

(1980) 07 BOM CK 0013
In the Bombay High Court
Case No : First Appeal No. 826 of 1971

Narayanrao

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 14-07-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 226, 227, 311, 32
Hindu Succession Act, 1956 — Section 14
Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 — Section 16, 41
Registration Act, 1908 — Section 17(1)

Citation : AIR 1981 Bom 271

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : R.G. Deo, for the Appellant; M.R. Kotwal, Government Pleader, for the Respondent

Judgement

1. The appellant before me in this first appeal, since deceased, was the plaintiff in the trial Court who had filed the suit in question for declaration that the order passed by the Deputy Collector (Ceiling), Nanded, dated 31st August 1965, holding that the plaintiff was a surplus holder of an area to the extent of 52 acres and 39 Gunthas of land was illegal, null and void. He also attacked that part of the same order by virtue of which the Deputy Collector did not give the plaintiff an opportunity to select Survey Nos. 76, 77 and 31/A admeasuring 59 acres and 65 Gunthas in all to be declared as surplus area. The suit has been dismissed by the trial Court. Hence this appeal.

In this appeal initially Mr. Deo struggled to contend that the said piece of land under Survey Nos. 76, 77 and 31/A could not be said to be belonging to the plaintiff having regard to the provisions of Section 14 of the Hindu Succession Act, 1956. In the alternative, he contended that even assuming that those lands were not the separate property of the plaintiff's wife and even assuming that those lands were to be included in the total area of land held by the plaintiff for

determining surplus land held by him in the context of the provisions of the Maharashtra Agricultural Land (Ceiling on Holdings) Act, 1961 (hereinafter, the Ceiling Act) still it was incumbent upon the Deputy Collector to give a chance to the plaintiff to treat these lands as surplus lands. He contended that in the instant case no such chance was given to the plaintiff and that, hence, the order of the Deputy Collector treating such land, Survey Nos. 114, 60, 43/B and a portion of Survey No. 40, is illegal.

2. The question arises in the following circumstances:--

There is no dispute that Survey Numbers 76, 77 and 31/A and various other lands at one tune belonged to the plaintiff and his entire holding of all the lands which were 10 in number admeasured 148 acres and 29 Gunthas. It is the plaintiff's case that in or about the year 1953 there were certain matrimonial bickerings between himself and his wife and, hence, the three lands Survey No. 76 (22 Acres), No. 77 (35 Acres, 21 Gunthas) and No. 31/A (7 Acres, 24 Gunthas) were given by him in the possession of his wife for maintenance. It is his case that he got necessary mutation entries in the record of rights made by virtue of which his wife was shown as the Kabjedar from that year. It is the further case of the plaintiff that in the year 1955, he became ill and, hence, he called back his wife and that she started living with him once again. It is his further case that thereafter his wife entered into an agreement for sale of the abovementioned lands Survey Nos. 76 and 77 with defendants Nos. 2 and 3 respectively. The entire consideration was received and the possession of the lands was handed over to defendants Nos. 2 and 3 respectively. It is the further case of the plaintiff that on 6-7-1959 plaintiff's wife obtained permission from the Deputy Collector for sale of these lands and on 31-7-1959 two sale deeds were executed by her in favour of defendants Nos. 2 and 3 respectively. Exh. 59 is the sale deed executed by her in favour of defendant No. 2 in respect of Survey No. 76 and Exh. 57 is the sale deed executed by her in favour of defendant No. 3 in respect of Survey No. 77.

