

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Second Appeal No.125 of 2015

Sarang S/o Avinash Shah.

.. Appellant.

Versus

The Zilla Parishad Osmanabad
And Others.

.. Respondents.

Shri. S.B. Talekar, Advocate, holding for Shri. Sunil M.
Vibhute, Advocate, for appellant.

Shri. K.J. Ghute-Patil, Advocate, for respondent Nos.1 to
3.

CORAM: T.V. NALAWADE, J.

DATE : 19th OCTOBER 2015

ORDER:

1) The appeal is filed to challenge the judgment and decree of Regular Civil Appeal No.403 of 2014 which was pending in the Court of the District Judge-1 Bhoom, District Osmanabad The appeal of respondents - Zilla Parishad filed against the judgment and decree of Regular Civil Suit No.33 of 2005 is allowed by the First Appellate Court and the decree of perpetual injunction given in favour of the present appellant is set aside. Both the sides are heard.

2) The suit was filed in respect of 74 R portion of Survey No.3 of Paranda. It is the case of the appellant, plaintiff that Survey No.3 was owned by Jivraj, grand father of the plaintiff. It is his case that Jivraj had bequeathed some portion of Survey No.3 to one private educational institution without mentioning boundaries of the portion. It is contended that a school was opened and it was started from 1953-54 but subsequently the school was closed and so the property given for this school came back to Jivraj.

3) It is the case of the plaintiff that Jivraj died on 8-4-1993 leaving behind the plaintiff and other persons as his legal heirs. It is contended that the plaintiff is representing the other heirs of Jivraj as Karta of joint Hindu family and in that capacity he has filed the suit.

4) It is the case of the plaintiff that when the plaintiff saw the revenue record after the death of Jivraj he realised that name of the Zilla Parishad is entered in the revenue record in respect of the aforesaid survey number and for most of the portion of the survey number.

It is contended that as per the revenue record, 57R portion is shown to be in possession of Police Station. It is contended that when he made enquiry, he realised that the portion which is shown in the revenue record as belonging to Zilla Parishad is shown to be acquired for the purpose of Panchayat Samiti. It is contended that such acquisition was illegal as compensation was never paid to Jivraj or to the plaintiff. It is contended that Mutation No.2327 made in that regard is illegal and it has not passed title to the defendants.

5) It is the case of the plaintiff that only 6R portion is with the Zilla Parishad and 57 R portion is with the police station. It is the case of the plaintiff that remaining portion is in possession of the plaintiff. The plaintiff had prayed for relief of injunction in respect of the portion of 74 R from Survey No.3.

6) By filing written statement the defendants, local body, contested the suit. It is contended that there was no private school in existence and right from beginning there was primary school of the Zilla Parishad

on Survey No.3. It is contended that the property was measured on 20-1-1996 and that has made the things clear. It is contended that the property which is in possession of Zilla Parishad was acquired and mutation was sanctioned on the basis of award on 20-9-1986. It is contended that in the award made in respect of Survey Nos.3 and 14 dated 23-5-1959, portion of 1H - 20R was acquired and was given for the purpose of Panchayat Samiti from Survey No.3 and the plaintiff was never in possession of this portion.

7) Issues were framed by the trial Court on the basis of the aforesaid pleadings. Both the sides gave evidence. Though oral evidence is given in the present case, more importance needs to be given to the documentary evidence which is very old and which is relevant for deciding the matter.

8) It is not disputed that Jivraj was owner of some portion of Survey No.3 in the past. In the plaint itself plaintiff has admitted that the property was bequeathed for construction of school. If Jivraj was alive it was not

possible to hand over the property, giving ownership to the school under will. In any case such will was not produced by the plaintiff to show the exact portion which was given to the school by Jivraj and also no record is produced to show as to how the portion came back to Jivraj. There is no record with regard to the private school. On the other hand there is record that there was primary school of Zilla Parishad and there is oral evidence also in that regard. It is the contended by Zilla Parishad that in the past, for starting of the school, the property was gifted by Jivraj and there is copy of gift document. So it can be said that the case of the defendants is more probable.

