

(1915) 03 BOM CK 0009

In the Bombay High Court

Case No : First Appeal No's. 269 and 270 of 1913

Rasulkhan Hamadkhan and Gulab Chhitu

APPELLANT

Vs

The Secretary of State

RESPONDENT

Date of Decision : 17-03-1915

Acts Referred:

Limitation Act, 1963 — Article 14

Citation : AIR 1915 Bom 72 : (1915) 17 BOMLR 513

Hon'ble Judges : Shah, J;Heaton, J

Bench : Division Bench

Judgement

Heaton, J.—In this matter the following facts are either admitted or established beyond any real controversy.

2. There is a certain plot of land which is used, and for many years has been used, as a graveyard, but also for storing wood. On the findings of the first Court which to this extent are not challenged in appeal, the occupants or persons who are in charge of the land whether with reference to its use as a graveyard or as timber store are the plaintiffs. This occupation had continued for at least fifty years before this suit was brought.

3. Eventually the Government Officers decided that the plaintiffs should be evicted unless they ceased to use the land for the purpose of a wood store. I am describing the case in general, but I think insufficiently accurate, terms. Plaintiffs have brought this suit substantially to protect themselves against the proposed eviction by Government Officers unless they cease to use the land as a wood store. The acting District Judge who heard this case substantially found the facts as I have described them, but he came to the conclusion that the order of eviction was perfectly legal and justified under the provisions of the Land Revenue Code. It is here at the outset where I differ from the District Judge. To begin with, as a general principle, Government have no power to evict persons in such occupation of land except as provided by the law, and it is not suggested that they have any power to evict these plaintiffs unless that power is to be

found in the provisions of the Land Revenue Code. It is not denied that the plaintiffs are lawfully in occupation of this land provided that they put the land to a proper use, that is to say, they are not in occupation as trespassers or persons without any right. It is said, and it may be perfectly true, that they are in occupation as persons entitled to be in charge of the graveyard which exists on the land. But assuming this to be so, and knowing as we do, that they have used the land as a wood store, is there any provision in the Land Revenue Code which entitles the Government Officers to evict them? I can find none. It is not shown in this case that the land, has been assigned for the purpose of a graveyard as provided in Section 38 of the Land Revenue Code. We know merely that the land is and has been a grave yard for a very great many years. How, under what arrangement, or by whose authority, it came to be a graveyard we do not know, and in our ignorance it would be profitless to conjecture.

4. Then this land, so far as the evidence shows, has neither been assessed nor held for the purpose of agriculture. True, it was assessed, but so far as I can judge on the evidence it was assessed for some purpose not directly connected with agriculture, because when it was assessed, it had been for many years and was still a graveyard. No assessment was ever levied from the occupants and it nowhere appears from the Government records that the land was ever regarded as land to be used for the purpose of agriculture. In fact it never has been used for the purpose of agriculture, so far as the evidence informs us. It is not therefore land to which Sections 65 and 66 of the Land Revenue Code apply. I can find no provision which entitles the Government to evict these person as from their proceedings it seems they propose to do. On the merits therefore, I feel no doubt whatever that the plaintiffs are entitled to protection against this intended eviction.

5. The only other points which I need notice are first that we are not in any way in the case concerned with the question as to whether Government have the power or whether they ought to levy any assessment on this land. Secondly, it has been argued that the suit is time-barred. It has been so argued because, it is said, Article 14 of the schedule to the Limitation Act covers the case. That Article relates to a suit to set aside an act or order of an officer of Government. It is true that the suit is one in terms to set aside the order of an officer of Government but it is a suit to set aside an order which bears a date less than one year from the time when the suit was filed and, therefore, the suit is not on its face time barred. What really underlies this argument is not a question of limitation so much as a very different question. It is argued that there was an earlier order and that limitation runs from the date of that order. That can only be if the order were one which, if not set aside, would lawfully operate as a bar to the plaintiffs' rights. So far as I can see, none of the orders in the case operates as a bar to the plaintiffs' rights. Neither the earliest of them, that of the District Deputy Collector, nor the latest, that of the Commissioner. It is true that the orders are adverse to the interests of the plaintiffs and if practically given effect to, would lead to the eviction of the plaintiffs. No doubt these orders give

the plaintiffs a right of action because they are at any rate to the extent of a threat, an invasion of their rights, but they are not a tangible invasion. They do not of themselves affect the plaintiffs; it would only be the enforcement of the orders which would do this. Therefore, I think there is no bar of limitation in the case.

