

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.163 OF 1989

Union of India & Anr. ..Appellants
vs.

Smt. Umrao Kevalchand Bothra (Since deceased)
through Legal representatives ...Respondents

Ms.Jyotsna N. Pandhi for the Appellants.
Mr.S. M. Vyas for the Respondents.

CORAM : A. M. DHAVAL, J.

RESERVED ON : 30th AUGUST, 2018.

PRONOUNCED ON: 4th OCTOBER, 2018.

JUDGMENT

. The following questions of law have been framed in this appeal
on 28/8/2009:

“Whether the appellant had the right to resume the land and if so
on what terms ?”

2. The facts relevant may be stated as follows:

Respondent Nos.1A to 1F herein are the legal heirs of Smt.
Umrao Kevalchand Bothra, who was the plaintiff and the Respondent Nos.2
and 3 are her sisters who were the Defendants. Appellant No.1-Union of
India and the Appellant No.2-Military Estates Officer are the original

Defendant Nos.1 and 2 for the sake of convenience they are hereinafter referred as per their status in the Trial Court.

3. The Notice dated 1/1/1971 Exhibit 61 issued by the Under Secretary to the Government of India to 5 persons including one Mahipal Ghand Sukhraj Mutha is the cause of action. As per the notice it was communicated that land comprising Survey No.701 (Bungalow No.3, Prince of Wales Drive Poona Cantonment) measuring 2.32 acres was belonging to the President of India and was held on old grant terms by Sukhraj Hajarimal under conditions of A.R.I Vo.II of 1887 under which the Government was entitled to resume the said land. The said land was held by the Government and the Government has decided to resume the suit property under the terms of old grant. Hence, the notice was issued offering Rs.22,510/- to the occupiers towards the standing structures with a right to challenge the compensation before the Committee of Arbitration and all rights, easements and interest in the said land which the notice might have, would cease on expiry of one month from the date of service of this notice.

4. The deceased Umrao Kevalchand Bothra filed Regular Civil Suit No.2405/1974 for a declaration that the suit notice was illegal, ultra virus and of no consequence and the defendants were not entitled to deprive the plaintiffs of their property without following due process of

law. Declaration was claimed that the Government was not entitled to resume possession. The plaintiff claimed that the suit property was of sole ownership of Mahipalchandra Sukhraj Mutha and after his death, the plaintiff and Defendant Nos.3 and 4 became the sole owners and legal heirs of Mahipalchandra Mutha. The bungalow and servant quarters were taken on lease by the predecessor in title of the plaintiff and defendant Nos.3 and 4 on rent of Rs.292.06 per month. The defendant No.2 occupied the portion of the suit property as lessee and in May 1966 defendant No.1 through defendant No.2 called upon Mahipalchandra to renew the lease on certain terms and conditions. The said lease was not renewed. Thereafter, Mahipalchandra received above written notice. The said notice was illegal and void ab initio and issued without authority. The said land was not belonging to the Government. The land structure belonged to the plaintiff and the plaintiff was not given sufficient opportunity. The rights of Plaintiff were constitutional rights under Article 228 and the Court has no competency to determine the same.

5. Defendant Nos. 1 and 2 filed the written statement Exhibit 23 and they contended that said land bearing G.L.R. Survey No.701 was the property of the Government (Ministry of Defence). It was granted on 30/12/1887 to M/s.Ludha Ebrahim & Co. under the provisions of Army Regulations of 1875. As the said land was not brought in use, the grant was cancelled. But again on 12/6/1889 the said land was granted on the

conditions signed by the grantee. Mr. Abdul Satar Umar came in possession of the bungalow by virtue of consent decree in Suit No.86/1909. He with the permission of the Head Quarters on 4/8/1924 mortgaged the property to one Rajan Ali Lallji Sajan and thereafter mortgaged to Sukharaj Hajarimal on 10/9/1925 who purchased the bungalow on 26/8/1926 for Rs.26,000/-. The said record in file W.L. B.S. of the Cantonment Board, Poona belonging to the Central Government were missing. The plaintiff was in possession of the structure through late Sukharaj Hajarimal. One portion of the same was taken by the Central Government through the Garrison Engineer with effect from 1940 on a monthly rent of Rs.216/-. The lease agreement dated 28/3/1941 executed by Sukharaj shows that the said land was held by the Government and the Government had retained right of resumption which was exercised by issuing notice. The notice is valid. The Under Secretary had delegated powers to issue notice to defendant No.2.

