
(1998) 03 GUJ CK 0045
In the Gujarat High Court

Patel Jivabhai M. (Decd.) through his Heirs and Another	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 12-03-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 41 Rule 27

Citation : (1998) 2 GLR 1685

Hon'ble Judges : D.C. Srivastava, J

Bench : Single Bench

Judgement

D.C. Srivastava, J.—This is plaintiffs' Second Appeal.

2. The plaintiffs filed suit in representative capacity under Order 1, Rule 8 of the CPC for several declarations and injunction. The first declaration was that the plaintiffs be declared to be occupants of the disputed land and further be declared that they are owners thereof. Alternatively, it was sought to be declared that the plaintiffs are in possession of the suit land under customary right. Further declaration was sought that the Government has no right to hand over the suit land to anybody unless it proves its ownership over the same under the Bombay Land Revenue Code. Another declaration was sought that the proceeding taken by the Government Surveyor do not affect ownership right or possession of the plaintiff over the suit land. Relief of permanent injunction was sought restraining the Government officers not to enter over the suit land and not to interfere with the plaintiffs' possession over the suit land.

3. The case of the plaintiffs was that before coming into existence of Saurashtra State there was Dhrangadhra State and village Bharad was Girasdari village of the said State. The plaintiffs were cultivating the land of Girasdar of village Bharad. They were given agricultural land, house, vada and khada land for threshing purpose. The threshing floor is called as khada land or Khala land or Khalavad. The previous practice was that if one farmer left the land the Girasdar used to give the same to another farmer under a Deed on receipt of Nazarana. The Khala land was already given along with agricultural land and it was so

mentioned in such Deeds. The Khala land according to the plaintiffs, is common village land used for threshing purpose and is known as "Khalavad". After Saurashtra State came into existence the Saurashtra Land Reforms Act was enacted under which the plaintiffs have become occupant of the said land of Gujarat State. In the alternative they claimed as occupants of the Khalavad land since many years and since they were using the same for threshing purpose they have acquired customary right for such user. On 12-4-1979 Khalavad land was measured by Government Surveyor for being given to some Harijans. On 12-12-1979 inquiry was made and it was found that the Government wanted to give such land to Harijans. Thereafter, the plaintiffs issued notice to the Government, but with no result. On 5-2-1980 direction was given by Taluka Development Officer to prepare lay-out of the land. Apprehending interference with plaintiffs' possession they filed suit for declaration and permanent injunction.

4. The suit was resisted by the State on the ground that the plaintiffs have not acquired any customary right over the disputed land which is part of Survey No. 197 admeasuring 8 Acres - 37 Gunthas. This land is recorded in the name of the Government and the plaintiffs are neither owners nor occupants nor in possession of the same. It was further pleaded that even if the plaintiffs used the land in dispute for some time as threshing floor, it was permissive possession which does not confer any right on the plaintiffs and that the suit land has been acquired by the Government and stands in the name of the Government.

5. The trial Court dismissed the suit. An Appeal was preferred which was also dismissed. It is, therefore, this Second Appeal.

6. Following substantial questions of law were formulated for disposal of this Appeal:

(1) Whether the suit land known as Khalavad has vested in the State under the Saurashtra State Acquisition Act?

(2) Whether the appellants-plaintiffs are the occupants of the suit land under the Saurashtra Land Reforms Act?

(3) Whether the inquiry u/s 37(2) of the Bombay Land Revenue Code should be made before making the entry in the name of the State Government regarding the land in dispute?

(4) Whether the rights of the plaintiffs over the suit land are not affected u/s 4 of the Saurashtra Estate Acquisition Act?

(5) Whether the plaintiffs have customary right of using the suit land under the law?

7. The learned Counsel for the parties were heard and the material on record was examined.

8. The two Courts below have held that the plaintiffs have not acquired any

customary right of using the suit land for threshing floor purposes. Learned Counsel for the appellants did not press substantial question No. 5 on this point at the beginning of his argument. Consequently, it is held that the plaintiffs have not acquired any customary right of using the suit land as threshing floor or Khalavad.

9. So far as other four questions are concerned they are inter-connected. However, it is desirable to answer those questions separately.

