

(1961) 03 BOM CK 0018
In the Bombay High Court
Case No : Second Appeal No. 262 of 1959

Haribax Chotalal	Vs	APPELLANT
Punaji Januji Thombe		RESPONDENT

Date of Decision : 28-03-1961

Acts Referred:

Berar Land Revenue Code, 1928 — Section 141(c), 141(d), 141(f)
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (1961) 63 BOMLR 922

Hon'ble Judges : Abhyankar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Abhyankar, J.—This appeal is filed by the unsuccessful plaintiff Haribax whose suit for possession of field survey No. 13/2, area 3 acres 30 gunthas, revenue Rs. 16-2-0, situate at mouza Songir, in Belapur taluq of Akola district, was dismissed by the First Additional Judge to First Civil Judge, Class It, Akola, in Civil Suit No. 428-A of 1951 on July 25, 1952. His appeal in the Court of the First Additional District Judge, Akola, which was Civil Appeal No. 40-A of 1958, was also dismissed on January 31, 1959.

2. The plaintiff claims possession on the ground that this field was put to sale by a revenue Court on October 18, 1948, in Revenue Case No. 7 XXXI 1946-47 and that he was declared the highest purchaser for Rs. 150. The sale was confirmed on November 25, 1948, and he has been given a sale certificate u/s 16.1. of the Berar Land Revenue Code declaring him to be the purchaser of this property. The sale-certificate is dated February 18, 1949, and is filed as exh. P-1 in the lower Court. The plaintiff, therefore, issued notice to defendant No. 1 Punaji, who was in possession of the field under a lease from defendant No. 2, Not having obtained possession he issued another notice on December 3, 1949, As possession was not given the plaintiff filed the present suit on November 22, 1950. The plaintiff claims possession as he has become owner of the property by

virtue of the auction-sale. The plaintiff has also claimed mesne profits for the years 1948-49 to 1950-51. Along with the plaint the plaintiff had filed a certified copy of an entry in the record of rights for the year 1946-47. This copy seems to have been obtained on September 9, 1946. This copy shows that Gajadhar and three others were recorded as occupants of survey No. 13/2, assessed to land revenue of Rs. 16-2-0 having obtained possession on foot of a decree in Civil Suit No. 297 of 1928 on April 7, 1929, in respect of one half interest. In the column for acres, no figure is given and is kept blank.

3. Defendants resisted the suit on the ground that there was no such field as survey No. 13/2, 3 acres 30 gunthas, separately assessed to land revenue of Rs. 16-2-0 at all. Defendants' case is that Gajadhar Rudmal, who was the employer of the present plaintiff Haribax, in fact owned only survey No. 13/1, 7 acres 24 gunthas, and assessed to land revenue of Rs. 10-12-0. The rest of the land in survey No. 13 belonged to and was in possession of defendant No. 2 as an occupant. It was stated that Gajadhar Rudmal is one of the proprietors of the shop Baxiram Rudmal at Akola which owned survey No. 13/1 alone and no other land out of survey No. 13. The rest of the field was owned by defendant No. 2. Thus Gajadhar had no right, title or interest over survey No. 13/2. In fact it was stated that survey No. 13/2 had an area of 8 acres 8 gunthas and not 3 acres 30 gunthas. Defendant No. 2 had paid the land revenue in respect of the area in survey No. 13 which was in their possession and that the land revenue was not outstanding in respect of 3 acres 30 gunthas of survey No. 13/2 as alleged. It was further stated that Gajadhar deliberately withheld land revenue in respect of survey No. 13/1 and brought to sale the land, i.e. 3 acres 30 gunthas of survey No. 13/2 for realisation of arrears of land-revenue which was due in respect of survey No. 13/1. The land was sold and purchased by plaintiff Haribax who was really benamidar purchaser for Baxiram Rudmal Shop. Thus fraud was practised on revenue authorities in getting 3 acres and 30 gunthas of survey No. 13/2 sold for the alleged arrears of land revenue and having it purchased in the name of the plaintiff who was really acting for Gajadhar Rudmal. Defendant No. 2 had also pleaded that no notice was issued to defendant No. 2 in respect of any alleged arrears due on account of survey No. 13/2, and the property was put to sale on account of a fraudulent act on the part of Gajadhar and plaintiff and that they should not be allowed to take advantage of their own fraud.

