

Babu Vs. Sheshrao

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Court : Mumbai Aurangabad

Decided On : Apr-10-2015

Judge : Ravindra V. Ghuge

Appeal No. : Second Appeal No. 99 of 2015 with Civil Application No. 3130 of 2015

Appellant : Babu

Respondent : Sheshrao

Judgement :

Per Court:

1. I have heard Shri Jadhav, learned Advocate for the appellant and Shri. Jain, learned Advocate for the sole respondent for quite some time.
2. The appellant is aggrieved by the judgment and decree of the learned Trial Court dated 07-02-2013 delivered in R.C.S.No. 206 of 2006 as well as by the judgment of the Appeal Court dated 29-12-2014 delivered in R.C.A. No. 45 of 2013.
3. The respondent herein is the original plaintiff and the appellant is the original defendant. Suit for removal of encroachment of land admeasuring 30 R was instituted by the plaintiff. The defendant was alleged to have indulged in an act of encroachment to the extent of the said land.

4. It was the case of the plaintiff that he is the owner of land admeasuring 1 H. 05 R in survey No. 63/C. He had got the suit property in a partition in 1984-85. He had applied for measurement on 13-02-2012 on account of the alleged encroachment by the defendant. Measurement was carried out on 28-12-2012 and it was revealed that the defendant had encroached upon 30 R land of the plaintiff from the northern side of land survey No. 63/C. The encroachment made by the defendant was shown in the measurement map. The plaintiff was, therefore, found to be in possession of only 75 R land in survey No. 63/c.

5. The Defendant filed his written statement at Exhibit 42 and an amended written statement at Exhibit 42/1. He denied the ownership of the plaintiff on land admeasuring 1 H 05 R and also denied the allegation of encroachment. He claimed that the grandfather of the defendant Kundlik was the owner and possessor of land admeasuring 25 Acre and 32 Gn. There was partition amongst his sons Gopal and Vithoba. There were further partition between the subsequent owners.

6. The defendant submitted that at the time of the Fragmentation and Consolidation applied by a Scheme to survey No. 63/A, it was divided into two parts 'A' and 'B'. Survey No. 63/B was in possession of the father of the defendant and survey No. 63/A was in possession of the uncle of the defendant.

7. Land of the uncle of the defendant was divided into four parts of which Vithoba got 60 R land. Defendant got the second fragment of the land admeasuring 2 H. 08 R. Father of the plaintiff Ganpati got the third part of the land admeasuring 70 R and the 4th part admeasuring 1.45 R land went to Dhondiba. Hissa Form No. 4 was prepared and the defendant is in possession of the land admeasuring 2 H. 08 R's on the basis of his Hissa Form No. 4. It was the case of the defendant that the plaintiff got a mutation entry carried out in collusion with the revenue officers.

8. T.I.L.R., Nilanga was appointed for measurement of land survey No. 63. An officer of the Department carried out the measurements and has submitted his report.

9. The basic contention of the defendant / appellant herein is that Hissa Form No. 4 is the official document and based on the same, he is the owner and possessor of the land admeasuring 2 H and 8 Gn. It is canvassed by Shri Jadhav, learned Advocate for the appellant that the moment there is reference to Hissa Form No. 4 which is maintained under the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, the Trial Court is divested of its jurisdiction.

10. He has relied upon Section 36-A of the said Act. However, he was unable to point out from the written statement as well as the amended written statement as to whether any specific contention or averment was made by the defendant before the Trial Court that, since an issue falling under the said Act is involved, the Trial Court would have no jurisdiction to conduct the adjudication in R.C.S. No. 206 of 2006. Nevertheless, I have dealt with this issue in the later part of this judgment.

11. Shri Jadhav, has relied on the judgment of this Court in the case of NarayanS. Bite and others Vs. Mahadeo Shripati Pise and others, 2001 (3) Bom.C.R. 262 in support of his contention that when there is any reference to any issue as regards the said Act or any decision taken under the said Act, the Trial Court would have no jurisdiction.

12. I have gone through the judgment in the NarayanS. Bite and others case (supra) and I do not find that it would be of any assistance to the appellant. The issues framed by the Trial Court and as reproduced by this Court in paragraph No. 4 of the Narayanjudgment (supra), are as under:-

- (1) Whether village committee was established at the time of Consolidation Scheme at village Awalavi.
- (2) Whether plaintiffs or defendants were involved in the village committee.
- (3) Whether previous notices were given to the land holder.
- (4) Whether plaintiffs as well as defendants were present at the time of formation of Scheme.
- (5) Whether parties to the suit have consented for formation of Scheme.

