Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 3523 OF 2002

LIFE INSURANCE CORPORATION OF INDIA
A Corporation constituted under the Life Insurance Corporation Act, 1956 having their Western Zonal Office at 'Yogakshem', Jeevan Bima Marg, Mumbai 400 021. **...PLAINTIFF**

Versus

1. **RAMAKANT VAMAN VARDE**
2. **SUDHA NARENDRA VARDE**
3. **RANJIT NARENDRA VARDE**
4. **SUJIT NARENDRA VARDE**
   All the above Nos. 1 to 4, adults, Indian Inhabitants of Bombay, residing at Swapnapurti, 298/A Turner Road, Bandra, Mumbai 400 052
5. **RAJESH BUILDERS**
   Raj Construction, Raj Towers, Opp. Silver Quire Hotel, Ground Floor, Holly Cross Road, I.C. Colony, Borivali (West), Mumbai 400 103. **...DEFENDANTS**

Mr Ajay Khaire, *I/b M/s. The Law Point, for the Plaintiff.*
Mr Rajesh Kachare, *with Amit Potnis, I/b Tamhane & Co, for Defendants Nos. 1 to 4.*
Mrs Sheeja John, *I/b M/s MP Savla & Co, for Defendant No. 1.*

CORAM: G.S. PATEL, J

RESERVED ON 22nd November 2018

PRONOUNCED ON: 5th December 2018

JUDGMENT:

1. The Plaintiff is the Life Insurance Corporation of India constituted under the Life Insurance Corporation Act 1956 (**"LIC"**). The Plaint seeks, first, a declaration in regard to construction by the Defendants of a stone boundary wall, grill gates with doors, an electric metre, a drainage system, toilet block, a pucca shed, cabins and other civil works on properties described thus:

> "Eksar (Borivali), bearing Survey no. 204, Hissa No. 1 part and bearing CTS No. 2400 and admeasuring 5,218 square yards (equal to) 4,364.6 sq mtrs., and another piece of land bearing Survey No. 204, Hissa No. 1 Part, CTS No. 1446 and admeasuring 2,768 sq yards (equal to) 2,311.4 sq mtrs., and thus making the total area of the entire plot of the suit premises as 7,986 sq yards (equal to) 6,676 sq mtrs."

2. The second prayer seeks a declaration that a stay order dated 11th April 2002 granted by the Maharashtra Government's Revenue and Forest Department to an order of 28th October 1991 of the Additional Commissioner Konkan Division confers no right, title and interest on Defendants Nos. 1 to 4 in these premises. Then there is a prayer for removal of all construction on this property, and finally there is a prayer for delivery of possession.

3. According to LIC, by a registered conveyance dated 20th August 1948 one Gurbux Rai Agarwal ("**Gurbux Rai**") sold Survey No. 204 Hissa No.1 to the erstwhile Asian Assurance Company Limited (**"Asian Assurance"**). After the constitution of the LIC in 1956, all assets and liabilities of various life insurance companies including Asian Assurance where transferred to, and stood vested in, LIC; which claims that it thus became the owner of Survey No. 204 Hissa No. 1 in village Eksar, Borivali.

4. The Plaint then goes on to say that in 1968 upon the conduct of a survey under the new City Survey Regime, old Survey No. 204 Hissa No.1 was assigned City Survey No. 1446. The area was reflected in sq mtrs. In paragraph 3 of the Plaint, LIC says that there was a revision in the Revenue Records and old Survey No. 204 Hissa No.1 was bifurcated. Old Survey No. 204 Hissa No.1/2 was assigned CTS No. 2400 with an area of 4364.6 sq mtrs and it showed the 1st Defendant as the "holder". Old Survey No. 204 Hissa No. 1/1 was assigned CTS No. 1446 of 2311.4 sq mtrs (the two sub-parts equalling to 6676 sq mtrs) and this CTS No. 1446 showed the holder as Asian Assurance, LIC's predecessor-in-title. A Mutation Entry No. 4560 showing this holding was made by the Revenue Authorities.

