

(2015) 12 BOM CK 0039

In the Bombay High Court

Case No : Second Appeal Nos. 598 and 599 of 1993

Ramchandra Yeshwant Desai and Others

APPELLANT

Vs

Krishna Sitaram Desai and Others

RESPONDENT

Date of Decision : 04-12-2015

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 89
Civil Procedure Code, 1908 (CPC) — Section 100
Maharashtra Land Revenue Code, 1966 — Section 88, 89
Transfer of Property Act, 1882 — Section 54

Citation : (2016) 1 ABR 526 : (2016) 2 BomCR 275 : (2016) 2 MhLj 120

Hon'ble Judges : R.D. Dhanuka, J.

Bench : Single Bench

Advocate : V.S. Gokhale, for the Appellant

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—By consent of the parties, both these second appeals are heard together and are disposed of by a common judgment.

2. The appellant No. 1 in Second Appeal No. 599 of 1993 was the original defendant No. 1 before the trial Court and was appellant in Civil Appeal No. 30 of 1985. The appellant Nos. 2 and 3 are the original defendant Nos. 2 and 3 respectively before the trial Court and were appellant Nos. 2 and 3 in Civil Appeal No. 30 of 1985. The respondent Nos. 1, 2 and 3 were the original plaintiffs before the trial Court and were respondent Nos. 1, 2 and 3 in Civil Appeal No. 30 of 1985.

3. Insofar Second Appeal No. 598 of 1993 is concerned, the appellant to the said appeal was the original plaintiff before the trial Court and the appellant in Civil Appeal No. 33 of 1985. The respondents to the second appeal were the original defendants before the trial Court and were the respondents in Civil Appeal No. 33 of 1985. Common evidence was led by the parties in both the suits.

4. Some of the relevant facts for the purpose of deciding these appeals are as under:

The suit property which is the subject matter of both the proceedings is a portion of survey No. 34, hissa No. 4, admeasuring 9 gunthas of village Degve, taluka Sawantwadi, district Sindhudurg (hereinafter referred to as the "suit property").

5. Some time in the year 1981 the respondent Nos. 1 to 3 in the Second Appeal No. 599 of 1993 filed a suit before the learned Civil Judge, Junior Division, Sawantwadi, inter-alia praying for declaration and injunction against the defendants (the appellants herein).

6. Some time in the year 1981, the appellants herein (original plaintiffs in RCS No. 152 of 1981) filed a suit against the respondents herein (original defendants to the said suit) RCS No. 152 of 1981 inter-alia praying for injunction against the defendants therein on the ground that the appellant (original plaintiff) was the owner and was in possession of the suit property.

7. On 21st December, 1984, the learned trial Judge decreed RCS No. 123 of 1981 filed by the respondents herein and declared that the respondents herein (original plaintiffs) were entitled to possession of 9 gunthas from survey No. 34, hissa No. 4, which were included out of the old survey No. 35, Falani No. 5 and passed an order of injunction restraining the defendants from obstructing the plaintiffs' possession. Similarly the learned trial Judge in RCS No. 152 of 1981, which was filed by the appellant in Second Appeal No. 598 of 1993 decreed the said suit partly and restrained the defendants thereto (respondents to the second appeal) permanently from obstructing the plaintiffs' possession in respect of the said land excluding 9 gunthas originally from survey No. 35, Falani No. 5.

8. Being aggrieved by the decree passed by the trial Court in RCS No. 123 of 1981, the appellant No. 1 in Second Appeal No. 599 of 1993 filed Civil Appeal No. 30 of 1985 in the Court of Additional District Judge, Sindhudurg at Sawantwadi. In the said appeal, the appellant Nos. 2 and 3 herein were impleaded as the respondent Nos. 4 and 5.

9. Being aggrieved by the order and judgment dated 21st December, 1984 passed by the learned Civil Judge, Junior Division, Sawantwadi, the appellant in Second Appeal No. 598 of 1993 (original plaintiff), filed Civil Appeal No. 33 of 1985.

