such a view is taken as per his contention, the very purpose of including the provision of appeal in the Act would be rendered otiose.

18. In **Telma Gonsalves** (supra), a learned Single Judge of this Court (F.M. Reis, J.) was dealing with the petition under the provisions of the Act and where in the course of its hearing a point came up for consideration as to whether a revision preferred by the respondent which resulted in the impugned order before the Administrative Tribunal was itself maintainable in law. In the brief facts of that case, it was apparent from the record that proceedings were initiated by the respondent for registration of the mundkar in terms of Section 29 of the Act which came to be allowed by the learned

Mamlatdar and being aggrieved by the said order, the petitioner preferred an appeal before the learned Additional Deputy Collector in terms of Section 29(8) of the Act and which came to be allowed by him. The respondent preferred a revision being aggrieved by the said order before the learned Administrative Tribunal which came to be allowed by the impugned order giving rise to the revision petition at the instance of the Bhatkar. The learned Judge while examining the point involved in the petition with regard to the jurisdiction of the learned Tribunal considered Section 25 of the Act and on its plain reading observed at para 5 that a revision to the Administrative Tribunal would lie against the orders passed in appeal under Section 24 or under sub-section (2) of the Act. Having found that the order impugned before the learned Tribunal was that passed in an appeal in terms of Section 29(8) of the Act, the revision preferred by the respondent was not maintainable and consequently held that the exercise of jurisdiction by the learned Tribunal in such revision was erroneous and set aside the said order.

19. In **Telma Gonsalves** (supra), with respect, there was no discussion or interpretation of the provision of appeal

contained in Section 24 juxtapositioned with the provision of appeal in terms of Section 29(8) of the Act and the question whether the general provision of appeal contained in Section 24 had to give way to the provision in Section 29(8) did not at all fall for consideration before the learned Single Judge. This judgment too did not deal with the intricacies and interpretation on the order passed in appeal under Section 24 of the Act and that under Section 29(8) of the Act and at the highest would have persuasive value unlike the contention of Shri A.F. Diniz, learned Advocate for the petitioner that a revision was not maintainable in the first instance before the Tribunal at the instance of the respondents.

20. It was the contention of Shri A.F. Diniz, learned Advocate for the petitioner in reply to the contention of Shri Nitin N. Sardessai, learned Senior Counsel for the respondents that the judgment in **Telma Gonsalves** (supra) was not per-incuriam and in that context reliance was placed in the **State of Bihar V/s. Kalika Kuer @ Kalika Singh & Ors. [AIR 2003 SC 2443]**.

21. In **Kalika Kuer** (supra), a two Judge Bench of the Apex

Court proceeded to examine in what circumstances a decision can be considered to have been rendered per incuriam and in that context quoted Halsbury's Laws of England where it was observed as under:

> "A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction while covered the case before it, in which case it must decide which case to follow or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force . A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties , or because the court had not the benefit of the best argument, and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority . Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake."

22. **Kalika Kuer** (supra), considered the judgment in **Govt. of Andhra Pradesh and Anr. V/s. B. Satyanarayana Rao (Dead) by Lrs. [2000 (4) S.C.C. 262]**, where it has been held as under:

> "Rule of Per Incuriam can be applied where a Court omits to consider a binding precedent of the same court or the superior court rendered on the same

> issue or where a court omits to consider any statute while deciding that issue. We therefore find that the rule of per incuriam cannot be invoked in the present case. Moreover a case cannot be referred to a larger Bench on mere asking of a party. A decision by two judges, unless it is demonstrated that the said decision by any subsequent change in law or decision ceases to laying down a correct law."

23. Considering the predicates of per-incuriam laid down in **Kalika Kuer** (supra), it cannot be heard on behalf of Shri Nitin N. Sardessai, learned Senior Counsel on behalf of the respondents that the judgment in **Telma Gonsalves** (supra) was rendered per incuriam when even otherwise the judgment in **Leao Vitorina D'Souza** (supra) of a learned Single Judge was overruled on a particular point namely that registration under Section 29 of the Act was synonymous with the relief of declaration under Section 8A of the Act.? to refer Leao Vitorina D'Souza for the actual transcript.