6. On these pleadings the Trial Judge framed issues Exh.31. Both the parties led no documentary evidence except the impugned notice dated 1/7/1971. The plaintiff examined Kevalchand Bothra who claimed that the plaintiff was his wife and they have adopted son viz., Mahipalchandra. The learned Civil Judge, Senior Division, Pune held that the plaintiff's title was not proved. The challenge to the validity of the notice was also not proved. The defendant proved that it was government property and they retain

right to resume the said property on terms and conditions. Hence, the suit was dismissed.

7. Being aggrieved the plaintiff preferred First Appeal No.920/1981. After hearing the arguments, the learned 7th Additional District Judge, Pune by judgment dated 2/8/1988 decreed the suit. He observed that the plaintiff has proved title to the suit land. However, the defendants have failed to prove that the suit land was resumable. Reliance was placed on the judgment of this Court in P.T. Anklesaria vs. N.C. Vashistha, AIR 1980 Bombay page 9. By allowing the appeal, he decreed the suit and perpetual injunction was granted not to disturb or cause interference in the land in possession of the plaintiff unless otherwise than in due course of law as long as the defendants do not obtain declaration from the Competent Court that the said land was resumable one and was on old tenure. Hence, this appeal.

8. Learned counsel for the appellant has argued that the plaintiff's witness has admitted that the land was in the cantonment area and was belonging to the Government which was bearing GLR number of lands from the cantonment area belonging to the Government and as per the documents produced by the defendant No.1 and 2 in the First Appellate Court the land was granted under old grant with a term for resumption. She argued that the judgment on which reliance was placed by the

appellant/plaintiff was set aside by the Apex Court and there are several judgments which lay down that the Government land under old grant are resumable. She argued that the learned First Appellate Court has wrongly refused permission to produce original documents under Order 21 Rule 27 CPC. She submitted that the old grant document of 1887 was not available but document of 1889 granting permission for construction of bungalow on condition of retaining right of resumption was produced and the said should have been permitted. The plaintiff has only possessory right. The notice was legal and valid. The learned Appellate Court should have drawn inference against the plaintiff. The application under Order 41 Rule 27 should have been allowed. Hence the substantial question of law be answered in favour of the appellant and the appeal be allowed and decree of the Trial Court be restored.

9. Per contra, learned advocate for the Respondent submitted that the GLR entry was not produced in the Trial Court and not even in the Appellate Court. The documents produced in the First Appellate Court were not complying the provisions of Order 41 Rule 27. The appellants had failed to prove right to resume. The learned First Appellate Court rightly relied on the judgment of the Bombay High Court in *P. T. Anklesaria vs. N.C. Vashistha*¹ and has decreed the suit. No inference is called for.

1 AIR 1980 Bombay page 9

10. After hearing the arguments of learned advocate for the parties, I find that lethargic and adamant attitude of the Government officials in not producing material documents and not examining material witness and later non judicial attitude by the First Appellate Court has resulted into the retention of land ad-measuring 2.32 Acres by the respondent/ plaintiff for a period of 47 years.

11. Though the notice was issued in 1971 the suit came to be filed in the year 1974 and till then officers of the defendant Nos.1 and 2 did not take any action for implementation of the notice. The written statement filed shows that the defendant Nos.1 and 2 were having documents in their custody and the defendant No.3 was bound to produce original documents and they were bound to examine atleast one officer, but it has not been done.

12. The plaintiff's conduct is not different. The notice Exh.61 was issued to several persons including Mahipalchandra was replied by the plaintiffs vide reply dated 29/12/1972 These are the only documents on record. The plaintiffs claim right through Mahipalchandra. He claimed that he was adopted son of Smt.Umrao Bothra. He did not enter the witness box.

13. Plaintiff's father Kevalchand has examined himself. He

admitted that the suit land was under cantonment area and was Government land. In light of these facts, the plaintiff was certainly in possession of several documents relating to the said land.

