BOMBAY HIGH COURT

Lakshman Venkatesh Naik

Vs

The Secretary of State

(N.J. Wadia , J.)

24.08.1938

JUDGMENT

N.J. Wadia, J.

1. The appellant, who was the plaintiff in the lower Court, purchased survey No. 399 of Mangoli from one Dastgir in 1926. Seven years before that, on May 19, 1919, Dastgir had taken a tagavi loan of Rs. 2,000 from Government for the purpose of weeding the land and for making a stone pavement in a part of it. Under the terms of the tagavi bond (exhibit 58), two other lands owned by Dastgir, survey Nos. 383 and 412, were hypothecated for the loan. In the same year, in which Dastgir sold survey No. 399 to the plaintiff, he also mortgaged the other two lands survey Nos. 383 and 412 to Mr. P.A. Desai. Dastgir failed to repay the tagavi loan in accordance with the terms of the bond and the Prant Officer ordered that the arrears due from Dastgir should be recovered by sale of one of the hypothecated lands, survey No. 383. Against that order an application was made to the Collector by Mr. Desai, to whom the land had been mortgaged, and the Collector ordered that survey No. 399, the land for the benefit of which the loan had been taken, should be forfeited and sold. The Mamlatdar of Bagewadi accordingly gave notice to the plaintiff on March 4, 1932, informing him that unless he paid the arrears of the tagavi loan, Rs. 1,089 and odd, which were due from Dastgir, survey No. 399 would be forfeited and sold. The plaintiff applied to the Collector to reconsider his order, but the Collector declined. The plaintiff, having appealed unsuccessfully to the Commissioner and to the Government, filed the suit, out of which this appeal arises, for a declaration that survey No. 399 was not liable to be forfeited and sold for the arrears of the tagavi loan due from Dastgir, and for a permanent injunction to the defendant, the Secretary of State, not to forfeit and sell survey No. 399. The learned First Class Subordinate Judge dismissed the suit and the decree was confirmed in appeal by the District Judge of Bijapur. Against that decision the plaintiff has filed the present appeal.

2. It was the plaintiff's contention that he was a bona fide purchaser from Dastgir without notice of the charge created on the land by the tagavi loan; and that he first came to know of the

proceedings for the recovery of the tagavi loan when he got a notice from the Mamlatdar on March 4, 1932, informing him that if he did not pay up the arrears the land would be forfeited and sold. The contention of the defendant was that the loan to Dastgir had been advanced under the Land Improvement Loans Act, (XIX of 1883), that the charge created by the loan under Section 7(c) of that Act was a paramount charge, that the plaintiff was not a bona fide purchaser for value without notice, and that even if he were, the charge being a paramount charge the land in the plaintiff's hands would be subject to the charge.

3. The first question which arises for consideration in the appeal is whether the plaintiff is entitled to contend, as he did in the trial Court and the lower appellate Court, that the suit bond was under the Agriculturists' Loans Act (XII of 1884) and not under the Land Improvement Loans Act (XIX of 1883). Both the trial Court and the lower appellate Court have held that it was not open to the plaintiff to raise this contention on the ground that the contention was raised at a very late stage and was inconsistent with the facts as originally set out in the pleadings. It is admitted that in the plaint itself no contention was raised that the loan was not under the Land Improvement Loans Act but was under the Agriculturists' Loans Act. On the contrary in certain applications made by the plaintiff (exhibits 16 and 18) it was stated that the loan was under the Land Improvement Loans Act. The suit was filed on February 27, 1933, and it was not till nearly two years later, January 21, 1935, that the plaintiff applied that an additional issue should be framed whether the suit bond was under the Land Improvement Loans Act, as contended by the defendant, or under the Agriculturists' Loans Act. In my opinion it was open to the plaintiff to raise this contention before the evidence was actually recorded and he did so raise it. Under Order VI, Rule 17, of the Civil Procedure Code, it is open to the Court to allow at any stage of the proceedings either party to alter or amend his pleadings in such manner and on such terms as may be just, and to allow all such amendments to be made as may be necessary for the purpose of determining the real questions in controversy between the parties. In the present case the terms of the bond were undoubtedly such as gave some support to the plaintiff's contention that the loan was under the Agriculturists' Loans Act and not under the Land Improvement Loans Act, and the question was a very important one from the point of view of the plaintiff. It was certainly one the decision of which was necessary for the determination of the real question in issue between the parties, namely the liability of survey No. 399 to forfeiture and sale for nonpayment of the tagavi loan. That being so the plaintiff was entitled to raise that question.

