
(1937) 39 BOMLR 216

Bombay High Court

Case No: Second Appeal No. 835 of 1932

Surji Fulaji

APPELLANT

Vs

The Secretary of State
for India

RESPONDENT

Date of Decision: Oct. 14, 1936

Acts Referred:

Bombay Land Revenue Code, 1879 " Section 37#Evidence Act, 1872 " Section 110

Citation: (1937) 39 BOMLR 216

Hon'ble Judges: Sen, J; Broomfield, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Sen, J.

The plaintiff-appellant sued the Secretary of State, the defendant respondent, for a declaration that he is the owner of the land in

suit and for a consequential injunction. The land in suit consisted of two plots marked X and Y in the map which has been produced in this case.

The plaintiff's case is that these two plots belong to him and have been in the possession of his family from ancient times. The contention of the

defendant is that the plot marked Y is used as a passage by the village people visiting or passing through the locality, that the plot marked X is an

open wada and that both the plots belong to Government u/s 37 of the Bombay Land Revenue Code. It seems that a City Survey was held in

respect of the lands in the village site in 1921 and that in 1922 the District Deputy Collector held an inquiry in which he held that both these plots

belonged to Government. The plaintiff's appeal to the Collector was dismissed in 1926. The oral evidence adduced, for the plaintiff was to the

effect that there were old hedges to the south and west of the land Y, that a new hedge was put up on the north about ten years ago and that the

plaintiff had been in possession of the two plots for the last thirty or forty years.

2. The trial Court held that the plaintiff must be regarded as being in possession from remote times and that his title must be presumed from such

possession. The learned Subordinate Judge accordingly decided the suit in plaintiff's favour.

3. In the lower appellate Court the decision of the learned Subordinate Judge as to plot X and as to one part of the plot Y was upheld, and as to

two other parts of Y it held that the presumption under both the customary law and Section 37 of the Bombay Land Revenue Code being that

Government is the owner of unoccupied village site, the plaintiff, in order to succeed, must prove possession for the statutory period, and that this

not having been done Government (i.e., the defendant) must be held to be the owners. Those two parts of plot Y are the otli shown by the letters

ABD in the map and the portion of Y which is exclusive of this otli as well as exclusive of the land between survey Nos. 51 and 52.

4. The trial Court relied as regards the law applicable to this case on the decisions in Secretary of State for India v. Gulam Rasul ILR (1916) 40

Bom. 392, 18 Bom. L.R. 243. Hanmantrav v. The Secretary of State for India ILR (1900) 25 Bom. 287 : 2 Bom. L.R. 1111. and Gangaram v.

The Secretary of State for India ILR (1895) 20 Bom. 798. As regards Vasta v. Secretary of State for India ILR (1920) 45 Bom. 789 : 23 Bom.

L.R. 238, relied on by the defendant, the learned Subordinate Judge remarked :

The correctness of the decision in Hanmantrav v. Secretary of State for India is doubted in Vasta v. Secretary of State for India, but that decision

is not overruled. Moreover, in Vasta v. Secretary of State there was a Ghabhan Register and therein the land in question was entered as a

Government ghabhan. Here there is no record to prove the title or possession of Government prior to 1921. The final decision in Vasta v.

Secretary of State for India rested on the particular circumstances of that case.

The lower appellate Court held that Hanmantrav v. Secretary of State for India was ""directly overruled"" by Vasta v. Secretary of State" for India,

and stated the legal position thus :

By the customary law Government is the owner of unoccupied village sites. Section 37 strengthens this title; for if it can be shown that a site at

some time was occupied the presumption of title arises under this section also in favour of Government. If then Government can show that at any

period within the sixty years the site in question was unoccupied, the burden of proof of title is shifted to the other side, and if he seeks to prove

title by possession, he must prove possession for the statutory period,

The corollary of this view of the law is that where a person attempts to prove his possession by acts of user which being trifling and commonly

allowed to villagers or recent are ambiguous evidence of exclusive possession, such evidence does not cast the burden of proving that the land was

unoccupied upon Government.

5. The main question in this case appears to be whether the plaintiff has succeeded in proving the kind of possession that would justify an inference

as to. his title u/s 110 of the Indian Evidence Act. The evidence does not show anything beyond this, that as regards the area described as part (1)

out of plot Y in the learned Assistant Judge"s judgment, the plaintiff has been using the open ground for tethering cattle for a number of years, and

that as regards, the other part of plot Y described by the learned Assistant Judge as part (II) of the said plot, there has stood a temporary otli for

some years. It is admitted that there is no permanent structure on this part (II) of the plot Y. There is the further evidence that on the west and

south of plot Y there are old hedges and that to the north thereof there is a hedge put up ten years ago.

6. Nearly all the cases cited by the advocates on both sides can easily be distinguished from the present case on the ground that the facts therein

are altogether different in nature from the facts of this case. In *Vasta v. Secretary of State*, as the learned Subordinate Judge has pointed out, there

was a Ghabhan Register with entries dating back to 1866, the suit being of the year 1919; and thus Government in that case started with a

presumption in their favour and the plaintiff had to prove adverse possession. In *Hanmantrav v. Secretary of State for India* there was a house built

on the land in dispute and the plaintiffs had spent a sum of Rs. 1,600 on the building. There was thus an undoubted fact of possession in favour of

the plaintiffs. Similarly, in (1893) ILR 20 834 (Privy Council) , which was relied on in *Hanmantrav's* case, the litigation related to land with

premises thereon and there was no doubt as to the possession. In none of these cases was there any question of the kind of user that has been

proved in this case.

