

(2013) 01 BOM CK 0154
In the Bombay High Court
Case No : Reference Case No. 1 of 2011

Gadbad Sonne

APPELLANT

Vs

Ramrao Sonne

RESPONDENT

Date of Decision : 17-01-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 113, 9
Forest (Conservation) Act, 1980 — Section 1(3), 2, 2(i)
National Greens Tribunal Act, 2010 — Section 14, 2(1)(c), 29

Citation : (2013) 2 ABR 339 : (2013) 2 ALLMR 745 : (2013) 2 BomCR 75 :
(2013) 3 EFLT 531 : (2013) 3 MhLj 426

Hon'ble Judges : U.D. Salvi, J;R.M. Borde, J

Bench : Division Bench

Advocate : R.V. Gore, for the Appellant; S.K. Rahane, Advocate and Shri S.K. Tambe, A.G.P. for State, for the Respondent

Judgement

U.D. Salvi, J.—This is a reference made by Jt. Civil Judge, Junior Division, Kannad u/s 113 of the Code of Civil Procedure, for seeking answers to the following questions:

(A) Whether Civil Court can regularise encroachment over forest land by declaration of ownership in contravention and avoiding bar created by Section 2 of Forest (Conservation) Act, 1980 ?

(B) Whether Government Resolution dated 12.9.1979 is still good to regularise encroachment over forest land in contravention of Section 2 of Forest (Conservation) Act, 1980 ?

(C) Whether Civil Suit is maintainable to protect the encroachment over forest land in contravention of Section 2 of Forest (Conservation) Act, 1980 ?

Genesis of this reference lies in Regular Civil Suit No. 153/2007 instituted by one Gadbad Bhavdu Sonne against his brother Ramrao Bhavdu Sonne in the Court of the Civil Judge, Junior Division at Kannad for the following relief:

(1) Decree for perpetual injunction permanently restraining the defendant Ramrao from interfering in possession of the plaintiff Gadbad to the extent of 2 Hectors of landed property in the portion on the northern side of Gat No. 162 (Old Survey No. 38), situate at Mehunrampurwadi, Taluka Kannad, District Aurangabad.

2. According to the plaintiff therein, 10 acres of land from the said land totally admeasuring 1400 acres, a forest land belonging to the State/Government, was encroached by father of the rival parties to the suit; and the encroachments thus made were regularised by the Government and the said land was being cultivated by his father till his demise in 1982 and thereafter the plaintiff and the defendant divided the said encroached portion of land in two equal parts, northern and southern, the northern portion falling to the share of the plaintiff and the southern to the share of the defendant. Since then, the plaintiff stated, the said land was being separately cultivated by the plaintiff and the defendant.

3. The plaintiff further stated that the defendant had filed a suit being Regular Civil Suit No. 372/1998 in the Court of Civil Judge, Senior Division, Aurangabad against the State and District Forest Officer for declaration of ownership of the portion of the said landed property admeasuring 5 acres (2 Hectors), which fell to his share, and injunction restraining the defendants therein the State and District Forest Officer from causing obstruction to the possession of the plaintiff over the said land. The said suit was decreed against the defendants therein following the judgment dated 17.12.1998, passed in the said suit by 2nd Jt. Civil Judge, Senior Division, Aurangabad.

4. The defendant herein has contested the said suit with the written statement dated 1.11.2007. He specifically denied that 2 Hectors of northern portion of the said landed property was in possession of the plaintiff since many years and their father belonged to backward caste. The defendant specifically contended that by virtue of the decree in Regular Civil Suit No. 372/1998 he has become owner of the 5 acres of the said landed property and the plaintiff was taking disadvantage of the boundaries of the said landed property indicated in the said suit.

5. With reference to entries in the revenue record, the learned Civil Judge observed that out of 2 Hectors and 10 areas of forest land encroached upon by one Kishan, Dhana and father of the parties to the present suit, the father of the parties Bhavdu was having only 5 areas of land. Learned Civil Judge further observed that the defendant succeeded in recording his name in the record of rights pertaining to 2 hectors of the land on the basis of the decree for declaration of ownership of land admeasuring 2 hectors from land Gat No. 162 passed in Regular Civil Suit No. 372/1998. In the opinion of the learned Civil Judge the parties to the suit are playing tactics to grab forest land by getting regularised their possession over the land admeasuring 2 hectors in place of 5 areas land held by their father. Learned Civil Judge further opined that the decree in Regular Civil Suit No. 372/1998 is in contravention of Section 2 of Forest (Conservation) Act, 1980; and the forest land which has not been

regularised in favour of the father of the parties to the said suit, cannot be held regularised on the basis of the decree passed in favour of the defendant.