9) It appears that record of measurement which was taken in writ petition filed by the present plaintiff was produced before the trial Court. This record showed that property admeasuring 2H 15 R was in the possession of the Zilla Parishad, the school. Evidence is given that construction of the school was made some where in the year 1952-53 and since then school is there. Thus, actual possession over portion of 2H 15R was found with Zilla

Parishad in the measurement which was made at the instance of the plaintiff. Present suit came to be filed in year 2005. During life time of Jivraj he did not take steps to recover possession from the Zilla Parishad and this circumstance needs to be kept in mind.

10) The trial Court has considered following documents :

- "1. A notification by the Government of Hyderabad Revenue Department, dated 16.1.1957 (Exhibit 79).
2. A letter dated 7-10-1961 sent by the Office of the Block Development Officer to the Tahsildar, Paranda (Exh.80).
3. A statement of award (Exh 144).
4. A copy of the gift deed dated 2.9.1951 issued by the Tahsil Office Paranda (Exh.160).
5. An application dated 24.12.1962 preferred by Jivraj Shaha to the Tahsildar, Paranda seeking the amount of compensation Rs.575/- of the land admeasuring 2Acres 20 R out of Survey No.3 which was acquired for the Government School. (Exh.59).
6. A letter dated 29.6.1957 addressed to Tahsildar by Jivraj Shaha stating that he would surrender the possession of 03-Acre 00-Guntha after receiving the compensation (Exh.62).
7. The Award in Case No.L.A.Q.P.7 of 1965 (Exh.63).

8. A letter issued in January 1963 by the Deputy Collector Osmanabad to the Tahsildar, Paranda (Exh.180)."

11) It appears that no objection was taken by the plaintiff to give exhibit to aforesaid documents. It is not open now to the plaintiff to say that this record cannot be read in evidence. This record includes some correspondence of the Zilla Parishad and also copy of gift deed. This record shows that the property as contended was acquired. The record also shows that property admeasuring 2H 15 R is in possession of the Zilla Parishad, school. The record of acquisition shows that total 15 acres area was acquired from Survey Nos.3 and 14.

12) The contents of the documents particularly gift deed show that Jivraj did not want to get compensation in respect of portion which was to be utilized for school purpose. The trial Court was much influenced by the copy of letter given by Jivraj to the Tahsildar on 24-12-1962 in which Jivraj had asked for giving compensation of Rs.575/-. The trial Court has made comparison of the

signature appearing on the application and the signature appearing on the gift document. Such exercise was unnecessary and unwarranted. The record shows that the amount of compensation was deposited in bank as before the Special Land Acquisition officer Jivraj had not shown interest to collect the compensation for aforesaid reason. It appears that in the year 1962 there was some dispute but it appears that the acquisition was complete and Jivraj did not take steps though he had some dispute.

13) The award and other record show that Jivraj parted with entire portion which he had in Survey No.3. The 7/12 extract shows not only the Zilla Parishad and Police Station are there in Survey No.3, but there are many more persons who have made construction of their buildings in Survey No.3.

14) The learned counsel for the appellant submitted in this proceeding that at the time of acquisition, Panchayat Samiti was not in existence and the said Act came into force subsequently so it cannot be said that the property was acquired for Panchayat Samiti. This

submission is not at all acceptable. Acquisition of the property was made for particular purpose. The relevant record in that regard was not disputed by the plaintiff.

15) The First Appellate Court has considered some record which amounts to admission of the plaintiff. The plaintiff had filed Regular Civil Suit No.175/2000 against one Thakur (Exhibit 166). In that suit the plaintiff had contended that the plaintiff was owner of 53 R portion of Survey No.3 and out of that portion defendant Thakur was in possession of 29 R. Thus in the year 2000 it was the case of the plaintiff that he was in possession of hardly 14 R portion. Now the plaintiff is claiming that he is in possession of 74 R portion.

16) In the proceeding which was filed in the High Court, measurement was made at the instance of the plaintiff and the map of the measurement (Exhibit 82) is used in the trial Court. As per this report, the plaintiff was not found in possession of any portion.

