Bapu Vithal Rajput Vs The Secretary of State for India

First Appeal No. 320 of 1926

Court: Bombay High Court

Date of Decision: Oct. 16, 1931

Acts Referred:

Bombay Land Revenue Code, 1879 â€" Section 40, 79A

Citation: AIR 1932 Bom 370 : (1932) 34 BOMLR 780 : (1932) ILR (Bom) 278 : 140 Ind. Cas. 164

Hon'ble Judges: Nanavati, J; John Beaumont, J

Bench: Division Bench

Judgement

John Beaumont, Kt., C.J.

This is an appeal from a decision of the District Judge of West Khandesh. The plaintiffs sued for a declaration

that the three houses and the mango trees upon the land, the survey numbers of which are referred to in the judgment of the learned District Judge,

belong to them and for recovery of possession thereof from defendant No. 2, and also to recover price of mango crops and damages from both

defendants.

2. The material facts are that one Sonia, the predecessor-in-title of the plaintiffs, became the occupier of the survey numbers referred to, upon

which stood the mango trees in suit and upon one of which survey numbers, viz., 127, stood the three houses in suit, On the grant of the land to

Sonia, Government did not reserve the trees under the power contained in Section 40 of the Bombay Land Revenue Code, and in the year 1907

Sonia applied to the Collector for a kaul or lease of the trees, and the Collector replied that the trees had been declared to be of Sonia''s

ownership and that no kaul was necessary. In accordance with this opinion of the Collector an entry was made in the last column of village form

No. 1 to the effect that the mango trees were of the ownership of the Khatedar Sonia, see Exhibit 25. There is, therefore, no doubt that Sonia was the owner of the trees in suit.

3. In 1911 Sonia sold the trees and houses in the survey numbers in question to the plaintiffs, In the year 1921 the son of Sonia, viz., defendant

No. 2, applied to Government alleging that the sale to the plaintiffs was in breach of the provisions of the Bombay Land Revenue Code, and asking

that such sale might be set aside. The Collector accepted this view and on April 27, 1022, purporting to act u/s 79A of the Bombay Land Revenue

Code, he ordered possession of the mango trees and houses in suit to be given to defendant No. 2. The plaintiffs appealed to higher revenue

authorities, but the order of the Collector was upheld, and this suit was accordingly filed on November 14,1924.

4. The learned Judge held that the sale of 1911 under which the plaintiffs claim was in breach of Section 73A, and that the Collector''s order was,

therefore, valid u/s 79 A of the Bombay Land Revenue Code. He also held that the plaintiffs'' claim was barfed by limitation, and accordingly the

plaintiffs'' suit was dismissed. The question as to limitation is really the same question as that which arises on the merits, because if the Collector''s

order was ultra vires and a nullity in whole or in part, it would not be necessary for the plaintiffs to take steps to set aside the order or part of the

order which is a nullity.

5. The learned trial Judge dealt with the provisions of the Bombay Land Revenue Code as they existed at the date of the trial. That, I think, was

not correct. The Bombay Land Revenue Code was amended in 1913, and as the transfer in this case was made in 1911, the rights of the parties

must depend upon the Act as it stood at that time.

6. Section 73A(1) of the Bombay Land Revenue Code in 1911 was in the following terms :-

73A (1) Notwithstanding anything in the foregoing section, in any tract or village to which Government may, by Notification published before the

introduction therein of an original survey settlement u/s 103, declare the provisions of this section applicable, the occupancy or interest of the

occupant in the land shall not after the data of such Notification be transferable without the previous sanction of the Collector.

7. It is not disputed that the conditions necessary to bring this section into operation had been performed prior to the material dates. "" Occupancy

is defined in the Act as signifying the sum of the rights vested in an occupant as such, and ""occupant"" is defined as a holder of unalienated land.

Land "" is defined as including things attached to the earth ; all these definitions applying only if there is nothing repugnant in the subject or context.

Reading Section 73A in the light of the definitions, the transfer that is forbidden is of the sum of the rights vested in the holder or the interest of the

holder in the land, including trees and houses as being things attached to the earth.

