
(1926) 28 BOMLR 641 : 95 Ind. Cas. 950

Bombay High Court

Case No: First Appeal No. 227 of 1923

Surajlal Munshilal

APPELLANT

Vs

Secretary of State for
India in Council

RESPONDENT

Date of Decision: Jan. 7, 1926

Acts Referred:

- Limitation Act, 1908 - Article 14

Citation: (1926) 28 BOMLR 641 : 95 Ind. Cas. 950

Hon'ble Judges: Norman Macleod, J; Coyajee, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Coyajee, J.

Until the year 1914, Sakarpur was a Bhagdari village in Ankleahvar Taluka of the Broach District. In 1869-70, the survey settlement was applied to it and it was recognised as a separate Akari Bhag village, i.e., the bhags were assessed on separate survey numbers in each bhag; and in addition to those lands, there was considerable vinghoti or non bhagdari lands in the village area. Exhibit 124, which is the vahivatnama issued to the village, contains this clause:

The Bhagdars must make the payments according to their respective instalments as at present (settled) or according as the Government may from time to time settle. In case a Bhagdar fails to pay, all the Bhagdars and Jathadars must pay the amount (Government dues) jointly and severally, and if the amount recovered falls short of the revenue fixed, Government is at liberty to exercise the power according to law to recover the balance together With interest and to discontinue the narva (system of tenure) and to introduce the vahivat (administration) according to the seja (system of tenure).

2. The village is situated on the southern bank of the Narbada river. Between the years 1873 and 1887, by reason of the continued encroachment of that river, a considerable portion of the cultivable land in Sakarpur and also the old village-site was washed away. Since 1877, a remission of assessment was annually granted to the Bhagdars in respect of the lands lost by diluvion. This, however, was clearly against the spirit of the Bhagdari tenure, according to which the body of Bhagdars is responsible for the total land-revenue of the bhag lands. After 1877, the river ceased to encroach on the village lands, and some time later an island began to form in the bed of the river. The island grew larger, until all that divided it from the old uneroded land was a narrow creek. After some years, the land thus re-formed was given out by Government at first as grazing land and later for cultivation. In some cases, where the land could be clearly identified by reference to the boundaries of the lands not washed away, many fields on the newly formed island were marked out and restored to the former holders without payment of any occupancy price. On May 5, 1914, the Collector, by his letter, Exhibit 125, to the Commissioner N.D., proposed that this bet land should be treated as suitable only for annual disposal like the rest of the Narbada bets, and that it should be declared that the village itself was no longer held on the Bhagdari tenure, The Commissioner replied on July 20, 1914 :-

At the time of the Revision Survey...many eroded survey numbers in this village were recorded as occupied and assessed. It appears...that the assessment on these numbers was retained in the records in the interest of the actual occupants who lost their lands by diluvion; the Bhagdars being unable to collect any revenue on the land, their responsibility under the agreement ceased. For the purposes of the tenure, these eroded survey numbers as well as any which have been relinquished, should be treated as permanently lost to the bhag. The area of the former should now be shown in the village accounts separately as "river Kharaba" and that of the latter as Government waste both being excluded from the bhag area of the village." (Exhibit 92.)

3. On November 27, 1914, plaintiff and other Bhagdars made a joint statement (Exhibit 95) as follows :-

With regard to the Bhagdari lands belonging to us situate at the village of Sakarpur, we agree that the bhag (tenure) in respect of the same may be cancelled and that the same may according to (our) occupation (kabja) be en-bared in our names under Government rayatvari (tenure) i.e. under the old tenure.

4. Accordingly, the rayatvari tenure was substituted for the Bhagdari. The history of this conversion is detailed in the judgment of the learned trial Judge and will be referred to hereafter.