(6) Whether record was prepared on the strength of any evidence by Consolidation Officer.

(7) Whether Scheme was confirmed finally."

13. In the light of the above issues that were cast by the Trial Court, this Court came to a conclusion in paragraph No. 5 that the said issues are to be tried and decided exclusively by the competent authority under the Act and not by Civil Court. The conclusions set out in paragraph No. 5 are as under:-

5. Since each of the abovesaid issue, mentioned in the application, can be exclusively tried and decided by the Competent Authority under the Act, it is not possible to sustain the conclusion reached by the Court below that suit could proceed before the Civil Court. In my view each of the issue mentioned in the application below Exh. 28 is relevant for full and complete adjudication of the matter. It is well settled that the Civil Court has no jurisdiction to settle, decide and/or deal with any question which can or under the Act required to be decided by the Authority or the State Government. There is express bar of jurisdiction of the Civil Court in this behalf as provided for in Section 36A of the said Act. It would be apposite to refer to the decision of the Apex Court in *Shevantabai Maruti Kalhatkar v. Ramu Rakhamaji Kalhatkar and Anr*, relied upon by the Petitioners to contend that when any issue would arise for consideration in the suit which can be decided, settled or dealt with by the Competent Authority under the Act, it is not open for the Civil Court to adjudicate the same because of the express bar under Section 36A of the Act.

14. Having gone through the impugned judgments of the Trial Court and the Appeal Court, it is evident that the issue for the adjudication of the Courts below was as regards encroachment and not as regards whether the Hissa Form No. 4 under the said Act was properly prepared or arrived at or any other issue related thereto. As such, I am unable to accept the contention of Shri Jadhav that the issue as regards applicability of the said Act would, therefore, be a substantial question of law involved in this matter.

15. The only issue before the Trial Court was as regards encroachment. The defendant examined the Talathi who deposed before the Trial Court that the original register in which there was an alleged correction as regards area of land, does not bear the signature of any person as well as any endorsement on the basis of any specific order of a competent authority.

16. The T.I.L.R. who has measured the land has submitted his report as well as the measurement details. The appellant attempted to nullify the said report by contending that the highest officer from the concerned Department had not carried out the measurement. The report indicated that an officer from the Department under the orders of the Court had carried out the measurement. All instruments used for the measurement were proved by evidence, to have been actually used. The objections of the appellant as regards measurement made by the T.I.L.R. were, therefore, negated.

17. So far as Hissa Form No. 4 is concerned, the Trial Court has relied upon the judgment of the Division Bench of this Court in the matter of GovindraoShankarrao Reddy Vs. Rukhminibai w/o Vithal Reddy and others, 2009 (2) Mh.L.J. 583 which lays down the law that Hissa form No. 4 cannot be said to be a document creating or conferring the title upon the person whose name is mentioned as an Occupant.

18. The relevant observations in paragraph Nos. 18, 19, 20 and 21 are reproduced as follows:-

18. System of imposition and recovery of land revenue had been evolving even after the joint report system of occupancy. Such evolution forms large part of the correspondence between the administrators and the then government. Capt. Wingate's letter and letters of the then Government, have recorded part of such evolution of term "occupant". Apart from the administrator i.e. officers in the survey and settlement department and the then Government, Courts have also played their role. The courts enforced partitions without record to the Joint Rules. It was because Joint Rules were not the law and, therefore, had no binding effect whatsoever upon the decisions of the Courts prevailing, in the era. The officers working under the survey and settlement department, thus, were compelled by law to effect, to carry out the partitions, orders passed by the Courts, even though the

Collector was not allowed by the Joint Rules to recognise such partitions and sub divisions of the agricultural lands. In a given case, on account of partition, for example, between three sons of the deceased cultivator, the revenue officer was compelled to take them in possession of their several plots. As per the Joint Rules holding the field, in fact, Collector was to enter the name of the eldest son (Rule of primogeniture which was prevailing at the relevant time) only and accordingly eldest son was technically recorded as "occupant" and his name was recorded in the then Government records.

