
(1926) 07 BOM CK 0056
In the Bombay High Court
Case No : First Appeal No. 70 of 1923

Kanhailal Badridas

APPELLANT

Vs

Ismailbhai Kasambhai

RESPONDENT

Date of Decision : 08-07-1926

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 119, 121

Citation : (1926) 28 BOMLR 1498

Hon'ble Judges : Madgavkar, J; Amberson Marten, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Amberson Marten, Kt., C.J.—His Lordship held on merits that the land in dispute formed part of the Wadvan lands; and proceeded as follows on the question of law arising in the case:- It will be borne in mind in the first place that we have here suits brought by either party. That is to say, we have the vendor's suit for declaratory relief and possession, and the purchaser's suit for specific performance. The Court was therefore in full season of the dispute between the parties. Both parties had appealed to it and, in the ordinary course, it would have been for the Court to adjudicate between them as to their respective rights to this green land. But later on the Khot applied to the Court for leave to have the boundary disputes settled under the Bombay Land Revenue Code, and I gather also, to have a Commissioner appointed under Order XXVI, Rule 9, of the Civil Procedure Code. That application was opposed by the purchaser, but it was nevertheless granted and eventually another survey was made by a particular individual, who was the Commissioner appointed by the Judge and was also the survey officer appointed by the local authorities under the Bombay Land Revenue Code, he proceeded to investigate the matter and made his award in 1923, and he found in favour of this black line and consequently in favour of the vendor. When his award or survey was laid before the Court, the purchaser once more objected to it, but notwithstanding that it was accepted by the learned Judge as

evidence in the case.

2. Now, before us, this has led to an argument on behalf of the vendor that our jurisdiction to determine this matter is wholly ousted by the decision of this gentleman under the Bombay Land Revenue Code. We have been referred to Sections 119, 120 and 121 of the Bombay Land Revenue Code and to another section of the Bombay Revenue Act to show that the jurisdiction of the Court is ousted. It is argued that it makes no difference in this respect, whether the award of the officer appointed by the Collector is made before or during or, I suppose, after the suit, and that these questions of boundaries are solely a matter for the Collector or his surveyor under the Land Revenue Code. Now, this raises, to my mind, a most important and far-reaching question of jurisdiction and principle, because it must be remembered that the Acts in question are not Acts of the English Parliament, nor are they Acts passed by the Legislative Council of the Empire of India. They are Acts passed by the local legislature, and, moreover, they are Acts not passed under the jurisdiction at present given to them by the recent Act of 1920, but under the jurisdiction of past days, when the legislative bodies were of a very different character from what they are to-day. I, accordingly, put it to counsel for the vendor whether he contended it was within the jurisdiction of the Bombay legislature to pass an Act saying that the High Court should have no jurisdiction to decide any case relating to land and that all disputes relating to land should be decided by the Collector and be binding on all parties. Counsel replied that that was going too far, but that the local Government can legislate regarding boundaries. But that is a compendious phrase. A boundary does not merely mean a line on the map, or through a field or along a fence. In a disputed case it involves the question whether certain lands belong to A or belong to B.

3. It is unfortunate, I think, that in the decisions which have been hitherto given in this Court, the broad question as to whether these particular Acts were not, in this respect, ultra vires of the Bombay legislature, has never been expressly raised, But if the contention raised by the vendor is correct, then why should our Courts in the past have determined boundary disputes between the parties, when the whole of their labours were liable to be upset at some future date by an executive officer, who in no sense represents a law Court ? I may say that we do not propose to determine that point today. We have not heard sufficient arguments to enable us to-day to give a proper opinion on the subject, I only mention it to show that the point has not been overlooked by us, and that if a similar argument to that advanced in this case is raised in others, then the question of ultra vires will have to be seriously considered, To my mind, it is not sufficient to deal with this class of case piece-meal, as has been done in some of the cases cited to us. If really at the bottom there is a question of principle involving a direct challenge to the jurisdiction of this Court, then I say that the matter should be grasped-and grasped firmly-and that the point should not be evaded and left to puzzled practitioners to find distinctions between this case and that, I would, therefore, much prefer to thrash this point out once and for all.