4. The next question is whether the bond (exhibit 58) was, as a matter of fact, under the Agriculturists' Loans Act as contended by the plaintiff or under the Land Improvement Loans Act as contended by the defendant. The main contention of the defendant on this point is that the very nature of the loan makes it clear that it could not have been under the Agriculturists' Loans Act and could only have been under the Land Improvement Loans Act. Section 4 of the

Agriculturists' Loans Act and Rule 3 of the rules framed under that Act provide that loans may be made under that "Act to owners and occupiers of arable land for the relief of distress, the purchase of seed or cattle, or any other purpose not specified in the Land Improvement Loans Act. Section 4 of the Land Improvement Loans Act provides that loans may be made under that Act for the purpose of making any improvement to lands. The loan in the present case was granted, as the bond exhibit 58 shows, for the purpose of weeding the land and for making a stone pavement in a part of it. No loan for the latter purpose could properly have been granted under the Agriculturists' Loans Act. The plaintiff, however, relies on certain facts appearing in the bond. The bond mentions at the top that the loan is granted according to the Agriculturists' Loans Act of 1883. On the original bond the figure "4" has been altered to "3" in 1883. In the body of the bond there is the sentence "I shall act according to the regulations of the Act of 1884". The Act of 1884 was the Agriculturists' Loans Act, the Land Improvement Loans Act being of 1883. This is the principal ground on which the plaintiff bases his contention that the loan was under the Agriculturists' Loans Act and not under the Land Improvement Loans Act. He also relies on the fact that no copy of the bond was sent to the village officers for being entered in the Record of Rights as should have been done if the loan had been under the Land Improvement Loans Act and the charge created on the land had to be shown in the Record of Rights. In support of the contention reference has been made to a note at p. 56 of a book called the "Manual of Tagavi and its Accounts" prepared by Mr. Anderson for the Government and published by Government. There is however no provision either in the Land Improvement Loans Act or in the rules framed under it which requires that a copy of the bond should be sent to the village officers for entries being made in the Record of Rights. The note at p. 56 of Mr. Anderson's Manual is a note below Tagavi Form II and forms no part of the rules framed under the Act. It has also been pointed out that in the standard form of the Loan Bond given in the Manual the area of the land for the benefit of which the loan is granted is to be mentioned, and that that is not done in the bond which has been taken from Dastgir. Admittedly the bond taken in this case was not in the form prescribed in the Manual, but in an abridged form and the mere omission to mention the area of the land can hardly be considered sufficient to hold that the loan bond was not taken under the Land Improvement Loans Act. The purpose for which the loan was borrowed was one which clearly came under the Land Improvement Loans Act. A loan for that purpose could not possibly have been given under the Agriculturists' Loans Act. The fact that the land for the benefit of which the loan was taken was mentioned in the bond also suggests that the loan must have been under the Land Improvement Loans Act. I agree therefore with the view, which the lower Courts have taken, that the loan must have been under the Land Improvement Loans Act and not under the Agriculturists' Loans Act.

