BOMBAY HIGH COURT

Dattatraya Vishwanath Sulakhe

Vs

The Secretary of State

(Sen and Bavdekar, JJ.)

09.10.1947

JUDGMENT

Sen, J.

1. The plaintiff-appellant in the first of these two appeals brought a suit against respondent No. 1 (the Secretary of State for India in Council) and other defendants for a declaration in respect of, and for possession of, six hissas of land in three survey numbers, and for recovery of a sum of Rs. 105 alleged to have been illegally recovered by defendant No. 2. The plaintiffs-appellants in Second Appeal No. 451 of 1944 are defendants Nos. 3 and 4 in the first suit and are cousins of the plaintiff in the same suit. Their plaint is similar to that of the appellant in second appeal No. 401 of 1944. The two suits were tried together, and there is one judgment of each of the two lower Courts in respect of them. I shall refer in the following judgment, as the plaintiff and the defendants respectively, to the plaintiff and the defendants in the suit out of which second appeal No. 401 of 1944 arises. The material facts are these. The lands in suit were given as kazi inam lands to the ancestors of defendants Nos. 2 and 5 to 18 by the Emperor Aurungzeb in the year 1670. In 1867 one of the lands was mortgaged to an ancestor of the plaintiff, and later on the other lands were also similarly mortgaged. The mortgage-deeds of the subsequent mortgages, however, are not forthcoming. There was an enquiry by the Inam Commission appointed under Act XI of 1852 to enquire into the present Kazi inam; and a sanad was granted to the family of the kazis in 1880. Therein it was declared that the lands in suit "shall be continued, so long as village community may require the service, as the service emolument appertaining to the office of Qazi on the following conditions. That is to say, that the holders thereof shall perform the usual service to the community and shall continue faithful subjects of the British Government. As this watan is held for the performance of service it cannot be transferred and so no Nazarana will be levied." In 1914 certain members of the kazi family brought a suit against the members of the plaintiff's family for redemption of the mortgage, but it was dismissed in 1915. In 1920 the question of the alienation of these lands was brought up before the District Deputy Collector. In the order that was passed it was stated that the service to the community was still required and

was being performed, and that the lands had been, in the possession of one Mr. Sulakhe and his ancestors since 1870. As the alienation was old, it was directed that Mr. Dattatraya Vishwanath Sulakhe should pay the difference between the assessment and the judi every year to Hafijoddin walad Amroddin, Qazi of Barsi, so long as the Qazi service was required and performed by him or his agent. It seems that in 1930 the plaintiff, who was a member of the Barsi Municipality, along with four other Councillors, tabled a motion in the Municipality protesting against the Government's action in arresting certain political leaders and stating that the Municipality agreed with the non-co-operation movement; that proposal was carried. Two other resolutions were passed as regards the hoisting of the National Flag by the Municipality. On this the Collector issued a notice to the plaintiff asking him to show cause why the Qazi Inam lands in his possession should not be resumed as plaintiff had violated the conditions of the sanad. The Commissioner wrote to Government in 1930 proposing that the order made by the District Deputy Collector should be revised, and that Sulakhe should be evicted from the lands, and that they should be restored to the officiating Qazi. Thereupon Government passed a resolution that the kazi inam lands should be resumed from Sulakhe and should be regranted to the Kazis on the same terms as before. Accordingly possession of the suit lands was taken away from the plaintiff and they were restored to the officiating kazis. The plaintiff filed the present suit in 1931. The defence of Government (defendant No. 1) was that the suit was barred under Section 4(a) of the Revenue Jurisdiction Act, the Court having no jurisdiction to question the order of resumption passed by Government because the plaintiff had committed two breaches of the conditions of the sanad regarding loyalty and non-transferability.

2. The trial Court found that the Sulakhes were the owners of the lands in suit by adverse possession, that the condition about the non-transferability was broken, but that Government had no power of resumption, and that the suit was barred by the Revenue Jurisdiction Act, Section 4(a), Clause (1) Accordingly it dismissed the suit. On appeal to the District Court the learned District Judge has found that the claim against Government was barred under Section 4(a), Clause (1) of the Revenue Jurisdiction Act, that against the other defendants there is no bar under the said Act, but that the order made by Government in 1930 being an order in revision of the previous order of 1920 was intra vires, just and proper; accordingly he has dismissed the appeal.

