

## SUPREME COURT OF INDIA

Kali Ram Dokania

Vs.

S.K.Ulfat Hossain

C.A.No.64 of 1950

(M.H.Kania,CJI., M.Patanjali Sastri and S.R.Das,JJ.,)

01.12.1950

### JUDGEMENT

#### **Patanjali Sastri, J.,**

1. This is an appeal from a judgment and decree of the High Court of Judicature at Patna reversing a decree of the Subordinate Judge of Bhagalpore and decreeing the respondents' suit to set aside a revenue sale of an estate and to recover possession thereof. The estate is part of Mahal Matha Dih, Tauzi No. 3411 paying a revenue of Rs. 132-5-0. In June 1867 there was a collectorate partition of the mahal whereby 9a. 6p, share of the village Narainpore comprised in the mahal was carved out as Tauzi No. 4038 and separately assessed to a revenue of Rs. 16-6-0. On 8-1-1868, the then proprietors of the separated estate executed a kabuliyat or kistbandi agreeing to pay the Government revenue in two instalments of Rs. 8 and Rs. 8-6-0 in the months of April and December respectively every year. Tauzi No. 4038 was further sub-divided on the application of one of the co. shares in the year 1920-21 and the separated share was entered as Tauzi No. 4038/1 bearing a revenue of Rs. 4-8-0, the residue of the estate being jointly held by the other co-shares and entered as Tauzi No. 4038 (Ijmal) with a separate revenue of Rs. 11-14-0. On 30-4-1939, the Collector of Bhagalpore issued a notification under S. 6, Bengal Land Revenue Sales Act (XI [11] of 1859) (hereinafter referred to is the Act) which was made applicable to the Province of Bihar also, stating that an arrear of land revenue of Rs. 2-8-6 due in respect of Tauzi No. 4036 (Ijunal) not having been paid on or before the 28th March, the last day fixed for its payment, the property would be solar by public auction on 5-6-1939. The sale was accordingly held on that date and the estate was purchased by appellant 1 as the highest bidder for a sum of Rs. 630. The sale was duly confirmed and an order for delivery of possession to the purchaser was also made by the Collector on 11-1-1940. An appeal to the Commissioner having proved unsuccessful, the respondents instituted the present suit on 4-6-1940.

2. The respondents' case, so far as it is material for the purpose of this appeal, was that no arrear of revenue was in fact payable in respect of Tanzi No. 4038 (Ijmal) on 28-3-1939 as on a proper calculation, the respondents' account was in credit and that the Collector had,

therefore, no jurisdiction to sell the estate as he did on 5-6-1939. It was alleged that although the original Tanzi No. 4038 bearing a revenue of Rs. 16-6-0 was subdivided in 1920-21, the kistbandi of 1868 relating thereto continued in force and accordingly the reduced sum of Rs. 11-14-0 separately assessed in respect of Tanzi No. 4038 (Ijmal) was payable in two instalments of Rs. 5-14-0 and Rs. 6 in the months of April and December respectively as before.

3. The suit was contested by the appellants who denied the genuineness and truth of the kistbandi of 1868 and pleaded that even if true it was not binding on the revenue authorities as the batwara officer had no power to change the instalments of Government revenue fixed at the permanent settlement of the parent estate. The arrear of Rs. 2-8-6 entered in the Tauzi ledger for 1938-39 was correctly arrived at after adjusting the credit balance in favour of the respondents and the arrear not having been paid on or before 28-3-1939, the last date fixed for payment of that arrear, the Collector had jurisdiction to bring the property to sale. It was further pleaded that the respondents, not having relied on the alleged kistbandi in their appeal to the Commissioner were precluded under S. 33 of the Act from putting it forward in the present suit. Other subsidiary pleas were also raised but it is unnecessary to refer to them here as the only questions argued before us were (i) whether there was any arrear of revenue due in respect of Tauzi No. 4038 (Ijmal) before 28-3-1939 so as to entitle the Collector to bring the estate to sale on 5-6-1939, and (2) whether the respondents are precluded under S. 33 of the Act from putting forward the alleged kistbandi of 1868.