5. The next contention of the plaintiff is that even if the loan was under the Land Improvement

Loans Act Government were not entitled to sell survey No. 399 which had been purchased by the plaintiff subsequent to the loan and without notice of the charge created on it by the loan. Both the trial Court and the lower appellate Court have found as a fact that the plaintiff was not a bona fide purchaser for value without notice of the charge. I am unable to agree with the view which they have taken on this point. The trial Judge holds that the plaintiff had constructive notice, because in his opinion the plaintiff would have come to know of the charge if he had made inquiries in the Mamlatdar's office. There was no obligation on the plaintiff to make such inquiries. All that he was bound to do was to see if there was any entry made of the charge in the Record of Rights. It is alleged by the plaintiff that there is no entry of the charge in the Record of Rights, and the extracts of the Record of Rights which he has put in (exhibits 4, 5 and 6) show that there is, as a matter of fact, no such entry against survey No. 399, although the fact that survey Nos. 383 and 412 had been hypothecated for the tagavi loan is mentioned in the Record of Rights against those lands. The learned District Judge held that the plaintiff had not proved that he was a purchaser without notice of the Government charge because he had not produced the extracts of the Record of Rights for the year 1926, the year in which the plaintiff purchased the property, to show that there was no entry in the Record of Rights for that year with regard to the charge. I am unable to accept this view. If there had been any entry in the Record of Rights with regard to the charge, that entry would have continued in subsequent years and would have appeared in the extracts for the year 1931 which the plaintiff has produced. The fact that no entry appears in that extract, shows that no entry with regard to the charge could have been made at all at any previous time. The defendant has admitted in his written statement that the charge was not mentioned in the Record of Rights. Clause 6 of the written statement says that the non-mention of the charge in the Record of Rights is of no consequence whatever. The plaintiff has therefore in my opinion succeeded in showing that he was a purchaser for value without notice of the charge. The question however is whether, if he is a purchaser for value without notice of the charge, the charge is not enforceable against the land in his hands. He relies in support of his contention on Section 100 of the Transfer of Property Act, the second clause of which provides that "save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge". The charge in this case however is a statutory one created by Section 7 of the Land Improvement Loans Act, which provides that (1) subject to such rules as may be made under Section 10, all loans granted under the Act, all interest (if any) chargeable thereon, and costs (if any) incurred in making the same, shall, when they become due, be recoverable by the Collector in all or any of the following modes, namely : (a) from the borrower-as if they were arrears of land-revenue due by him; (b) from his surety (if any)-as if they were arrears of land-revenue due by him; (c) out of the land for the benefit of which the loan has been granted-as if they were arrears of land-revenue due in respect of that

land; (d) out of the property comprised in the collateral security (if any)-according to the procedure for the realisation of land-revenue by the sale of immoveable property other than the land on which that revenue is due. Sub-caluse (3) provides that it shall be in the discretion of a Collector acting under this section to determine the order in which he will resort to the various modes of recovery permitted by it. It was therefore open to the Collector to adopt all or any of the four different methods which the section provides for the recovery of the tagavi arrears. Clause (c) of Sub-clause (1) read with the proviso makes it clear that the charge created by the section on the land for the benefit of which the tagavi loan is granted is a paramount charge. The proviso directs that no proceeding in respect of any land under Clause (c) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower, and of mortgagees of, or persons having charges on, that interest, and, where the loan is granted under Section 4 with the consent of another person, the interest of that person, and of mortgagees of, or persons having charges on, that interest. It is clear from the language of the proviso that the interest of mortgagees of the borrower's rights or of persons having charges on the borrower's interest in the land would be affected by the charge even though such interest may have accrued to them prior to the granting of the tagavi loan. The charge is therefore clearly a paramount charge. It was held in Sankaran Nambudripod v. Ramaswami Ayyar (1918) I.L.R. 41 Mad. 691 that a loan advanced under the Land Improvement Loans Act is, subject to the proviso to Section 7(1), a first charge on the land for the improvement of which the loan is advanced, and a sale under Section 7(1)(c) of the Act to recover the loan is free of prior incumbrances. That being so Section 100 of the Transfer of Property Act cannot help the plaintiff, since that section in terms expressly excludes from its operation charges provided by any law for the time being in force. The land in the plaintiff's hands is therefore subject to the charge even though the plaintiff was a purchaser for value without notice of the charge.