To complete the chronology of events, it may be stated here that the Ceiling Act came into effect thereafter. Under the said Act 4-8-1959 was the notified date. A notice dated 21-2-1962, was, thereafter, sent by the Deputy Collector to the plaintiff under the said Act for investigation into the question of surplus holdings, if any, held by him. By the said notice, the plaintiff was called upon to submit his return in that respect on 26-11-62. In his return he did not show the abovementioned three lands Survey Nos. 76, 77 and 31-/A to be part of his holdings on the relevant date. Thereafter, on 23-4-1964 a notice was given to him by the Deputy Collector relating to the inquiry to be held for ascertaining the plaintiff's holdings. The date of inquiry mentioned in the said notice was 20-5-1964. The notice was at Exh. 52 in the trial Court. The notice is an omnibus notice. In the notice the plaintiff is called to mention as to which of the lands he would choose for being treated as surplus lands. By the self-same notice he is called upon to explain many other things as well as also to show cause as to why

any particular land should not be treated as surplus land and further as to why any particular transfer should not be treated to be one offending against the provisions of the Ceiling Act. The question that is material and relevant for the purpose of these proceedings is as to whether the plaintiff was called upon to exercise his option to make a selection in respect of the lands which he would choose to be held as surplus lands. Clause 11 of the notice is relevant in that behalf. The said clause calls upon him to select; subject to the provisions of Section 16 of the Ceiling, Act, the lands for being treated as surplus lands; but evidently this clause has to be read subject to the initiating portion of the said notice which mentions that the plaintiff held the lands mentioned in the Schedule annexed to the said notice. The schedule is written on the reverse of the said notice. The noteworthy fact is that the said lands Survey Nos. 76, 77 and 31-A were not mentioned in the said schedule. It follows that as per the notice the plaintiff was never given option to select these suit lands for being treated as surplus lands.

After this notice, proceedings were held and by his order dated 31-8-1965 the Deputy Collector held that the abovementioned suit lands were part of the plaintiff's holdings and that the plaintiff was holding an area of 52 Acres, 29 Gunthas as surplus lands. The Dy. Collector also ordered that land admeasuring 1 Acre, 3 Gunthas from Survey No. 114, 14 Acres, 38 Gunthas from Survey No. 60 and 4 Acres, .39 Gunthas from Survey No. 43B and land admeasuring 31 Acres, 30 Gunthas out of Survey No. 40, all of them totally admeasuring 52 Acres, 29 Gunthas should be treated as surplus land. Against the said order, the plaintiff filed a revision application to the Maharashtra Revenue Tribunal. What is to be noticed here is that the question urged before the Tribunal was restricted only to the correctness and legality of the order of the Dy. Collector in so far as he held that the said lands continued to be of the ownership of the plaintiff, entries in the revenue records notwithstanding. The Tribunal dismissed the application by its order dated 7-12-1966. Against the said order of the Tribunal, the plaintiff filed a writ petition to this Court under Article 227 of the Constitution of India. But even in the writ petition the question that was urged was the one relating to the validity of the order of the Deputy Collector, in so far as, by the order the Deputy Collector had included the suit lands in the holdings of the plaintiff, the contention urged before this Court was that the plaintiff had given the lands to his wife and she had even sold those lands to strangers and that, hence, those lands could not be included in the holdings of the plaintiff. This contention was negatived by this court. No other point was urged before this Court and, hence, the writ petition was dismissed with costs by this Court by its order dated 26-9-1968.

3. After this defeat the plaintiff started a second round of litigation by filing Civil Suit No. 92 of 1969 in the Court of the Civil Judge, Senior Division, Nanded. This suit out of which the present appeal arises was filed on 21st July, 1969, In the suit it was contended that the suit lands were of the ownership of the plaintiffs wife and that it was an act of illegality on the part of the Dy., Collector to include

those lands in the holdings of the plaintiff. Secondly, it was also contended that it was incumbent upon the Deputy Collector to give an opportunity to the plaintiff to choose the suit lands for being treated as surplus lands. Contention was that in the notice dated 23-4-1964 (Exh. 53) those lands were not included in the schedule at all. The result was that the plaintiff had no opportunity to make any choice at all in the real sense and contemplation of Section 16 of the Ceiling Act. Various defences were raised on behalf of the defendant/Government and, hence, various issues were framed by the learned Judge, On all the relevant issues, the learned Judge recorded a finding against the plaintiff and, hence, he dismissed the plaintiffs suit with costs. The present appeal is filed against the said decree of dismissal.