4. The first Court decided this suit against the plaintiff by its judgment dated July 25, 1952. Against this judgment and decree the plaintiff filed an appeal. That appeal was allowed on June 24, 1954, by the appellate Court. At the appellate stage the appellate Court had admitted to record certain copy of an entry in the record of rights at the instance of the appellant. That certified copy showed that survey No. 13/2 had an area of 3 acres 30 gunthas and revenue of Rs. 16-2-0 and was recorded in the name of plaintiff Haribax. In column 10 the source of title was said to be the revenue sale. Against this judgment and decree, the respondents preferred Second Appeal No. 583 of 1954 which was decided by this Court on December 17, 1957. It was held that the lower appellate Court should

not have admitted fresh evidence without giving any opportunity to the opposite side to counteract the evidence thus admitted at that stage. The judgment and decree of the lower appellate Court was, therefore, set aside, and the appeal was remanded to that Court for being dealt with according to law.

5. After remand the respondents were allowed to file documents in the shape of record of rights entries, copy of decree in Civil Suit No. 297 of 1928, a copy of tabayadi in that suit and a mortgage-deed. Evidence was also recorded by the appellate Court in the light of the documents admitted in that Court. On a consideration of all the materials on record of the trial Court as well as the appellate Court, the appellate Court came to the conclusion that it was not established that there was any such field survey No. 13/2, with area 3 acres 30 gunthas and land revenue of Rs. 16-2-0 in existence. It was also held that no such field was proved to be in arrears of land revenue. On these findings it was also held that plaintiff did not get any title under the revenue sale held on October 18, 1948, and thus the plaintiff was not entitled to possession of the above named field. As regards the fraud alleged by defendant No. 2 the learned Judge observed as follows in para. 18 of his judgment:

The defendant No. 2 had alleged in paragraph 8 of his written-statement that Gajadhar Rudmal deliberately withheld the payment of land revenue and brought to sale the land which he never owned and of which he was never in possession. He has also alleged fraud on the part of the plaintiff. The learned Judge of the lower Court has rightly disbelieved these allegations of fraud. Though fraud as such has not been positively established, the matter is not entirely free from doubt. The plaintiff Haribax is in service of Baxiram Rudmal shop and he looks after the field property of the said shop. [Please see the evidence of Gulabrao (PW-1) and Dawlat (DW-2)], He could certainly be presumed to know the land which was in actual possession of Baxiram Rudmal. His conduct in purchasing the land in dispute in arrears of land revenue alleged to have been due from his own master, does not appear to be bona fide. He has also not entered the witness box to clarify his own position. Under these circumstances, he cannot even be considered to be a bona fide purchaser for value.

On these findings the learned Judge confirmed the judgment, and decree of the Court below.

6. The appellant plaintiff filed an application on or about June 24. 1959, under Order XLI, Rule 27, Civil Procedure Code, for admission of certain documents in that appeal. These documents are (1) a certified copy of list of property attached in revenue case No. 7 XXXI 1946-47, (2) the auction list in that revenue case and (3) report of the Naib Tahsildar with order confirming the sale in the said revenue case. I have admitted these documents to record as they are certified copies of public documents and there having been no objection on the part of the opponents for admission of these documents.