And I only regret that the way in which it has been laid before us prevents us from giving a decided opinion on this important point.

4. But the authorities which have been cited to us go, at any rate, to this length. They show that, if there have been no proceedings before the Collector, and no application to him, and no decision by him, then the jurisdiction of the Court to determine a boundary dispute is not ousted. That was decided in *Lakshman v. Antaji* I.L.R (1900) 25 Bom. 312. Then there is another class of case which decides that, though the Collector's decision may be binding as regards the boundaries between two villages for the purpose of revenue and so on, or even further between two land-owners as regards the mere question of boundary and survey number and so on, yet this does not prevent a land-owner, who has been decided against, from successfully proving in a Court of law that he has acquired a title to this land by adverse possession. That was decided in *Bhaga Motiji Vs. Dorabji Sorabji*, by Sir Norman Macleod and Mr. Justice Heaton. But that case is open to the following criticism. If the vendor's argument is to be pushed to its full logical conclusion and if the Collector's award is really to be "determinative" within the broadest meaning of that word in the Bombay Land Revenue Code, then surely it must be "determinative" for all purposes, and you cannot hold that the land belongs to A and yet that B is the owner of it by reason of adverse possession. How do people become land-owners? They may do so by grant, by inheritance or by adverse possession. Accordingly, when in any particular dispute you have to determine whether certain lands belong to A or to B, you have to take all those matters into consideration. The point is, who is the owner and not who was the owner?

5. Much reliance was placed by the vendor on the judgment in *Bai Ujam v. Valiji Rasulbhai* ILR (1886) 10 Bom. 466. And if one looks at the words used by Sir Charles Sargent at page 460 and if they are not to be in any way limited, then it may be that they would largely help the contention of the vendor. He says (p. 460):- "The rights here referred to must, from the nature of the dispute necessitating the settlement, be the rights of the landholders inter se, and by the word "determinative," (which we may remark is not one of ordinary use in legal documents), we can only suppose was meant "conclusive" as between the parties to the disputes wherever the boundary of the holdings comes in question. We agree, therefore, with the Subordinate Judge that, as the piece of land in question is admittedly within the boundary as fixed by Collector, and as the defendant does not claim to have acquired, since the Collector's decision, the right to hold the plaintiffs' land except by adverse possession, which the Subordinate Judge finds not proved, the plaintiffs are entitled to have the possession of it restored to them."

6. On the other hand in *Bala bin Joti Shirke v. Nana bin Dhulappa Hunargi* (1893) P.J. 41 which is a decision of Sir Charles Farran and Mr. Justice Candy, the head-note runs as follows :-

The jurisdiction of a Civil Court is not ousted by Section 4(g) of Act X of 1876, in

case of a dispute as to the position of the boundary line between two survey numbers as laid down by the survey authorities, the defendant alleging that the boundary marks were changed, the plaintiff alleging that they are in their right position.

7. There, what had been held in the Court below was that the jurisdiction of the Court had been ousted because all matters of boundaries were for the revenue authorities and therefore the plaintiffs had come to the wrong Court instead of to the right Court of the revenue authority. That contention was expressly negated by this Court. The judgment runs (p. 42):-