24. **Leao Vitorina D'Souza** (supra), challenged in revision the order passed by the Senior Civil Judge, Mapusa. In the brief facts, the respondents had filed the suit for restoration of possession of a house against the petitioners, who while resisting it, raised a question that they were the mundkars residing in the said house. Issues were accordingly framed

including whether the petitioners were mundkars or not. The respondents sometime after filing an application before the Trial Court that the petitioners had made an application to the Mamlatdar to get themselves registered as mundkars which was dismissed by the Mamlatdar which fact had not been denied by the petitioners in their written statement and prayed for the deletion of the issue of the mundkarship. This application was opposed by the petitioners on the grounds that the application was merely for registration of the name of the first petitioner as a mundkar which had only presumptive value and the declaration of a person as a mundkar had to be under Section 8A and there was no reason to delete the issue.

25. In **Leao Vitorina D'Souza** (supra), the learned Trial Judge upheld the view of the respondents and deleted the issue. It was contended on the petitioners' behalf that registration of a mundkar gives a mere presumption which is rebuttable and does not bar an application under Section 8A for declaration of mundkarship. In that context Section 29(2) was considered and it was held at paragraph 6 that an appeal provided under Sub-section 8 of Section 29 is respecting only to the entries of those other particulars and not in respect of

the finding as to whether or not a person is a mundkar. The remedy against this finding indeed is the one laid down in Sections 24 and 25 of the Act, since such finding had necessarily to be held to be a declaration made in exercise of the powers conferred by Section 8A of the Act.

26. In **Gulabi Devidas** (supra), the question which arose in the Letters Patent Appeal was whether the proceedings under Section 8A of the Act were maintainable after an order is passed by the Mamlatdar under Section 29 of the Act rejecting the application for being entered as a mundkar in the register of mundkars. In the brief facts, late Sangtu had filed an application before the Joint Mamlatdar of Canacona for entering his name as a mundkar in the register to be maintained under Section 29 of the Act which came to be dismissed by the Mamlatdar vide the order dated 27/02/1982. He then sought a declaration in respect of the house situated in the property known as Panna but did not prefer an appeal against the order of the Mamlatdar as prescribed under Section 29(8) of the Act and instead filed an application under Section 8A for a declaration of being a mundkar in respect of the house in dispute.

27. In **Gulabi Devidas** (supra), the application was resisted by the respondent landlady on the ground that the application was not maintainable in view of the dismissal of the application filed under Section 29 of the Act. The objection of the jurisdiction of the Mamlatdar to entertain the application found favour and the Mamlatdar vide order dated 10/01/1986 dismissed the application. In the meantime, he expired and his widow and legal representatives carried an appeal under Section 24 of the Act before the Additional Collector which ended in dismissal by the order dated 30/01/1987 and the appellants thereupon preferred a revision application before the Administrative Tribunal which allowed the revision application and remanded the proceedings to the Mamlatdar for disposal on merits.

28. In **Gulabi Devidas** (supra), the Tribunal came to the conclusion that the application under Section 29 of the Act was only for registration of mundkarship and the dismissal of that application cannot prevent the appellants from seeking declaration of mundkarship rights under Section 8A of the Act, both the provisions being different and distinct in scope and

purpose. The order of the Tribunal was challenged by the respondents in the Writ Petition and a learned Single Judge reversed the order of the Tribunal giving rise to the challenge in the Letters Patent Appeal. It was contended on their behalf that a learned Single Judge was in error in concluding that the order passed under Section 29 of the Act operates as a bar for seeking a declaration under Section 8A of the Act. The impact of an inquiry under Section 29 was only for the purpose of entering the name of a person as a mundkar in the register maintained under the Act and Section 30 of the Act provides that the entries made in the register have only presumptive value unlike Section 8A which confers substantial right on the parties to seek a declaration of mundkarship right.