7. In support of this appeal Mr. Padhye the learned Counsel for the appellant has

contended that the plaintiff was entitled to a decree for possession as title of the plaintiff to the property was fully established by production of the sale-certificate granted at the revenue sale. It, is urged that the very fact that the plaintiff is declared a purchaser of the property at the revenue sale which was held for realisation of arrears of land revenue or any other arrears recoverable as land revenue ipso facto established that the field survey No. 13/2 was liable to be sold at the auction and further that there must have been arrears which were recoverable by sale of the holding. According to the appellant, it was not permissible for defendant No. 2 to challenge the sale except to the extent and" in the manner provided in the Berar Land Revenue Code. The sale having been field for realisation of arrears of land revenue or arrears recoverable as land revenue, it should have been held that the plaintiff was entitled to a decree for possession. According to the plaintiff, the documents on record showed that there was in fact survey No. 13/2 with area 3 acres 30 gunthas and assessed to land revenue of Rs. 16-2-0. In support of this contention reference is made to the record of rights parcho, filed with the plaint which showed that Gajadhar was recorded as an occupant of survey No. 13/2. But it has to be remembered that the entry in column 9 of the document is based on entry in column 10, and the entry in column 10 shows that entry in column 9 was made in favour of Gajadhar on the ground that Gajadhar had acquired one-half interest in survey No. 13/2 on the basis of possession delivered to him on April 7, 1929, in execution of a decree in Civil Suit No. 297 of 1928. Now the respondents have filed a certified copy of that decree and a certified copy of the tabayadi in that suit. These are exhs. N.A. 4 and N.A. 5 in the record of the lower appellate Court, A perusal of these documents leave no manner of doubt that what was decreed in Civil Suit No. 297 of 1928 was possession of survey No. 13/1 having an area of 7 acres 34 gunthas and assessed to land revenue of Rs. 10-12-0, and not survey No. 13/2. Thus it is conclusively established that the record of rights entry, a copy of which is filed with the plaint, is entirely erroneous and could not show that Gajadhar was occupant of Survey No. 13/2. It is also to be seen that the area of this survey No. 13/2 is not given in the column for area. The appellant also sought support on the basis of the entry in the record of rights which he filed in the first instance in the lower appellate Court which showed again the plaintiff as the occupant of survey No. 13/2, area 3-30 acres and revenue Rs. 16-2-0. But this entry was apparently made on the basis of the auction sale itself, and this document could not be made use of to prove the fact in issue, viz. whether the plaintiff had become the owner of any such field as survey No. 13/2 with an area 3 acres 30 gunthas on the basis of the auction sale. It has to be further noted that the entry in column 10 of this document is entirely erroneous. It shows that Haribax had become the owner or occupant of the field on foot of a sale held in revenue case No. 14 XXXI 1948-49 which was alleged to have been held on November 15, 1948. Thus it will be seen that the source of title which is mentioned in column 10 is entirely erroneous. This again shows how unsafe it is to infer validity of title to the property merely on the basis of entries in the record of rights.

8. The appellant then urged on the basis of the documents filed by him in this Court that the attachment list showed that arrears of land revenue were due for the years 1945-46 and 1946-47; and inasmuch as the arrears of land revenue are thus established, the sale held for realisation of such arrears would authorise the revenue officer to put to sale survey No. 13/2 and thus it could not be said that there were no arrears due in respect of survey No. 13/2. A close scrutiny of the attachment list will show that the property was attached not u/s 141(c) alone but under the provisions of Sections 141(c), 141 (d) and 141 (f) of the Berar Land Revenue Code. Again it is not at all clear from this attachment list; whether the sum for which the property was being put to sale was due by way of arrears of land revenue or any other sum recoverable as arrears of land revenue. It is also not clear whether the land revenue was due in respect of field survey No. 13/1 or 13/2. Thus this document is of no assistance to the plaintiff and in fact it shows that the property was attached in exercise of all the powers u/s 141 by the revenue officer. Then we go to the next document filed in this Court, viz. the auction list. This auction list itself shows that the total amount due was Rs. 98 4-0. For realisation of this amount survey No. 13/1, which admittedly was the property of Gajadhar Rudmal, was put to sale and was purchased by the plaintiff himself when his bid for Rs. 300 was accepted as the highest bid. Now it is not understood why it was necessary to put to sale survey No. 13/2 at all when the sale held in respect of survey No, 13/1 had fetched a substantial amount of Rs. 300 which was more than sufficient to wipe out and pay arrears which were then due from the defaulter Gajadhar Rudmal. A revenue officer has no right to put to sale more property than is necessary for realisation of arrears due. It has not been established by these documents that any amount was due in respect of land revenue of survey No. 13/2. Thus the auction sale of survey No. 13/2 does not seem to be justified or warranted on the strength of the very documents which have been filed by the plaintiff in this Court.