14. As held in *Gopal Krishnaji Ketkar vs. Mahomed Haji Latif and Ors.*² the parties were bound to lead the best possible evidence irrespective of burden of proof. The plaintiff did not produce adoption deed and the documents assigning right by the government and the subsequent document relating to the nature of rights held by Mahipalchandra.

15. The learned Appellate Court totally failed to consider that initial burden is always on the plaintiff to prove his case and if the plaintiff does not produce any material document or does not examine any material witness, adverse inference can be drawn against him. The learned Appellate Court failed to properly exercise judicial discretion under Order 41 Rule 27 of CPC which reads thus:

“Production of additional evidence in Appellate Court

27(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court.

But if---

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced

2 AIR 1968 SC 1413

by him at the time when the decree appealed against was passed, or

b) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

16. It is no doubt true though the Government officers and the learned AGP should have produced all the material documents in the Trial Court itself but the defendants has produced along with list Exh.39 some copies of their record. It was duty of the Trial Court as well as the First Appellate Court to deliver justice and to prevent injustice to both the parties. The duty of the Court is to elicit the truth and the decision should be based on the truth. In this regard I rely on the judgment in the case of ***Ritesh Tiwari vs. State of UP³ and State of Rajasthan vs. Ani @ Hanif & Ors.⁴*** The Courts were not expected to act like neutral umpires and allow the justice to be defeated on technicalities.

17. As it is often found, in this case also there is casual, indifferent and adamant attitude of Government officers in not producing all the material documents and not leading any evidence. In this case, if the Courts are going to act as neutral umpires there will be no elicitation of true facts

³AIR 2010 SC 3823

⁴ AIR 1997 SC 1023

and the justice will not be based on true facts and ultimately if decision goes against the Government, the public money or public property will go into the wrong hands and the public at large will be the sufferers. In such contingency it was not only permissible but it was prominent duty of the First Appellate Court to exercise powers under Order 41 Rule 27(b). Thus, Section 165 of Evidence Act enables the Court to call upon any party to produce any document or to examine any witness if it is required to enable it to deliver judgment or for any substantial cause. The First Appellate Court totally failed to understand the scope of this provision. The First Appellate Court was not only entitled but obliged to exercise power under Order 41 Rule 27 to find out the truth. Section 165 of the Evidence Act permits the Judge to call upon any party to produce any document.

18. Considering the indifferent, casual and adamant approach of the Government officers it was necessary for the Judge to exercise such powers. It is material here to record that the Government officers must remember that all the rules of Evidence Act and procedural law are equally applicable to the Government when the Government appears as a party before the Court. The Government or government officers can not claim any privilege or exemption from the applicability of rules and procedures under the Act. But, if public interest is going to suffer when the Government is deprived of land of 2A and 32 R for indefinite period, there cannot be any better cause for exercising power under Order 41 Rule

27(b). I hold that the documents produced before the First Appellate Court as well as copies of GLR produced before this Court were essential for eliciting the truth and for delivering the judgment and the First Appellate Court should have permitted production of the documents produced vide list Exh.29.

19. The learned First Appellate Court has also shown legal misconception about the documents which are public documents and has held that those documents were not proved. I fail to understand how the documents of 1889 produced from the custody of the Government office can be ignored and how the learned First Appellate Court expected those documents to be proved. No witness of the relevant period can be available as documents were 100 years old. The presumption for deemed execution of documents was available. With regard to the content there are circumstances which show land was belonging to the Government and the plaintiff was in possession of the land. The circumstances were sufficient to hold that these documents were duly proved but the learned First Appellate Court totally ignored the aforesaid fact and observed that the plaintiff has deliberately not produced any document in his possession.

20. The learned First Appellate Court was of the view that the documents were not the documents of grant. It failed to consider that when the grant was given in 1887 the original documents must be also in

possession of the predecessor in title of the plaintiff and that the plaintiff has failed to produce them. The said original document of 1887 was not available with the Government, but document of 1889 has been produced. Those are applications filed before the public officer by the predecessor in title of the plaintiff and the orders passed thereon by the government officials. Those are certainly public documents. The view of the learned Appellate Court that these documents were not public documents and were not admissible is erroneous. The original grant was in favour of Ibrahim. I direct these documents to be transferred to "C" file and be preserved.