5. On August 30, 1917, plaintiff instituted this suit to recover possession of six survey numbers, namely, R.S. Nos. 116, 118, 250, 21, 96/2 and 275 in Sakarpur. The plaintiff alleges as follows: The lands in suit originally formed part of the principal (moksh) bhag which stood in the name of Bai Rattu. They and some other lands in this bhag fell to the

share of Partap Mansang, a recognized sub-sharer of Bai Rattu. In execution of a decree of the civil Court, the right, title and interest of Partap in that recognized sub-division of the bhag were sold and were purchased by Muleshvar Bapuji. Muleshvar and his heirs enjoyed the benefits of those lands. On January 6, 1914, Muleshvar's son Jeahankar sold all those lands including the suit lands to the plaintiff. Between 1873 and 1884 the suit lands were washed away by the Narbada river : but a portion of the lands has now re-appeared and become cultivable; some portion is still, submerged or has not become cultivable, On July 20, 1914, the Commissioner N.D. made an order directing that the suit lands should be removed from the plaintiff's Khata and entered as Government unassessed bhatha land; that order was illegal, as the Commissioner had no authority to pass it. Plaintiff found that R.S. Nos. 116, 118, and 96/2 had become cultivable; he then let them to tenants and tendered the assessment to the village officers but they declined to receive it. He, thereupon, applied to various Revenue Officers and to Government for redress, but without success. In July or August 1915, the defendant's agents and servants prevented the plaintiff's tenants from retaining possession of R.S. Nos. 116, 118 and 96/2 and from cultivating them, and the plaintiff apprehends that he and his tenants will be prevented from taking possession of or cultivating the other lands in dispute. He, therefore, sued : (1) for restoration of the lands to his possession; and (2) for a permanent injunction directing the defendant, his agents and servants not to obstruct the plaintiff, his servants and tenants in their possession and enjoyment of the suit lands. The third paragraph of the plaint contains this allegation : "At the time when the Bhag-dars and those others who were interested in the lands gave their consent for abolishing the bhags and to make the village a rayatvari one there was a clear understanding between them and the Government officers that, if the lands washed away be re formed, or if the lands increase by the action of water, the right of ownership of such lands would continue in the person whose lands had been washed away or to whose lands such additions have been made as in the case of the right to the original land." It may be noted that S. Nos. 116 and 118 have been fully re-formed; a portion of Survey No. 96 was submerged in 1914; and the other three lands were completely submerged until the year 1918. The plaintiff purchased the suit lands and other lands from Jeshankar Mulesh-var for Rs. 100 on July 16, 1914 (Exhibit 46).

6. The written statement of the Secretary of State raised, among others, the following defences:-

1. The suit was barred under Article 14 of the Indian Limitation Act.
- 2 The suit was not maintainable as regards R.S. Nos. 250, 21 and 275 which had not re-appeared.
3. The allegations in the third paragraph of the plaint were denied. The Bhagdars had consented to the change of tenure unconditionally.

4. As the suit lands had neither re-appeared nor had they re-formed until 1914, neither the plaintiff nor his predecessors in interest had acquired any title thereto by purchase or otherwise.

5. The lands in suit were not the survey numbers which were once eroded and had subsequently re-appeared. They were an accretion to the bed of the river and belonged to the State;

6. The eroded survey numbers were treated as permanently lost to the bhag, and their area was shown in the village accounts as Government unaassessed bhatha (subsequently changed to river Kharaba) and excluded from the bhag area. The lands now formed are not the lands which were eroded.

7. As the suit lands were not formed till 1914, neither Muleshvar nor his sons were in possession of the same. Similarly, neither the plaintiff nor his tenants were ever in possession of these lands. As plaintiff had no title to the lands, assessment) in respect of them was not received from him.

8. The cause of action arose in 1914 when the Commissioner directed the eroded lands to be removed from the plaintiff's Khata and to be entered as Government unaassessed waste or river Kharaba.

7. Upon a careful consideration of the evidence adduced in the case, the District Judge held as follows :-

1. The suit was barred under Article 1.4 of the Limitation Act).

2. The suit was not maintainable in respect of S. Nos. 250, 21 and 275.

3. The allegations in the third paragraph of the plaint were not proved.

4. Plaintiff was not the proprietor of the soil of the lands in dispute and he had not acquired a title to those lands.

5. Neither Muleshvar, nor any of his sons, nor the plaintiff nor his tenants were ever in possession of these lands.

6. Plaintiff's sale-deed, Exhibit 46, contravened the provisions of Section 3 of the Bhagdari Act.

8. The Judge accordingly dismissed the suit. He considered it unnecessary to record his finding on the seventh issue, namely, whether it was proved that the lands which have now formed were the same as those submerged between 1873 and 1887 ? The plaintiff himself, in his evidence, Exhibit 45, said: "During the flood all the suit numbers except one guntha of S. No. 96 were washed away. Marks of the original land were in some cases still visible in 1902-03. There were the remains of hedges. I do not remember in

what survey numbers they were. I do not know whether there was anything left by which one could identify the suit numbers," However, for the purposes of this case, it may be assumed that the suit lands have been clearly identified and that they have re-formed upon the site of the survey numbers which had been previously washed away and submerged.

