

(2017) 06 BOM CK 0091
In the Bombay High Court
Case No : 74 of 2010

SHANTABAI L. PARKAR

APPELLANT

Vs

SMT. LILA PANDURANG SHIRODKAR, & ORS.

RESPONDENT

Date of Decision : 22-06-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 11](#),
[Section 9](#), [Order 9Rule 8](#)
[Order 9Rule 3](#) - Res Judicata - Courts to try all
civil suits unl

Citation : (2017) 06 BOM CK 0091

Hon'ble Judges : Nutan D.Sardessai

Bench : SINGLE BENCH

Advocate : Sudin Usgaonkar, Vinita Palyekar, Shivan Desai, P. Chopdekar

Final Decision : Allowed

Judgement

1. Heard.

2. Questioning the legality of the judgment dated 28/01/2010 by virtue of which the learned Reference Court held the legal heirs of the party no.1 entitled to claim compensation in respect to the suit house and allowed the claim of the original party no.2, the original respondent are in appeal before this Court.

3. Shri S. M. Usgaonkar, learned Senior Advocate came to be heard on behalf of the appellant who submitted that she was the owner of the land in question who was secured by the decree of the Civil Court in the proceedings filed against the Comunidade in respect of the Survey holding admeasuring 2700sq.mts. The respondents had no documents except the Panchayat receipts and the letter from Comunidade despite which the learned Reference Court had awarded the entire compensation in their favour despite the fact that the respondents had not succeeded in the plea of mundkarship raised by them including that of adverse possession. The suit filed by the appellant for the eviction of the respondents was dismissed and the First Appeal too was dismissed as the pleadings were not

amended. The Second Appeal filed by them was however withdrawn as the house in question was demolished due to the acquisition. The name of the appellant was recorded as an occupant in respect of the suit property and the house was shown entered in the name of her father-in-law unlike the name of the respondent no.1 not being recorded in the Survey Records. The Reference Court despite this backdrop and that the Survey Records were promulgated in the name of the appellant pursuant to the mutation held against the appellant. There were several erroneous findings given by the Reference Court which was unduly influenced by the possession of the respondents when the appellant had admitted the possession of the respondents and filed a suit for eviction as early as 1983. The learned Reference Court had recorded erroneous findings that the documents showed the ownership of the respondents to the suit house and allotted the entire compensation to the respondents. The learned Reference Court was also in error to invoke the plea of *res judicata* against the appellant and therefore on all these grounds, the appeal had to be allowed and the compensation apportioned in favour of the appellant alone.

4. Shri Shivan Desai, learned Advocate for the respondents contended that it was a conceptual fallacy that the principle of *res judicata* could not apply in the proceedings under Section 30 vis-avis that in the said Civil Suit. He placed reliance in the *Comunidade of Bambolim V/s. Manguesh Betu Kankonkar* [2001(2) Mh.L.J. 160]. The appellant had not established her right to the suit structure whose suit for eviction was dismissed, the First Appeal too dismissed and the Second Appeal filed was withdrawn. Therefore, the findings were binding and could not be re-agitated invoking the principle of *res judicata*. The appellant had to establish that the structure in question existed in the Survey no.260/1-A which she had failed to establish. The issue regarding the suit structure had attained finality and therefore the learned Reference Court had rightly invoked the principle of *res judicata*. No fault could be found with the findings recorded by the Reference Court and therefore no reversal was warranted of the impugned judgment.

5. Shri Usgaonkar, learned Senior Advocate in reply submitted that the plea of *res judicata* was not helpful to the respondents. The plea of *res judicata* in their suit for eviction was held against them and there was no basis for the learned Reference Court to hold in favour of the respondents. Besides, the respondents had identified the suit structure in their Survey holding No.260/1-A and therefore it was not open to the Reference Court to hold that the suit structure was not in the Survey No.260/1-A. The appeal had therefore to be allowed and the compensation had to be apportioned wholly in their favour.