29. In **Gulabi Devidas** (supra), it was contended on behalf of the respondents that it was not permissible to institute proceedings for a declaration under Section 8A of the Act after the appellants failed to seek registration of mundkarship rights under Section 29 and that permitting the appellants to re-agitate the question before the same Authority, which had earlier determined proceedings under Section 29 of the Act, would be contrary to the principles of finality of the orders.

The remedy to the appellants was to file an appeal against the orders passed by the Mamlatdar under Section 29 and not to file a separate proceedings under Section 8A of the Act. The Division Bench held that the scope of inquiry under Section 29 was to make entries in the register which are only presumptive in nature while a declaration under Section 8A concludes the rights of the parties, finally. Besides, Section 8A confers a substantive right to enable the parties to seek a declaration of right of a mundkarship or a negative declaration to the contrary. The Division Bench which was seized of the judgment in **Leao Vitorina D'Souza** (supra) held that the latter observations of a learned Single Judge that the finding recorded by the Mamlatdar under Section 29 has to be considered as a declaration made under Section 8A of the Act was not accurate and required to be overruled. The judgment in **Gulabi Devidas** (supra) as submitted by Shri Nitin N. Sardessai, learned Senior Counsel for the respondents did not overrule the view taken in **Leao Vitorina D'Souza** (supra) that the appeal provided under Sub-section 8 of Section 29 was respecting only to the entries of those other particulars and not in respect of the finding as to whether or not a person is a mundkar and that the remedy against this finding was the

one laid down in Section 24 and 25 of the Act.

30. In **Bank of India** (supra), a two Judge Bench held at para 8 as under:

> "8. As a general principle where two remedies are available under law one of them should not be taken as operating in derogation of the other. A regular suit will not be barred by a summary and a concurrent remedy being also provided therefor, but if a party has elected to pursue one remedy he is bound by it and cannot on his failing therein proceed under another provision."

31. In **Shankar Fatarpenkar** (supra), a learned Single Judge of this Court while deciding the Writ Petition seeking to quash and set aside the order passed by the Mamlatdar, the Additional Collector and the judgment passed by the Administrative Tribunal in Mundkar Revision Application held that the Administrative Tribunal when exercising revisional jurisdiction has to exercise its powers in terms of Section 115 of the CPC. It is no doubt an express command. The provision does not contemplate a situation which enables the Tribunal to act under the CPC. It is not that the powers of revision under the Act are to be exercised in addition to the powers conferred under Section 26. On the contrary, from the express terms of Section 26, it flows that the powers of the

revision conferred on the Tribunal are to be discharged in accordance with the provisions of the Act, namely Section 27, without however overlooking that the reference to the words "legal" and "just" as well as the expression "in accordance with the provisions of this Act" found in the body of sub-section (1) of Section 26 are clearly connected not with the impugned order under challenge in revision but instead with the very order to be passed by the Administrative Tribunal itself while adjudicating the revision on its merits. This position has been highlighted by a Division Bench in **Madhukar V. Khandeparkar** (supra), where the Division Bench of this Court held that no more controversy was possible on the point where the Administrative Tribunal of the State while exercising its power of revision under Section 25 of the Act had to confine itself within the scope of Section 115 of the Code of Civil Procedure.

32. Shri Nitin N. Sardessai, learned Senior Counsel for the respondents in the course of the arguments produced a photocopy of the appeal filed by the respondents challenging the order of the Mamlatdar registering the petitioner as a mundkar under Section 29 of the Act and being filed under

Section 24 of the Act. In that context it was his contention that there was no objection to the appeal at the instance of the petitioner as being filed under Section 24 instead of Section 29(8) at any time. At the same time, there can be no dispute in the submission of Shri A.F. Diniz, learned Advocate for the petitioner that assuming that no objection was raised by the petitioner herein, it could not confer jurisdiction on the Deputy Collector by consent or waiver. Fact of the matter however remains that the appeal was to all intents and purposes tenable and accordingly the matter came to be heard by the Deputy Collector who dismissed the same giving rise to the revision at the instance of the respondents herein before the learned Administrative Tribunal. It is another matter as rightly submitted by Shri A.F. Diniz, learned Advocate for the petitioner that the appeal in any event was tenable before the Deputy Collector be it under Section 24 or Section 29(8) of the Act and therefore there was no much weightage given to the aspect of the appeal being styled as the one under Section 24 nor referred to as such by the learned Deputy Collector in his judgment, subject matter of challenge in revision. Yet, at the same time there is force in the contention of Shri Nitin N. Sardessai, learned Senior