4. In order to appreciate the contentions advanced before us it is necessary to give a brief outline of the system of collection of revenue provided for by the Act and the rules framed thereunder. One feature of the system was that it made provision for landlords or proprietors making deposits in advance with Collectors if they chose to do so in order to secure themselves from the risk of the property, which might be very valuable, being brought to sale for a default in the payment of a disproportionately small arrear of land revenue, the Collector being authorised to apply the deposit to the payment of arrears of revenue. Another peculiar feature was the distinction made between (1) an instalment of revenue payable according to the engagement or kistbandi executed by the proprietors, (2) an arrear of revenue which is defined in S. 2 of the Act as an instalment of any month of the era according to which the settlement and kistbandi of any mahal had been regulated remaining unpaid on the first of the following month and (3) the latest day fixed by the Board of Revenue under S. 3 for payment of arrears in order to save an estate from sale by public auction. The dates thus fixed under S. 3 for estates paying a revenue of Rs. 10 and upwards but not exceeding Rs. 50, in which category the estate here in question falls, are the 12th January and the 28th March. The practical result of this system is thus explained by, the Judicial Committee in *Dinabandhu Chatterjee v. Ashutosh Chatterjee*,<sup>1</sup>.

"But as already stated the mere fact that there is an arrear to be paid in respect of an estate does not lead to any untoward consequences until the expiry of the last date of payment fixed under S. 3. As the mere failure to pay each instalment in the prescribed month does not entail any penalty, the details of the monthly instalments were omitted from the Tauzi ledger of an estate and only the demand for arrears for which the

estate would become liable to sale after the latest date of payment was entered in the Tauzi ledger . . . . The expression kist as explained in the Tauzi Manual issued by the Board of Revenue, Bengal, means the period between one latest date for payment of arrears of revenue and the next and is not used in the restricted meaning assigned to it in S. 2 of the Act."

5. In the case of this estate, which has to pay revenue in two instalments in April and December, if the kistbandi of 1868 is in force and regulates the payment of revenue, the "fourth kist", under which the arrear of Rs. 2-8-6 is shown, must mean the period between 12th, January and 28th March 1939. The question is whether, on a proper calculation, that sum was in arrear, for which the latest date of payment was the 28th March, so as to involve a liability for sale of the estate in case of failure to pay on that date.

6. The learned Subordinate Judge, while doubting whether the batwara officer had the power under the law to change the kistbandi dates originally fixed at the time of the permanent settlement of the mahal, and to fix new kistbandi dates for the separated Tauzi No. 4038, held that the kistbandi of 1868 (Ex. 3) was genuine, being an ancient document produced from the custody of the Collector and based his calculation thereon. Taking the annual revenue of Tauzi No. 4038 (Ijmal) as payable in two instalments of Rs. 5-14-0 in April and Rs. 6 in December, the learned Judge calculated the sum payable for the three years 1936-38 inclusive at Rs. 35-10-0. Deducting from this sum the payments shown in the Tauzi ledgers to have been made by the respondents during those years amounting to Rs. 22-1-6 and the credit balance shown in the year 1936 Rs. 10-3-6, the learned Judge found that there was deficit of Rs. 5- 8-6 at the end of December 1938, for which the estate must be deemed to be in arrear on 1-1-1939. This was reduced by a payment of Rs. 3 on 11th of January leaving Rs. 2-8-6 as an arrear, for which the latest day of payment was 28-3-1939 and this amount admittedly not having been paid before that date the learned Judge held that the Collector's sale of the estate on 5-6-1939 was not without jurisdiction.

7. The learned Judges of the High Court, on the other hand, went elaborately into the figures appearing in the Tauzi ledgers for the three fasli years 1936-37, 1937-38 and 1938-39 and found that the estate was not in arrear at the end of December 1938 and that the Subordinate Judge's calculation was based on a "complete misunderstanding" of the extracts from the Tauzi ledgers. "The whole confusion," they observed.

"has arisen by the two dates of the kistbandi not having been kept distinct from the dates fixed for the arrears of those instalments."

Inasmuch as the Tauzi ledger for the year 1938-39 (Ex. G.-2) shows that the estate was in credit in the sum of Rs. 3-7-6 at the end of January 1939 and the next instalment to fall due according to the kistbandi would be the April instalment, the earliest date on which the estate would be in arrear for the non-payment of that instalment would be 1-5-1939 and the latest date for its payment as fixed by the Revenue Board under S. 3 of the Act could not be earlier than 12-1-1940. Hence the learned Judges concluded that the sale of 5-6-1939 was "wholly without jurisdiction."