The history of occupancy further reveals that such diversions had established at that time, two kinds of title to agricultural land, one founded upon possession, recognition by the Courts, the second upon "registration" recognised by the revenue authorities. History of occupancy further shows for about sixty years, it was a struggle first to reconcile and second to combine the two into one sensible and logical system. Thereafter, the first Survey and Settlement Act in the year 1865 came to be passed. This Act has thus, for the first time, had given legislative sanction to the survey/ settlement operations and measures. This first Act of 1865 superseded the Joint Rules. Changes thought necessary were also incorporated in the provisions of the Act. Considerable changes relating to "occupancy" were made. Their, in the Act of 1865, section II (J) was incorporated, providing that the person whose name is entered authorisedly in the survey papers, for other public accounts, is responsible to Government for payment of the assessment due upon any field or recognised share of a field. Concept of sole holder was not favoured and Rule 27 had recognised co-ownership of the occupancy. Principles of liability of payment of land revenue, however, was saddled upon the occupant proper regarding whole survey number. The joint occupant merely was conferred with right to have his/ their names entered and his/ their shares shown fractional parts of the rupee i.e. in terms of Annas and Pai; for their share of the assessment to the occupant. Fact of sub divisions was recognised by the Act of 1865, however, said Act revised the sub division of original survey numbers. By the Act no.IV of 1868 permission was granted to survey officers to sub divide by survey number or share, subject to the limitations of area imposed. The law of occupancy stand revised by the Land Revenue Code (Act V of 1879) (hereinafter referred to as the Act of 1879, for short). This Act of 1879 recognised two classes of rights under two

heads of "occupancy" and "registered occupancy", Word "occupant" came to be defined by section 3(16) of Act of 1879 meaning thereby as holder of unalienated land, or where there are more holders then one, the holder having the highest right in respect of any such land, or where such highest right vests equally in more holders than one, any one of such holders. The other category i.e. registered occupancy was defined under section 3(17) as a sole occupant or the eldest or principal of several joint occupants whose name is authorisedly entered in the Government records as holding unalienated land whether in person or by his co-occupant, tenant, agent, servant or other legal representatives. This double system of occupancy i.e. occupants under section 3(16) and registered occupant under section 3(17) of Act V of 1879 lasted for about 25 years. The confusion all along in these two terms that "occupant" and "registered occupant" was faced by the agrarians. The then Government faced the serious defects inherent in the survey settlement system. Famine Commission expressed an opinion for preparation of "record of right" for property administration. For some time "Khatedar system" was also resorted to. For manifold reasons such Khatedar system was found unuseful and was actually abolished. Thus, "Famine Commission", in the year 1901, was of the opinion of preparation of record of rights. Study was carried out by two officers and report was submitted to the then Government. Outcome of the report was, an "Act to provide for the preparation and maintenance of record of rights in the lands of the Bombay Presidency". Record of rights, thus, was brought into operation by Act No.V of 1913. Changes proposed were considered and embodied in the Land Revenue Code Act No.IV of 1913. Under section 6(h) "occupant" was defined. Section 6(c) had provided sub division of a number. Authorisation was given under section 117-A for splitting up the survey number into such sub divisions. Thus, foundation was laid of whole new system of record of rights Act V of 1913 which was repealed and amalgamated with the Land Revenue Code.

19. It is also necessary to refer to few enactments since I am dealing with the question of agricultural land from Latur district of the State of Maharashtra, which was earlier Part of Nizam's State of Hyderabad. The Hyderabad Land Revenue Act (No.VIII of 1317 F. (1927 A.D.)) was applicable to the present Marathwada region of the State of Maharashtra. The Bombay Land Revenue Code, 1879 is a

repealed enactment i.e. repeal of Bombay V of 1913. Application of the Bombay Land Revenue Code, 1879 is given under sub section (2) of section 1. It is provided that it extends to the pre-reorganization State of Bombay, excluding the transferred territories. In the foregoing paragraphs of this judgment, I have referred to few definitions and important is the definition of term "occupant" under section 3(16) of the Bombay Land Revenue Code, 1879, It has been provided that the survey officer had occasion of making or revising a settlement of land revenue, to prepare a register to be called "the Settlement Register" showing the area and assessment of each survey number with any other particulars that may be prescribed and other records in accordance with such orders as may from time to time be made on this behalf by the State Government. Section 135 (d) of the Bombay Land Revenue Code, 1879 is important for our purpose. It provides register of mutations and register of disputed cases. A duty is cast upon the village Accountant (the then Kulkarni) to maintain such register of mutations and register of disputed cases. Under sub section (6) of section 135(d) it has been provided that the entries in the register of mutations shall be tested and if found correct, or after correction, as the case may be, shall be certified by a revenue officer of the rank not lower than the Mamlatdars First Karkoon (Subsequently recognised as Taluka Awwal Karkoon, in the State of Maharashtra). Presumption of correctness of the entries in the record of rights and register of mutation is laid down under section 135(j) of Bombay Land Revenue Code, 1879 which reads an entry in the record of rights, and the certified entry in the register of mutations shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted thereof. One more enactment i.e. the Hyderabad Record of Rights in Land Regulation 1358 Fasli (1968 A.D.) needs to be referred to. This regulation is after the promulgation of Maharashtra Land Revenue Code, 1966. This Regulation of 1968, has been made enforceable to the area of whole of the Hyderabad State which is laid down under section 1(2). Section 1(3) is also relevant from the view point of the date on which this Regulation of 1968 can be considered to be in force. In this regulation, preparation and maintenance of record of rights is provided under section 4. Section 6, under this regulation, is regarding register of mutations and register of disputed cases. Presumption of correctness of entries in record of rights and register of mutations is made available under section 13 of this