6. It appears that the learned Civil Judge has misconstrued the phrases "State Government or other authority" used in Section 2 of the Forest (Conservation) Act, 1980 as well as "regularisation of encroachment" used in the Government Resolutions.

7. In the first place, it is to be made clear that the term "Court" though defined nowhere in law, means an organised body to which sovereign powers to do justice are transferred by the State. Doing justice means to give what is due to one to whom it is due and, therefore, in the process of doing justice the function of the Civil Court is to determine rights of the parties litigating before it on application of law to the facts in a civil dispute and make declarations of the rights so determined and/or to pass injunctions, either mandatory or prohibitory, for enforcement of those rights. Thus, the Court is an arbiter of the cause and not a player in it.

8. On this backdrop, it is necessary to construe the provisions of the Forest (Conservation) Act, 1980. This Act was enacted to provide for the conservation of forests and for matters connected therewith or ancillary or incidental thereto. Essentially, conservation of forests is executive function. Section 2 of this Act provides for restrictions on de-reservation of forests or use of forest land for non forest purpose and thus, regulates the executive function of the State in that regard. Section 2 of the Forest (Conservation) Act, 1980 reads as under:

2. Restriction on the de-reservation of forests or use of forest land for non-forest purpose.--Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing,--

(i) that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;

(ii) that any forest-land or any portion thereof may be used for any non-forest purpose;

(iii) that any forest-land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation not owned, managed or controlled by Government;

(iv) that any forest-land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reforestation.

Explanation:- For the purposes of this section "non forest purpose" means the breaking up or clearing of any forest land or portion thereof for

(a) the cultivation of tea, coffee, spices, rubber, palms, oil bearing plants,

horticultural crops or medicinal plants;

(b) any purpose other than reforestation,

but does not include any work relating or ancillary to conservation, development and management of forests and wild life, namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trench marks, boundary marks, pipelines or other like purposes.

9. Grievance Redressal mechanism in respect of a grievance occasioned as a result of directions under the foregoing provisions of law was provided with incorporation of Section 2-A in the said Act. If the provisions are read together, it is not difficult to perceive that the term "other authority" used in a phrase "State Government" or "other authority" means and includes instrumentalities or agencies of State Government and would not mean and include the Courts which has judicial functions to perform.

10. Secondly, it is also necessary to understand what is regularisation. Webster defines the term "regular" to mean confirmable to a rule or methodical. Thus, making anything confirmable to the rules by condoning any procedural irregularity can be understood as an act of regularisation. This is certainly not a job of Civil Courts. Government Resolutions in that regard are the executive instructions to the State officials to act in a particular way as regards the subject matter of such Government Resolutions.

11. Having understood the meaning of the aforesaid terms, it can be seen that the first question-Question-A regarding the competency of the Civil Court to regularise the encroachments over forest land in light of the provisions of the said Act would not arise as it is not the job of the Civil Court to regularise an encroachment but to adjudicate the rights of the parties making claim to any land save and except the limitations on its jurisdiction either express or implied.

12. The Forest (Conservation) Act, 1980 came into force on 25th day of October 1980 by virtue of Section 1(3) of the said Act. With on-set of this law, the restrictions as contemplated in Section 2 therein on passing of any directions by the State Government, may be by virtue of Government Resolutions dated 12.9.1979 have been clamped on the hands of the State Government or other authorities acting as instruments or agencies of the State Government. Obviously, therefore, Government Resolution dated 12.9.1979 is not good to regularise encroachment over forest land in contravention of Section 2 of the Forest (Conservation) Act, 1980.