9. The Courts below have accepted the evidence led by respondent No. 2 that he was in possession of the rest of land in survey No. 13 except survey No, 13/1 with an area of 7 acres 34 gunthas which alone was owned by Gajadhar the master of present plaintiff. Defendant No. 2 has entered the witness-box and stated that he had paid the land revenue in respect of the rest of the area of survey No. 13 which was in his possession except survey No. 13/1. To the same effect is the statement of the revenue Patel who has been examined as D.W. 3 in the trial Court, He is Rambhau Patel, and he has made a categorical statement that defendant No. 2 was in possession of 24 acres of land out of survey No. 13 and no land revenue remained to be paid by defendant No. 2. But Mr. Padhye, the learned Counsel for the appellant, has invited my attention to the statement of this witness in cross-examination in para. 4 where he has stated that he could not say if defendant No. 2 paid land revenue of 3 acres 30 gunthas before auction. Now it is not possible to interpret this statement as an admission that land revenue in respect of 3 acres 30 gunthas was not paid by defendant No. 2. Defendants' case is that 3-30 acres were not separately demarcated or assessed

to land revenue. Defendant No. 2 had paid land revenue in respect of the whole area of 24 acres from survey No. 13, and this position is admitted by the revenue Patel. What the Patel meant to say was that he could not say whether land revenue was separately paid by defendant No. 2 in respect of 3-30 acres land. Thus it is not possible to accept this contention of Mr. Padhye for the appellant that the Patel's evidence showed that land revenue in respect of 3-30 acres was not paid before the auction. On the contrary the Patel's evidence read as a whole fully supports defendant No. 2 in his claim that he had paid all the land revenue that was due. A complaint is made that defendant No. 2 has not filed receipts for payment of land revenue and, therefore, it should have been held that there is not adequate proof of such payment having been made. Now I do not see why & statement of defendant No. 2, which has been accepted by the Courts below, should not be held to furnish adequate proof of the fact of payment. On the other hand, if the plaintiff was not satisfied with that statement, the plaintiff could have established the fact of non-payment either by producing on record certified copy of the statement of account which ought to be in the record of the revenue case in which sale of survey No. 13/2 was ordered. u/s 140 of the Berar Land Revenue Code a statement of account regarding liability for arrears duly certified by a revenue officer is a conclusive evidence of the fact that such arrears were due. This could have been the best evidence of the case of the existence of non-payment of arrears in respect of survey No. 13/2. The plaintiff has not cared to place this evidence on record, and the Courts below were right in accepting the evidence tendered by defendant No. 2 to show that no arrears were due in respect of survey No. 13/2.

10. The plaintiff has also failed to establish that any area admeasuring 3 acres 30 gunthas of land was separately demarcated as survey No. 13/2 or assessed to land revenue of Rs. 16-2-0. Mr. Padhye has contended by reference to exh. N.A. 2 filed by defendant No. 2 in the lower appellate Court to show that document which is an entry in the record of rights in respect of survey No. 13/2 showed that even though survey No. 13/2 originally measured 7 acres 21 gunthas assessed to land revenue of Rs. 32, the further entry in that document showed that one half area of the survey No. 13/2 was carved out and separately demarcated as survey No. 13/2 A and this showed that there must have been a separately demarcated survey No. 13/2 with an area of 3 acres 30 gunthas and assessed to land revenue of Rs. 16-2-0, No such entry which Was bound to be reflected in the record of rights has been filed on record. Even assuming that there was any such survey number, the only inference that can be drawn from exh. N.A. 2 would be that survey No. 13/2 if any such were to be in existence would be in occupation of Bobtaji and Jagdeo and would not show Raoji, Tukaram and Shioram as occupants .But it is not possible to speculate in this connection as the necessary documents from the revenue records have not been placed on record and no sufficient reason has been shown to disturb the finding of the Courts below that the plaintiff has failed to establish that there was any such separately demarcated survey number as 13/2 with an area of 3 acres 30

gunthas and land revenue of Rs. 16-2-0.

