

(1933) 12 BOM CK 0025

In the Bombay High Court

Case No : Letters Patent Appeal No. 19 of 1932

Mota Raghunath Marwadi

APPELLANT

Vs

Sidhram Annaji Manurkar

RESPONDENT

Date of Decision : 05-12-1933

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 121

Citation : AIR 1934 Bom 248 : (1934) 36 BOMLR 502 : 152 Ind. Cas. 60

Hon'ble Judges : Broomfield, J; Baker, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Barlee, J.—This is a Letters Patent appeal from the decision of Mr. Justice Barlee reversing the decree of the District Judge of Poona passed on appeal. The facts are simple. There was a dispute about a wall between the plaintiff and the defendant, who are neighbours. The first Court awarded the plaintiff's claim, and on appeal the District judge of Poona confirmed the decree on the ground that the matter was res judicata by reason of a suit in 1913 between the parties. On appeal Mr. Justice Barlee, sitting singly, reversed the decision of the District Judge on the ground that the question that was decided in 1913 was a boundary dispute with which the Court had no jurisdiction to deal, and, therefore, that decision does not bar the present suit by res judicata, and that in 1917 there was a demarcation of the boundary line which showed that this wall was in defendant's land. Therefore, the plaintiff was not entitled to succeed. From that decision this Letters Patent appeal is presented.

2. In 1913 the present defendant brought a suit against the plaintiff's predecessors for certain relief's including a declaration that he was the owner of the wall now in suit. That was decided against him and an issue was framed as to the ownership of the wall and it was found that the defendant (i.e., the predecessor of the present plaintiff) was the owner of the wall. That decision would operate as res judicata. But it is contended that, when in 1917 the boundary between the

two survey numbers, which are the same as the houses occupied by the parties, was fixed, that decision u/s 121 of the Land Revenue Code is determinative, and that, therefore, as the wall falls within the boundary of the present defendant's survey number, the plaintiff cannot succeed. No doubt it has been laid down in a series of decisions which are referred to by Mr. Justice Barlee that the decision as to a boundary line between two plots is a matter for the Collector, and in *Lakshman v. Antajt* ILR (1900) Bom. 312 : 2 Bom L.R. 1083 the Court was directed by this Court to ascertain whether there had been a decision by the Collector; and if there was no such decision, to order the plaintiff to apply to the Collector to secure a decision. It may be observed that in 1913 when the present defendant brought the suit already referred to, there had been no decision by the Collector as to the boundary. Had that suit proceeded on the question of the boundary between the two houses, it might be argued that that was a matter for the decision of the Collector u/s 121 of the Bombay Land Revenue Code. But from the judgment in that suit we find no reference to the boundary. The suit was decided on title and it was held that the wall belonged to the predecessors of the present plaintiff and not to the present defendant, and it would be a strange thing if several years after the decision in 1913, from which there was no appeal, and which, therefore, became final, it were possible to reopen the question by a decision of the Collector or the survey officer fixing the boundary between the two houses? a decision which deals with the boundary between two plots of land and has no direct reference to the wall in question.

3. It has been held by a bench of this Court in a recent decision in *Kanhailal Badridas Vs. Ismailbhai Kasambhai*, that the civil Court has jurisdiction to entertain a suit for settlement of boundaries of fields, where subsequent to the filing of the suit the boundaries have been determined by revenue officers. That view has been criticized by the learned Counsel for the respondent. It is, however, a decision of this Court and is binding upon us. But, in the present case, it is not necessary to go so far as that, because a perusal of the judgment in the suit of 1913 shows that there was no question of any boundary dispute but that the title to the wall was determined on the sale-deeds of the parties. It is quite true that neither party claimed to be in possession of any portion of the house beyond their own plot, and, therefore, no question of adverse possession or anything of the kind will arise. But it seems to me clear that the parties had not in mind when they went to the trial Court the question of the boundary, and with respect I do not agree with the decision of Mr. Justice Barlee that the real point was as to whether the wall was or was not within the boundary of survey No. 1245. In these circumstances I do not know how a subsequent decision with regard to the boundary between two survey numbers can have the effect of setting aside a judgment given four years earlier in which the ownership of the wall in dispute was decided in favour of the plaintiff, when that matter is clearly barred by *res judicata*; and although questions of boundaries are matters which are to be decided by the Collector whose decision is determinative, I do not think that we can hold that other consequences should flow from that which will have

the effect of disturbing the decision which has already been given by a competent Court.

14. A second point has been taken by the learned Counsel for the appellant and it is this; that in order that, u/s 121 of the Bombay Land Revenue Code, there should be a determinative decision by the Collector, there must be a dispute. This has been held by this Court in several cases; but, as a matter of fact, when the survey was made in 1917 there was no dispute in regard to the boundaries of these two numbers as between the present parties. It is, therefore, questionable whether the decision can be considered u/s 121 of the Bombay Land Revenue Code to be determinative. But I do not rely so much on this as on the first point, viz., that the decision of the Court as to the ownership of the wall was one based on the title of the parties and the question of the boundary was not in the mind of the Court. I dare say that if the issue had been what was the boundary between these two survey numbers then it might be argued that that was a matter which should be decided by the Collector. But I am unable to agree with the view of Mr. Justice Barlee that the decree of 1913 was without jurisdiction. It follows, therefore, that if that decree stands, the matter is *res judicata* and the title is with the plaintiff. I am, therefore, of opinion that the decree of Mr. Justice Barlee should be set aside and that of the first appellate Court restored with costs throughout.