5. According to LIC this Mutation Entry No. 4560 showing the bifurcation is erroneous. It claims that the whole of Survey No. 204 Hissa No.1 was always the property of Asian Assurance and, on the formation of LIC, stood vested in LIC. At no point, according to LIC, was any part of old Survey No. 204 Hissa No.1 sold to any of Defendants. LIC avers that showing the 1st Defendant as the holder of CTS No. 2400 (old Survey No. 204 Hissa No.1/2) was a mistake and that it was only LIC that remained the sole and true owner of this property.

6. LIC applied to the City Survey Office for a rectification. That application was rejected. An appeal to the Sub-Divisional Officer was allowed. The 1st Defendant and the husband of the 2nd Defendant and the father of Defendants Nos. 3 and 4 appealed. That appeal was in turn allowed. LIC filed a Second Appeal which came to be dismissed and ultimately LIC then filed Revision Application No. 41 of 1989 before the Additional Commissioner, Konkan Division. By his order dated 28th October 1991, the Additional Commissioner Konkan allowed LIC's Revision Application and directed the cancellation of the Mutation Entry No. 4560. Defendants Nos. 1 to 4 filed an appeal against the order in revision and moved an application for stay on 11th April 2002 before the Minster of Revenue and Forest Department of Government of Maharashtra. LIC says that the appeal was time-barred but the Hon'ble Minister stayed the order of the Additional Commissioner Konkan Division on 10th May 2002. According to LIC, the stay does not confer title on the Defendants and in any case that stay was granted *ex parte*. LIC reiterates that it is the sole owner of old Survey No. 204 Hissa No.1/2 now assigned CTS No. 2400 of village Eksar, Taluka Borivali.

7. In paragraph 8 of the Plaint, LIC has listed a number of Revenue and Land Records on which it relies. LIC then avers that taking wrongful advantage of the stay order granted by the Hon'ble

Minister the Defendants have carried out unauthorised work although they have no title to the land.

8. The Writ of Summons having been served, Defendants Nos. 1 to 4 entered a Written Statement dated 17th March 2008. At the forefront, they claimed that the entire suit was false and the suit property, i.e., old Survey No. 204 Hissa No.1/2, CTS No. 2400 belonged to them and was in possession of their forefathers from 1920 onwards as owners. The 1st Defendant's father purchased several adjacent properties in 1943.

9. In paragraph 6, Defendants Nos. 1 to 4 have traced the title of the property in question thus: Originally one Ramchandra Vishnu Madgavkar owned various properties before 1914. The suit properties were not among these. Ramchandra died on 28th April 1914 in England and left a Will dated 10th March 1914. The Will was probated in England on 21st May 1914. By an Indenture dated 6th March 1918 the three Executors named in the Will, viz. Krishnarao Madgavkar, Balwant Madgavkar and Govind Madgavkar conveyed various properties mentioned in the first schedule to that Indenture to Krishnarao. They also conveyed various properties set out in the second schedule to Balwant. Neither in the conveyance nor its two schedules was Survey No. 204 and Hissa No. 1 mentioned anywhere. By a Deed of Settlement dated 27th November 1933, Balwant conveyed the properties he had purchased to the joint names of himself, one Durgabai Balwant Madgavkar, Madhukar Madgavkar and Prabhakar Madgavkar. Balwant died on 4th May 1934. His son Prabhakar then made a declaration dated 27th January 1943 setting out the details of the properties that the late Balwant had acquired and which had devolved on Prabhakar. That declaration was registered. This also does not mention Survey No. 204 Hissa No.1.

10. On 20th August 1948, three conveyances came to be executed. The first was of 20th August 1948 between Madhavrao Shankkarrao Pandit, Madhukar Balwantrao Madgavkar and Bhalchandra Krishnarao Madgavkar on the one hand as Vendors and Gurbux Rai as the purchaser. It did not mention Survey No. 204. The second Indenture of the same date was between Prabhakar and Gurbux Rai and it mentioned new Survey No. 204 alone. The third Indenture was between Gurubux Rai as the Vendor, one Basantidevi as a confirming party and Asian Assurance which was the only document that mentioned Survey No. 204 of village Eksar, Borivali. This was allegedly registered under No. BOM/2438/1948. The case of Defendants Nos. 1 to 4 is that this conveyance, assuming its existence and validity, had no force of law. Prabhakar could not have conveyed property to which he himself had no title. Survey No. 204 had not passed to Prabhakar at any time and it is not shown, according to Defendants Nos. 1 to 4, how he could have purported to conveyed it to Gurubux Rai and therefore how Gurubux Rai in turn could have purported to convey it to Asian Assurance. According to the Defendants Survey No. 204 remained with them as property owned and held by their ancestors.