4. It may be stated here that though various issues were framed by the lower Court it will not be necessary for me to examine and consider all of them. All of them together give rise to, four questions. On the first question regarding the one of title of the plaintiff to the suit lands, the plaintiff has no case whatsoever. As regards the second question regarding the right of the plaintiff to make a choice of the suit lands for being treated as surplus lands, I will presently point out that the plea is clearly barred by the principle of constructive res judicata by a judgment of this Court in Special Civil Application No. 1197 of 1966. The issue relating to the jurisdiction of the Court of entertaining the suit under the provisions of Section 41 of the Ceiling Act and the issue regarding the question of limitation need not, therefore, be considered by me at all and, hence, I express no opinion on these issues.

5. Coming to the two points urged before me by Mr. Deo, I will deal with them one after the other. The first point urged by Mr. Deo is that the suit lands cannot be said to be forming part of the plaintiffs holdings at all at the relevant time. He invited my attention to the plaintiff's contention and evidence that the suit lands were given by him into the possession of his wife as early as in the year 1953. He pointed out that necessary mutation entries were made in the revenue records. It was, therefore, contended that his wife Sarubai was possessed of the suit lands in the year 1956 when the Hindu Succession Act came into force. He, therefore, contended that Sarubai had become owner in respect of those lands from the year 1956, His contention was that the suit lands were given to Sarubai in lieu of her right of maintenance and such lands became the absolute property of the female concern-ed with effect from the said date.

6. To my mind, the contention of Mr. Deo is very much misconceived and it stems from misreading of Section 14 of the Hindu Succession Act, The legal consequence contemplated by the said section arises only when the property is "acquired" by a female Hindu before or after the commencement of the Act. The property might be acquired by the female under a compromise decree or under a decree in invitum or it may be by any instrument of transfer. Mere handing over of the property by the husband to the wife does not amount to her having "acquired" the said property, Moreover, what is to be noted is the strict

dichotomy maintained by the said section between the possession of the property as full owner on the one hand and as limited owner on the other. This dichotomy postulates that the female Hindu concerned has got vested in herself at least limited ownership of the property and there must be something to prove that such right to the property was transferred to her. By no stretch of imagination can it be said that mere mutation of names effected in the revenue records by the husband in favour of the wife would amount to her having "acquired" the said property. The revenue records may at the most serve as evidence of possession and, on occasions, even as presumption of title but, as mentioned above, mere possession by a female Hindu of any property does not make her a full owner of the said property under said Section 14 of the Hindu Succession Act. The possession must refer to some legitimate claim of title as owner, may be as full owner or limited owner. So far as the presumption of title is concerned, in the context of the admitted facts in the present case, the presumption stemming from the entries in the revenue records can be of no value to the plaintiff or to his wife Sarubai at all. When it is admitted that the plaintiff had not executed any document in accordance with the provisions of law transferring the suit lands to Sarubai in the year 1953 or at any time thereafter, the fact that Sarubai's name was shown in the Kabjedar column as the occupant of the suit lands could not confer any title upon her.

7. In support of his abovementioned contention, Mr. Deo sought to place reliance upon the judgment of the Patna High Court in the case of Sumeshwar Mishra and Others Vs. Swami Nath Tiwari and Others, I am afraid this judgment far from supporting Mr. Deo's contention, if at all, goes against him, The facts of that case were as follows:--

The joint family property at one time belonged to one Devkinandan Nissir, The petition was filed by Mosstt. Shukbaso Kuer claiming that she was entitled to have her name substituted in the place of her son Man Nissir. There was thus a family dispute and this dispute was set at rest by a compromise dated 3rd January, 1925, according to which, the names of the original plaintiffs were mutated in relation, to the property in question and by the same compromise the suit land was allotted to Mosstt Shukbaso Kuer for her maintenance with a restriction upon her against alienation of the property. In spite of this restriction, however, Mosstt. Shukbaso Kuer transferred the suit property to defendants Nos. 1, 2 and 3 in August, 1960 by two registered sale deeds. It is these sale deeds which were challenged by the plaintiff contending that the transferee got no title under the sale deeds by virtue of the restriction upon the alienation imposed by the said instrument embodying the terms.