10. On question No. 3 the contention of learned Counsel for the appellants has been that the land in dispute could not be recorded in the name of the Government without inquiry contemplated u/s 37(2) of the Bombay Land Revenue Code and if such entry has been made in the revenue record without notice to the plaintiffs the same has no consequence and such entry does not confer title upon the Government over the land in dispute. It, therefore, takes us to the appreciation of Section 37(2) of the Bombay Land Revenue Code. Section 37(2) of the Code reads as under:

(2) Where any property or any right in or over any properties is claimed by or on behalf of (the Government) or by any person as against (the Government), it shall be lawful for the Collector or a Survey Officer, after formal inquiry of which due notice has been given, to pass an order deciding the claim.

11. It is, therefore, clear from plain reading of this section that claim of a property should be made firstly by or on behalf of the Government, secondly by any person as against the Government. Similar claim should be made in respect of any right in or over any property and then only it is lawful for the Collector or Survey Officer after formal inquiry by giving due notice to pass an order deciding the claim. This section itself postulates that there should be a claim in nature of dispute may be the Government by claiming a particular land or right over particular land against private individual or body corporate or body of individuals. Likewise, there may be a dispute or claim by any person against the Government in respect of any property or any right in or over any property. Unless there is a dispute of this nature it is not lawful for the Collector to issue notice and hold formal inquiry and pass an order deciding the claim.

12. In the case before me the plaintiffs claimed to be occupants of the Khalavad land. Occupancy rights were claimed by them. However, evidence on record shows that such right was claimed by the plaintiffs before the Mamlatdar. Application was moved by plaintiff Ambaram Govindbhai for issuance of occupancy certificate. He applied for occupancy rights in respect of seven fields. He admitted in the witness box that he applied for occupancy certificate in respect of the house, wada land, but he was given occupancy right only in respect of the house, agricultural field and wada land. He further admitted that there is no mention of Khala land in the said certificate and that he came to know about this fact only when the certificates were returned to him by the bank about 15 years ago. This portion of the statement hardly inspires confidence. If

claim for occupancy rights over Khalavad or Khala land was rejected by the Mamlatdar proper action by filing Appeal should have been taken. It cannot be believed that for 15 years said plaintiff was ignorant of the fact that his claim for occupancy right over Khala land was rejected. Not only this, he further admitted that no occupancy right has been given to any of the plaintiffs in respect of Khala land. Number of plaintiffs have been shown in the schedule of the plaint. It was a suit in representative capacity. None preferred appeal against the order of Mamlatdar. It is undisputed that the disputed land is Survey No. 197. It is recorded in the name of Government since 1952. Consequently, having remained silent at an appropriate time the plaintiffs cannot be permitted to agitate the matter now in Civil Court or in this Second Appeal that proper inquiry u/s 37(2) of the Bombay Land Revenue Code should have been made by the Collector. Not a single document has been filed to show that occupancy certificate was issued to the plaintiffs.

The answer to question No. 3 is that on the facts and circumstances of the case no inquiry u/s 37(2) of the Bombay Land Revenue Code was necessary before recording the name of the State Government in revenue record over the land in suit.

13. The next question for consideration is whether the plaintiffs are occupants of the suit land under the Saurashtra Land Reforms Act. Learned Counsel for the appellant contended that unless the Government establishes its title to the land, the suit of the plaintiffs is liable to be decreed. However, I am unable to accept this contention. It is for the plaintiffs to establish that they are occupants of the land in suit and they have acquired occupancy rights over the same. Mere possession or permissive possession will not make them occupants of the land in suit. The brief history is that prior to creation of Saurashtra State the Girasdar used to grant licence of agricultural land, house, wada land and Khala land to the farmers on crop basis and also on Nazarana. It was thus permissive possession from the Girasdar. The purpose of giving Khala land to the farmers was that there should be a compact piece of land where during harvesting seasons all the farmers, after harvesting the crops, may store the same at that place and after the grain is separated from the chaff proper distribution may be made and share of Girasdar may not be misappropriated by the farmers. It was with this aim that such compact land was left apart by the Girasdar. For such land also the farmers were having permissive possession for a particular period and that too during two harvesting seasons and not that they remained in continuous possession or occupation of Khala land.