11. In paragraph 9 of the Written Statement the Defendants say that they are in exclusive use occupation and continuous possession of the suit property CTS No. 2400 as owners from the year 1920. They have protected the property. They filed a Suit No. 1436 of

1983 in the Bombay City Civil Court against one Upadhyay seeking his eviction on the ground of trespass. Upadhyay filed a counter Suit No. 6460 of 1983 claiming adverse possession. Consent Terms were filed by which Upadhyay admitted Defendants Nos. 1 to 4 as the owners of the property.

12. It is in these circumstances that the Defendants claim that the Mutation Entry made on 11th October 1985 by the Tahsildar Borivali is correct. They defend the stay order granted by the Hon'ble Revenue Minister on 10th May 2002. They also point out that on 18th April 2002 the Plaintiff sought demarcation of the property and caused notice to be issued to the contesting Defendants. The allegations made by the Plaintiff are thus denied.

13. On these pleadings the following issues were struck on 2nd July 2014. These are set out below with my answers against each:

SR. NO.	ISSUES	FINDINGS
1.	Whether the Suit filed by the Plaintiff is within limitation?	**YES**
2.	Is the Plaintiff entitled to the decree of possession of the suit property as prayed in terms of prayer clauses (a) and (b)?	**NO**
3.	What decree? What orders?	**SUIT DISMISSED**

14. The Plaintiff led evidence of one Sunil Babu Nimje, the Administrative Officer of the Plaintiff at its Western Zonal Office. Nimje deposed on the basis of the records. He produced several documents. Only three came to be marked in evidence and these are the only documents, therefore, that can be considered. Exhibit "P1" at pages 104 to 109 is his Evidence Affidavit. Exhibit "P2" is a letter of Authority[1] and Exhibit "P3"[2] is a copy of the order of Additional Commissioner, Konkan Division, Mumbai passed on 28th October 1991.

ISSUE NO. 1 : LIMITATION

15. The Suit was filed on 4th October 2002 and its is alleged that the cause of action for it arose in August 2002 when the officers of LIC noticed construction activity on the land in question. This is not seriously contested in arguments before me, although in the Written Statement a plea is taken that the Suit is time barred. It is alleged in paragraph 30 that Defendants Nos. 1 to 4 entered in to Development cum Sale Agreement with Defendant No. 5 but no construction was being done by Defendants Nos. 1 to 4 by themselves prior to that time. It seems to me evident that the suit is really for a declaration of title on LIC noticing construction on the land, and is therefore not one that can be said to be barred. Even otherwise, proceedings before the Revenue Authorities continued until as late as April and May 2002.

16. The first issue is answered in the affirmative.

1Compilation *p.* 110.

2Compilation *p.* 119 to 134.

RE ISSUE NO. 2 : CLAIM FOR POSSESSION

17. This issue turns entirely on LIC being able to establish its title to the property in the first place. As I have noted that the Plaint proceeds on the basis that the agreement between Gurbux Rai and Asian Assurance is a valid subsisting and a binding document. This required LIC to produce the conveyance, its primary document of title. At no point in the trial was LIC able to produce even a certified copy of this conveyance on which the whole of its case is based. Not only is the original document not produced, but no certified copy of the document, alleged to be registered, is produced either.