8. In the case of the trees which were assigned, these were assigned apart from any land, and the assignment would, in my opinion, only include

such necessary easements over the land as would entitle the transferee to enjoy the trees sold to him. In the case of the houses, these were sold together with the land on which they stood. (See Exhibit 28).

9. The first question which we have to determine is whether the section prohibits a transfer of trees apart from land. The contention of Government is that land in Section 73A includes trees there being nothing in the context to exclude the definition of land, and that accordingly the transfer of trees is prohibited. The contention of Mr. Thakor for the appellant was that the scheme of the Act is to deal with occupancy rights and not ownership, and that trees are the subject of ownership. I am, however unable to agree that the Act makes any such distinction. It is true that u/s 40 the trees may be reserved to Government though in the present instance this was not done, and it is true that a good many sections draw a distinction between the land and the trees; see for instance Sections 56, 62, and 65. But the occupant acquires his rights in the trees as part of the occupancy; the trees as part of the land are subject to payment of land revenue, and the trees as part of the land are liable to forfeiture for non-payment of land revenue. No doubt the occupant as part of his occupancy rights may cut down or uproot and remove a tree, but equally may he remove a piece of rock which forms part of the soil.

10. The real question seems to me to be what is the "" land "" an interest in which the occupier is precluded from transferring u/s 73A. If is to be noticed that the words "" or any part of the land "" are not included in the section, It is clear that a tree is not in itself land, though it may be included in the word ""land."" At the most it forma part of the land. The ownership of land normally extends ab imo usque ad coelum and I apprehend that the same rule applies to occupancy under the Bombay Land Revenue Code, subject to any reservations in favour of Government. A tree can never occupy more than a part of the soil and part of the air above the soil, Whatever the unit of land dealt with in Section 73A may be, and assuming for the purpose of my judgment that it is each and every piece of land held by the occupant, a tree forms only part of that unit, and it seems to me that the section does not preclude the transfer of a part of land. It is settled law in England that the covenant commonly found in leases against assigning or underletting the land demised is not broken by an assignment or underletting of part of the land, the covenant not expressly referring to part of the land. Section 73A restricts the rights of the occupant, and I see no reason why we should construe the section less strictly than a covenant in a lease, and extend it to a part of land, when a part of land is not mentioned. It is to be observed that if the transfer of growing trees is prohibited by the section, it would seem that a transfer of growing crops would also be prohibited, and I apprehend that a sale of grow ing crops is a not a unusual transaction.

11. In the case of the houses the position is different. The transfer, Exhibit 28, is of the houses with the land thereunder and stones and earth, and in

my opinion that includes the whole interest of the occupant in the land upon which the houses stand. I think, therefore, that that transfer was

prohibited by Section 73A.

12. In the result, therefore, I think that the appeal must be allowed in respect of the mango trees, but must be dismissed in respect of the houses,

There will have to be an account in respect of the profits of the mango trees. Costs in this Court and in the Court below to be proportionate to the

respective values of the trees and the houses, the appellant getting the proportion of costs attributable to the trees, and the respondent, the

proportion of costs attributable to the houses.

Nanavati, J.

13. The plaintiffs sued in the Court of the District Judge, West Khandesh, for a declaration that the three houses and mango trees described in the

plaint belong to them and for recovery of possession of the same. It was alleged that the houses and trees were in the possession and enjoyment of

Sonia, the father of defendant No. 2, and were situated in lands in the occupation of Sonia. The plaintiff''s further stated that the houses and mango

trees were sold by the deceased Sonia to the deceased Gatalu for the sum of Rs. 2,500 by a registered sale-deed dated July 15, 1911. The

plaintiffs are the surviving coparceners of the deceased Gatalu. It was further stated that defendant No. 2 Dongrya, son of Sonia, applied to the

Collector to have the houses and trees restored to his possession, whereupon the Collector passed an order to the effect that the lands in which the

houses and trees stood were held on restricted tenure by the deceased Sonia; that the sale to Gatalu by Sonia was illegal, and that the plaintiffs

should restore possession of the houses and trees to defendant No. 2. The plaintiffs claim that the deceased Sonia had the right to transfer the said

houses and trees and that the order of the Collector was not legal.