6. The order which I would propose is that the decree of the lower Court be set aside, that a declaration be made that the plaintiffs are in lawful occupation of the land in suit and are entitled to remain in such occupation undisturbed and I think the plaintiffs should have their costs in both the Courts.

Shah, J.

7. These appeals arise out of two suits brought by the respective plaintiffs against the Secretary of State for India in Council for a declaration that they were the owners of the property in suit and that they had been in possession and enjoyment adversely to the defendant for over sixty years, for the cancellation of a certain order of the Commissioner Northern Division, and for a permanent injunction against the defendant to prevent any obstruction being caused to them in the enjoyment of the property. The lower Court dismissed the suits on the ground that the claim was time-barred, though it held that the plaintiffs were the occupants of the land in suit. The plaintiffs have appealed to this Court and have urged two points in support of the appeals, viz., (1) that the evidence establishes the fact that they have been in possession of the property in suit in their own right, and (2) that their claim is not time-barred.

8. With reference to the first point a few facts which are beyond dispute may be stated. The plaintiffs have been in possession of the land at least from the year 1860 and have been using the property partly as a grave-yard and partly for the purpose of stacking timber. There is nothing to show as to how the plaintiffs obtained this land, nor is there anything to show that the defendant had originally assigned this land to them before the year 1860. In 1871 when a survey settlement was effected, the land was assessed. It is not clear on what footing it was assessed. It was entered in the revenue register as waste land and the amount of assessment was shown in that register. No assessment was ever demanded from the plaintiffs up to the date of the present litigation. In 1898 there was some correspondence with regard to the land in suit as well as other lands and in the letter of the Collector to the Commissioner dated the 20th of April 1898 the view which the Revenue Authorities took of their position with reference to this land is stated. It is not suggested, however, that the plaintiffs had anything to do with this correspondence or that any attempt was made to question the propriety of their possession or of the use which they were making of the land. In 1907 the order, which is referred to by the lower Court as the order which the plaintiffs must seek to set aside, was made by the District Deputy Collector. That was however, only a letter addressed by that officer to the Mamlatdar of Ankleshwar, and there is nothing to show as to when, if at all, it was communicated to the plaintiffs. In that order it was stated as follows:—"If, in

this manner, a house be built on the cemetery land, and a wood depot be opened there or wood be stored there, that cannot be allowed on any account whatever. Therefore you will please cause the building and the wood to be removed forthwith from the said land." An appeal was preferred against this order to the Collector, who declined to interfere. A further appeal was preferred to the Commissioner who made an order in April 1909 declining to interfere with the order of eviction. The notice which was actually served on the plaintiffs has been put in on behalf of the respondent now in this appeal. That notice orders the plaintiffs to remove the wood and clear the ground, directs them to use the land only for the purposes of a Kabarasthan, and states that on failure of their doing so, steps would be taken against them u/s 202 of the Land Revenue Code.

9. The present suits have been brought on the 22nd of February 1910, i.e., within a year from the Commissioner's order, but more than a year after the order of 1907, Exhibit 49, or the notice of September 1908.

10. The plaintiffs have adduced evidence to show that at least since the year 1860 they have been using the land in suit in their own right and dealing with it as their own property. They have mortgaged and leased the property from time to time. There are superstructures over the land and it has been used as a timber shop. The evidence also shows that a part of the land is used as a private Kabarasthan by the plaintiffs. It is not necessary to discuss the oral evidence which establishes these facts. The evidence as to the possession and the use of the property is clear and practically unchallenged. The lower Court also has substantially accepted that evidence as proving these facts. It is clear, therefore, that the plaintiffs have been in possession of this land for over fifty years. There is nothing to show that the defendant had assigned this land to them before that time. Under these circumstances it seems to me that though there is no direct evidence the plaintiffs are the owners of the land, u/s 110 of the Indian Evidence Act the burden of proving that they are not the owners would be on the defendant who affirms that they are not the owners.

