

# CALCUTTA HIGH COURT

Nobin Chunder Dey

Vs

The Secretary of State

(Richard Garth, J.)

13.07.1875

(Richard Garth, C.J. Macpherson, J.)

## JUDGMENT

### **Richard Garth, C.J.**

1. This was a suit brought by the plaintiff, who, for some years previously to March 1874, appears to have been a retail dealer in sidhi and other excisable articles at Calcutta, against the Secretary of State for India in Council; and the object of the suit was to establish certain claims against the Government of India, the nature of which was not very clearly denned either in the plaintiff's statement or in the evidence.

2. It is unnecessary, however, in the view which we have taken of the case, to enter into all the circumstances, which have been so carefully considered and commented on by the learned Judge in the Court below. Suffice it to say that, in substance, the plaintiff puts his claim in this way: He says--At the public auction, which was held by the Government officer on the 4th of March 1874, of licenses to sell certain excisable liquors and drugs, I became the highest bidder for the right to sell such liquors and drugs at five different shops at Calcutta; I paid the deposit upon my purchase, and did all that was necessary to entitle me to the licenses. I demanded these licenses from the Government officials, and I failed to obtain them. Furthermore, I paid the duties upon certain excisable articles of the same character which I kept in my godowns; but, notwithstanding this payment, I could not obtain from the Government officers the necessary papers to enable me to obtain these articles. The consequence was, that I was obliged to close my shops. I sustained heavy damages upon the resale of goods, as well as in other ways, entirely through the wrongful acts and default of the Excise officials; and I am therefore entitled in the first place to be compensated for all the damage which I have thus sustained, or, failing that, I am at least entitled to have the deposit which I paid on the purchase of the licenses returned to me.

3. This being the nature of the plaintiff's claim, the first and main question which arises, and the only one which it is really necessary for us to decide, is, is this a claim which, even assuming the plaintiff to be right upon the merits, he can legally enforce by suit against the Government of India? Because when he sues the Secretary of State for India in Council, he sues him of course as

representing the Government. He relies for that purpose upon the provisions of the Act which has been so frequently referred to, the 21 & 22 Vict., c. 106, under which the possession and government of the British territories in India were transferred from the East India Company to the Crown; by the 65th section of which Statute it was provided that the Secretary of State in Council might be sued as a body corporate, and that all persons might have and take the same remedies and proceedings against him in that capacity, as they might have had and taken before the Act passed against the East India Company. Then comes the question, whether taking the plaintiff's claim to be as he states it himself, was it, or was it not, such a claim as could have been enforced before the Act against the East India Company? In order to decide this question, it will suffice to refer to one authority, upon which the learned Counsel for the plaintiff mainly relied in his argument, and which explains and distinguishes in the clearest manner those claims which could and those which could not have been enforced against the East India Company before the Act. I allude to the case of the *P. & O. Co. v. The Secretary of State for India in Council* Bourke's Rep. Pt. vii 167.

4. It was a suit brought by the plaintiffs for damage done to one of their horses through the negligence of some men employed at one of the Government dockyards, which dockyard was carried on by the Government in the same way, and for the same purposes, as any private firm or company might have carried on a similar business. It was tried by MACPHERSON, J., sitting at that time as the First Judge of the Small Cause Court, and the question of the defendant's liability was referred by him to the Supreme Court as a point of law. The case was heard by Sir BARNES PEACOCK and two other Judges of the Supreme Court, and resulted in a most learned and elaborate judgment, in which, after going very, fully into the provisions of the Statute, and examining all the authorities with great care, the Court decided that the Government of India were responsible to the plaintiffs in that suit upon the express ground that the negligence complained of was an act done by their servants in carrying on the ordinary business of ship-builders (unconnected altogether with the exercise of sovereign powers), and which any firm or individual might have carried on for the same purposes.

5. It was held that, because the East India Company would have been liable in such a case before the Act, the Government of India was equally liable after the Act came into operation; and the distinction was very carefully drawn between acts done by the East India Company in their private capacity and acts done by them in the exercise of those sovereign powers, which were entrusted to them by the Crown for purposes of Government. "There is a great and clear distinction" (says Sir Barnes Peacock) "between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them." He cites *Moodalay v. The East India Co.* and *Moodalay v. Morton* 1 Br. Ch. Ca. 469 relied on by Mr. Wood, and Lord Kenyon's observations upon that case, and then Sir Barnes Peacock goes on to say: "But where an act is done or a contract entered into in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them, no action will lie."

6. Bearing in mind this very important principle, with which we entirely agree, let us see whether the claim of the plaintiff is one which could possibly be enforced against the Government of India.

7. The persons who are said to have been guilty of the acts and default of which he complains, are the officers employed in that department of the Government service which relates to the imposition and collection of the Excise duties. The ground of the complaint is that those officers have been guilty of various breaches of duty in not fulfilling obligations to the plaintiff which they were bound to fulfil in that capacity.

8. Now it is impossible to doubt for a moment that the laws which are made in this or any other country for the taxation of the subject by the imposition of customs and duties, are laws which can only be made or enforced in the exercise of sovereign powers properly so called ; and these sales, at which the plaintiff contends that he purchased the rights on which he claims, only constitute a portion of the machinery and arrangements by which the imposition and collection of the Excise duties are regulated" in this country. His claim is therefore clearly one of those which cannot be enforced against the Government of India. In this view of the case, it is unnecessary to enter into the consideration of several other points which were pressed upon us by Mr. Wood in the course of his argument; as for instance, whether the word "revenue" as used in particular Acts meant merely land revenue, or was used in a more extended sense; whether the cross-claim that was made against the plaintiff by the Government officers was or was not well-founded; and generally whether, assuming the plaintiff to have been in a position to sue, he would have been entitled to enforce his claim upon the merits.

9. We decide this case upon the broad and intelligible ground which I have already mentioned, and which was very clearly explained by Phear, J., in the Court below.

10. The appeal will be dismissed with costs on scale No. 2.