We do not, however, agree with the Assistant Judge that in such a case the jurisdiction of a Civil Court is ousted by Section 4(g) of Act X of 1876. See *Krishnarav v. Lakshman* (1883) P.J. 191. The plaintiff sued in ejectment, basing his claim on the alleged fact that the disputed strip of land formed part of the survey number according to the boundaries of that number as laid down by the Revenue Authorities. Defendant replied that by those boundaries the disputed strip formed part of his survey number. The question was thus simply one of fact, What was the boundary laid down by the Revenue Authorities? Section 119, Land Revenue Code, provides that if a dispute arise concerning the boundary of any survey number after the survey records have been handed over to the Collector, it shall be determined by the Collector whose decision shall be determinative of the proper position of the boundary line or boundary marks, and of the rights of the landholders on either side of the boundary. Clearly if the boundary so fixed includes the disputed strip in the plaintiff's survey number, plaintiff's right to come to the Civil Court and obtain possession of that strip is not ousted by any provision of the law. We therefore reverse the decree of the Assistant Judge and remand the case for a fresh decision.

On remand the District Court will have to decide :-

1. Whether the Collector has determined the boundary line between these two survey numbers.

2 If he has, whether in accordance with his settlement of the boundary, . the land in dispute forms part of the plaintiff's survey number or not?

If the Collector has not already settled the boundary, a postponement of the case will be necessary in order to enable the Civil Court to dispose of the case according to law. This was the course suggested in the case of *Krishnarav v. Lakshman*.

8. I quote that case as meaning that provided the Collector had not already fixed a boundary, then the case was to proceed in the ordinary way in the civil Court, which would, in that event, have ample jurisdiction to hear it. But even if the Collector had determined the boundary line, then at any rate, if his decision was in favour of the plaintiff, the plaintiff could come and enforce his rights to that land by claiming possession.

9. That brings me to what, I think, is the most important distinction in fact between the present case and the other cases which have been cited to us, viz,, that both parties had started suits in this Court to determine their relative rights before any application was made to the Collector to determine the dispute under the Bombay Land Revenue Code. We have not had any elaborate argument on that point, and I particularly regret that Mr, Thakor was obliged to be in some other Court and thus we had no argument from him in reply before giving our decision on the case as presented to us, But we hold that, in this particular case, the Court having once obtained jurisdiction by the acts of both parties, the subsequent award of the Collector could not oust the matter which was thus Sub judice, Accordingly, in our view, on the facts of this particular case, the award of the Collector is not binding on this Court.

10. Whether it was admissible in evidence at all is another point, which, I think, we need not decide. It is noteworthy that the surveyor who made the award was not called as a witness, and that, therefore, to a certain degree, many of the statements that he made about what took place before him and what was said would be matters of hearsay. In so far as he was appointed Commissioner by the Court under Order XXVI, Rule 9, my practice on the Original Side has been to give the parties an opportunity of cross-examining any special Commissioner, if they so desire. It does not appear on the record-so far as it has been brought to our attention-that this particular point was raised in the Courts below. But, if the award per se is not binding on the Court, then, I think, it may be very unsatisfactory to the litigating parties to have these matters determined by some stranger whom they have no opportunity of cross-examining, although the Code expressly contemplates the possibility of that being done.

11. It follows, then, from our decision that the award of 1923 is not binding on this Courts and that, on the other hand this Court has jurisdiction in this case to determine wholly the dispute between the parties and to say whether the land in dispute belongs to A or whether it belongs to B, and that in this particular case, having regard to our previous findings, the red line was the correct line and not the black line. Accordingly, in the result, the purchaser succeeds as regards the main point in dispute in this case....

12. Accordingly, as regards the specific performance action, I would decree that the earnest money of the purchaser be returned with interest at six per cent, from the date of the original payment, up to the date of repayment.

13. Both appeals will be allowed with costs throughout.

Madgavkar, J.—His Lordship agreed with the chief Justice on the question of fact arising in the case, and on the question of law observed :- In the course of the suit, a Commissioner was appointed and on the application of the Khot to the court for permission, (not apparently necessary under the law) and opposed by the purchaser, action was taken u/s 118 of the the Bombay Land Revenue Code and the boundary between the two villages settled in 1921 by the Collector on

the report of a survey officer in favour of the Khot.