11. The learned Counsel for the appellant has, however, contended that it is not open to the defendant to raise a defence that the arrears were not due in respect of the holding, i.e. survey No. 13/2 and that no finding could be delivered on the footing of such a defence. It is argued that u/s 156 of the Berar Land Revenue Code any person interested in a holding which has been sold at a revenue sale is bound to file an application for setting aside the sale on the ground of any irregularity or illegality in publishing or conducting the sale. Thus, according to the plaintiff, defendant No. 2 ought to have filed such an application and have the sale set aside before the revenue Court. Admittedly, defendant No. 2 did not file any such application and, therefore, no such claim could be made by defendant No. 2 by way of defence to the suit filed by the plaintiff. In support of this proposition the learned Counsel has invited my attention to the provisions of Sub-sections (1) and (2) of Section 157 of the Berar Land Revenue Code. Under Sub-section (1) of Section 157 if no application is made u/s 156 within the time allowed therefor, all claims on the ground of irregularity or mistake are barred. I do not think Sub-section (1) of Section 157 has any bearing on the issue raised by defendant No. 2 in this case. Section 156 of the Berar Land Revenue Code creates a limited right in favour of a person interested in a holding to have a sale set aside on the ground of some material irregularity or mistake in publishing or conducting the sale. The ambit of inquiry u/s 156 will not permit an inquiry as to whether in fact arrears were or were not due or whether the sale is vitiated by some other illegality which makes the sale a nullity. Thus the bar created u/s 157(1) should be limited to a relief which could be asked by making an application u/s 156 of the Code at the instance of a person interested in the holding. Now as regards Sub-section (2) of Section 157 the provisions which permit a suit being filed to set aside the sale on the ground of fraud or on the ground that the arrears for which the property was sold were not due cannot be interpreted as creating a bar in a party which is impleaded as a defendant to resist the suit for possession on either of these grounds. The contention of Mr. Padhye is this. Section 157(2) of the Berar Land Revenue Code provides a remedy for a person who wants to avoid a sale held by a revenue officer on the ground of fraud or on the ground that arrears were not due. It is, therefore, suggested that the remedy having been provided in the form of a suit to be instituted by the plaintiff in which he must claim setting aside of the sale, it must necessarily follow that that is the only remedy for a person in the position of defendant No. 2 and if that remedy is not followed, defendant No. 2 must be held to be precluded from raising similar issues by way of defence. Now I do not accept this interpretation of Sub-section (2) of Section 157, In fact the right given to a person to set aside a sale on the ground that there was no arrear for which the property could be sold itself shows that a sale cannot be held by a revenue officer if there are no arrears in respect of holding or no arrears for which the property could be put to sale. Whether this finding can be given in a suit filed at the instance of a person who claims to be the owner of the property,

or this finding is required to be given at the instance of the same person when possession is asked of him, is not a matter of importance when one is considering the right that is created u/s 157(2). I do not also see how an act which is vitiated by fraud cannot be so challenged by way of defence in a suit for possession. Fraud will vitiate all actions, whether fraud is committed by a party or revenue officer who conducts the sale with special powers. I, therefore, cannot accept that provisions of Section 157(2) of the Berar Land Revenue Code have the effect of depriving a party-defendant in resisting the suit for possession filed by an auction purchaser at the revenue sale in showing that in fact no arrears were due and the holding could not have been put to sale.