14. Defendant No. 1, who is the Secretary of State for India in Council, contended that the suit was barred by limitation; that the survey numbers

in question were held on restricted tenure; and that as the houses and trees in suit stood in the said survey numbers they could not be transferred

without the previous sanction of the Collector; and that accordingly the transfer was properly set aside under the Bombay Land Revenue Code,

Defendant No. 2 did not appear.

15. The learned District Judge held that the suit was barred under Article 14 of the Indian Limitation Act; that the lands mentioned in the plaint

were held under restricted tenure ; that the previous sanction of the Collector was necessary before the bouses and trees in suit could be

transferred; and that the order of the Collector was legal and proper u/s 79A of the Bombay Land Revenue Code and acccordingly dismissed the

suit with costs. The plaintiffs have appealed.

16. The principal question in this case is whether the order of the Collector compelling the plaintiffs to give up possession of the houses and trees

u/s 79A of the Bombay Land Revenue Code was a legal order, The point of limitation also depends on the answer to this question, because if the

action of the Collector was not covered by that section his order was a nullity, and it would not be necessary for the plaintiffs to have it set aside in

order to succeed in the present suit. The suit would in that case not fall under Article 14 of the Indian Limitation Act. The appellants were

dispossessed on April 4,1922, as appears from Exhibit SO, and there would be no bar of limitation if the Collector''s order was not competent u/s

79A as alleged.

17. Coming, therefore, to a consideration of the powers of the Collector under the Bombay Land Revenue Code (Bombay Act V of 1879), it may

be noted at the outset that the material sections were amended in 1918 The question, therefore, whether Sonia was entitled to transfer the property

in suit would depend on the language of the Act as it stood at that date. Now, the Code by Section 73 lays down that an occupancy is, generally

speaking, heritable and transferable property. Then Section 73A which wa8 inserted by an amendment in 1901 (as it stood before 1913) enacted

as follows:-

(1) Notwithstanding anything in the foregoing section, in any tract or village to which Government may, by Notification published before the

introduction therein of an original survey settlement u/s 103, declare the provisions of this section applicable, the occupancy or interest of the

occupant in the land shall not after the date of such Notification be transferable without the previous sanction of the Collector.

18. Sub-section (2) is not material for the present purpose. Section 79A, which was also inserted in 1901, enacted as follows (as it stood before

1913). Its form, as it stood after 1913, does not, I think, make any substantial change in the position,

19. Any person unauthorizedly occupying or wrongfully in possession of any land

(a) to the use or occupation of which he has ceased to be entitled under any of the provisions of this Act, or

(b) of which the occupancy right is not transferable without previous sanction "" u/s 73A or by virtue of any condition lawfully annexed to the

occupancy under the provisions of Section 62, 67 or 68, may be summarily evicted by the Collector.

20. It is common ground that a notification had been published prior to the introduction of the original survey settlement in the taluka where the land

in suit is situated by which the land in question came to be held under what is known as restricted tenure u/s 73A, and the occupancy or interest of

the occupant in the land thereby became not transferable without the previous sanction of the Collector. What was transferred by Sonia under the

sale deed Exhibit 28, however, was not the whole of his land but three houses and large number of mango trees situated on the land. Whether the

transfer contravened Section 73A or not would, therefore, depend on the question whether the transfer was of the occupancy or of the interest of the occupant in the land, ''Occupancy'' is defined in Section 3 (18) of the old Code as follows:-

Occupancy signifies the sura of the rights vested in an occupant as such.