14. u/s 28 of the Saurashtra Land Reforms Act, 1951 if any tenant wanted to acquire occupancy right he had to apply as provided in this section. Under this section a tenant shall at any time be entitled to acquire occupancy rights in his holding on payment of such amount as shall be equal to six times assessment payable in respect of agricultural land included in such holding and may apply in prescribed form to the Mamlatdar for acquiring such rights. Application is to be

made in the prescribed form giving particulars mentioned in Sub-section (2) of Section 28. This section itself clearly provides that a tenant can apply for and acquire occupancy rights in his holding on payment of prescribed amount payable in respect of agricultural land included in such holding. The Khalavad is not to be treated as agricultural land. Consequently, occupancy rights could not be claimed over Khalavad land. It could be claimed in respect of the agricultural land only. In this view of the matter also the Mamlatdar did not commit any illegality in not granting occupancy right to plaintiffs in Khalavad land. Moreover no action was taken by the plaintiffs against order of the Mamlatdar directing entry in the name of Government in respect of the land in suit. The learned Counsel for the appellants contended that since no notice was issued to the plaintiffs by Mamlatdar they could not agitate the matter. It was argued by him that notice of acquisition should have been given to the plaintiffs and in support of this contention the case of Gujarat Housing Board, Ahmedabad Vs. Nagajibhai Laxmanbhai and Others, was referred. The aforesaid case is apparently on a distinct point. In this case it was laid down that the acquiring body is interested person and as such necessary party in acquisition proceeding. The question before me in this Appeal was not under consideration in the aforesaid Full Bench decision. Hence, the said decision is of no help to the appellant. Further, as already held under Point No. 3 that no inquiry u/s 37(2) of the Bombay Land Revenue Code was required to be made in the facts and circumstances of the case in the absence of specific claim by the plaintiffs, no further notice was required. It was a case of vesting of land under the Saurashtra State Acquisition Act, 1952.

15. In the absence of any reliable documentary evidence that the plaintiffs acquired occupancy right over suit land this question is also to be answered in negative and is so answered.

16. Coming to the first question it has to be seen whether Khalavad land has vested in the State of Gujarat under the Saurashtra State Acquisition Act. Section 3 of the said Act provides for abolition of Girasdar and Barkhali tenure. It provides as under:

3. Abolition of Girasdar and Barkhali tenures: (1) The Government may from time to time, by notification in the official gazette, declare that with effect from such date as may be specified in the notification, all the rights, title and interest of Girasdar or Barkhalidars shall, in respect of any estate or part of an estate comprised in the notification, cease and be vested in the (State of Gujarat); and all the incidents of the said returns attaching to any land comprised in such estate or part thereof shall be deemed to have been extinguished.

(2) A notification under Sub-section (1) may be issued in respect of an estate or part of an estate or in respect of all estate in any area specified in the notification.

(3) Nothing in Sub-section (1) shall apply to -

(a) any land allotted to a Girasdar or a Barkhalidar for personal cultivation under the provisions of the Saurashtra Land Reforms Act, 1951, or the Saurashtra Barkhali Abolition Act, 1951 or to any gharkhed land; or

(b) any land in respect of which any person (other than the Girasdar or Barkhalidar) becomes or is entitled to become an occupant under any of the aforesaid Act.

17. Consequences of abolition of Girasdar or Barkhalidar in any State are given in Section 4 of the aforesaid Act.

18. What is contemplated u/s 3(1) is that the Government may, from time to time, by notification in the official gazette declare that with effect from a date as specified in the notification all rights, title and interest of Girasdar or Barkhalidar shall in respect of any estate or part of estate comprised in the notification cease and be vested in the State of Gujarat. Thus, by notification in the official gazette the Government can come forward with declaration that from the specified date all rights, title and interest of Girasdar in any estate or part of any estate shall cease and be vested in the State of Gujarat. For such notification no prior notice was required to be given by the State Government to the plaintiffs and the contention to the contrary is totally unacceptable.