Broomfield, J.

15. According to the decision in *Kanhailal Badridas Vs. Ismailbhai Kasambhai*, , the Court in the suit in 1913 had jurisdiction to determine the boundaries of the parties holdings. That decision has been criticised by Mr. Tyabji, but it is binding upon us until such time as it may be overruled by a full bench. If the Court in 1913 had jurisdiction to determine the boundaries of the holdings?and on this authority it had? then obviously there can be no question but that the finding in that suit operates as *res judicata*. The ownership of the wall was directly and substantially in issue there, and that issue was finally determined, and it would make no difference in this view whether the finding was based on a determination of the boundaries of the holdings or not.

16. But, as a matter of fact, I agree with my learned brother that it is not clear that the Court in that suit did determine the boundaries. I cannot see any sufficient grounds for holding that when the Court then decided that the wall belonged to the defendant in that suit and not to Manurkar who was the plaintiff there it really meant to decide or did decide that the wall was part of the property then known as house No. 943. The whole of the judgment has been read to us. There is no reference in it to the boundaries of the holdings. The finding that the wall belonged to the defendant was based on two sale-deeds, one of 1854 and the other of 1859 which mentioned the wall and purported to convey it to the defendant's predecessor-in-title. It would have been open to the plaintiff Manurkar in that suit to produce the documents which he subsequently produced in the survey enquiry. He produced no documents at all. It would have

been open to him to contend that the wall must belong to him because he was the owner of house No. 942 and the wall was included in the limits of that holding. If that was disputed, he could have moved the Court, on the authority of *Lakshman v. Antaji*, to have the dispute about the boundaries determined by the Collector. Even if he had done that and if the Collector's decision have been in accordance with the decision of the survey enquiry officer, it would not, I think, necessarily follow that the issue as to the ownership of the wall would have been differently decided. For, of course, the owner of survey No. X may acquire a portion of the adjoining survey No. Y by adverse possession. No doubt the plea of adverse possession was not raised. The question of ownership was allowed to be decided without going into any such question, and, as far as I can see, without necessarily determining the boundaries of the holdings at all. That being so, I am unable to see how the finding in that suit could be rendered nugatory by the determination of the boundaries in a survey enquiry held four years after the suit was filed. Even if the order in the survey enquiry were conclusive (which it could not be if *Kanhailal v. Ismailbhai* is good law), the only result would be that the present appellant is the owner of a wall which forms part of the respondent's survey number.

17. There is one other point I wish to mention. As far as I understand Mr. Justice Barlee's judgment, he has not held that the finding of the enquiry officer in 1917 was determinative within the meaning of Section 121 of the Bombay Land Revenue Code. We have seen the register of the summary enquiry. It appears that the plans were sanctioned and sandals issued in the ordinary course of a survey enquiry. No doubt there were notices to the parties but there was nothing which could be called a dispute about the boundaries. In fact the respondent has admitted in his evidence that there was no dispute at all at that time except as to some matter of compensation payable by the Municipality. That being so, on the authority of *Lakshman v. Antaji*, there was no determinative or conclusive order of the Collector u/s 121 of the Bombay Land Revenue Code.

18. What the learned Judge appears to me to have held is that the Court in the suit of 1913 ought to have got the boundaries determined by the Collector. Let us then examine this position. It cannot seriously be disputed, I think, that the Court in the 1913 suit had jurisdiction to determine the ownership of the wall. That was one of the two main issues in the suit. Mr. Tyabji has argued indeed that there is never any question of the jurisdiction of the civil Courts to determine title being ousted by Section 121, and he has criticized Chief Justice Marten for using language suggesting the contrary in *Kanhailal v. Ismailbhai*. His argument has been that, if for the purpose of determining title it is necessary to know where the boundary between the survey numbers lies, that question of fact, as to the position of the boundary, must be determined by the revenue or survey authorities and not by the Court. Let us take that to be so, and let us assume further that the issue in the 1913 suit did depend on the boundaries (though, as I have said, I am not satisfied that it did). It would follow that the Court ought to have got the boundaries fixed by the Collector before proceeding

to decide the question of ownership. The Court was not asked to do this and did not do it. Perhaps the omission to do it resulted in a wrong decision as to the ownership of the wall. But how can that affect the question of res judicata? The decision might have been challenged in appeal on the ground that the Court had omitted to get an essential question of fact determined in the way prescribed by the law. But there was in fact no appeal and the decision stands. It is hardly necessary to say that a[wrong decision as to title, by a Court which had jurisdiction to decide rightly or wrongly, is just as much res judicata as a right one. I, therefore, agree with my learned brother that this appeal succeeds, and that the decree of the lower Court should be restored.