12. It has been further contended by Mr. Padhye for the appellant that defendant No. 2 has not pleaded that there was no statement of account served in respect of arrears due from survey No. 13/2 and thus there is no question of establishing whether in fact arrears were or were not due in respect of survey No. 13/2. What is urged is that the very fact that the holding was put to sale must necessarily postulate that there must have been certain arrears as provided u/s 140 of the Code and it must be presumed that the holding must have been put to sale because of the existence of such arrears. I do not think that is the effect of the rule of evidence that is incorporated in Section 140 of the Code. Section 140 of the Berar Land Revenue Code only provides that if there is a statement of account duly certified by the Deputy Commissioner or by the Tahasildar, then that statement of account shall be treated as conclusive evidence of the fact that there were arrears in existence and the person who is named as defaulter is the person against whom the arrears were due. If in a given case there is no such statement of account and yet it is established that there were arrears due in respect of a holding, I do not think the powers of the revenue officer are curtailed in bringing the property to sale for realisation of arrears of land revenue of that holding. If in spite of the existence of a statement of account certified as per Section 140 of the Berar Land Revenue Code it is still open to a person to show that there were no arrears which is clear from the provisions of Section 157(2) of the Code, I do not see how it is not possible for a person to show that there were in fact no arrears even though a statement of account certified u/s 140 is not available. Thus nothing turns on the statement of account duly certified being presented in a particular case or not being presented. What has to be established is the fact of arrears being due in respect of the land put to sale. As the plaintiff has failed to establish that fact, and inasmuch as defendant No. 2 has established that he, had paid all the land revenue due in respect of survey No. 13 so far as the area in his possession was concerned, I do not find it possible to hold that defendant No. 2 could not raise a defence based on his allegation that in fact no arrears were due in respect of the holding which was put to sale.

13. Mr. Padhye has further contended that it having been observed by the learned Judge of the lower appellate Court in para. 18 of his judgment that fraud, as alleged by defendant No. 2, was not proved, the suit ought to have

been decreed. Here again I find that the learned Judge of the lower appellate Court, has fallen into an error in considering the actual finding of the trial Court in respect of the allegation of fraud which was put in issue. Issue No. 2 was framed in the following form:

Whether the auction of the suit field is consequent to fraud practised on the revenue authorities?

And the finding of the learned Judge of the trial Court was in the affirmative. Thus the observations of the learned Judge of the lower Appellate Court in para. 18 that the trial Court had disbelieved the allegation of fraud is not correct. On the contrary the trial Court has found in para. 8 of its judgment that even though the defendant could have led more evidence to show the circumstances which tend to prove the fraud practised upon the revenue authorities, he has further held there was no portion of survey No. 13/2 with an area of 3 acres 30 gunthas which was in existence and was in arrears of land revenue. He has further held that, an imaginary sale was held, and such an imaginary sale did not confer title on the plaintiff. The learned Judge of the lower appellate Court himself has held that the conduct of the plaintiff Haribax, who was in the service of Baxiram Rudmal Shop and was looking after the property of that shop which comprised among other fields survey No. 13/1, could not have been in ignorance of the fact that the shop did not own any such field as survey No. 13/2. Haribax himself has purchased survey No. 13/1 also at the auction sale held on October 18, 1948. It is difficult to believe that plaintiff Haribax did not know that his master did not own survey No. 13/2. In fact there is a clear evidence of collusion and fraud in having survey No. 13/2 sold for arrears of land revenue. When the land revenue amount which was certified to be due, apparently a sum of Rs. 98-4-0 or so, it was well-known as is apparent from the record, that the shop of Baxiram Rudmal which owned this property was in sufficiently affluent circumstances to be able to clear off this arrear. Whatever the case may be in respect of survey No. 13/1, it is clear from the record that the plaintiff could not have been in doubt either that survey No. 13/2 was not the property of Baxiram Rudmal or that there were no arrears pending in respect of survey No. 13/2 and in fact there was no such field as survey No. 13/2. All these circumstances clearly point out that the sale was held in respect of survey No. 13/2 at the instance of the plaintiff by misleading the revenue authorities into selling this property and further element of the fraud is also apparent from the documents filed in this Court, viz. haraspatti which shows that it was certainly not necessary to put to sale survey No. 13/2 when a sum of Rs. 300 was realised in respect of survey No. 13/1 and the arrears due were only Rs. 98-4-0. I, therefore, hold that defendant No. 2 has also established that the sale was effected by misleading the revenue officers in respect of the property as well as the liability of the property for payment of any land revenue.

14. Thus there is no reason to interfere with the findings of the Courts below, and the appeal fails and is dismissed with costs.