6. In *Comunidade of Bambolim* (supra), the Revision was directed against the order passed by the Civil Judge, Senior Division, Panaji in the Execution Application raising an important question as to whether the suit, at the instance of a person, who claims entitlement to the compensation awarded or to a part thereof in the acquisition proceedings to which he was not a party is

maintainable. In the brief facts the Government of Goa had called upon the Deputy Collector, Goa North Division, Panaji, to draw the acquisition proceedings where the present respondent had not received any notice under the relevant provisions of the Act. Although the Land Acquisition Officer had called upon the petitioner to furnish information of the interested persons interested in the land sought to be acquired, the petitioner did not state the interest of the respondent in the land, failed to furnish all the required information and suppressed the subsisting tenancy rights of the respondent and his interest in the land sought to be acquired. The Award was made by the Deputy Collector wherein a part of the property belonging to the petitioner of which the respondent was a tenant was acquired and the compensation determined by the Land Acquisition Officer which was paid to the petitioner. Since the petitioner had not disclosed the interest of the respondent, he was unaware of the acquisition proceedings and in the result the entire amount of the compensation was received by the petitioner and nothing was paid to the respondent although he was entitled to receive 50% of the compensation being a legal tenant of the land.

7. In *Comunidade of Bambolim (supra)*, the respondent learnt about the acquisition proceedings in October, 1981 when the road widening work was taken up by the Government in the acquired land and issued a notice to the petitioner calling upon him to pay half of the awarded amount. He then filed a Suit in the Court of the Civil Judge, Senior Division, Panaji seeking a money decree against the petitioner being 50% of the amount of the compensation received by the petitioner with interest from the date of filing of the suit till recovery. The suit was decreed and being aggrieved by the said decree, the petitioner filed the First Appeal which was decreed by the High Court on merits. In the aforesaid proceedings no question was raised regarding the maintainability of the suit or the jurisdiction of the Civil Court to entertain the suit nor were the pleadings in the plaint on the jurisdiction of the Civil Court denied by the petitioner in the Written Statement. The petitioner filed a Special Civil Suit in the Court of Civil Judge, Senior Division, Panaji against the respondent and two other sets of tenants showing readiness and willingness to pay the share to such tenants in respect of the acquired land. The petitioner also claimed the relief for restraining the respondent from taking any proceedings against the petitioner in respect of the acquired land and the compensation. However, the said suit was dismissed under Order IX, Rule 8 of C.P.C. against the legal representatives of the respondents No.6 under Order IX, Rule 3 of C.P.C. The Respondent who had obtained the decree in his suit filed the execution proceedings to execute the decree which was contested by the petitioner by filing objection thereto and also prayed for a stay of the execution proceedings.

8. In *Comunidade of Bambolim (supra)*, the award passed by the Land Acquisition Officer was the subject matter of a reference under Sections 18 and 30 of the Act at the instance of one Shri Atmaram Mulgaonkar and the legal representatives of late Yeshwant Gauns claiming interest in the land. Pending the execution, the reference was tried by the Additional District Judge, Panaji, who

rejected the Reference holding that the applicants, therein, had no interest in the land but the present respondent had interest on the date when the land was acquired. In the execution proceedings, the executing Court passed an Order attaching an amount from the Bank account of the petitioner and only thereafter the petitioner filed the fresh objections which were replied by the respondent. The petitioner objected to the executability of the decree on the ground that the Land Acquisition Act was a self contained Code, the Civil Court had no jurisdiction to pass the decree in the Special Civil Suit and the same was obtained from the Court which had no inherent jurisdiction to entertain and try the suit and therefore the decree was a nullity. According to the petitioner, it was obligatory on the part of the respondent to invoke the jurisdiction of the Land Acquisition Officer under Section 30 of the Act and ought to have established his right to 50% of the amount of the compensation in the reference proceedings.

9. In *Comunidade of Bambolim* (supra), the respondent / decree-holder replied to the objection and on hearing the parties, the Trial Court dismissed the objection holding that the respondent/decree-holder was not a party before the Land Acquisition Officer and therefore could not have raised an objection under Section 30 of the Act. The executing Court found that the only recourse available was to file a suit against the petitioner which he did and it further held that the Civil Suit filed by the respondent for recovery of money was perfectly maintainable and therefore the Civil Court did have jurisdiction to decide the suit and the decree passed therein could not be termed as a nullity. The Court below held that the executing Court could not go behind the decree and rejected the objections holding it to be without any merits giving rise to the revision before this Court. It was contended on behalf of the petitioner that in the event of any dispute as to the entitlement of a person to receive the compensation or the apportionment thereof, it was obligatory on the part of the respondent to have applied for a reference under Section 30 of the Act and the Civil Court had no jurisdiction to entertain and try such a suit and therefore the decree passed by it suffered from an inherent lack of jurisdiction as the suit itself was not maintainable and the decree was a nullity.