10. By an order and judgment dated 16th August, 1993, the learned Additional District Judge, Sawantwadi dismissed Civil Appeal No. 30 of 1985, which was filed by the appellant No. 1 in Second Appeal No. 599 of 1993. By an order and judgment dated 16th August, 1993, the learned Additional District Judge, Sawantwadi dismissed Civil Appeal No. 33 of 1985.

11. The appellants in Second Appeal No. 599 of 1993 has impugned the judgment and decree dated 16th August, 1993 passed by the Additional District Judge in Civil Appeal No. 30 of 1985. The appellants in Second Appeal No. 599 of

1993 has impugned the judgment and decree passed by the learned Additional District Judge on 16th August, 1993 dismissing the appeal filed by the appellants in Second Appeal No. 598 of 1993. The learned counsel for the parties have made common submissions in both the appeals.

12. Insofar as Second Appeal No. 599 of 1993 is concerned, by an order dated 3rd January, 1994 while admitting the said appeal, this Court has formulated the following substantial questions of law on 3rd January, 1994:-

(1) Whether Exhibit-42 (Botkhat) and Exhibit-43 (Akharphod Patrak) are liable to be considered as documents proving title in respect of the suit land?

(2) Whether the said two documents by themselves can be considered as sufficient in law to rebut the presumption arising from mutation entries in respect of the suit land (being the said mutation entries referred to in para 26 of the judgment of the First Appellate Court)

13. Both the learned counsel appearing for the parties have agreed before commencing their arguments that substantial questions of law formulated by this Court in Second Appeal No. 599 of 1993 would also arise in Second Appeal No. 598 of 1993 and have addressed this Court on the said substantial questions of law in both the second appeals.

14. Mr. Gokhale, learned counsel for the appellants in both the appeals invited my attention to some part of the oral evidence, documents and also the findings rendered by both the courts below. He submits that the appellant was the owner of larger piece of land bearing survey No. 34, hissa No. 4 admeasuring 44 acres from village Degve which was inclusive of 9 gunthas of land from survey No. 35, Falani No. 5. He submits that the present dispute in both the appeals is only in respect of 9 gunthas of land of survey No. 35, Falani No. 5. Insofar as the suit property is concerned, the defendants before the trial Court (appellants herein) had claimed ownership by adverse possession. Learned counsel submits that the learned trial Judge as well as the lower appellate Court has erred in appreciating the evidence placed before the Court and ought to have rejected the prayer of the plaintiffs for perpetual injunction. He submits that the learned trial Judge ought to have rendered a finding that the defendants to the said suit had proved their title and ownership in the land in dispute and that they were in possession of the same.

15. Learned counsel however, in fairness invited my attention to the various findings of fact recorded by the learned trial Judge in RCS No. 123 of 1981, which was filed by the respondent Nos. 1 to 3 herein for a declaration and injunction.

16. The learned trial Judge in the said suit had framed five issues. Insofar as the issue whether the plaintiffs had proved their possession in respect of the suit land is concerned, the learned trial Judge has answered the said issue in affirmative in respect of title. The learned trial Judge has also held that the

plaintiffs were entitled for injunction as prayed. The learned trial Judge held that the plaintiffs were entitled for possession of the suit land together with mesne-profits. Insofar as the issue as to whether the defendants had proved that they became the owners by adverse possession of the suit land is concerned, the said issue was answered in negative. By the said order and decree dated 21st December, 1984, the said suit was decreed and it was declared that the plaintiffs were entitled to possession of 9 gunthas from survey No. 34, hissa No. 4 which were included out of the old survey No. 35, Falani No. 5 and restrained the defendants from obstructing the possession of the plaintiffs.