9. From the decree dismissing his suit the plaintiff has now, brought this appeal, It is contended on his behalf: (1) that the plaintiff's vendor, who was a Bhagdar, had a proprietary interest in the suit lands; and (2) that the land in suit, being the property of the plaintiff's vendor and not of Government, Section 37 of the Bombay Land Revenue Code did not apply; the Commissioner's order, Exhibit,-92, was, therefore, ultra vires, and it was unnecessary to sue to set it aside within one year from the date on which it was made (Article 14, Indian Limitation Act).

10. It is necessary to set out briefly the circumstances in which the Bhagdari tenure was abolished and the rayatvari tenure established in this villaga. It is an undisputed fact that beginning with 1877 the Bhagdars had year after year been receiving large remissions of land-revenue in respect of the lands which were washed away and submerged. To this remission or decrease of assessment they were clearly not entitled. In 1911, the Collector proposed to give out the re-formed land on a new tenure; but the proposal was not sanctioned by Government. In 1914, he wrote the letter, Exhibit 125, which is important. He considered the possibility of giving over portions of the reformed land to the Bhagdars and said :-

But I was met by the difficulty of their claim to have some part of the bet lands which neither they nor any one else can define, given to them as of right and thrown into their bhag. To grant this request is alike impossible and unreasonable. The claim is neither fair nor well-founded. The Bhagdars have accepted remissions for a term of thirty-seven years; and the bet lands have been annually disposed of for many years. The second point I have to urge is that the Bhagdari character of the village should now be formally abolished. My view is that by accepting remissions, the Bhagdars have abandoned their position as Bhagdars, and with it, all the incidents of the tenure, whatever they may be. The bhags as they exist on paper, exist no longer in reality. Their limits have been wiped out by the river and the Bhagdars are unwilling to fulfil their duty by paying the full land revenue of the village to which they are bound by the Bhagdari agreement between themselves and Government. They refuse to abandon the remissions most emphatically, while they are equally averse to admit that the Bhagdari character of the village has disappeared or to agree to see the village lands entered as being held on the ordinary Vighotia tenure.

11. The Commissioner's reply, Exhibit 92, dated July 20, 1914, has already been set out above. His order was that "these eroded survey numbers, as well as any which have been relinquished, should be treated as permanently lost to the bhag," The Bhagdars knew of this order. On October 14, 1914, they, including the plaintiff, made an application

in writing (Exhibit 116) as follows:-

Some of the Bhagdars among us had applied for the restoration of the " lands that had been washed off, But we were informed that, as we had not paid the Government dues for a number of years in respect of the lands that had been washed off, according to the Bhagdari vahivat, and as we had taken the advantage of the remissions in respect of the lands that had been washed off, Government had made Khalsa (our) lands that had been washed off and had made an order that the same should be entered as Government lands. In this matter we submit the following prayer : When the Collector asked us whether we were willing to transfer the Bhagdari benure of our village to that of Vinghoti (rayatvari) we did not entertain any idea even in a dream that our lands would be made Khalsa...In this manner we believe that an ijustice has been done to us. But we poor subjects are unable to submit an appeal be Government against the order that has been made, as also in a civil Court, for the purpose of obtaining relief against Government...For the reasons mentioned above we hereby agree to transfer our village to Vin-ghofcia (i.e., rayatvari tenure) but on the understanding that we may be given the advantage of the grant of remissions according to the Government rules in respect of our lands that may be washed away from time to time and the same may be restored to us when it may again be re formed.

12. On November 11, the Collector wrote :-

We cannot break the Bhagdari tenure on conditions. But if it is broken up, the holders of the land know that they will get the benefit; of the alluvion rules. Their consent to breaking up must however be unconditional.

13. The plaintiff and other Bhagdars then made a joint statement, Exhibit 95, to which reference has already been made. On February 25, 1915, the District Deputy Collector wrote to the Collector as follows:-

All the Bhagdars of the village are willing to have the bhag tenure abolished unconditionally and to have the land entered in the names of the present Kabjedars on the ordinary survey tenure. Commissioner"s sanction may therefore be obtained for the change of tenure of the village.