8. While examining this question as to whether in spite of the said restriction Mosstt. Shukbaso Kuer had become full owner or not of the suit lands, the High Court of Patna held as follows (at p. 349 of AIR) :--

"Where in mutation proceedings a bona fide dispute between the parties is composed each party recognising the antecedent title in the other, and the

parties make a petition to the Court informing the terms of the agreement, there is no necessity to have such a petition registered as it does not purport to create or assign any right in the immovable property within the meaning of Section 17(1)(b) of the Registration Act it is merely a recital of a fact by which the Court is informed that the parties have come to an arrangement."

It could be, therefore, held that Mosstt. Shukbaso Kuer acquired a title to the property by virtue of the compromise, absence of registration of the compromise deed notwithstanding. However, even this question was left open by the Patna High Court, The Court held that even assuming that the document required registration, still the absence of registration would be of no avail because in that case Mosstt. Shukbaso Kuer must be held to have acquired title to a widow's estate in respect of the suit property by adverse possession. The Court, therefore, held that on the date when the Hindu Succession Act came into force Mosstt. Shukbaso Kuer was possessed of the property in question with a right of ownership. It may be that she acquired the right only to the widow's estate, that is to say, only as a limited owner; but whatever right she had was a right of ownership recognised by law. This being the position, according to the Court, it followed that the right of limited ownership of Mosstt. Shukbaso Kuer had ripened into full ownership by virtue of the provisions of Section 14 of the Hindu Succession Act.

9. But the Patna High Court relied upon the judgment of the Supreme Court in the case of *Eramma Vs. Verrupanna and Others*, In the said judgment the Supreme Court has clearly noticed the dichotomy referred by me above between the full ownership and limited ownership and the Supreme Court has pointed out that what is done by Section 14 of the Hindu Succession Act is to convert limited ownership of a widow into full ownership. Section 14 of the Hindu Succession Act does not purport to create a title in a female Hindu when none existed.

9-A. In the instant case, it is impossible to find any justification for holding that Sarubai, the wife of the plaintiff, had even a title of title to the suit lands. There was, therefore, no question of her title being ripened into a title of a full owner. The first point raised by Mr. Deo, therefore, has got to be rejected out right.

10. The second point raised by Mr. Deo, however, is not without substance to some extent. He contended in the first instance that under the Ceiling Act it is incumbent upon the Deputy Col-lector to give an opportunity to the holder concerned to make a choice in respect of the lands which should be treated as surplus lands. Mr. Deo contended that such a choice could not be exercised by any holder unless he knew for certain that he held surplus holdings. Mr. Deo contended, not without some force, that in the instant case the order holding that the suit lands were a part of the plaintiff's holdings was passed by the Deputy Collector as late as 31st August, 1965. He pointed out that in his notice dated 23rd April, 1964 the lands considered to be forming part of the plaintiff's holdings were showed in the schedule annexed to the notice and the plaintiff was called upon to make a choice in respect of the surplus lands. Evidently he would