17) Writ Petition No.2989 of 1998 was filed by the present plaintiff in this Court against Government, Special Land Acquisition officer etc. In the writ petition, the aforesaid measurement was made and Exhibit 82 was prepared. In this writ petition the plaintiff had contended that some portion of the property was gifted to the school by Jivraj. Thus in the year 1998 the plaintiff had admitted that property was gifted though in the present matter he contends that there was a will. It needs to be mentioned again that the plaintiff was not aware of the exact area. In Writ petition No.2989 of 1998 following relief were claimed :-

(B) The respondent Nos.1 to 5 be directed by issuing a writ of mandamus or order or direction in the nature of writ of mandamus or any other appropriate writ or order or direction, to release the land admeasuring 6 acres from survey No. situated at Paranda, Taluka Paranda, District Osmanabad to the petitioner from acquisition for the purpose of running the High School.

(C) The respondent No.1 to 5 further be directed to either vacate this 6 acres and from survey No.3 situated at Paranda, Taluka Paranda, District Osmanabad belonging to the petitioner which is at present being used for running Zilla

Parishad School forthwith being in illegal possession or otherwise may be directed to carry out the land acquisition proceedings as per the law and to pay compensation as per the market value existing as on today and also to pay the compensation for the illegal user of such land since they have enforced their illegal possession till either upto vacating the said premises or upto passing the award."

Writ Petition No.2991 of 1998 was filed by the plaintiff for the following reliefs :-

"(B) The respondents No.1 to 5 be directed by issuing a writ of mandamus or order of direction in the nature of writ of mandamus or any other appropriate writ or order or direction, to release the land admeasuring 3 acres from Survey No.3 situated at Paranda, Taluka Paranda, District Osmanabad belonging to the petitioner from acquisition for the purpose of construction of Panchayat Samiti offices and quarters.

(C) The respondents No.1 to 5 be further directed to either vacate this 6 acres land from Survey No.3 situated at Paranda, Taluka Paranda, District Osmanabad belonging to the petitioner which is at present being used for running Zilla Parishad School forthwith being in illegal possession or otherwise may be directed to carry out the land acquisition proceedings as per the law and to pay compensation as per the market value existing as on today and also to pay the compensation for the illegal user of such land since they have enforced their illegal possession till either upto vacating the said premises or upto passing the award.

(D) The respondent Nos.6 to 7 be further directed to vacate the land admeasuring 57 R being illegal possession of Panchayat Samiti Paranda or else the respondents be directed to initiate the land acquisition proceedings as per the Land Acquisition Act and to pay the compensation as per the market rate existing as on today and also be pay damages for the user of such land from the date they have enforced their illegal possession upto either the vacating the premises or passing of the award.

(E) The respondent No.8 be further directed to vacate the premises admeasuring 6 Are from survey no.3 situated at Paranda, Taluka Paranda, District Osmanabad which is in their illegal possession and which is lease illegally and without authority to New College Paranda or else to carry out the land acquisition proceedings as per the law and to pay the compensation to the petitioner as per the market rate as on today. And also to pay the damages for illegal user of the land from the date of their illegal enforcing the possession upto either vacating the premises or passing of award."

18) Thus, in the year 1986 or even in 1988 plaintiff was not in possession of any portion of Survey No.3. Both the writ petitions came to be withdrawn unconditionally in March 2014. It appears that the plaintiff used very possible way and tried to create complication, for getting some portion from Survey No.3. When the suit was decided in his favour he prosecuted the matter before the

revenue authority and got some order for deleting the name of the Zilla Parishad from the revenue record. However in the writ petition when measurement made was found against him, he thought it proper to withdraw that writ petition. It appears that he thought that there was decree of Civil Court in his favour and that would help him to get the possession. The fact remains that the title was disputed and he was not in possession of any portion.

19) The present suit was filed for the relief of injunction simpliciter. In view of the aforesaid record it was not possible for the trial court to hold that the plaintiff was in possession of particular portion of Survey No.3. It was necessary for the plaintiff to claim declaration of ownership and it was also necessary for him to show that the area which he wanted back was not acquired. As the plaintiff was not in possession, injunction could not have been granted in his favour. The plaintiff ought to have sought relief as required under section 41 (h) of the Special Relief Act, 1963.

20) In view of the above circumstances, this Court holds that no substantial question of law can be formulated.

21) In the result, the appeal stands dismissed.

Sd/-
(T.V. NALAWADE, J.)

rsl