17. The lower appellate Court in the order and judgment dated 16th August, 1993 in the appeal filed by the appellant No. 1 in Second Appeal No. 599 of 1995 formulated eight points for consideration and confirmed the findings rendered by the learned trial Judge and answered those issues accordingly. The learned appellate Court also adverted to the various portions of the oral evidence led by both the parties and held that the names of ancestors of the respondent Nos. 1 to 3 herein were recorded in Botkhat and Akharphod Patrak (Exhibits 42 and 43 respectively). The learned Additional District Judge placed reliance on the judgment of this Court in case of Anant Dattatraya Thakur-Desai Vs. Mahadev Wasudeo Thakur-Desai, and the judgment of this Court in the case of Hashomal Mulohand Vs. J.S. Bajaj, . Reliance was also placed on the judgment of this Court in case of Dattu vs. Babasaheb, XXXVI, The Bombay Law Reporter 359 and in the case of Shankarrao Dagadujirao vs. Shambhunath Patil, , 43, The Bombay Law Reporter, 1 .

18. The lower appellate Court has held that the documents at Exhibits 42 and 43 i.e. Botkhat and Akharphod Patrak were sufficient to rebut the presumption as regards the entries appeared in the record of rights in the name of the appellants and respondent Nos. 4 and 5. The appellate Court took cognizance of the fact that the names of the appellants and respondent Nos. 4 and 5 had appeared in the records of survey No. 33 hissa No. 4 and also in the joint khata No. 215.

19. The lower appellate Court considered section 89 of the Maharashtra Land Revenue Code and held that the survey which were made at the time of preparation of Botkhat and Akharphod Patrak were prepared under the provisions of the Bombay Land Revenue Code and Botkhat being the document of title shall be deemed to have been made under the provisions of Chapter-V of the Code. It is held that the presumption regarding the entries appearing in the name of the appellant in the record of rights accordingly stood rebutted in view of the said Botkhat and Akharphod Patrak being Exhibits 42 and 43. It is held that the title cannot pass by mutation proceedings which are not judicial proceedings in which the title in respect of immovable property are determined. It is held that the order made in the mutation proceedings is not judicial determination of title or proprietary in question. It does not transfer the ownership and is within the definition of sale as defined in section 54 of the Transfer of Property Act. It is held that mere entries in the record of rights in the name of the appellants in

survey No. 34/4 to the extent of the area of 9 gunthas from Falani No. 5 of survey No. 35, in the record of rights, did not confer title and interest on the appellants.

20. The lower appellate Court after considering the oral evidence has held that the respondent Nos. 1 to 3 herein (original plaintiffs and respondent No. 6) had sufficiently established their title, interest in the land in dispute. The appellant and respondent Nos. 4 and 5 had failed to establish their title by way of adverse possession.

21. Insofar as Second Appeal No. 598 of 1993 is concerned, Mr. Gokhale, learned counsel for the appellant submits that the appellant had perfected his title by adverse possession in respect of the suit property and was entitled to the relief of perpetual injunction. He submits that his client had also proved his possession and title over the entire suit land. He submits that the entries in Botkhat and Akharphod Patrak did not confer any title on the persons whose name was entered in those documents. It is submitted that the entries made after the new survey and its promulgation superseded the entries made in the Botkhat and Akharphod Patrak.

22. Learned counsel appearing for the contesting respondents in both the appeals supported the findings recorded by both the courts below which are the subject matter of the second appeals and submits that the concurrent findings recorded by both the courts below in both the matters cannot be interfered with by this Court under section 100 of the Code of Civil Procedure, 1908, the same being not perverse. He submits that both the courts have referred to various judgments of this Court on the issue as to whether Botkhat and Akharphod Patrak were liable to be considered as documents proving title in respect of the suit property and were sufficient in law to rebut the presumption arising from the mutation entry in respect of the suit land. He submits that the judgments of this Court which are relied upon by the courts below are applicable to the facts of this case and are binding on this Court.

23. I have heard the learned counsel for the parties at length and have given my anxious consideration to the rival submissions made by the learned counsel. A perusal of the orders passed by the trial Court and as well as the lower appellate Court in both the matters clearly indicates that both the Courts below in both the proceedings have rendered a concurrent finding of fact against the appellants herein and in favour of the respondent Nos. 1 to 3 in the suit filed by the respondent Nos. 1 to 3 herein and also in the suit filed by the appellant No. 1 herein before the learned trial Judge. The learned trial Judge has rejected the plea of adverse possession urged by the appellants herein.