14. The substitution of rayatvari tenure for Bbagdari was sanctioned on March 22, 1915 (Exhibit 129).

15. Witness Keshavlal Chhotalal, who was the Assistant District Inspector of Land Records in 1911, explains in his evidence, Exhibit 140, how the re-formed lands were dealt with by revenue officers from time to time. He says :-

With regard to the lands re-formed within the limits of the old bhags the District Inspector of Land Records inspected the land and marked the original boundaries, and lands fit for cultivation were eliminated from the previous year"s remission statement and by

permission of the Assistant District Inspector of Land Records the previous Bhagdar occupied that portion only. The remaining uncultivable portion of the bhag lands was let out by auction annually for grazing. Between 1912 and 1914, the question of the remission and disposal of the land was placed before Government in connection with the disposal of lands on new tenure. Government pointed out that the remission of so large an amount by the local officers was illegal and this resulted in the lands not fit for cultivation being confiscated to Government and treated as Kharaba, and any Bhagdar, who demanded the Khalsa area after 1914 on the ground that he was owner of the original land on the site could only obtain it by paying occupancy price, and all remissions ceased.

16. The Commissioner's order, Exhibit 92, was passed on July 20, 1914; and the trial Judge held that this suit, instituted on August 30, 1917, was too late and was barred under Article 14 of the Indian Limitation Act. He also held, for reasons which are clear and sufficient, that neither Muleshvar, nor any of his sons, nor the plaintiff was ever in possession of any of the suit lands. For obvious reasons, the correctness of this finding as to possession was not challenged before us, It was, however, urged before us on behalf of the plaintiff that the said Article 14 did not apply to this case, for, the Commissioner had no authority to make the order, Exhibit 92, in respect of the suit lands which were owned by and belonged to the plaintiff's predecessors in interest who were Bhagdar

17. The narva tenure (so called in Kaira) and its incidents were fully discussed and explained by West J. in *Manohar Ganesh Tambekar v. Chutabhai Mithabhai* (1). The learned Judge said (pp. 353, 355, 359) :-

Whether the settlement of a village on these terms by a group of three, five, or more contractors makes them proprietors of the soil is a question that might be answered perhaps with an approach to correctness in different ways. In the case of a village reclaimed from the waste and populated by the narva-dara who have contracted for the payment annually of an "udhad jama" or fixed land-tax, one would be inclined to say they must be owners, whether subject or not to a defeasance of their rights and to confiscation on a failure to pay the stipulated tax. Where, on the other hand, a village is already populated, cultivated and subjected to the land-tax, it would not necessarily follow from three or four of the chief inhabitants contracting to pay the tax, and recouping themselves by payments from the smaller holders, that they thus acquired any proprietorship. Such engagements, indeed, were in former days made by groups of the principal villagers in various parts of India without any pretence that they thus became owners of their village...Where,,a group of narvadars were not proprietors, the narva would not give any absolute ownership, but rather a tenure dependent on the fulfilment, by them, of the prescribed terms. The nature of the narvadari tenure...was such that land severed from the holding or narva reverted to the Government, and the narva itself involved a condition of forfeiture of the special terms in the event of failure to pay the full land-tax of the village. By such a forfeiture the original rights of the Government would

revive; the obligations of the narvadars would be those of simple rayats subject to separate assessment, and separately responsible each for his own holding, These obligations had been in several cases enforced.

18. In this case, there is no evidence in support of the plaintiff's claim that his predecessors in interest were proprietors of the soil of the lands in suit. The claim is not consistent with the terms of the vahivatnama, Exhibit 124. Moreover, had the Bhagdars of Sakarpur been the proprietors of the soil they would not have unconditionally consented to a conversion of the village into rayatvari. In *Umar Amanji v. Secretary of State for India* (2) Batchelor J. observed (p. 90):-

It appears to us...that so far as the bhagdari tenure is concerned, it cannot give the plaintiff any higher title to his assigned land in the village site than he has to his assigned land in the village fields. And in regard to these latter lands he is indisputably liable to pay rent or assessment to the Government, He oannob, therefore, make any claim to the proprietorship of Buoh lands.