Counsel on behalf of the respondents that the petitioner had not raised any objection to the tenability of the revision filed by her challenging the order passed by the Collector in appeal and therefore to all intents and purposes it had to be assumed that there was a waiver at the instance of the petitioner and no basis in her objection now to the non maintainability of the revision challenging the order of the Collector in appeal.

33. Coming to the merits of the case, the petitioner had submitted her application to the Mamlatdar furnishing her personal details, the name of the Bhatkar, the duration of her residence and the location of the house in question while seeking for the registration of her name as a mundkar in the register in terms of Section 29 of the Act. A plea was canvassed by Shri Nitin N. Sardessai, learned Senior Counsel for the respondents that there were no details of fixed habitation or that she was residing in the said house with the consent of the bhatkar to qualify as a mundkar. Besides, she had also not produced any documents prior to the appointed date and therefore the application was inconsequential. However, looking to the proviso to Section 29 which authorises the Talathi to make inquiry and propose the name

of the mundkar to the Mamlatdar to be recorded in the concerned register, the contention of Shri Nitin N. Sardessai, learned Senior Counsel for the respondents would not stand the test of scrutiny. Moreover, on a bare reading of the application submitted by the petitioner, it was apparent that she was claiming residence in the house in question since 20 years prior to her letter dated 02/04/1984 which would take her case much prior to the appointed date and thereby substantiating her plea as a mundkar prior to the appointed date.

34. The respondents had disputed her claim to the house as a mundkar and had set out a specific plea in defence that she was a servant of the late husband of the respondent who was given temporary accommodation in the outhouse and denying her residence since the last 20 years. The respondents had also otherwise brought on record during her cross-examination that she was allowed to reside in the suit house as her sister-in-law was working for the Bhatkar. Rather, the respondent during her examination had spelt out that the applicant was residing in the property as a tenant paying ₹4/- per month and besides she was engaged as a maid servant on

payment of ₹30/- per month as wages. It is another matter that later she denied the case that the applicant was paying ₹4/- as rent to her. Be that as it may, the learned Mamlatdar on considering the evidence brought on record by the petitioner and the respondents observed that there was no specific defence taken by the respondents in the reply while taking a plea in the evidence that she was employed as a servant and allowed to reside in the part of the suit house on payment of rent and ultimately holding in favour of the petitioner allowing her application for registration as a mundkar of the dwelling house in question by the judgment dated 08/04/2003.

35. The Deputy Collector was seized of the appeal filed by the respondents under Section 24 of the Act challenging the finding of the Mamlatdar registering the petitioner as a mundkar who again on the basis of his findings proceeded to hold that the petitioner was a servant of the late husband of the respondent, that there was no reason to interfere with the findings given by the learned Mamlatdar and concurring with the said findings dismissed the appeal thereby confirming the findings in favour of the petitioner.

36. The Administrative Tribunal while dealing with the revision filed by the respondents had to deal with the concurrent findings of fact by the two Courts below i.e. of the Mamlatdar and the Deputy Collector holding in the petitioner's favour. Thus while dealing with the revision the learned Administrative Tribunal on a consideration of the arguments canvassed on behalf of both the learned Advocates appearing before him apart from the written synopsis placed on record came to hold that there were no pleadings at the instance of the petitioner herein that she had been residing in the house with the consent of the Bhatkar nor were there any pleadings that she had constructed the house with the consent of the Bhatkar or that she was residing lawfully and with fixed habitation. In the contention of Shri A.F. Diniz, learned Advocate for the petitioner, the learned Administrative Tribunal had given erroneous findings while dealing with the revision petition and that he had to restrict to the predicates of Section 115 of the Civil Procedure Code.

