(1978) 07 BOM CK 0034

Bombay High Court

Case No: Second Appeal No. 787 of 1971

The State of Maharashtra		APPELLANT
	Vs	
Yeshwanta Pandu Bhavar		RESPONDENT

Date of Decision: July 28, 1978

Acts Referred:

- Maharashtra Land Revenue Code, 1966 - Section 32, 33, 65, 66

Citation: (1978) 80 BOMLR 688

Hon'ble Judges: Vaidya, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Vaidya, J.

The above Second Appeal filed by the State of Maharashtra is directed against the judgment and decree passed by the learned Assistant Judge, Ahmednagar, dated April 6, 1971, confirming the decree passed by the Joint Civil Judge, Senior Division, Ahmednagar dated March 24, 1970, declaring that the respondent-plaintiff was the owner of 3 acres 5 gunthas of land out of 4 acres 17 gunthas situated on the southern side of the current of the stream adjacent to survey No. 117 and directing the State Government to give possession of 3 acres 5 gunthas of the land to the plaintiff, dismissing his prayer regarding 1 acre 12 gunthas, giving liberty to the defendant-State Government to lease out that portion of land 1 acre 12 gunthas as per the provisions of Rule 41 of the Land Revenue Rules, 1921 and the provisions in Maharashtra Land Revenue Code, 1966, if the Collector of Ahmednagar so chooses to do, and modifying the injunction which the learned Civil Judge had granted restraining the State from selling any portion of the 4 acres 17 gunthas of the land in question in auction by substituting for 4 acres 18 gunthas in place of 3 acres 5 gunthas. In other words, the learned Assistant Judge confined the injunction in respect of 3 acres 5 gunthas of which the plaintiff was declared to be the owner.

2. The plaintiff-respondent filed the suit on October 14. 1968 for the declaration and injunction against the State Government making the allegations which may be briefly summarised as follows:

It appears that the suit land bearing survey No. 118 originally belonged to one Pandurang Krishnaji Deshpande. The plaintiff-respondent became the statutory tenant of land survey No. 118, which admeasured 6 acres 35 gunthas and was assessed at Rs. 6.50. The plaintiff has not made the present owner of survey No. 117 party to the suit and we do not know to whom the land belongs now. It appears that the survey No. 117 is to the south of survey No. 118. One streamlet was passing through these two survey numbers in west east direction for a period of thirty years before the suit, and that for the last seven years i.e. from about 1960 or 1961, this streamlet started passing by the eastern side of survey No. 118 towards north. Due to change that had occurred direction of the current of the stream some time before seven years the plaintiff''s land of 3 acres 5 gunthas situate on the southern side of survey No. 118 was washed away and new alluvial land admeasuring 4 acres 17 gunthas was formed.

3. According to the plaintiff this change in the flow of the stream did not affect other land of survey No. 117 but affected by reducing cultivable land of survey No. 118 that belonged to the plaintiff from 6 acres 35 gunthas to 3 acres 30 gunthas. He also stated in the plaint that during six/seven years alluvion admeasuring 1 acre 12 gunthas was formed on the eastern side of the land.

4. It appears that in 1961 this land of the plaintiff was surveyed by the Cadastral Surveyor at the plaintiff''s instance and thereafter the plaintiff had claimed this alluvial portion of the land of 4 acres 17 gunthas by making an application to the Tahsildar, Newasa. The application was rejected. The Tahsildar recovered possession of the land on October 13, 1967 from one Keru Bala Gaikwad, who was unauthorisedly cultivating the same.

5. The plaintiff contended that he had become owner of 3 acres 5 gunthas of land out of alluvial land of 4 acres 17 gunthas and alternatively pleaded that under the provisions of Section 32 of the Maharashtra Land Revenue Code of 1966, he has a right to purchase this land of 3 acres 5 gunthas and also the other land of 1 acre 12 gunthas which is adjoining his land and the defendant, the State of Maharashtra had no authority to sell the same without first offering it to the plaintiff by public auction and that as the State had refused plaintiff''s just demand for this portion of the land, the plaintiff was required to serve notice on the defendants and as the defendants did not comply with the demands made in the said notice, the plaintiff filed the present suit praying for declaration and injunction.

6. On behalf of the State Government, various frivolous contentions, as usual, were raised about jurisdiction, court-fees, valuation without making any attempt to refer to law on the subject of alluvion and as a result of this there has been, a gross

miscarriage of justice in the present case. I find that the suit is liable to be dismissed only on the ground of non-joinder of neighbouring owners of survey No. 117 and any other person who may be having a claim or interest in the alluvion land created by the change of the river bed as stated by the plaintiff.