8. Mr. Umrigar on behalf of the appellants assailed this reasoning and conclusion but has not been able to convince us that the decision of the High Court is vitiated by any error of principle or of arithmetic. Learned counsel seemed to realise that, if the kistbandi of 1868 was still in force and bound the Government as well as the proprietors, the finding of the High Court must be correct. His whole attempt was to make out that the kistbandi of 1868 fell into desuetude, both the proprietors and the revenue authorities having proceeded on the footing that, whatever may be the dates when the instalments fell due according to the kistbandi, the dates fixed by the Board of Revenue under S. 3 were the crucial dates and the demands shown in the Tauzi ledgers under each "kist" period were only sums which had already become arrears as defined in S. 2 of the Act. Accordingly it was said the sum of Rs. 6 entered as the demand in the "fourth kist" in Ex. G.2 was an arrear, the latest day for paying which was 28-3-1939. After adjusting the previous credit balance of Rs. 3-7-6, a sum of Rs. 2-8-6. was, it was claimed, correctly shown as an arrear for the non-payment of which the estate was liable to be sold. Reliance was placed in support of this argument on certain observations in *Radha Gobinda v. Girija Prasanna*<sup>2</sup>, *Jadunandan Singh v. Savitri Devi*<sup>3</sup>, and *Shama Kant v. Kashi Nath*<sup>4</sup>, Reference was also made to the definition of "demand" in the Tauzi Manual as meaning.

"sums due from proprietors, farmers or ryots for the recovery of which legal steps can at once be taken on the day immediately following the latest day of payment."

These citations, however, are not of much assistance to the appellants. In the cases referred to above no kistbandi was forthcoming and the decisions turn on the particular facts with which they had to deal. We do not read the observations made therein as suggesting that even in cases where a kistbandi or a kabuliyat regulating the payment of Government revenue is shown to have been executed by the proprietors and accepted by the revenue authorities it should be deemed not to be in force.

9. On the other hand *Haji Buksh Elahi v. Durlav Chandra Kar*<sup>5</sup>, is a clear authority for the view that

"no variation of the contract of parties and the statutory provisions applicable thereto is possible by reason of general considerations or administrative rules which have not the sanction of Indian statute."

In that case their Lordships of the Judicial Committee set aside a revenue sale as it was held without reference to the date fixed for payment of the revenue in a kabuliyat executed by the proprietors to the revenue authorities. Nor does the definition of "demand" in the Tauzi Manual carry the matter any further, for the entry of a sum as "demand" in the Tauzi ledger cannot be assumed to have been correctly made. It, must still be determined whether it represented an "arrear" within the meaning of S. 2 of the Act.

10. If, then, the revenue due in respect of the estate Tauzi No. 4038 (Ijmal) is payable in two instalments in April and December according to the kistbandi of 1868, the conclusion of the

High Court that the estate was not in arrear before 28-3-1939 based, as already stated, on the entries in the Tauzi ledgers, seems to us to be correct.

11. The contention based on S. 33 of the Act is devoid of substance. After providing that no sale for arrears of revenue made after the passing of the Act shall be annulled by a Court of justice except upon the ground of its having been made contrary to the provisions of the Act, the Section proceeds to enact that:

"no such sale shall be annulled upon such ground unless each ground shall have been declared and specified in an appeal made to the Commissioner under S. 2 of the Bengal Land Revenue Sales Act, 1868.. ." It was argued that this provision barred the respondents from relying on the kistbandi of 1866 as the same was not specifically put forward in their petition of appeal to the Commissioner. It is true that there was no reference in that petition to the kistbandi, but the latter is only evidential matter and however important in establishing that the estate was not in arrear before 28-3-1939, could not be said to constitute a "ground" for annulling the sale. That ground was that there was no arrear payable before the 28th March and this was clearly raised in para. 7 which stated that "instead of any default there have been all along amounts in excess of the revenue in the Collector's books."

12. The appeal fails and is dismissed with costs.

13. Appeal dismissed.

Judgment Referred.

<sup>1</sup>65 I.A. 380 at p, 385 : (A. I. R. (25) 1938 P. C. 148

<sup>2</sup>AIR. (19)1932 Cal. 153 (59 Cal 186

<sup>3</sup>12 Pat. 750 : (A.I.R. (20) 1933 Pat. 236 S. B.

<sup>4</sup>AIR. (13) 1926 Pat. 549: (96 I. C. 807

<sup>5</sup>39 Cal. 981: (39 I. A. 377 P. C.