19. Such notification, in view of Sub-section (3) of Section 3 shall not apply to any land allotted to a Girasdar for personal cultivation. It is, therefore, clear that Khalavad land was also in the estate of Ex-Girasdar and it was never allotted for personal cultivation of the Girasdar. Consequently, notification for divesting the Girasdar of interest in Khalavad land and vesting such property in the State of Gujarat was perfectly within the domain of the State Government. By virtue of such notification even Khala land could vest in the State Government.

20. Learned Counsel for the appellant again contended that since the plaintiffs acquired occupancy right over the land in suit they could not be divested of such right without due notice. It has already been held above that plaintiffs have miserably failed in establishing that they acquired occupancy right over Khala land and Khalavad. Consequently, no other notice was required to be given to them before issuing notification as contemplated u/s 3 of the Saurashtra State Acquisition Act.

21. Learned Counsel for the appellant next contended that the lower Appellate Court was in error in permitting additional evidence, viz., award Ex. 30 and notification Ex. 31 in the First Appeal despite objections raised by the appellant. I do not find any illegality which has been committed by the lower appellate Court on this point. Additional evidence could always be accepted by the appellate Court under Order 41, Rule 27 of the CPC provided such evidence was necessary for effective adjudication of the controversy involved in the suit and the appeal. The notification and the award were necessary and important documents on which proper adjudication of the controversy could be made by the appellate Court. The lower appellate Court, therefore, rightly accepted additional evidence

in appeal.

22. Ex. 31 is a notification No. RD-IV-2541 Rajkot dated 2-9-1954 from Government of Saurashtra. Under this notification all uncultivable waste land held by Girasdar/Barkhalidar in Saurashtra were acquired by the State Government from the date of notification. The Girasdars were divested of such rights and such rights vested in the State with effect from 2-9-1954. Learned Counsel for the appellant contended that this notification is irrelevant because it relates to uncultivable waste land, where Khalavad is cultivable waste land and since no notification for acquisition of cultivable waste land was brought on record it could hardly be said that the Government acquired title over such land. It is true that the relevant notification relating to cultivable waste land was not brought on record either in the trial Court or in the first appellate Court, but in the award Ex. 30 there is specific mention of two notifications. The first is notification No. RD-IV-1571 dated 27-10-1952 and other notification No. RD-IV-2541 dated 2-9-1954. The first notification of 27-10-1952 is described in relation to kheravad padtar land and the second notification of 2-9-1954 is in relation to bin-kheravad padtar land. The word kheravad padtar means cultivable waste land and the word "bin-kheravad padtar" means uncultivable waste land. It is not only that in Para 1 of Ex. 30 such description has been made, but at page 2 also kheravad padtar land having an area of 73 Acres-30 Gunthas was taken into consideration for the purpose of awarding compensation. Applications were moved by Girasdar claiming compensation in respect of uncultivable waste land and also cultivable waste land. There is finding of the two Courts below that compensations were paid as per terms contained in Ex. 30. This finding of fact was assailed by the learned Counsel for the appellant to be perverse, but I do not find any perversity in this finding. The reason is that the plaintiffs can have no direct knowledge whether compensation in terms of Ex. 30 was paid to the Girasdar or not. The best person could have been the Girasdar to deny the alleged payment pleaded by the State Government. No Girasdar was examined on behalf of the plaintiffs. Consequently, in the absence of best evidence of denial of payment the version of the State Government has to be accepted and the version of the plaintiffs being unreliable, cannot be accepted. If compensation was received by ex-Girasdar in respect of cultivable waste land it can hardly be said that such land became occupancy tenancy of the plaintiffs or they became occupants of the same or they acquired occupancy rights over the same.

23. Recital in Ex. 30, being a public document, regarding earlier notification dated 27-10-1952 cannot be ignored simply because there was no proper conduct of the case on behalf of the State of Gujarat by not filing said notification.

24. Waste land by itself has not been defined in Saurashtra State Acquisition Act. However, waste land means land which is of no utility for agricultural purpose. A land may not be used for agricultural purpose. Hence, it may be considered to be waste land, but at the same time such land may have other potential value

inasmuch as such land can be used for constructing residential building and colonies and for allied purpose. Waste land is of two categories, one is cultivable waste land and the other is non-cultivable waste land. Land has been defined u/s 2(c) of the Saurashtra State Acquisition Act, 1952 to mean land of any description whatsoever and includes benefits arising out of land and things attached to the earth or permanently fastened to anything attached to the earth.