13. Referring to the judgment delivered by the Hon"ble Supreme Court in the case of [T.N. Godavarman Thirumulkpad Vs. Union of India and others,], learned Advocate Mr. Gore for the plaintiff submitted that the provisions of the Forest (Conservation) Act, 1980 are applicable to all forests so understood irrespective of the ownership or classification thereof. He further submitted that,

if the Government Resolution dated 19.9.1979 had been issued with the prior approval of the Central Government to regularise the encroachment made prior to 25.10.1980-the date on which the said Act came into force, then the said Government Resolution is still good to regularise encroachment over forest land. In this context, he invited our attention to the judgment delivered by the Hon"ble Supreme Court in the case of [Nature Lovers Movement Vs. State of Kerala and Others,]. Adverting to Section 2 of the Forest (Conservation) Act, 1980, he further submitted that there is no express or implied exclusion of the Civil Court by virtue of the said provision and thus, the Civil Suit instituted for perpetual injunction and not for the declaration of ownership would be maintainable. Judgment delivered in Dhulabhai's case [Dhulabhai and Others Vs. The State of Madhya Pradesh and Another,] by the Hon"ble Apex Court is pressed in service to lend support to this submission.

14. In T.N. Godavarman's case (supra), while clarifying the scope of Forest (Conservation) Act, 1980, the Hon"ble Supreme Court interpreted the word "forest" in following terms:

4. The Forest Conservation Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance; and therefore, the provisions made therein for the conservation of forests and for matters connected therewith, must apply to all forests irrespective of the nature of ownership or classification thereof. The word "forest" must be understood according to its dictionary meaning. This description covers all statutory recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2 (i) of the Forest Conservation Act. The term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof.

15. Reading of Section 2 of the Forest (Conservation) Act, 1980 amply makes it clear that the restrictions have been imposed on:- (1) dereservation of forest, (2) use of forest land for non-forest purpose, (3) creation of interest or other proprietary rights of any private individual authority, Corporation, agency or such other organisation not owned, managed or controlled by Government in any forest land, and (4) clearing of trees which have grown naturally in any forest land even for the purpose of using it for reforestation. Explanation appended to this provision regarding the term "non-forest purpose" further widens the scope of this non-forest purpose by bringing into its sweep breaking or clearing of any forest land or portion thereof for cultivation of tea, coffee, spices, rubber, palms, oil bearing plants, horticultural crops or medicinal plants and any purpose other than reforestation save and except any work relating or ancillary to conservation,

development and management of forests and wild life. It is, therefore, not difficult to find that, an act of encroachment on a forest land by any private individual or any other organisation not owned, managed or controlled by Government amounts to invasion of the forest land for its use for any non-forest purpose and in any event its regularisation by the State amounts to virtual assignment of the forest land in favour of the encroacher-a private person.

16. The Hon"ble Apex Court, in Nature Lovers Movement"s" case (supra), on advertng to the National Forest Policy, 1988 and the provisions of Forest (Conservation) Act, 1980 ruled as follows in the appeal preferred against the judgment of the High Court of Kerala in the matter of assignment of forest land to unauthorised occupants/encroachers after seeking approval from the Central Government:

27. In the result, the appeal is disposed of in the following terms:

(1) The policy decision taken by the Government of Kerala to assign 28588.159 hectares of forest land to unauthorized occupants/encroachers after seeking approval from the Central Government does not suffer from any legal infirmity and the High Court rightly declined to interfere with the said decision.

(2) After the enforcement of the 1980 Act, neither the State Government nor any other authority can make an order or issue direction for de-reservation of reserved forest or any portion thereof or permit use of any forest land or any portion thereof for any non-forest purpose or assign any forest land or any portion thereof by way of lease or otherwise to any private person or to any authority, corporation, agency or organization not owned, managed or controlled by the Government except after obtaining prior approval of the Central Government.

(3) Conclusion No. D recorded by the High Court in para 103 of the impugned judgment is legally unsustainable and is set aside.

(4) As and when the State Government decides to assign 10,000 hectares of forest land to unauthorised occupants/encroachers, it shall do so only after obtaining prior approval of the Central Government and the latter shall take appropriate decision keeping in view the object of the 1980 Act and the guidelines framed for regularisation of encroachments on forest land.

17. None of the parties hereto have pointed out that there is approval from the Central Government to the Government Resolution dated 12.9.1979 in the matter of regularisation of the encroachments over forest land. In the result, Question-B needs to be answered negatively. However, it needs to be clarified that, an action under Government Resolution dated 12.9.1979 to regularize encroachment over forest land if undertaken prior to the commencement of the Forest (Conservation) Act, 1980, is saved from the rigour of the Act, it being prospective in operation.