Regulation of 1968. There are two more sections i.e. section 17 regarding modification of law in consistent with this Regulation and section 19 repealed and savings clause.

20. Thus, terms "occupant", "survey number", "restricted or new tenure", "old tenure" have their genesis in the Survey and Settlement Manual and various enactments referred to in the foregoing paragraphs of this judgment. The preparation and maintenance of record of rights, has been evolved in due course of time. The presumption attached to said record of rights is similarly worded in all the relevant sections of the earlier enactments. By and large, it can be said that the Bombay Survey and Settlement Manual and various enactments, which are referred to herein above, were brought in force for the fiscal purpose by the Government holding the field of governance. All along these enactments were brought in force for the purpose of imposition and recovery of the land revenue by the then Government. While imposition and recovery of the land revenue, the then Government felt the necessity of preparation of record of rights regarding, agricultural land. Recording the names of the occupant, recording the names of the cultivators, tenants etc. was all for the prime object of imposition and recovery of the land revenue by the Government. In this view of the matter, presumption has been conferred upon the mutation entries, entry taken in the record of rights by these enactments. Such presumption always is rebuttable presumption. Apart from these enactments, presumption under section 114 of the Indian Evidence Act, 1872 regarding entries in the record of rights is also available; in favour of such entries.

21. In the case on hand, learned counsel for the Appellant has placed reliance on two documents i.e. Exhibit-5 Hissa Form No.4, and Tonch Map Exhibit-85. Extensive survey of Survey and Settlement Manual, various enactments pertaining to agricultural lands have been considered by me. In my view, Hissa form No.4 (origination is from Gunakar Book) cannot be said to be a document creating or conferring the title over the person whose name is mentioned as occupant in this Hissa form no.4. This Hissa Form No.4 also cannot be equated with a document creating title in favour of the person whose name is mentioned in the column No.11 of Hissa form No.4. In the case on hand, Govind Shankar is the name

mentioned i.e. of the plaintiff. In other words, this Hissa Form No.4, in the case on hand, cannot be said to be a piece of evidence or document creating or conferring title over the plaintiff regarding land Survey No.23(1), admeasuring 00 Hectare 32 Ares. It is clarified that Pot Hissa No.1 or sub division No.1 of land Survey No.23, admeasuring 00 Hectare 32 Acres, cannot be said to be owned by the plaintiff Govind because of this document Hissa Form No.4 Exhibit-5.

19. The Trial Court has specifically observed that the defendant did not submit any document to establish that the entries regarding his ownership in the revenue record were made on the basis of Hissa Form No. 4. It is further observed that the defendant could not explain the sudden expansion of the land in his possession and the sudden decrease in the land which was held by the plaintiff. The T.I.L.R. report and documents on record indicated encroachment by the defendant to the extent of 30 R land.

20. The Appeal Court has considered the record and proceedings before the Trial Court and has once again gone into the rival contentions of the parties. On the basis of the evidence, the Appeal Court also concluded that the increased area in possession of the defendant originally from 1 H 30 R to 2 H 08 R was neither proved, nor established by the defendant. The Appeal Court also went into the measurement of the suit properties which was proved before the Trial Court and it noticed that the portion of 30 R land shown in orange colour was proved to be an encroachment and the defendant could not establish that the said portion belonged to him.

21. In the light of the above, I do not find that any substantial question of law is involved in this matter. The Second Appeal is devoid of merit and is, therefore, dismissed. Pending Civil Application does not survive and the same is also disposed off.

22. Learned Advocate for the appellant has prayed for staying order. Shri Jain, learned Advocate opposes the said request on the ground that concurrent findings have been arrived at and the appellant was not under any protection for all these years.

23. In the light of the same and in view of the concurrent findings and my conclusions as above, the request made by the appellant is rejected.

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