18. Section 64 of the Evidence Act says that documents must be proved by primary evidence except in the cases mentioned after that section. Section 62 tells us that primary evidence means the document itself produced for the inspection of the court. Then comes Section 65, which reads thus:

> "**Section 65: Cases in which secondary evidence relating to documents may be given**
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> Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-
>
> (a) When the original is shown or appears to be in the possession or power—of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) When the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

19. Assuming that the original conveyance was destroyed or loss or cannot be traced, secondary evidence ought to have been led of its execution under sub-clause (c) of Section of Section 65. This was never done. That section itself tells us that any secondary evidence of the contents of the documents would be admissible. That secondary evidence would have to be by a person aware of the contents of the document and able to depose to the correctness. This would have meant the evidence of somebody to explain how Survey No. 204, Hissa No. 1 was included in that conveyance between Gurbux and Asian Assurance, although Gurbux, the vendor, was not shown to have acquired title to it from any of the Madgavkar family members or otherwise.

20. For completeness it is necessary to set out Sections 74 to 77 of the Evidence Act:

> "**74. Public documents.** — The following documents are public documents:-
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> (1) Documents forming the acts, or records of the acts —
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> (i) of the sovereign authority,
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> (ii) of official bodies and tribunals, and
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> (iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;
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> (2) Public records kept in any State of private documents.
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> **75. Private documents.** — All other documents are private.

> **76. Certified copies of public documents**. — Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is true copy of such document or part thereof, as the case may be and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal; and such copies so certified shall be called certified copies.
>
> ***Explanation***.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.
>
> **77. Proof of documents by production of certified copies**.— Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies."

21. Some attempt was made to put in evidence copies of applications made by LIC to the Registering Authorities for production of a certified copy, and the reply from those authorities saying that there was no such document found, and this correspondence was never marked in evidence. I believe it would be unfair to LIC to exclude that evidence having regard to these circumstances, and I will, therefore, take the LIC's letter of 3rd September 2014 marked **"X2"** for identification on record and mark it as **Exhibit "P4"** in evidence. The letter seeks a certified copy of the conveyance of 20th August 1948 under Serial No. 3438/1948 and is addressed to the Registrar Class II (Records), Old Customs

House, Mumbai.[3] The reply from the authority although it does not show any inward stamp by LIC was marked **"X3"** for identification. It is dated 10th September 2014. It is in Marathi. I will mark this in evidence as **Exhibit "P5".** It says that after taking search, the Registering Authority was not able to find the document of which a certified copy was requested and hence no certified copy could be issued. There is an assurance that should the document be found, a copy would be provided. This was never done.

22. Now this throws up an additional question of evidence that ought to have been led, for LIC was now required to establish not only the correctness of the contents of the conveyance and it is execution but also its registration.

23. The evidence led by Nimje could not improve the situation, for he had no personal knowledge of the contents of the missing conveyance, nor of its execution and registration. His cross-examination was brief and succinct, but the fact remains that his testimony does not serve to discharge the Plaintiffs' evidentiary burden.

24. I do not think that it is possible in a matter like this to pick out one sentence from the Written Statement and say that the Defendants have admitted the existence of the conveyance in question. Indeed they have not. They have disputed the correctness of its contents. The production of a document will speak to the correctness of its contents but there is no law that says that a

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3 An Earlier letter mentioned the wrong serial number and is not marked in evidence.

document though registered cannot be disproved or its contents shown to be incorrect. That would undoubtedly be a burden that false on the Defendants; but that burden would fall on the Defendants only if the document was produced and marked in evidence to begin with. It is well settled that entries in land revenue records do not confer or extinguish title. Those entries therefore cannot establish LIC's title and in any case, the Plaint itself proceeds on the basis that the relevant entries in the revenue records showing Defendants Nos. 1 to 4 as the holder of Survey No. 204, Hissa No. 1/2 was *incorrect.* This, therefore, required LIC to discharge the primary burden of establishing its title by producing its original title document, namely its conveyance, and demonstrating the correctness of its contents. LIC having failed to do so, Issue No. 2 must be answered in negative.

RE: ISSUE NO. 3

25. Accordingly, the Suit is dismissed. No costs.

26. The original documents filed by the parties will be returned to them upon these being substituted with a set of photocopies duly authenticated by their respective Advocates in accordance with Rule 306 of the Bombay High Court (Original Side) Rules.

(G. S. PATEL, J)