25. Cultivable waste or cultivable waste land has been defined in Section 2(b) of the said Act to mean cultivable land which had remained uncultivated for a period of three years or more before 17-4-1951. The word estate has been defined u/s 2(c) of the above Act to mean the land of whatever description or undivided share thereof held by a Girasdar or a Barkhalidar.

26. From analysis of the above definition it is clear that estate means land held by Girasdar and the land has been defined u/s 2(e) of the Act. Notification u/s 3(1) of the Act could be made in respect of estate or part of the estate. Cultivable waste within the meaning of Section 2(b) of the Act will also be cultivable land which has remained uncultivable for a period of three years or more before 17-4-1951. In view of this definition Khalavad which admittedly remained uncultivated for more than three years before 17-4-1951 will be treated as cultivable waste land and in view of Section 3(1) the State Government could by notification divest the Girasdar of all interest in such land which could legally vest in the State of Gujarat. Therefore, separate notification for cultivable waste land was also within the competence of the Legislature of the Government.

27. In view of aforesaid discussion, it is clear that the disputed Khalavad land rightly vested in the State of Gujarat under the Saurashtra State Acquisition Act, 1952. The question is answered in affirmative.

28. Coming to the last question No. 4 the learned Counsel for the appellant contended that rights of the plaintiffs over the suit land are not affected in view of Section 4 of the Saurashtra State Acquisition Act, 1952. This contention is also hardly acceptable. Section 4, aforesaid, provides for consequences of abolition of Girasdari or Barkhali in any estate. The consequences which are to follow from the date of notification are given in Sub-section (a). Sub-section (ii) of Sub-section (a) of Section 4 provides that all cultivable and uncultivable waste lands (excluding land used for building or other non-agricultural purpose) shall be the property of the State of Gujarat and all such rights held by Girasdar in such property shall be deemed to have been extinguished. The word "cultivable and uncultivable waste land" cannot be interpreted to mean that the word "cultivable" relates to agricultural land and uncultivable waste land relates to such land only. On the other hand, proper construction of this sub-section is that all cultivable waste land and uncultivable waste land shall vest in the State of Gujarat from the date of notification. The intention of the Legislature for such interpretation further finds support from Sub-section (b) of Sub-section (v) of Section 4 which provides that the Girasdar or Barkhalidar shall, subject to the provision of this

Act, be deemed to be in occupation in respect of all other lands held by him. Thus, under this section interest of the plaintiffs is not safeguarded.

29. Learned Counsel for the appellant, however, placed reliance upon Section 4(a) (v) of the Act and contended that since rights of the plaintiffs over the Khala land have been established the same cannot vest in State of Gujarat. In the first place it has already been held earlier that the plaintiffs have failed to establish their occupancy rights over the land in suit. Consequently, their contention cannot be accepted. Secondly, Sub-section (v) of Section 4(a) aforesaid, relates to schools, dharmashalas, public temples and other such buildings or structures together with sites on which such building and structures stand and not to uncultivable land like Khalavad. It is only in respect of such buildings and sites where a person could establish his right that he can claim that he cannot be divested of such right and not that he can claim that he cannot be divested of all rights over Khala land which has a different meaning.

Consequently, it is difficult to accept the contention that Section 4 of the Saurashtra State Acquisition Act preserves the rights of the plaintiffs. The question is answered in negative.

30. In the result the appellants have failed to establish their occupancy rights " over the land in dispute. They have also failed to establish that their rights are protected u/s 4 of the Saurashtra State Acquisition Act. They have also failed to establish that the land in suit has not vested in the State of Gujarat; rather the respondent have succeeded in establishing that the land in suit has vested in the State of Gujarat. The appellants have further failed to establish that inquiry u/s 37(2) of the Bombay Land Revenue Code was condition precedent for recording the name of the State Government over the disputed land in 1952. As a result the two Courts below did not commit any illegality in dismissing the suit and Appeal of the appellant. There is no merit in this Second Appeal which is hereby dismissed with costs.