6. The last contention of the appellant is that he is entitled to the benefit of the principle of marshalling laid down in Section 56 of the Transfer of Property Act and to claim that Government should first proceed against the other two lands, survey Nos. 383 and 412, which have been hypothecated for the tagavi bond under the terms of the bond and against which there is an entry in the Record of Rights showing that they have been so hypothecated. It is contended that the discretion given to the Collector under Section 7 of the Land Improvement Loans Act to adopt all or any of the four methods of recovery provided in that section is subject to the condition that the Government have complied with all the provisions of the Act in making the loan. Reference was made to Maxwell on Interpretation of Statutes, 8th ed., p. 321, where the learned author says:Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or

authority conferred It is contended that in the present case there was a failure on the part of Government to observe two statutory requirements in connection with the making of the loan. Section 89 of the Indian Registration Act requires that every officer granting a loan under the Land Improvement Loans Act, 1883, shall send a copy of his order to the registering officer within the local limits of whose jurisdiction the whole or any part of the land to be improved, or of the land to be granted as collateral security, is situate. It has been admitted by the defendant that no such copy was sent. There is no provision in the Land Improvement Loans Act which requires that a copy of the order sanctioning the loan should be sent to the Sub-Registrar. The bond itself is not compulsorily registrable under Section 17(2)(ix) of the Indian Registration' Act, and I am unable to see how the failure of the Collector to send a copy to the Sub-Registrar for registration can affect the operation of Section 7 of the Land Improvement Loans Act. The Indian Registration Act itself provides no penalty for non-compliance with the provisions of Section 89.

7. It is next contended that the bond does not comply with the requirements of Rule 12 of the rules under the Land Improvement Loans Act. That rule provides that the order granting a loan shall be endorsed on the application, if separate, and also be made out in any of the Forms 1 to 3 annexed to the rules suitable to the case, and shall, at the time of or before the issue of the loan or the first instalment of it, be signed by the applicant or applicants and other persons concerned in token of understanding and agreeing to the conditions contained therein. One of the conditions appended to form I annexed to the rules is as follows:

14. And I further agree that it shall be lawful for the Secretary of State to cause the said lands to be sold without the intervention of the Court under Section 69 of the Transfer of Property Act, 1882, in either of the following cases, namely : (a) where the said moneys or any part thereof have become due and notice in writing requiring payment thereof has been served upon me and I have made default in payment for three months after such notice, or (6) where some interest on the loan referred to in the said order amounting to at least five hundred rupees (Rs. 500) is in arrear and unpaid for three months after becoming due.This condition admittedly is not part of the bond taken from Dastgir in the present case. It is however not under that condition that the Collector has acted so far as the plaintiff is concerned. Condition 14 refers to the right of Government to cause the lands to be sold without the intervention of the Court under Section 69 of the Transfer of Property Act. The Collector has not acted under that section. He has ordered the land to be forfeited and sold under the statutory power given to him by Section 7(1)(c) of the Land Improvement Loans Act. It cannot therefore be said that the non-inclusion of this condition in the bond which was taken from Dastgir has in any way prejudiced the plaintiff, and I am not prepared to hold that the fact that this condition was not included in the bond taken from Dastgir would have the effect of depriving the Collector of the power to proceed under Section 7(1)(c).

8. With regard to the contention that it is a hardship on the plaintiff that the Collector should proceed to enforce the charge upon the land in his hands although! that charge had neither been recorded in the Record of Rights nor registered under Section 89 of the Indian Registration Act, instead of first proceeding to recover the arrears out of the two lands, survey Nos. 383 and 412, which were hypothecated for the security for the loan, it is clear, on a perusal of Section 7 of the Land Improvement Loans Act, that it was the intention of the legislature that the liability for the tagavi loan should rest primarily on the land for the benefit of which the loan was taken. This appears from Sub-clause (2) of Section 7 which provides that when any sum due on account of any such loan, interest or costs is paid to the Collector by a surety or an owner of property comprised in any collateral security, or is recovered under Sub-section (2) by the Collector from a surety or out of any such property, the Collector shall, on the application of the surety or the owner of that property (as the case may be), recover that sum on his behalf from the borrower, or out of the land for the benefit of which the loan has, been granted, in manner provided by Sub-section (7). Sub-clause (3) of the section gives the Collector absolute discretion to determine the order in which he should resort to the various modes of recovery permitted by the section, and the Collector in exercising his discretion in the way in which he did was not in any way acting unfairly. The land in the hands of the plaintiff is, therefore, in my opinion, liable to forfeiture and sale for the arrears of the tagavi loan due from Dastgir.

9. The appeal fails and is dismissed with costs.