10. In *Comunidade of Bambolim* (supra), the respondent took a plea that the objections raised to the execution of the decree were not only untenable but amounted to an abuse of the process of law. Besides, the petitioner had bitterly contested the suit for recovery of the compensation and no objection was raised to the jurisdiction of the Civil Court or the maintainability of the suit nor in the appeal filed before the High Court. As such the decree suffered by the petitioner and the findings recorded therein that the respondent was entitled to 50% of the amount of compensation would operate as *res judicata* between the parties and the objection could not have been allowed to be raised in the execution proceedings. Besides not having raised such objections, the said issue would have to be treated as an issue in decision and as such the finding would operate as *res judicata*. Besides the petitioner having failed to raise an objection to the execution of the decree within a period of three years, his objection under

Section 47 was barred by limitation.

11. In *Comunidade of Bambolim* (supra), the learned Single Judge held that when a special statute had created a machinery for granting reliefs which are awardable only under that statute, the jurisdiction of the Civil Court under Section 9 of the Civil procedure Code cannot be invoked for the same relief. Section 18 of the Land Acquisition Act provides for reference to the Civil Court in case the compensation awarded by the Land Acquisition Officer is not acceptable to the claimant and the law provides that if he accepts the amount under protest and prays for a reference to be made under section 18 of the Act a reference shall be made. Therefore, a Civil Suit for the enhancement of compensation is not maintainable in case the amount is not accepted by the party under protest and reference under section 18 is not prayed. In the ultimate, it was held that the Civil Suit in the facts and circumstances of the case was maintainable and the Civil Court had the jurisdiction to entertain and try the suit. Besides, in view of the admitted facts and in the wake of the earlier litigation between the parties, a decree passed by the Civil Court in Special Civil Suit No.125/1982/A and its confirmation in First Appeal No.81/1984 on merits and the judgment having become final, would operate as *res judicata* between the parties and on that count also the objection raised by the petitioner to the execution of the decree must fail and in that context dismissed the revision application.

12. The appellant had filed the suit against the *Comunidade* before the Court of the C.J.J.D, Ponda for declaration that she was the owner by adverse possession of an area of 2700 sq.mts with distinct boundaries and which was decreed in her favour declaring her to be owner by adverse possession of an area of 2700 sq.mts and forming a part of the land of the *Comunidade* bearing the Survey No.260/1 of village Usgao. The original respondent had filed proceedings under Section 29 of the Goa, Daman and Diu Mumdkars (Protection from Eviction) Act, 1975 for registering her name as a mundkar in respect of her dwelling house situated in the property of the same *Comunidade* of Usgao bearing the Survey No.260/1 but the Mamlatdar had held against her and rejected her claim of mundkarship. It is equally a matter of record that the appellant as one of the legal heirs of Laxmikant Parker had filed a suit being Regular Civil Suit No.18/83/D against the original respondent and her husband for the recovery of money and eviction and the Civil Court by the judgment dated 31/03/2003 held against her and dismissed the suit.

13. The First Appeal filed against the said judgment and decree before the District Court, Panaji also came to be dismissed confirming the judgment of the Civil Court. The appellant had preferred the Second Appeal in 2007 challenging the judgment of the First Appellate Court but which came to be dismissed as withdrawn as the house in question came to be demolished pursuant to the acquisition. Though the appellant did not succeed in the suit filed against the original respondent, the learned Civil Court had however held against the respondent on the plea of adverse possession. The Survey records of the holding

260/1 clearly showed the name of the appellant as an occupant in respect of the defined area of 2700 sq.mts. apart from the house owned by her late father-in-law with no name of the respondent recorded in the Survey records. The subsequent promulgated records of the Survey holding No.260/1-A shows the appellant as the occupant of an area of 2700 sq.mts. but without any reference to any house structure. This mutation was done in the appellant's favour consequent upon the decree of the Civil Court dated 26/08/1993 declaring her to be the owner of an area of 2700 sq.mts. of the Survey No.260/1 belonging to the Comunidade.