21. Under the same Code '' occupant'' signified a holder of unalienat-ed land (vide Section 3 (16)), and '' land '' was defined in Section 3 (4) as

including benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

22. Now, it seems to me clear that as far as the transfer of the houses is concerned, it necessarily implied a transfer of the land on which the houses

stood. When a house is mentioned it is usually understood as including the land and not merely the superstructure apart from the land on which it

stands. The superstructures were not sold as such for the purpose by being dismantled and taken away. Moreover, in the present case the land

below the houses is expressly conveyed. What was sold was the three houses including the land on which they stood.. To that extent Sonia had

undoubtedly sold '' the land'' of which he was a holder, in other words the occupant, and though he had not sold the whole of his holding or

occupancy, he certainly had sold the whole of his rights in a portion of it. Now I do not think that Section 73A can be interpreted as permitting

such a transfer and that was not what was contended before us, The learned Counsel for the appellants merely confined his claim in appeal to the

value of the superstructures which according to him had been taken possession of without giving him an opportunity of removing the same. Even to

this restricted claim I do not think that the appellants can be held to be entitled as of right. The purchaser was well aware of the tenure on which

Sonia held the land and was careful not to take a transfer of the land surrounding the houses. He took the risk of his view of the transfer of the

houses being erroneous and cannot complain if he was summarily evicted from the land including the superstructures.

23. The question of the sale of trees presents much more difficulty. It is true that '' land'' as defined includes benefits to arise out of land and things

attached to the earth. It is also true that trees are attached to the earth and the value of the fruits growing on the trees is a benefit arising out of land,

But serious difficulties would arise if the person to whom trees are sold is to be regarded as the occupant of '' land'' under the Bombay Land

Revenue Code. It was contended by the learned advocate for the appellants that according to the scheme of the Code land can only be the subject

of an occupancy whereas trees are regarded as being the subject of ownership ; for example, in Section 40 of the Code the question of trees is

specifically dealt with and it is provided that in the case of villages, ""of which the original survey settlement shall be completed after the passing of

this Act,"" (which is the case here), ""the right of Government to all trees in unalienated land, shall be deemed to be conceded to the occupant of

such land except in so far as such rights may be reserved..."" In the case before us, Sonia applied for a declaration of his ownership of the trees and

asked for an agreement or kaul declaring his right but he was informed that no such kaul was necessary and that a note would be made in the relevant registers that the trees were of his ownership. That such a note was made can be seen from Exhibit 25, in the remarks column of which it

is stated against the entries of the lands of which Sonia was the occupant as follows:-

Suit No. 62...'''' Dakhala (note) was taken as per order etc., in respect of the small and big mango trees 30 standing in the said number being of the

ownership of the said Khatedar (occupant) Sonia Vechia, Dated May 1, 1808.

24. Similar notes are made with regard to other survey numbers also. It is, therefore, clear that Government themselves have recognised the

ownership of Sonia to the trees as something different and distinct from his right of occupancy in the land.

25. Again Section 56 which declares that land revenue is to be a paramount charge on the land is so worded as to show that occupancy does not

necessarily include the right to the trees standing on the land, for, it declares that ''''failure in payment of land revenue shall make the

occupancy...together with all rights of the occupant or holder over all trees, crops, buildings and things attached to the land or permanently

fastened to anything attached to the land, liable to forfeiture.'''' It may of course be argued that these words referring to trees, crops and buildings

have been put in there by way of greater caution. It seems to be clear from this section that when an occupancy is sold for arrears of land revenue,

the sale passes the right to all trees, crops and buildingest and it on the land. But the fact that it should have been necessary to mention this

separately is some indication that the right to trees, crops and buildings is not necessarily comprised in the occupancy A person occupying land on

which the trees have been reserved by Government is not any the less an occupant of the land.

26. It is true that ''land'' as defined in the Code includes things attached to the earth; but where we have an inclusive definition of that sort, great

care is required in applying it in interpreting the word wherever it occurs. The definition clause itself starts by saying ''''Unless there be something

repugnant in the subject or context,'''' Therefore, in the first place we have to see whether there is any repugnancy in applying the inclusive definition.