18. Questions posed mainly arise out of encroachment over forest land. As

discussed above, regulation of encroachment over forest land is an activity which is restricted by provisions of Forest (Conservation) Act, 1980. It can also be seen that, forest land as widely understood is an area covered with trees, saplings, plants, micro organisms and used as habitat by living creatures mostly other than human beings. Any encroachment, therefore, presupposes invasion by any private individual/person or any organisation of individuals of the forest land and consequent interference in the environment including natural habitat of flora and fauna.

19. Section 2(1)(c) of the National Green Tribunal Act, 2010 defines "environment" as under:

(c) "Environment" includes water, air and land and the inter-relationship, which exists among and between water, air and land and human beings, other living creatures, plants, microorganism and property.

20. Thus, any encroachment over forest land brings into its wake some questions relating to environment envisaged under the foregoing provision.

21. Answer to Question-C lies in the provisions of the Code of Civil Procedure, 1908 read in conjunction with provisions of National Green Tribunal Act, 2010. Ordinarily, Civil Courts will have jurisdiction to entertain, hear and dispose off the Civil disputes. Section 9 of the Civil Procedure Code, 1908 deals with the fundamental issue of jurisdiction in following terms:

S.9. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

Explanation-I. A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Explanation-II. For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.

22. The provisions of Forest (Conservation) Act, 1980 particularly Section 2 thereof give rise to new set of rights and obligations vis-a-vis forest state and private individual/s or the organisations not pre-existing in common law. Generally speaking, wherever a right, not pre-existing in common law, is created by a Statute and that Statute itself provided a machinery for enforcement of the right, both the right and remedy having been created *uno flatu* and a finality is intended to the result of the statutory proceedings, then even in the absence of an exclusionary provision, the Civil Court's jurisdiction is impliedly barred.

23. Section 14 of the National Green Tribunal Act, 2010 reads as under:

14. (1) The Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal

right relating to environment), is involved and such question arises out of the implementation of the enactments specified in Schedule I.

(2) The Tribunal shall hear the disputes arising from the questions referred to in sub-section (1) and settle such disputes and pass order thereon.

(3) No application for adjudication of dispute under this section shall be entertained by the Tribunal unless it is made within a period of six months from the date on which the cause of action for such dispute first arose.

Provided that the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed within a further period not exceeding sixty days.

Schedule I of this Act includes the Forest (Conservation) Act, 1980.

24. With coming into force of this provision, it can be seen that, the Civil Court's jurisdiction over the Civil cases/suits involving substantial questions relating to environment (including enforcement of any legal right relating to environment) and arising out of the implementation of enactments specified in Schedule I to the National Green Tribunal Act, 2010 is taken over by the Tribunal by virtue of Section 14 of the said Act.

25. Moreover, a bar to the jurisdiction of the Civil Courts in respect of the claim, which may be adjudicated upon by the Tribunal is expressed in Section 29 of the National Green Tribunal Act, 2010 in the following words:-

29. (1) With effect from the date of establishment of the Tribunal under this Act, no civil Court shall have jurisdiction to entertain any appeal in respect of any matter, which the Tribunal is empowered to determine under its appellate jurisdiction.

(2) No civil Court shall have jurisdiction to settle dispute or entertain any question relating to any claim for granting any relief for compensation or restitution of property damaged or environment damaged which may be adjudicated upon by the Tribunal, and no injunction in respect of any action taken or to be taken by or before the Tribunal in respect of the settlement of such dispute or any such claim for granting any relief or compensation or restitution of property damaged or environment damaged shall be granted by the civil Court.

26. In light of these provisions of law, a civil case/suit involving substantial question relating to environment (including enforcement of any legal right relating to environment) and which arises out of the implementation of the Forest (Conservation) Act, 1980, is not maintainable before the Civil Court. However, the Civil cases/suits not involving any substantial question relating to environment and not arising out of the implementation of enactments specified in Schedule I to the National Green Tribunal Act, 2010 i.e. The Forest (Conservation) Act, 1980 shall continue to be entertained by the Civil Court as

before. Question-C raised in the present reference is answered accordingly. With these observations, the present reference stands disposed off with no order as to costs.