7. Both the Courts below did not care to apply their minds to the law contained in the Bombay Land Revenue Code, 1879 and the Rules made thereunder and the Maharashtra Land Revenue Code, 1966 and the Rules made thereunder about the rights of the public and the rights of the State Government with regard to alluvial land. Thus, the Bombay Land Revenue Code, 1879, which applied to the alluvial land laid down in Section 46 that all alluvial lands newly formed islands were liable to pay land revenue. Section 47 provides for diminution of land revenue in the case of diluvion.

8. Sections 63 and 64 run as under:

63. When it appears to the Collector that any alluvial land, which vests under any law for the time being in force in the State Government, may with due regard to the interests of the public revenue be disposed of, he shall offer the same to the occupant (if any) of the bank or shore on which such alluvial land has formed.

The price of the land so offered shall not exceed three times the annual assessment thereof.

If the said occupant shall refuse the offer, the Collector may dispose of the land without any restrictions as to the price to be asked.

For the purpose of this section, notwithstanding anything contained in Section 3, if the bank or shore has been mortgaged with possession, the mortgagor shall be deemed to be the occupant thereof.

64. When alluvial land forms on any bank or shore, the occupant, if any, of such bank or shore shall be entitled to the temporary use thereof unless or until the area of the same exceeds one acre. When the area of the alluvial land exceeds the said extent, it shall be at the disposal of the Collector subject to the provisions of the last preceding section.

Rule 41 of the Land Revenue Rules, 1921 laid down:

Land in beds of river.-Land situated in the bed of a river and not included in a survey number shall, save as otherwise provided in Sections 46 and 64, ordinarily be leased annually by auction to the highest bid4er for the term of one year or such further period as the Collector thinks fit. The accepted bid shall be deemed to be the land revenue chargeable on such land.

9. Chapter X of the Land Revenue Rules, 1921 dealt with alluvion and diluvion. Rules 71 and 72 run as under:

71. Holders of land with shifting boundaries may occupy up to such boundaries.-When a holding is bounded on any side by the bank or shore of a river, creek or nala or of the sea, the holder will be permitted, subject to the provisions contained in Sections 46, 47, 63 and 64, to occupy and use the land up to such bank or shore, notwithstanding that its position may shift from time to time.

72. The Collector to dispose of claims u/s 47.-(a) Claims to decrease of assessment on account of diluvion u/s 47 shall be disposed of by the Collector.

(b) It shall be the duty of the village officers to ascertain and to record the increases due to alluvion and losses due to diluvion in every holding subject to such changes. They shall also report to the Mamlatdar for orders when the area of any newly formed alluvial or island, or of any abandoned river bed, or land lost by diluvion exceeds the limits prescribed in Sections 46, 47 and 64.

10. The corresponding provisions which are in part materia in the Maharashtra Land Revenue Code, 1966 which came into force on August 15, 1967 with all its provisions prior to filing pf the present suit containing the same law in Sections 65, 66, 32 and 33 respectively corresponding to the aforesaid sections.

11. The Government has framed Maharashtra Land Revenue (Alluvion and Diluvion) Rules, 1967 in supersession of all previous rules. The rules came into force on August 21, 1967 prior to filing of the present suit on October 14, 1968. They were called the Maharashtra Land Revenue (Alluvion and Diluvion) Rules, 1967. Rule 2 imposes duty on the Talathi to ascertain and report to the Tahsildar and record the increases due to alluvion, and losses due to diluvion, in every holding subject to such changes.

12. Rules 3 and 4 were as under:

3. Holders of land with shifting boundaries may occupy upto such boundaries.-When a holding is bounded on any side by the bank or shore of a river, creek or nala, or of the sea, the holder may, subject to the provisions contained in Sections 32, 33, 65 and 66, occupy and use the land up to such bank or shore, notwithstanding that its position may shift from time to time.

4. Disposal of alluvial land.-(1) When alluvial land formed on any bank or shore exceeds one acre, it shall be disposed of by the Collector in the manner provided in Sub-section (1) of Section 32.

(2) If the occupant of the bank or shore does not accept the offer made by the Collector, and the alluvial land is not required for any public or Government purpose, it may be disposed of by public auction to the highest bidder.

Rule 5 provided for decrease in assessment on land lost by diluvion with which we are not concerned.

13. These are referred to in some details because it is rather unfortunate that in both Courts below the attention of the Courts was not drawn to these rules and the Courts proceeded with the matter on the basis of arguments and reasons totally ignoring all these relevant provisions which as it is well settled must be read subject to the case law which has developed with regard to the law of alluvial land over the century following the principles which are followed in England with regard to such lands.