11. Coming now to the defendant's evidence it seems to me that beyond the entries in the revenue registers, there is nothing to show that the Government assigned this land to the plaintiffs. It is not shown under what circumstances this land came to be assessed in 1877, but it is significant that in spite of the plaintiffs using the land as their own, no attempt was made even after 1877 up to the year 1907 either to prevent them from using the land otherwise than as a Kabarasthan, and they were never asked to pay any assessment. I am unable to infer from these revenue records that this land was assigned to the plaintiffs by the defendant. There is only one other piece of evidence upon which the learned Government Pleader has relied for the purpose of showing that the plaintiffs are not the owners. That is the statement which was made by one of the plaintiffs on the 18th of September 1903 before the Talati of Ankleshwar. There is no doubt that in this statement the deponent expresses his readiness to pull down the Kacha hut built on the land if Government have any objection to it. It seems to

me, however, that no steps were taken after this statement, as I have already stated, up to the year 1907, and when steps were taken in 1907 or in 1908, the plaintiffs asserted their present claim. It does not appear clearly how the statement came to be made before the Talati, but apparently it was in connection with some Revenue enquiry which ultimately resulted in the order of 1907. The plaintiff who has made this statement says that he made it in ignorance of law. On giving the best consideration to the statement it seems to me that it would not be right to treat this as an admission of the defendant's right by the plaintiffs. As soon as a definite order was made in 1907 that the plaintiffs should remove the huts, which they had built on the land, they asserted their right as owners of the land. Under these circumstances I am unable to treat this statement as in any way advancing the defendant's case. In my opinion, therefore, the result of the evidence is that the plaintiffs' possession for over fifty years is established and that the defendant has failed to show that the plaintiffs are not the owners.

12. It is necessary to mention here that the Government have never attempted to levy the assessment from the plaintiffs. So far as the present dispute is concerned, it has arisen in consequence of the Revenue Authorities having asserted their right to evict the plaintiffs if they did not remove the huts and if they failed to confine the use of the land to the purposes of a Kabarasthan. It is not, therefore, necessary to consider whether even if the plaintiffs be the owners of this land the Government have the right to levy any assessment from them in respect of the land. In fact there are no materials in the case upon which this point could be decided, and it is clear that the Government have not so far called upon the plaintiffs to pay the assessment. In coming to the conclusion favour of the plaintiffs, in virtue of their having proved their possession of the land in their own right and the defendant having failed to show that they are not the owners, we say nothing as to the right of the Government to assess this land and to levy the assessment from the plaintiffs. The lower Court has dealt with the question of assessment, but it does not seem to me to be either proper or necessary to decide that question in this case. I desire to make it clear that the declaration which may be made in favour of the plaintiffs in this litigation will be without prejudice to the right of the defendant, if any, to levy assessment in respect of this land.

13. I now come to the question of limitation. The lower Court has held that under Article 14 of the Indian Limitation Act the suits are time-barred because they are brought more than a year after the order (Exh. 49). It seems to me that the view taken by the lower Court on this point is wrong. In the first place in these suits it does not appear to me to be at all necessary for the plaintiffs to have any order set aside. Their claim is substantially one for confirmation of their possession and for an injunction restraining the defendant from evicting them. The order in question is not of such a character as would by itself have any effect if neither party took any action on it. Besides strictly speaking it is merely a communication by the District Deputy Collector to the Mamlatdar. In pursuance

of this order no doubt subsequently a notice was issued, and it was urged, on behalf of the respondent, that at least from the date of that notice the suits ought to have been brought within a year. I do not think that that notice is any more an order within the meaning of Article 14 than the order which is supposed to have been contained in Exh. 49. Further, on the merits, having regard to the view which I take of the plaintiff's possession and of their right to this property, it is clear that the order in question is outside the powers of the Revenue Authorities. It was urged by the learned Government Pleader on behalf of the respondent that the order in question was justified by the provisions of Sections 65 and 66 of the Land Revenue Code. It was contended that the plaintiffs having used the land for non-agricultural purposes, the Revenue Authorities had the power to evict the plaintiffs u/s 66 of the Act; but in my opinion these provisions of the Land Revenue Code have no application to the present case as the plaintiffs are not occupants of the land within the meaning of the Code, and their rights are not proved to be limited, to the agricultural use of the land. It is not possible, therefore, to attribute the order or the notice to any section of the Land Revenue Code under which the Revenue Authorities can be said to have the power to evict the present plaintiffs from the land in dispute. It follows, therefore, that the order and the notice are ultra vires of the Revenue Authorities. On these grounds it seems to me that it is not incumbent on the plaintiffs to have any order passed by the District Deputy Collector or the Collector or the Revenue Commissioner set aside.

14. I do not think that any injunction is necessary under the circumstances. It will be sufficient to declare that the plaintiffs are entitled to be confirmed in their possession of the land. I, therefore, concur in the order proposed by my learned colleague.