be deemed to have been required to make the choice from the lands which were shown to be part of his holdings. The suit lands were not shown as part of his holdings. Therefore, it follows that he was not called upon to make a choice from all the lands held by him. At least prima facie such an act on the part of the Deputy Collector would be illegal. On behalf of the Government, it was contended by Mr. Kotwal, the learned Government Pleader, that the suit lands were lands subject to encumbrance within the meaning of Section 16 of the Ceiling Act. He, therefore, contended that they were rightly kept out of the holdings from out of which surplus land could be chosen by the plaintiff. I am afraid I am not very sure about the correctness of this argument. To my mind, encumbrance contemplated by Section 16 must be a valid encumbrance or an encumbrance recognised by law. Such an encumbrance must have resulted from something done by the real owner or real holder by virtue of which the owner of the encumbrance gets a lawful interest in the lands in question. In support of his contention. Mr. Kotwal sought to place reliance upon a Division Bench judgment of this Court delivered in Spl. Civil Appln. No. 1363 of 1968, D/-14-3-1972. K.K. Desai & V.S. Deshpande, JJ. A cursory perusal of the judgment would show that Mr. Kotwal's contention could not be supported by the said judgment at all. In that case, the person concerned wanted to treat those lands to be surplus lands in which other coparceners were having 2/3rd shares. It was held that these lands could be legitimately considered to be having encumbrance within the contemplation of said Section 16. With great respects, I cannot but be in full agreement with the said judgment. What is, however, to be noted is that in that case the interest of the other persons concerned in the lands in question was interest recognised by law. If the authorities under the Ceiling Act were to take possession of these lands in which the other coparceners were having interest, evidently they could not take possession from the coparceners who had present interest in the land which enabled them to continue to remain in possession. Under no provisions of the Ceiling Act the other coparceners can be dispossessed by the authorities under the Act. The encumbrance was, therefore, rightly considered by this Court to be one which would disentitle the holder concerned from treating the lands so encumbered to be surplus lands. To my mind, Mr. Deo was very much right in contending that in the instant case the transferees/defendants Nos. 2 and 3 are not transferees from the present plaintiff. They are transferees from Sarubai the wife of the present plaintiff. For all legal and practical purposes, therefore, defendants Nos. 2 and 3 do not get a title or an iota of right, title and interest in the lands in question. To my mind, Mr. Deo was also right in contending that there is every power vested in the authorities under the Ceiling Act to take possession of the suit lands from defendants Nos. 2 and 3 at any time they desire, once these lands were treated as surplus lands. As to what would be the equity between defendants Nos. 2 and 3 on the one hand and plaintiff and his wife on the other is something with which the authorities under the Ceiling Act should have no concern. It can hardly be doubted that so far as defendants Nos. 2 and 3 are concerned they are total strangers to the authorities under the Ceiling Act. There is nothing in the Act, either liter legis or sentential

legis, that enjoins upon the said authorities any obligation to be concerned about the equities towards such strangers.

11. No other authority was brought to my notice by Mr. Kotwal showing that the lands such as the suit lands which were transferred to persons such as defendants Nos. 2 and 3 by any legal document constituted encumbrance upon the land within the contemplation of the said Ceiling Act. To my mind, the transferees such as defendants Nos. 2 and 3 must have at least a semblance of a title by virtue of which the authorities under the Ceiling Act would be legally and effectively prevented from taking possession of the lands in question in exercise of their powers under the Ceiling Act. I do not find any such semblance of title in defendants Nos. 2 and 3 and I do not find any impediment to the authorities under the Ceiling Act from taking possession of these suit lands from defendants Nos. 2 and 3, the sale deeds Exh. 57 and Exh. 59 notwithstanding. Prima facie, therefore, it appears that having regard to the nature of the notice that was given to the plaintiff dated 23rd April, 1964, Exh. 53, no opportunity can be said to have been given to the plaintiff to make a choice in respect of the suit lands which he would like to have treated as surplus lands. Prima facie, therefore, it can be a very arguable point for Mr. Deo on behalf of his client and he could contend probably with success that the order treating lands other than the suit lands as surplus lands was vitiated by virtue of the basic requirements of the Ceiling Act.

12. However, I am afraid that even this ground is not open for Mr. Deo any more. In the first place, this question is urged by Mr. Deo for the first time in this appeal. That question has not been urged in the manner in which Mr. Deo urges before me either in the plaint or at any time in the suit. I do not find that there is any issue framed on this point. Mr. Deo contended that the question of the validity of the notice was specifically raised by his client but I am afraid that even that point would not cover the present question urged by Mr. Deo in the present form. All the same, however, I would be certainly inclined to allow Mr. Deo to raise this point even in this appeal. No further evidence is required to be led on that point. The facts from which the point stems are all admitted facts and since defendants Nos. 2 and 3 are parties to the suit I would have found no difficulty or objection to allowing Mr. Deo to raise this point even for the first time in this appeal.