3. The sanad in this case, (exhibit No. 72), declaring that "the lands in suit shall be continued so long as village community may require the services," etc., seems to have been granted after proceedings had been held by the Inam Commission under Act XI of 1852, What was granted appears to be the land and not the revenue, and three conditions appear in the sanad subject to which the lands were allowed to continue with the family of the kazis, namely, the performance of the kazi services, the holders continuing to be faithful subjects of the British Government, and non-transferability of the lands. It is not alleged that the kazi services have ceased to be

performed. The grounds on which the order of resumption was made in 1930 are that the plaintiff had ceased to be a faithful servant of the British Government, and that the condition as to the non-transferability had been broken. It may be disputed whether the conclusion of Government as to the plaintiff's remaining a faithful subject to the British Government is correct. But if the transfer was not lawful, the plaintiff could hardly come within the definition of a holder as defined in Section 3 of the Land Revenue Code, for under the said definition a holder must be lawfully in possession of land. If the plaintiff was not a holder in this sense, it cannot be said that the condition of his remaining a faithful subject of British Government applied to him. There is, however, no doubt as to the last condition having been broken; and the question arises whether in the event of such a breach Government had any powers to resume the lands in suit. On this point we find the following passage in Jog lekar's Alienation Manual, first edition, at paragraph 98 A, p. 75 :-No power is conferred by Act XI of 1852 or Bombay Act 2 of 1863 to make rules for the resumption of these lands in Khandesh, Deecan and Southern Maratha Districts. No rent should be levied under the above rules in these Districts in respect of these lands in future and only the full assessment should be levied. The orders in G.R. Nos. 4230 dated 28th April 1908 and 8123 dated 10th August 1808 should be modified to this extent and the difference between the full assessment and judi should be paid to the offlciator.In Patdaya v. Secretary of State their Lordships were concerned with the question whether the order passed by the Collector in respect of a jangam inam, levying Tent in excess of the full assessment authorized by Government, was ultra vires. The Collector had there apparently acted under the rules framed in 1908 for the resumption of lands. Those rules purported to have been framed under the powers conferred by Act XI of 1852, Schedule B, Rules 8 and 10 and by Bombay Act VII of 1863, Section 2, Clause (3), and other powers in this behalf. The only possible basis for the order made by the Collector in that case was said to be afforded by those rules, no other statutory power having been referred to as justifying the order. Their Lordships remarked that Government had no power under Act XI of 1852 to frame any rules with reference to the resumption of lands given as emoluments of any hereditary office, such as kazis and village joshis. That conclusion appears to be based on an examination of Rule 8 under Schedule B to the said Act, under which alone the office of a jangam, like the office of the Kazi in the present case, could be dealt with. Rule 8 reads thus :-All lands authorizedly held by an official tenure which it is evident from local usage was meant to be hereditary, and has been so considered heretofore even though there be no sanads declaring it to be so,-for instance, inams which form the authorized emoluments of any hereditary office, as of kazis, village joshis, etc., and are not merely personal,-are to be continued permanently.It is under this rule that the present kazi inam appears to have been continued permanently. Proviso 5 to the said rule is as follows :-

> The provisions of this rule are not in any way to apply to emoluments continued for service performed to the State, as the service watans of desais, sardesais, nadgaudas,

deshpandes, patelsi kulkarnis, mhars, talavaras, whose claims are to be disposed of according to the rules which are or map he established for the regulation of such holdings.

Rules contemplated by this proviso would be such as would deal with the question of disposal of claims by the holders of service watans, such as desais, sardesais and others, and cannot therefore deal with the question of resumption of lands held by such persons as kazis, village joshis and others referred to in the main body of Rule 8. Rule 10 in Schedule B deals with the jagirs, saranjams and other tenures for service to the Crown and tenures of a political nature; but obviously a kazi inam does not come within any of these descriptions. In contrast to these provisions of Act XI of 1852 we have Section 2, Clause (3), of Bombay Act VII of 1868. It reads as follows :-Lands held for service shall be resumable or continuable under such general rules as the-Provincial Government may think proper, from time to tune, to lay down.It appears, therefore, that the resumption rules derive authority very largely, if not solely, from these provisions. Act VII of 1863, however, speaks of those parts of the Bombay Presidency which are not subject to the operation of Act XI of 1852. Act II of 1863, which is intended to provide for the final and summary adjustment of unsettled claims to exemption from the payment of the land revenue-and to fix the conditions for the recognition of titles to such exemption with respect to succession and transfer in those districts of the Bombay Presidency to which the operation of Act XI of 1852 extends, has no provision similar to Section 2, Clause (3) of Act VII of 1863. All that we have been able to find which appears relevant to this matter is a provision in Section 6, Clause (2), and under which lands held wholly or partially exempt from land revenue, on passing to any person not an heir by actual descent from the person to whose heirs the land is declared heritable, or from a person who may establish his title to such exemption, "shall forthwith become and be liable to payment of annual land-revenue at the full assessment." This is similar to the provisions in Sub-section (3) of Section 48 of the Land Revenue Code, which is as follows :-Where land held free of assessment on condition of being used for any purpose is used at any time for any other purpose, it shall be liable for assessment.Action on these provisions was taken by the Deputy Collector in 1920. No statutory authority other than those examined above and the rules of 1908 regarding resumption has been brought to our notice. The question, therefore, arises whether the District Judge was right in holding that the Government have the inherent power in such cases to resume the land. This point was raised in Patdaya v. Secretary of Stale and was thus dealt with (p. 1167) :We do not think that unless the powers could be referred to any statutory provision r or any rule which has the force of law, it could be assumed that the Collector would have the power of disturbing the possession of any third parties who may have acquired rights in respect of such lands under the operation of law, as, for example, by adverse possession. Where a third party is found in possession of such lands, either the party interested must sue him for possession; or if the Government feel interested in the restoration of the lands, they may be able to sue the third party for such restoration. We do not express any opinion on this last point.