2. The lower Court has held that this boundary was determinative u/s 121 as to the rights of the present parties and that the purchaser had not acquired title by adverse possession. Both the suits resulted in favour of the vendor. The purchaser appeals.

3. The construction of a, 121, Clause (6), of the Bombay Land Revenue Code, presents some difficulties, as was pointed out in Bhaga Motiji Vs. Dorabji Sorabji, . On a literal interpretation of the section, the jurisdiction of the civil Courts would be barred in a very large number of cases, And the question might well arise in view of 80 far-reaching a result, whether the taking away of so elementary a right as a recourse to the civil Courts in a dispute as to proprietary rights and its determination by a survey officer were or were not matters within the power of the Provincial Legislature, which has enacted the Land Revenue Code of 1879 : Secretary of State for India v. Moment (1912) L.R. 40 IndAp 48. In the absence of proper argument, I agree with the learned Chief Justice that we must reserve our opinion on the point.

4. Speaking for myself, I incline, as at present advised, to the view of Heaton J. in Manak v. Narayan (1910) 22 Bom. L.R. 1114 of the case above (Bhaga v. Dorabji). The Bombay Land Revenue Code is enacted mainly for the purposes of collection of land-revenue as between Government on the one side, and the land-holders, occupancy tenants or others, on the other. Chapter IX, to which these sections appertain, is headed "settlement of boundaries and the construction and maintenance of boundary marks," which are connected with the Ryotwari system, which has been an essential feature of this Presidency. These sections, taken as a whole, are meant to provide for the settlement of the boundaries of survey numbers and the preservation of boundary marks upon which the survey settlement and the whole assessment and collection of land-revenue in this Presidency depend. It is doubtful whether the legislature contemplated the results to which a strict and literal application of these sections would give rise. For, in that case, if the dispute pertained to land, which composed exactly one or more whole survey numbers, a decision of the Collector might be determinative, in other words, conclusive. But, if it extended to any portion of a survey number so that it would not only be a question of boundary marks the Collector would have no right to decide and the jurisdiction of the Court would remain. Or, again, if the dispute refers to the boundary of a survey number and is between the Collector and a party, is the Collector's decision conclusive and not open to question in the civil Courts ? Or, as in the present case, even after the institution of a suit and pendente lite, the jurisdiction of the Court could be ousted by a reference to the Collector at the instance of one of the parties, notwithstanding the objection of other.

5. Confining myself to the last point, I should say that these three Sections 119, 120, 121 are primarily meant for the purposes of the survey settlement of the boundary marks as between the Government on the one hand and the occupancy

tenants on the other. Government assesses upon the areas of survey numbers and recognized portions of survey numbers, An occupancy tenant could not perhaps sue Government in the civil Courts for a declaration that the survey boundaries of a certain number were wrong and the area was actually less. In this sense the Collector's boundaries may be determinative. But I doubt if they are so on the question whether a certain survey number or part of one belongs to one individual or another. The authorities-Bai Ujam v. Vuliji Rasulbhai ILR (1886) 10 Bom. 436 Lakshman v. Antaji ILR (1900) 26 Bom. 312 Kavasji v. Hormasji ILR (1904) 29 Bom. 73 and Bala bin Joti shirke v. Nana bin Dhulappa Runargi (1888) P.J. 41 are not all easy to reconcile. But where, as in the present case, there has been no determination by the Collector prior to the suit, I do not think that the appointment of a Survey Officer as Commissioner by the Court and a subsequent determination by that officer and by the Collector pendente lite can oust the jurisdiction of the Court and its own independent consideration. Treating, then, this dispute on the merits, as it is, in my opinion, open to us to do, it is of the essence of the question whether the boundary stones which from 1910 onwards have undoubtedly been on the red line in favour of the purchasers are proved to have been shifted at any time from the black line of the vendor....

6. For these reasons, I concur with the learned Chief Justice that the appeals must be allowed with costs throughout.