13. The unsurmountable difficulty which Mr. Deo, however, has to face is the judgment of this Court given in Special Civil Appln. No. 1197 of 1966. The order that is passed by the Deputy Collector is the self-same order dated 31-8-1964. It is against this very order that the Revision Application was filed before the Tribunal and ultimately the Civil Application was filed in this Court. The validity of the order in the context urged by Mr. Deo in this appeal could be challenged by his client the plaintiff even in the said Special Civil Application and if he had raised the said point he had every reason to believe that he would have succeeded in the same. Not having raised this point raises a clear bar of

constructive res judicata against him.

14. Mr. Deo contends that he would be required to face this point of constructive res judicata only in a writ petition and not in a suit. He further stated that this was not a bar of res judicata as such but was a bar of constructive res judicata and he contended that the decision in a writ petition would not operate as constructive res judicata in a suit subsequently instituted. In this connection he places reliance upon the judgment of the Supreme Court in the case of State of Punjab Vs. Bua Das Kaushal, . The following observations were strongly relied upon by him (at P. 1677):

"It has been observed that there is no good reason to preclude decisions on matters of controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of finality of decision after full contest."

Mr. Deo contended that there was not any contest on this question about the validity of the order of the Deputy Collector so far as the question of selection of lands was concerned. He contended that from the abovementioned authority it can be said that the principle of constructive res judicata did not apply to suits filed after decision in writ petition.

15. I am afraid this contention of Mr. Deo cannot be accepted. It does not appear that the question whether a decision of High Court in writ jurisdiction will operate as constructive res judicata or not fell for consideration of the Court in that case. On the other hand, the authority of" the Supreme Court's judgment in the case of Union of India (UOI) Vs. Nanak Singh, has the direct bearing on this point, Appellant in that case had filed a writ petition challenging the termination of his temporary services on the ground of infringement of Article 311. He had also challenged the competence of the authorities to order termination of his services. The petition was dismissed On the ground that no case of infringement of Article 311 was made good. There was, therefore, no decision given about the competency of the authorities concerned to order termination. The petitioner filed a suit challenging the order of termination and there he raised this question of competency of the authorities to order termination. It was held by the Supreme Court that this question was barred by the principle of constructive res judicata. I find no difference in principles so far as the abovementioned decision of the Supreme Court and the present case before me are concerned. Mr. Deo was not able to satisfy me that the question which he was urging before me today could not be raised by him before in this court in Special Civil Application No. 1197 of 1966. His present contention, therefore, must be held to be barred by the principle of constructive res judicata.

16. Mr. Deo further contended that the trial Court has not raised any issue on the principle of constructive res judicata. He contended that no such plea was raised by the defendants in the trial Court. To my mind, such a contention could not lie

in the mouth of the present appellant. He himself had not pleaded that his right to make a choice of the suit lands as surplus lands was denied to him by virtue of the impugned order passed by the Deputy Collector. If this point was raised by him, the defendants would surely have come out with the plea that it is barred by the principle of res judicata and on that point an issue would have arisen for being considered by the trial Court. This plea of Mr. Deo also, therefore, cannot be sustained.

17. Mr. Kotwal has also invited my attention to two more authorities of the Supreme Court viz., *Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others*, and *Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat)*, . The latter authority is one which in fact explains the former. However, to my mind, the abovementioned authority of the Supreme Court in *Union of India (UOI) Vs. Nanak Singh*, is enough so far as the present appeal is concerned and it is not necessary for me to consider the indirect effect of the abovementioned two authorities of the Supreme Court.

18. In this view of things, I have no other option but to hold that the plaintiff has not succeeded in bringing home to this Court the illegal character of the order passed by the Deputy Collector dated 31st August, 1965. The suit was, therefore, rightly dismissed by the lower Court, The appeal, therefore, fails and the same need to be dismissed. In the circumstances of the case, there shall be no order as to costs.

19. Appeal dismissed.