But even in a case where it is not possible to say definitely that such repugnancy exists, it is a recognised principle of judicial in-terpretation that the

inclusive meaning is not to be necessarily and indiscriminately applied to the word. '''' Where a term is interpreted in a statute as ''including'' & c., the

comprehensive sense is not to be taken as strictly defining what the meaning of the word must be under all circumstances, but merely as declaring

what things may be comprehended within the term where the circumstances require that they should'''': Emperor Vs. Braz H. De Souza, . The

principle is based on the undermentioned English cases and is well settled : The Queen v. The Justices of Cambridgeshire (1838) 7 Ad. & E. 480

Meux v. Jacobs (1875) L R. 7 Eng. & Ir. App. 481 and Mayor, Co., of Portsmouth v. Smith (1885) 10 App. Cas. 364

27. It would therefore, be for the Court to say whether in interpreting the term ''''occupancy or interest of the occupant in the land'''' we should

interpret ""land"" as necessarily meaning the trees standing on the land. There is no distinction in principle between annual crops and fruit trees from

which an annual revenue may be derived. Where an agriculturist sells the standing crops before they are harvested to a third party, are we to

regard the purchaser of the standing crops as being an occupant under the Bombay Land Revenue Code for the time being? I am not aware that

he has been held to be such at any time or that even the revenue authorities have ever regarded such a purchaser as an occupant. If that is so, it is

difficult to see why a person buying mango trees standing in occupied land should be regarded as occupying the land in addition to the Khatedar or

occupant who is in possession. Unless the purchaser of the fruit trees can be regarded as unauthorisedly occupying '' land", Section 79A would not

apply.

28. The ordinary meaning attached to a transaction such as the sale of fruit trees is merely this, that the purchaser has the right to enjoy the produce

of the trees so long as the trees are in existence and, when the trees die or are cut down, to appropriate the timber thereof. He is not regarded as

having acquired any title to the land connected with the trees, The purchaser would not be allowed to say, after the tree had ceased to exist, that he

had any right to the land on which, let us say, the trunk of the tree stood. He would not be allowed to plant another tree in the same spot and to

appropriate its produce after the original tree was dead. Herein lies an essential difference between the sale of a house and the sale of a tree. If a

house was destroyed or pulled down, the pur-chaser of the house would ordinarily be entitled to build another house on the land, but in a

transaction like the present in which trees are sold, the rights of the purchaser cease once the trees are dead. Any other view would lead to very

serious difficulties. If it is argued that a sale of a tree necessarily implies sale of some land, the answer would be that it is impossible to decide what

is the land that is sold. Is it only the small circle of land out of which the trunk of the tree emerges above the surface, or, is it the land through which

the roots of the tree spread themselves ? Or, is it the land which is covered by the shade of the tree ? Or again, is it the land from which by means

of percolating water the tree draws its sustenance ? It seems to me that in a transaction of the sale of trees the parties do not have in mind any

question relating to the transfer of any land in the physical sense and the transaction, therefore, is essentially one relating to the sale of the produce

of the trees so long as they are alive and the timber thereafter when they are dead. In this view although the tree may continue to stand on or be

attached to the land, what is sold is not the tree as part of the land but the tree as something that is capable of being severed from the land and

appropriated and enjoyed as such. To put the matter in another way, the definition of ""land"" as given in the Code includes trees, but it does not say

that "land" means trees apart from the land itself, and a sale of trees in essence is a sale of something which is enjoyed apart from the land, though for the time being that thing is attached to the land.

29. Then, again, the words "" summarily evicted by the Collector "" used in Section 79A are hardly appropriate when referring to trees. Nor do we

speak of persons who own trees as occupying them. I am inclined to think, therefore, that it is repugnant to the context to interpret purchase of

trees as being unauthorised occupation of "land " as contemplated in Section 79A. But, even if the point of repugnancy be considered doubtful, I

think that in view of the considerations set out above it must be held that though land as defined in the Code includes trees, a sale of trees in an

occupancy does not mean a transfer of occupancy, and is, therefore, not subject to the restrictions of Section 73A. It follows, therefore, that the

order of the Collector dispossessing the appellants of the trees was not covered by the authority conferred in Section 79A of the code and was

invalid to that extent.