24. The question that arises before this Court is whether the respondent Nos. 1 to 3 had rebutted the presumption to be drawn in the entries recording the names of the appellant and respondent Nos. 4 and 5 in revenue record by relying upon the Botkhat (Exhibit-42) and Akharphod Patrak (Exhibit-43) were

documents of title and whether those documents were sufficient to rebut the presumption.

25. There is no dispute that both these documents i.e. Botkhat and Akharphod Patrak were issued under the provisions of the Bombay Land Revenue Code, 1879 which was repealed by Maharashtra Land Revenue Code, 1996. Section 88 of the Maharashtra Land Revenue Code deals with the privilege of title deeds. Section 89 of the Bombay Land Revenue Code provides that any survey made before the said code came into force and entries under any law for the time being in force or otherwise, and in operation on the date of the commencement of the said Maharashtra Land Revenue Code, shall be deemed to have been made under the provisions of Chapter-V. It is not in dispute that the said documents i.e. Botkhat and Akharphod Patrak were already in existence when the names of the appellants and the respondent Nos. 4 and 5 were recorded in the revenue entries.

26. This Court in the case of Anant Dattatraya Thakur-Desai Vs. Mahadev Wasudeo Thakur-Desai, has held that an entry in Botkhat is presumptive evidence of title and possession in favour of the persons whose name appears in it. Mr. Gokhale, learned counsel for the appellants could not point out any other judgment taking a view contrary to the view taken by this Court in the case of Anant Dattatraya Thakur-Desai vs. Mahadev Wasudeo Thakur-Desai, (supra). Learned counsel for the appellants fairly states that the said judgment of this Court holds the field.

27. In my view since the said Botkhat and Akharphod Patrak which were proved by the original plaintiff before the trial Court and also before the appellate Court, those documents being the document of title are deemed to have been made under the provisions of Chapter-V of the Maharashtra Land Revenue Code and by virtue of those two documents, the plaintiff has rebutted the presumption which has to be drawn for the entries regarding the names of the appellant and respondent Nos. 4 and 5 in the revenue record.

28. Insofar as the entries in the revenue record is concerned, the learned trial Court has referred to the judgment of this Court in case of Hashomal Mulchand vs. J.S. Bajaj, reported in (1965) LXVIII, The Bombay Law Reporter 375. It is held by this Court that the mere entries in the record of rights do not make or unmake the title to the property. It is held that the entries in the record of rights is presumptive evidence and the said presumption can be displaced by better evidence.

29. The Supreme Court in case of The State of A.P. and Others Vs. Star Bone Mill and Fertiliser Co., has after adverting to its earlier judgment in case of Gurunath Manohar Pavaskar and Others Vs. Nagesh Siddappa Navalgund and Others, and in case of Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others, and in case of Chief Conservator of Forests, Govt. of A.P. Vs. The Collector and Others, has held that revenue record is not a document of title. It

merely raises presumption in regard to possession.

30. In my view, the entries in the revenue record do not create or extinguish any title in respect of land in dispute. It enables the person whose favour the mutation is ordered to pay land revenue. On the contrary, Botkhat and Akharphod Patrak can be considered as document of title and is sufficient to rebut the presumption arising from the mutation entry. I am respectfully bound by the judgment of this Court in case of Anant Dattatraya Thakur-Desai vs. Mahadev Wasudeo Thakur-Desai (supra) which squarely applies to the facts of this case and also the judgment of the Supreme Court in the case of State of Andhra Pradesh & Others vs. Star Bone Mill & Fertiliser Co. (supra).

31. I therefore answer both the substantial questions of law formulated by this Court on 3rd January, 1994 in the affirmative.

32. In my view no case is made out by the appellants for interference with the impugned order passed by the trial Court and the lower appellate Court in both the matters. Both these appeals are devoid of merits and are accordingly dismissed. No order as to costs.