14. The law in England is stated in, Halsbury''s Laws of England, fourth edn., vol. 8, in paras. 1437 and 1438 with regard to alluvion which runs as follows:

Land formed by alluvion. Where land is formed, by alluvion, namely by the casting up of earth or sand on the shore of the sea, the additional increment belongs to the Crown where the casting up of the earth or sand takes place suddenly. However, where new land is formed by small accretions and the additions or increments are so gradual as to be inappreciable, these belong to the owner of the adjacent land, whether the accretions are due to natural or to artificial causes, provided in the latter case the user of the land is lawful.

Land left bare by diluvion. Prima facie the Crown is entitled to land which is suddenly left bare in the narrow seas or in rivers as far lip as the tide flows and re-flows. However, if the site on which the land is situate belongs to a subject by grant or prescription, the land left bare by diluvion belongs to the subject. Furthermore, when the diluvion or dereliction takes place gradually the land left bare belongs to the adjacent owner; and it seems that the Crown is not entitled where the owner of land left bare, which was formerly covered, can recognise any portion which originally belonged to him, or where an island is created by a sudden act of water in cutting off land or by a sudden recession of the water. The same rules seem to apply to a sandbank in a river which uncovers at low water.

15. In Introduction to Land Law by J.G. Riddall, 1974, at page 46 the law with regard to land covered by water is stated thus:

In the case of land covered by water, for example a river, the bed of the river belongs to the fee simple owner of the land through which the river passes. Where the river forms the boundary between two plots belonging to two different fee simple owners, the presumption is that each owner is the owner of the bed up to the middle line. Similar principles apply in the case of a lake.

What has been said about the beds of rivers and lakes applies to all non-tidal water. The bed of all tidal water belongs to the crown.

16. In the present case without applying their minds to this law as settled by the cases and also to the various statutory provisions and rules, it is strange that the two Courts below decreed the suit as stated above without any regard for law by simply referring to some cases which have no relevance at all to the facts proved in

the present case and which could not be applied unless the neighbouring owners and all interested parties were joined as parties to the suit.

17. In Tarakdas Acharjee Choudhury Vs. The Secretary of State for India in Council, the Privy Council laid down that the bed of a large public navigable river and the lands thrown up by it are presumed to be the property of Government, and not that of a private person. Therefore, the onus of proving title to such lands by showing that they originally belonged to him, but that they were subsequently submerged by the river and they appeared again and became part of his estate, is on the person who claims those lands.

18. The title of such a person must depend upon the strength of his own case, and not upon the fortuitous circumstances of whether another person in a similar position had, or had not, pressed his claim. There is nothing on record of this case to show whether the river which was flowing between the lands survey Nos. 117 and/or 118 was a public river or a private river. There is also nothing on record to show that the river bed was included in survey No. 118 which belonged to the plaintiff.

19. In these circumstances, it is difficult to understand how the two Courts below declared the plaintiff as the owner of 3 acres 5 gunthas out of 4 acres 17 gunthas of land what appears to be the alluvial land. While the reasoning of the learned Judge is attempted to be supported by the decision of the Privy Council in Thakurain Ritraj v. Thakurain Sarfaraz (1905) 7 Bom. L.R. 872. which was, however, a decision under the regulations of the Province of Oudh and which was concerned with the case of ownership of a land which was covered by water and then water receded and it was held that after the water receded the soil became his exclusive property.

20. That however is not the case in the present suit. Here, it is nobody''s case that the land which the plaintiff is claiming originally belonged to him and in these circumstances the learned Judge was wrong in applying the said Privy Council decision to the facts of the present case. Similarly he was wrong in applying some observations in Shri Shushilendratirth Swami Vs. Secretary of State For India, where the claim made by the plaintiff in that case was rejected, to the facts of the present case.

21. There was no other law or case law referred to by the learned Civil Judge in holding that the plaintiff had become the owner of 3 acres 5 gunthas of land. Turning now to the learned Assistant Judge, the learned Counsel appearing before me had to concede that they could not follow exactly what the learned Assistant Judge had done in arriving at the conclusion by referring to some decision that the plaintiff had become the owner of 3 acres 5 gunthas without any reference whatsoever to the relevant provisions of the Bombay Land Revenue Code and the Rules made thereunder and the Maharashtra Land Revenue Code, 1966 and the Rules made thereunder.

22. He purported to rely on a decision in Vinayakrao v. The Secretary of State for India I.L.R.(1897) Bom. 39. It was a case of an Inamdar and it was difficult to understand how that case can have any application to the present case. He has quoted a passage from that judgment at page 44, though the judgment proceeds on the footing that the land did not belong to an unalienated village and the only relevant decision in that case was that the bed of the stream had flown through the property of the plaintiff who owned the land.