37. A reading of the judgment under challenge does not substantiate the contention of Shri A.F. Diniz, learned

Advocate for the petitioner that the learned Tribunal had not dealt with the aspect of jurisdiction of the Court below while rendering its findings against the petitioner. Rather, the learned Tribunal had observed that the learned Mamlatdar had not taken due cognizance of the material placed before him while allowing the application of the petitioner and the learned Deputy Collector in appeal while upholding the decision of the Joint Mamlatdar had not assigned any reasons while confirming the judgment of the Court below. The learned Tribunal observed that the learned Deputy Collector had misconstrued the provisions of the Act in favour of the petitioner and held that his acts were bad in law as he had neither considered the pleadings nor the evidence threadbare and moreover not exercised the jurisdiction vested in him while ultimately allowing the revision application. It therefore cannot be heard on behalf of Shri A.F. Diniz, learned Advocate for the petitioner that the learned Tribunal did not confine itself within the scope of Section 115 of the Civil Procedure Code while dealing with the revision application at the instance of the respondents.

38. A point was canvassed by Shri Nitin N. Sardessai,

learned Senior Counsel for the respondents that reversing the judgment of the Administrative Tribunal would amount to reviving an illegal order. In that context **State of Uttaranchal** (supra) was relied upon by him. **State of Uttaranchal** (supra) had challenged the interim order passed by the High Court of Uttaranchal at Nainital whereby in the Writ Petitions filed by the respondents, the High Court noticing the facts of the case passed an interim order directing the State of Uttaranchal either to proceed under the Land Acquisition Act or vacate the premises within a week. The State challenged the same before the Hon'ble Apex Court on the premise that by the interim order virtually the Writ Petitions had been finally decided. In that context, the Apex Court reiterated that it was well settled that it would not exercise its discretion and quash an order which appears to be illegal, its effect was to revive another illegal order.

39. In **Maharaja Chintamani Saran Nath Shahdeo** (supra), the Hon'ble Apex Court held that whether setting aside an order on the ground of lack of jurisdiction would result in the revival of the invalid order and held that it should not be set aside. However, these judgments would not per se

substantiate the contention of Shri Nitin N. Sardessai, learned Senior Counsel for the respondents inasmuch as it has been held on an appraisal of the impugned order that the learned Administrative Tribunal acted within the confineness of its revisional jurisdiction under Section 115 of the Civil Procedure Code and therefore the operation of these orders would not come into play.

40. In **ITI Ltd.** (supra), before a two Judge Bench of the Apex Court the question which arose for consideration was whether a revision petition under Section 115 of the Civil Procedure Code lies to the High Court as against an order made by a Civil Court in an appeal preferred under Section 37 of the Act. If so, whether on the facts and circumstances of the case, such a remedy by way of revision is an alternate and efficacious remedy or not while dealing with an appeal filed before it against the judgment and order of the Xth Additional City Civil Judge, Bangalore in turn questioning in appeal an interim order made by the Arbitral Tribunal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996. In that context, the Apex Court held at para 11 that :

> "11. It has been held by this Court in more than one case that the jurisdiction of the civil court to

> which a right to decide a lis between the parties has been conferred can only be taken by a statute in specific terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of civil nature, therefore, if at all there has to be an inference the same should be in favour of the jurisdiction of the court rather than the exclusion of such jurisdiction and there being no such exclusion of the Code in specific terms except to the extent stated in Section 37(2) we cannot draw an inference that merely because the Act has not provided the CPC to be applicable, by inference it should be held that the Code is inapplicable."

41. Considering also the merits of the matter there is no basis in the contention of Shri A.F. Diniz, learned Advocate for the petitioner that any interference is called for with the findings rendered by the learned Administrative Tribunal. In view thereof, i pass the following

O R D E R

(i) The Writ Petition is dismissed.

(ii) Rule is discharged.

NUTAN D. SARDESSAI, J.

NH