21. Term No.1 reads as under:

"Government retains the power of resumption at any time on giving one month's notice, and paying the value of such buildings as may have been authorized to be erected (the value to be fixed by a Committee of Arbitration) together with the sum originally paid as ground fee."

22. In the Trial Court the appellants has produced ordinary copies of public documents whereby permission was granted for construction of the building. In that document also there was term of resumption. It is correct that said document was neither original nor certified copy and thus cannot be admitted in evidence, but the Trial Court ought to have called upon the defendant to produce original thereof.

23. Ms.Jyotsna Pandhi, the learned advocate for the appellant has

submitted compilation including copies of GLR register. Learned counsel for the Respondent submits that said production is not permissible under Order 41 Rule 27. Considering the fact that document produced in the First Appellate Court make out a case of right of resumption of the Government, I hold it unnecessary to consider whether it is necessary to direct the Government to produce copies of GLR register.

24. Ms.Jyotsna Pandhi, the learned Advocate for the appellant has relied on the following judgments:

In the judgment in the case of *The Chief Executive Officer vs. Surendra Kumar Vakil & Ors.*⁵ passed by Mrs. Sujata V. Manohar, Justice on 23/3/1999 it is observed as under:

“The narrow question is whether the land was held by S.N. Mukherjee on old grant basis or not. The land is in the Cantonment area of Sagar. Grant of land in cantonment areas was, at all material times, governed by the general order of the Governor General in Council bearing No.179 of the year 1836, known as the Bengal Regulations of 1836. Under Regulation 6 of these Regulations, conditions of occupancy of lands in cantonments are laid down. Thereunder, no ground will be granted except on the conditions set out therein which are to be subscribed to by every grantee as well as by those to whom his grant may be subsequently transferred. The first condition relates to resumption of land. (1) The Government retains the power of resumption at any time on giving one month’s notice and paying the value of such buildings as may have been authorised to be erected. (2) The ground being in every case the property of the Government, cannot be sold by the grantee. But houses or other property thereon situated may be transferred by one Military or Medical Officer to another

without restriction except in certain cases. (3) If the ground has been built upon, the buildings are not to be disposed of to any person of whatever description who does not belong to the army until the consent of the officer commanding the Station shall have been previously obtained under his hand.”

“Under Rule 3 of these Cantonment Land Administration Rules the Military Estates Officer of the cantonment shall prepare and maintain a general land register of all land in the cantonment in the form prescribed in Schedule I and no addition or alteration thereto shall be made except as provided therein. Under Rule 4 of the Rules in force in 1936, the Military Estate Officer was required to maintain a Register of Mutation in which every transfer of right or interest in land in the cantonment which necessitated an alteration of the entries in any of the columns of the general land register, was entered. Under Rule 5 as then in force, every fifth year the general land register shall be rewritten so as to include all changes in the rights or interest in land and a fresh register of mutation shall be opened simultaneously. Under Rule 6, for the purpose of the general land register, land in the cantonment is divided into class A land, class B land and class C land. Rules 7 and 8 deal with these different categories of land”

“The general land register maintained under the Cantonment Land Administration Rules of 1925 has been produced which supports the contention of the appellants that the land is held on old grant basis. The appellants have also led evidence to show that the file containing grant in respect of the said property, is not available with them because it has been stolen in the year 1985. The respondents on the other hand have not produced any document of title pertaining to the said land or showing the nature of the rights of the respondents over the said land except the sale deeds referred to earlier.”

25. Further reliance is placed on the judgment in the case of *Smt. Chitra Kumari vs. Union of India & Ors.*⁶, passed by Justice S. N. Variava dated 4/2/2001, same findings were recorded as under:

“It could not be shown to us that Plaintiff/Appellant led any

⁶ Civil Appeal 1265-66/2001

evidence claiming ownership of land in question or denying title of Respondents. Admittedly documents shown to the Court were not tendered as Exhibits. On the other hand Respondents tendered and got marked as Exhibits, an admission in writing by Appellants predecessors that the land was on old grant terms, a copy of GGO No. 179 of 12th September, 1836 and the Register of Land Records. Parties then argued their respective cases. Ultimately, the Suit was decreed by a Judgment dated 27th November, 1978.”