14. The original respondent had claimed the right of mundkarship to the house bearing no.970 which plea was dismissed. Though the original respondent had taken a plea of adverse possession in the appellant's suit no.18/83/D, the appellant had not sought any declaratory relief carving a case that they had allowed the original respondent in 1978 to run a tea stall in the suit premises on a compensation of Rs. 40/- per month and on failure to pay the arrears, to deliver vacant possession. The original respondent had taken a plea that the land belonged to the Comunidade and the suit premises with the land beneath it was in exclusive, continuous and peaceful possession resulting in vesting of a perfect title by way of adverse possession. The learned District Court while deciding the appellant's appeal against the dismissal of the suit was unduly carried away by the fact that the house no.1130 standing in the name of the original respondent as per the Panchayat Certificate and situated in the Survey No.265/02 was actually existing in the Survey No.260/1 and that the Survey No.265 appeared to be incorrect without any basis particularly when the legal representatives of the respondent had clearly stated in his evidence that he had one more house besides the suit house and that it was situated in the property known as "Dhatgotmol" in the Survey No.265 and bearing the house no.1130. Moreover he had also categorically stated that he did not have any documents to indicate that the old house no.970 corresponded to the new house no.1130 and in that context too the District Court fell in error to hold otherwise.

15. The learned District Judge for that matter was unduly swayed on the possession of the respondent when there was no particular dispute about the possession of the respondent even in the suit filed by the appellant and who had amended the suit for eviction admitting the possession of the respondent and for recovery of money. The learned District Judge had also rendered an erroneous finding that the respondents had shown their ownership to the suit house when they had not produced any documents showing their ownership. The District Judge while dealing with the reference under Section 30 of the Act had considered the case of the original respondent as carved by her that she was permitted to construct a residential house in the property bearing the Survey No.260/1 belonging to the Comunidade of Usgao bearing house no.970(old) and 1170(new) apart from considering the fact that a suit had been filed against her for eviction and recovery of money being RCS No.18/83/D by the appellant herein as the party no.2 and it being dismissed and so too the appeal filed at her

instance. The reference Court also took a note of the fact that the Second Appeal filed by the appellant herein was dismissed on 18/06/2008 and that the respondent as the party respondent no.1 had claimed the entire compensation being in possession of the suit structure in 1970.

16. The learned reference Court for that matter was equally seized of the plea raised by the appellant as the party no.2 that the property belonged to the Comunidade, that she was entitled to an area of 2700 sq.mts. alongwith the residential house, cowshed and some fruit bearing trees and in pursuance of the Regular Civil Suit No.101/1993, she was declared as the owner by prescriptive title of an area of 2700 sq.mts. of the Survey holding 260/1 and allotted a separate Survey No.260/1-A.

17. The learned Reference Court had been seized of her case further that her husband had converted the cattle shed structure in 1963 into a permanent structure and used as a tea stall and thereafter let it out on royalty basis of Rs. 40/- per month to the respondent / party no.2. The respondent had agreed to vacate the suit shop but failed to vacate and quite on the contrary had constructed a cowshed, stopped paying royalty in respect of the suit shop and hence the applicant and issued notice to make the payment and to vacate the premises. The reference Court for that matter was not oblivious of the fact that the respondent had taken a plea that she was the owner of the suit structure by adverse possession as against the Comunidade of Usgao, had not filed any separate suit or counterclaim and her plea of mundkarship too was dismissed. The issue at large before the reference Court therefore was which of the party was entitled to the compensation in respect of the suit house which was answered in favour of the legal heirs of the respondent no.1. The learned reference Court had assessed the evidence brought forth by the legal heirs of the respondent no.1 which included the pleadings in the Civil Suit no.18/83/D, the memo of appeal in RCA No.79/2003 alongwith the judgment apart from that in the Second Appeal and the High Court's order amongst others.