But we think that if these rules are not intra vires of the Government as regards such lands as we are concerned with in this case, and if the Collector has no power to disturb the possession of a third party by summarily evicting him or by levying economic rent, the plaintiff is entitled to maintain a suit for the purpose of restraining the Collector from enforcing the order in question.No doubt if a grant is made subject to certain conditions, and if one or more of those conditions are broken, prima facie Government should have the right to have the grant terminated. But such right does not necessarily mean the power of terminating the grant by executive action. It may possibly be enforced, as pointed out above, by Government by filing a suit. In our opinion Government had no power to resume the lands in suit in this case.

4. The next question for consideration arises out of the provisions of Section 4 of the Bombay Revenue Jurisdiction Act, X of 1876. The relevant provisions of that section appear to be those contained in Clauses (7) and (3) of Sub-section (a). Clause (4), on which reliance was sought to be placed by the learned Assistant Government Pleader, does not apply, because it has not been shown that the lands in suit had been "declared by the Provincial Government or any officer duly authorized in that behalf to be held for service." If the order of Government be ultra vires, that is a nullity, Clause (3) will not be a bar, as it need not be set aside : Mallappa Tukko (1936) 39 Bom. L.R. 288 and the reasoning in Abdullamiyan Abdulrehman v. Government of Bombay , F.B.-a case in which bar of Section 11 was sought to be applied-will apply.

5. Coming to Clause (1), it has not been seriously disputed that the lands in suit are "property appertaining to the office of an hereditary officer" recognized under Act XI of 1852, though there are rulings (for instance, *Patali Begum v. Yeshwant*[5] to the effect that the office of a kazi is not hereditary. The important question that arises is, can this suit be said to be or involve "a claim against the Crown." Ordinarily, as pointed out in Mallappa v. Tukko, the words "claim against Government" would imply that a relief of some kind is sought against Government, for instance, possession, a money claim or an injunction, and that Government is not merely a formal party. The reliefs sought in this case, so far as they affect Government, are (1) a declaration that the Government's order is null and void and (2) a sum of Rs. 105 in respect of the income for the years 1930-31, to be awarded from defendants Nos. 1 and 2. The second claim is a distinct claim against Government and as such it is barred, though the claim as against defendant No. 2 will not be barred. As to the first relief sought, it is to be noted that the relief of possession is not sought against Government, as was the case in *Appaji v. The Secretary of State for India*[2] and in *Sagunappa Shankarappa v. Bhau Annaji*[3] decided by Macleod C.J., on August 17, 1920 (Unrep) which was referred to in Mallappa's case. The present case is similar to *Bhimangonda v. Secretary of State*[4] decided by Scott C.J. and Batchelor J. (Unrep) (also referred to in Mallappa's case) where a declaration was sought against both the Secretary of State for India and other defendants, but possession of the lands in suit was sought against the latter only, and the Court

said that "the suit was not on the face of it a claim against the Government. "In Mallappa v. Tukko the plaintiff sought an order for delivery of possession of property against both the Secretary of State and the other defendant, and it was remarked (p. 295):-Here the plaintiffs did not say in the plaint that they wanted an order for possession as against defendant No. 1 only, without seeking to bind the Secretary of State, and it is perfectly obvious that Government was made a party in order that their claim to possession of the lands might be enforced against Government. That being so, there was a claim against Government, namely, a claim for possession, which a civil Court could not entertain.That is not, however, the position here; possession is sought against defendant No. 2 only. Therefore it seems to us that there is no bar under Clause (1) of Sub-section (a) of Section 4 of the Act.

6. That being our conclusion, the question arises what kind of order should be made in this case. The plaintiffs in the two suits based them on title and the first Court has held that they were owners by adverse possession. There is, however, no finding on this point by the lower appellate Court. These not being suits under Section 9 of the Specific Relief Act-in fact such a suit against Government is not maintainable, they must be sent back to the lower appellate Court, which ought to have recorded a finding on the question of the plaintiff's title. We accordingly set aside the decree of that Court and remand the case to it for disposal according to law. Costs will be costs in the proceedings of that Court.

Cases Referred.

1(1944) 47 Bom. L.R. 112
2(1904) I.L.R. 28 Bom. 435, s.c. 6 Bom. L.R. 438
3(1920) F.A. No. 269 of 1918
4(1912) F.A. No. 47 of 1910