23. Mrs. Shenoy, the learned Assistant Government Pleader has therefore rightly attacked the judgment of the learned Assistant Judge on the ground that he relied upon what appears to be a totally irrelevant case as in the present case it is nobody''s case that the land was Inam land. The learned Assistant Judge has further referred to Shushilendratirth Swami v. Secretary of State which, as already stated above, has no application to the facts of the present case and has also referred to some other decisions where that decision was followed and has jumped to the conclusion in para. 15 of his judgment:

In view of this legal position, which Is laid down by our High Court in the aforesaid ruling it becomes clear that the plaintiff who is the owner of the land abutting on non-navigable and non-tidal small rivulet named Shingori is entitled to the soil which is part of the original bed of the stream.

The finding recorded on this appears to be correct and hence the same is affirmed.

24. Mrs. Shenoy rightly contended that none of the cases cited by the learned Assistant Judge is relevant to come to a conclusion that the entire river bed would belong to the owner of a land abutting on non-navigable and non-tidal small rivulet.

25. On the contrary, such land would belong to both the adjoining owners and not merely the plaintiff and merely because the owner of survey No. 117 has not cared to put forward a claim it cannot be said that the plaintiff is entitled to the entire or any part of any alluvial land irrespective of the provisions of the Land Revenue Code and the Rules made thereunder.

26. In Nasarvanji Pestamji v. Nasarvanji Darasha (1864) 2 B.H.C.R. 345, Arnould C.J. laid down where it was proved that the land which was adjoining to alluvial land admitted to have been gained from a river by gradual accretion and contiguous to be the plaintiff''s field, then the plaintiff was entitled to it on the principle of alluvion. There is a note to that case which lays down that the Indian law and usage on the subject correspond, according to Sir W. Macnaghten, with those of England and with the civil law.

27. It is laid down in the Privy Council decision in Tarakdas v. Secretary of State that it depends on facts as to whether the bed of a large public navigable river and the lands thrown by it are presumed to be the property of the Government.

28. The learned Assistant Judge assumed that the river in the present case is not a large river and realising that the neighbouring owner also will be entitled to a share in the alluvial land, if he claims it, he has observed in para. 16 of his judgment as follows:

I may, however, observe that owner of survey No. 117 which is to the south of the original bed of the stream or which is to the south of disputed land is not a party to this suit. Hence, it would not be proper nor is it necessary for this Court to adjudicate the question of ownership of plaintiff, vis-a-vis this adjoining owner of survey No. 117. That question if left open for being adjudicated in a properly constituted suit.

29. Mr. Kothari, the learned Counsel appearing for the respondent-plaintiff contended that the Government had not objected before the two Courts below that the suit was bad for non-joinder of the owner of the adjoining land and hence having regard to the observations made by the learned Judge, it was open to the learned Judge to confirm the decree passed by the trial Court altering the injunction as has been done by him.

30. As already stated above, there has been a gross-miscarriage of justice because the attention of the two Courts below was not drawn to the law with regard to alluvion, law containing in the Land Revenue Act and Rules, old and new under which both the neighbouring owners would be entitled to their share unless the neighbouring owners give up their shares. Even assuming that on a proper interpretation of the law, the two Courts were right in declaring the plaintiff as the owner of 3 acres 5 gunthas, it appears to be a very strange decision as it is difficult to understand how if he is the owner of that land, why he is not the owner of the rest of the land claimed by him.

31. But as the necessary party without whom the rights of the plaintiff could not be adjudicated by the Court was not made a party to the suit and the suit has resulted in miscarriage of justice as a result of two Courts below ignoring all the provisions of the two Land Revenue Codes and Rules made thereunder, the decrees passed by the two Courts below are set aside and the plaintiff''s suit is dismissed with liberty to the plaintiff to file a proper suit making all the interested persons as parties to the suit.

32. In my opinion, the suit like the present one in which the plaintiff claimed the alluvial land cannot be maintainable without joining neighbouring owners who have also claims thereto. If a suit is filed by the neighbouring owner against the Government, the Government will be bound by the decree in the present suit and the Government would not be able to open its mouth particularly as its law officers had not raised objections about the non-joinder in the lower Courts.

33. Ordinarily, it is true that such a point may not be taken in the second appeal but as in the present case both the Courts have ignored all the relevant provisions and

the rules which confer rights not only on the plaintiff but on the neighbouring owners to some extent; and as decrees passed by the two Courts below are not supported by any decision or any section of any law and justice requires that the plaintiff should be in a position to agitate his right properly in a properly instituted suit, while dismissing the suit I give him liberty as stated above to file a proper suit joining all the necessary parties.

34. In the result, the second appeal is allowed but as, the parties have not cared in both the Courts below to draw the attention of the two Courts to the relevant law, the carries should bear their own costs.