18. The evidence of the appellant too was examined which was brought forth through her power of attorney. It was canvassed on behalf of the respondent that the principle of res judicata in respect of the suit structure was attracted and therefore the appellant herein could not re-agitate the issue in the reference proceedings while it was submitted on behalf of the appellant that the provisions of Section 11 of C.P.C. did not apply to the reference proceedings and even otherwise the respondent had not shown any ownership nor produced title document unlike the appellant herein who had succeeded in proving her ownership over an area of 2700 sq.mts. The appellant had rather set up a specific case that the suit structure fell in the newly allotted Survey No.260/1-A unlike the respondent who claimed that it existed in the Survey No.260/1 bearing house no.970(old) and 1130(new) and produced the documents like electricity and water bills apart from the house tax receipts. The learned reference Court while assessing the evidence brought on record by the respondent through her

legal heir did not consider his admission that he did not have any document to show that his mother was permitted by the Comunidade to construct the suit house nor was he able to spell out whether his mother had made any application for the grant of permission from the Comunidade to construct the suit house and if any resolution was approved by the Comunidade approving the grant to his mother.

19. He had also no knowledge as to when the house was constructed and in that context could not account why the name of his mother was not shown in the Survey records. He had also stated that the area adjoining the suit house which was the subject matter in the suit filed by the appellant belonged to the Comunidade and after acquisition belonged to the Government till the time they were in the suit house before acquisition. In other words there was a clear admission on his part that the suit house was located in the property belonging to the party no.2 i.e. the appellant herein till the suit house became the subject matter of the acquisition along with the land. The reference Court while appreciating the evidence also failed to consider his admission that though they had applied for a declaration as mundkar of the suit property, the application was dismissed by the Mamlatdar and therefore could not have concluded that the respondent had established their rights to the suit house in question. I am all the more fortified in this conclusion inasmuch as the conduct of the respondent was lost on the trial Court who despite the admission had still claimed that the suit property belonged to the Comunidade and relented that their name was not appearing in the Survey records.

20. The legal heir of the respondent was then shown the Survey plan of the property bearing Survey No.260/1 who admitted that it was in respect of the suit property and the suit house and relented that the suit house was not shown in the Survey plan and rightly so considering his latter statement that it was in a dilapidated condition from which electricity and water connections had been disconnected and the house was demolished by the Government in the course of the acquisition proceedings. All these aspects of the case were not properly addressed by the learned reference Court while holding that the suit structure belonged to the respondent and holding the respondent entitled to the compensation. At the cost of repetition, it was clearly lost on the reference Court from the material on record that the appellants were the owners of the property admeasuring an area of 2700sq.mts. pursuant to the decree in her favour in the Civil Suit no.101/1993. It was also lost on the reference Court that the respondent had no documents except a few panachayat receipts to substantiate her claim to the suit house when her witness was unable to shed any light in that regard. The reference Court also failed to appreciate that the respondent had failed to carve out a plea of mundkarship and that the plea of adverse possession too did not survive, although the suit for eviction filed by the appellant was dismissed and so too the appeal filed by the appellant. The view remained that the respondent was not able to establish any right to the suit house including their plea of having derived possession from the Comunidade and in this view

of the matter, the learned reference Court could not have held in favour of the respondent that she had established her ownership to the suit house entitling her to the compensation.

21. The learned reference Court also ignored the admission of the respondent's witness who had identified the suit structure in the Survey plan which was located in the appellant's property and in the ultimate in allowing the Reference in the respondent's favour. The reference Court was totally in error to hold that the respondent had established her ownership in respect of the suit house and was unduly influenced by the possession of the respondent when it was the case of the appellant right from inception that she had permitted the respondent to occupy the suit house on royalty and based on her admitted possession had sought for the relief of eviction and damages.

22. In the result, the impugned judgment justifies interference in appeal and hence i pass the following O R D E R

The appeal is allowed and the impugned judgment of the reference Court holding on the respondent's entitlement to the compensation is quashed and set aside. It would follow as a necessary corollary that the appellant would be entitled to the compensation awarded by the Land Acquisition Officer.