19. In my opinion, the trial Judge was right in holding that plaintiff was not the proprietor of the lands in suit, that he had not acquired any title to those lands, and that the order, Exhibit 92, made by the Commissioner was within hia competence.

20. But the result, in this case, would have been the same even if the plaintiff had succeeded in establishing the fact that his predecessors in interest were the proprietors of the lands which were submerged between 1873 and 1887 and on the site of which the plaint lands are alleged to have re-formed. The general rule iathat if private property be submerged and subsequently again left bare by the water, it belongs to the original owner: *Lopez v, Muddion Mohun Thakoor* (1870) 13 M.I.A. 467 and *Haradas Aoharjya v. Secretary State for India* (1917) 20 Bom. L R. 49 In *Lopez*'s case, their lordships referred with approval to the rule expressed in *Hale, Be Jure Maria*, pp. 15 and 17, and said (p. 473):-

This principle is one not merely of English law, not a principle peculiar to any system of Municipal law, but it is a principle founded in universal law and juabice; that is to say, that whoever has land, wherever is is, whatever may be the accident be which it has boon exposed, whether it be a Vineyard which is covered by lava or ashes from a Volcano, or a field covered by the Sea or by a River, the ground, the Bite, the property, remains in the original Owner.

21. This rule, however, is subject to modification, for, in the same judgment, their lordships observed (p. 478) :-

Their Lordshipa, however, desire it to be understood that they do not hold that property absorbed by a Sea or a River is, under all circumstances, and after any lapse of time, to be recovered by the old owner, It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part

of the Sea or River of the State, and so liable to the written law as to accretion and annexation. But in this case the plaintiff, as between him and the State, did also take the most effectual means in his power (having the description and measurement of the submerged mouzkh recorded, and continuing to pay rent for it) to prevent the possibility of any question of dereliction or abandonment being raised against him.

22. In this case the plaintiff's predecessors in interest withheld payment of assessment in respect of the submerged lands for a period of about forty years. As pointed out by the Collector in Exhibit 125, this was entirely against the spirit of the Bhag-dari tenure, according to which the body of the Bhagdars was responsible for the total land revenue and Government had no concern with the question whether the land of the village was less or more. As he further remarked, the Bhagdars were unwilling to fulfil their duty by paying the full land-revenue of the village to which they were bound by the agreement between themselves and the Government. It must be taken, then, that the submerged lands had been so completely abandoned by them "as to merge again, like any other derelict land, into the public domain, as part of the River of the State." The plaintiff, therefore, is not entitled to recover there-formed lands.

23. The plaintiff having failed to prove his title to and possession of the lands described in the plaint, and his suit being barred, under Article 14 of the Indian Limitation Act, the decree passed by the lower Court is, in my opinion, correct

24. In this view of the matter, it is unnecessary to consider the question whether the sale-deed, Exhibit 46, contravenes the provisions of s. 3 of Bombay Act V of 1862. But, if a finding were necessary, I would hold that the transaction was valid. The document purports to convey the whole recognized sub-division of the bhag which stood until January 1914 in the name of Bai Pursan. These bhag lands include Survey Nos. 43 and 313 as well as the suit numbers, The said two numbers (43 and 313) were shown in some of the earlier revenue papers as being in the possession of Dhirajram Sadaram. Those papers, however, do not show in what right Dhirajram held those lands. The plaintiff has led evidence to prove that Dhirajram had been holding those lands as a tenant, first, under Muleshvar, and then under the plaintiff himself. But the trial Judge has disbelieved that evidence. I accept his finding that the alleged tenancy is not proved. But it does not follow that the sale is void. The object and intention of the Bhagdari Act is to prevent the dismemberment of bhags or shares, or recognised sub-divisions thereof, in Bhagdari villages. The plaintiff's vendor has done nothing to dismember the recognised sub-division of the bhag standing in the name of Bai Pursan. He has not sold Survey Nos. 43 and 313 to Dhirajram Sadaram. And by Exhibit 46 he purports to convey the entirety of that recognized sub-division to the plaintiff. The effect of the sale has not been to effect dismemberment of that recognised portion of the bhag. It is competent to the plaintiff, as it was competent to his vendor, to apply to the Collector to restore to the bhag the land which has for some time past been in the possession of Dhirajram.

25. I would dismiss the appeal and affirm the decree of the trial Court with costs.

Norman Macleod, Kt., C.J.

26. I agree.