“Once it is admitted that land was on old grant terms it is irrelevant to argue that it is not shown that Ambala was under the Bengal Army. The same would be the position when on evidence Court has held that land is on old grant terms. As that position could not be controverted and as those parties were fully covered by Surendra Kumar Vakil’s case (supra), those Appeals were withdrawn.”

26. Further reliance was placed on the judgment in the case of *Usha Kapoor and Ors. vs. Government of India and Ors.*⁷. The relevant part of the judgment is as follows:

“9. In a book on Cantonment Laws by J. P. Mittal, a precise history of the tenures which came to be known as old grant is available. A few paragraphs from the aforesaid book may be very usefully extracted below:

These tenures under which permission was given to occupy government land in the cantonments for construction of bungalows came to be known as 'old grant'. Such permission was given mostly on payment of no rent. This is how a large number of bungalows in the cantonments all over India came in the hands of civilians.”

“The reference to the nature of the holding i.e. old grant and the nature of rights of the holder i.e. the occupancy rights, in the GLR extracted above, in our considered view, is conclusive of the fact that the land is covered by an old grant and the rights enjoyed by the appellants were mere possessory or the occupancy rights in respect of the structures thereon. The terms of such grants being statutory and the same having vested title of the land in the UoI with the power of resumption, the impugned notices dated 14-12-2001 and 5-2-2002 must be acknowledged to be legal and valid.”

⁷ (2014) 16 Supreme Court Cases 481

27. Further reliance was placed on *Union of India and Anr. Vs. Dinshaw Shapoorji Anklesari & Ors.*⁸, decided on 6th May 2014. Relevant part of the judgment is as follows:

“While considering the case, if the High Court finds that the trial court or the first appellate court has placed reliance or made any reference to the aforesaid judgment of the Division Bench, it shall ignore that judgment, to that extent, and the High Court shall decide the matter afresh in accordance with law without taking into consideration or being influenced by the aforesaid judgment of the Division Bench.”

“In union of India and others v. Kamla Verma, (2010) 13 SCC 511, this Court has held that it is always open to the Union of India to resume the land held on old grant terms and that the Union of India cannot be prevented from resuming the said land.”

“The plaintiffs-respondents have only right with regard to the structure built on the suit premises. The Union of India-appellants have a right for resumption of the suit premises, as evident from evidence on record as discussed above.”“

28. Further reliance was placed on *Union of India & Ors. vs. Kamla Verma*⁹, Apex Court Judgment by Justice A.R. Dave dated 13/8/2010

“Meaning of the said grant has been clearly explained by this Court in the case of Chief Executive Officer (Supra) and that clearly denotes that the vendor who sold the rights in respect of the land in question, was never a full-fledged owner fo the said land but he was given the said land only on “old grant” terms. Being allotted the land on “old grant” terms, the said allottee never became a full-fledged owner and, therefore, he could not have transferred any right better than what he had in respect of the land in question, to the present respondent.”

“In our opinion, the High Court did not consider the fact that the present respondent was holding the land in question only on “old grant” terms and, therefore, she was

⁸ Civil Appeal No.6194/2013

⁹ (2010) 13 SCC 511

not a full-fledged owner of the land but she had the right only in respect of the super structure put up on the land in question, which had been given on lease to the present appellants.”

29. No doubt, the conduct of the Government officer and the learned AGP in not producing material documents at the right time cannot be approved. Still the learned First Appellate Court should not have forgotten that the plaintiff has not produced any document though he was having in possession several documents. On the other hand, when old grant land with right of resumption was retained by the Government it was incumbent upon the plaintiff to produce relevant documents which came in possession through predecessor in title. Such private party should make out the right to continue to hold the existing land, otherwise under the general law any license granted is always revocable. In the light of the facts, substantial question is answered in the affirmative. I find that the First Appellate Court committed patent error in interpreting the provisions of Law as per established principles applicable and hence the said judgment is not sustainable.

30. In the result, the appeal is allowed with costs. The judgment of the First Appellate Court is set aside. The judgment of the Trial Court is restored. Decree shall be drawn up accordingly.

(A. M. DHAVALA, J.)