7. *Secretary of State for India v. Gulam Rasul*, which has been cited on behalf of the appellant, was again not a case of slight acts of user such as

existed in *Framji Cursetji v. Goculdas Madhowji* ILR (1892) 16 Bom. 338. (which was distinguished): it seems, that some sort of structure was

put up in this case which the Mamlatdar threatened to demolish. In *Framji Cursetji v. Goculdas Madhowji* the point at issue was whether the user

alleged amounted to adverse possession. It would thus be seen that the cases referred to above all relate to facts or issues materially different from

those existing in the present case.

8. *Gcngaram v. Secretary of State for India* has been referred to by the learned advocate for the appellant. In that case the plaintiff who was in

possession of a certain land sued for a declaration that the defendant had no title to it and that it belonged to him. The plaintiff asserted that he had

built the cattle shed on the land and had kept fodder, grain and earth on the site. The building of the cattle shed was apparently held proved but the

learned District Judge found on the evidence that the plaintiff had not proved his title. It was held that the learned District Judge was right in refusing

the declaration of title, but on the authority of *Ismail Ariff v. Mahomed Ghouse* it was also held that the plaintiff was entitled to the land and the

shed built thereon. Thus in this case the evidence regarding the keeping of fodder, grain and earth on the site in suit was not held to constitute such

possession as would justify an inference of title.

9. We have, therefore, to see whether on the evidence in this case the plaintiff can be found to have established anything beyond mere acts of user,

and if not whether such user can constitute the kind of legal possession that would give rise to a presumption of title in his favour. There is no doubt

that the oral evidence sufficiently shows that he has been using a large portion of the area in question for the purpose of tethering cattle and storing

grass and, as regards one part of the site, that he has for a number of years had an otli thereon, All this, in our opinion, cannot establish anything

beyond undisturbed user for a certain period. The erection of hedges to the west and south of the plot does not seem to help his case materially,

because those hedges have been erected to the west and south of the existing buildings. The more recent erection of a hedge to the north of plot Y

cannot, in our opinion, even when combined with the evidence of user, be sufficient to prove or to amount to legal possession. Though the

defendant has not succeeded in proving what he has alleged in his written statement regarding plot Y, viz., that it has been used as a public

passage, and though it appears that the defendant has made no attempt to contradict or refute the evidence led by the plaintiff as to his acts of user,

it cannot be said that the plaintiff's case is strengthened by any weakness in the defendant's case. We do not think that the evidence adduced for

the plaintiff and the circumstances in this case suffice to prove such possession by him as would justify an inference of his title. We, therefore, see

no reason for differing from the conclusion at which the learned Assistant Judge has arrived with respect to the two parts of plot Y in regard to

which he has differed from the learned Subordinate Judge. That being so, the appeal will be dismissed with costs.

10. As regards the cross-objections, they relate to the decree of the lower appellate Court as regards the remaining part of plot Y and plot X. As

to this part of plot Y there is sufficient evidence as to the existence of a house and of old foundations therein and this has been regarded by both

the Courts as sufficient evidence of exclusive possession by the plaintiff. We see no reason to take a contrary view. As to plot X, the learned

Assistant Judge has on the documentary as well as the oral evidence found the existence of a wada on the site proved and he holds that the wada

is of longstanding. This according to him is a ""strong sign of a claim to exclusive ownership."" The learned Subordinate Judge also has based his

finding on the fact that there is no dividing boundary mark or fence between X and survey No. 55A, which is plaintiff's property, and that the plot

X is bounded on, four sides by private properties. These grounds have in our opinion been rightly considered to be sufficient evidence of the

plaintiff's possession. Here again, therefore, we see no reason to differ from the conclusions of the two Courts. The result, therefore, is that

Secretary the cross-objections will also be dismissed with costs.

Broomfield, J.

11. The question in this second appeal is precisely the same as in *Hanmantrav v. Secretary of State for India* ILR (1900) 25 Bom. 287 : 2 Bom.

L.R. 1111, that is to say, whether the possession of the appellant-plaintiff was or was not of such a character as to place on the respondent-

defendant u/s 110 of the Indian Evidence Act the burden of proving that plaintiff is not the owner of the land. The view taken by Mr. Justice

Ranade, which was decisive in that case, was that possession to come within the scope of Section 110 must be possession founded on a prima

facie right. This has been interpreted by Mr. Justice Fawcett in *Vasta v. Secretary of State for India* ILR (1920) 45 Bom. 789 : 23 Bom. L.R.

238, as meaning that the possession must be of such a character as leads to a presumption of title. I think there can be no doubt that that is what

Mr. Justice Ranade meant, and, if I may say so with deference, that is the correct view. The learned Assistant Judge is quite wrong in saying that

Hanmantrav v. Secretary of State for India is overruled by Vasta v. Secretary of State for India. Of course the decision of one division bench

cannot be overruled by another division bench.

12. But the facts in Hanmantrav v. Secretary of State for India were quite different, and, as my learned brother has pointed out, in all the cases

cited in which possession has been held sufficient prima facie proof of title the facts were much stronger than they are in the present case. We

should be going further than the authorities and in my opinion further than it would be safe to go if we held that the possession proved by the

plaintiff is sufficient to throw the burden of proof on the other side u/s 110. I agree that both the appeal and the cross-objections should be

dismissed with costs.