

(1876) 02 PRI CK 0005

In the Privy Council

Damodhar Gordhan

APPELLANT

Vs

Deoram Kanji, Deceased, By His Sons and Heirs

RESPONDENT

Date of Decision : 16-02-1876

Acts Referred:

Citation : (1876) 3 IndApp 102

Hon'ble Judges : Cairns, Selborne, James W. Colvile, Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

Selborne, J.—In this suit, which was instituted in the British Court of Gogo for the recovery or redemption of certain land situate in the village of Gangli, on the footing of mortgage, a decree for the plaintiff (whose representatives are the respondents here) was made by the Munsif of Gogo, but was reversed on appeal by the Assistant Judge of Ahmedabad. On a special appeal by the plaintiff to the High Court of Bombay the case was remanded to the Court of Ahmedabad for re-trial.

2. So far there was no question of the jurisdiction of these different Courts over the land in controversy, as territorially situate within their proper limits, and over the parties to the suit as resident within the same limits. But in 1866, after the remand by the High Court, the jurisdiction of all these Courts is alleged by the appellant to have ceased by reason of the cession by the British Government of certain territory, within which Gangli was included, to a Native potentate, the Thakore of Bhaunagar. A notification that the territory so alleged to have been ceded was removed, from and after the 1st of February in that year, from the jurisdiction of the Revenue, Civil and Criminal Courts of the Bombay Presidency, appeared in the Bombay Government Gazette of the 29th January 1866. The District Judge of Ahmedabad proceeded, nevertheless, to re-hear the appeal, and on such re-hearing, he restored the original judgment of the Munsif of Gogo in favour of the plaintiff. Thereupon the defendant brought another special appeal to the High Court of Bombay, alleging the notification in the Gazette of the 29th January 1866 as proof that the re-hearing had been coram non iudice; but the High Court, on the 2nd December 1870, rejected this special appeal, holding that

notification to be insufficient to show that the jurisdiction of the Court of Ahmedabad had ceased before the re-hearing. On a petition, however, by the defendant for a review of that order, accompanied by some further documentary evidence, the High Court appears to have considered (Record, p. 191) that a transfer of lands from British territory to the jurisdiction of a Native Prince, by the authority of the Secretary of State for India, might have been authorized by the Statute 21 and 22 Vic., cap. 106, Section 3, and a review of the order of the 2nd December 1870 was, therefore, directed. On the review, the Judges of the High Court held that it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a foreign power; and on that ground they made the order of the 24th March 1873, now under appeal, confirming their former order of the 2nd December 1870. The question, whether the law thus laid down by the High Court of Bombay is correct, was fully and ably argued at this Bar in July last; and their Lordships would have been prepared to express the opinion which they might have formed upon it, if, in the result of the case, it had become necessary to do so. But, having arrived at the conclusion that the present appeal ought to fail, without reference to that question, they think it sufficient to state that they entertain such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court of Bombay as to be unable to advise Her Majesty to rest her decision on that ground.

3. Before, however, the judgment, rejecting the special appeal to the High Court of Bombay, can be reversed, their Lordships must be satisfied that there was, in this case an actual cession of territory, which had the effect, before the re-hearing by the District Judge of Ahmedabad, of depriving Gangli of the character of British territory, and its inhabitants of the status and rights of British subjects. That question, considered as one of fact in this particular case, apart from the general constitutional question as to the power of the Crown to make a cession in any case, does not appear to have been so fully considered by the High Court of Bombay as their Lordships think it deserved to be. It has now (on the 17th of February last) been the subject of a separate argument at this Bar.

4. The facts, material to the determination of this question, may be thus stated.

5. There are, in the Province of Kattywad, one or more talooks, of large extent and value, belonging to the Thakore of Bhaunagar, which (whether the province ought, or ought not, to be regarded as a part of Her Majesty's dominions) have never been brought under the ordinary administration of the British Government in India. The Thakore is also the proprietor of other large talooks (the town and port of Bhaunagar, and many other villages and places, including Gangli), forming part of the districts of Dhundooka and Gogo, etc., which, having previously been part of Kattywad, were ceded by the Peishwa to the British Government in 1802, by the Treaty of Bassein. The territory so ceded was left, till 1815, under Native administration; but in that year it was brought under the

ordinary jurisdiction of the British Courts of the Bombay Presidency, and so remained until those proceedings in 1866, the effect of which is now in question. As to these latter estates, the Thakore, and all his dependents residing thereon, were (beyond controversy) subject to British law and jurisdiction.

6. Before 1802 the whole Province of Kattywad was divided between the Peishwa and the Gaikwar, who claimed over it sovereign rights, chiefly consisting in the exaction of tribute. A small number of estates in the province were held rent-free; but for the greater part the chieftains paid tribute, of the same character (so far as their Lordships can judge) as the land-revenue which is paid to the Government in British India; and Mr. Aitchison, in a work of authority, referred to on both sides at the Bar ("Treaties," Vol. VI, p. 366), states that the sovereignty of the country was understood by the Chiefs to reside in the power to which this tribute was paid. The rest of the rights of the Peishwa, in those parts of Kattywad which had not been transferred to the British Government by the Treaty of Bassein, were ceded to Great Britain in 1817.

7. With respect to the Gaikwar (leaving out of consideration one or more talooks of which that Prince is at the present day the direct proprietor), it appears that in 1807 a settlement was made between the Gaikwar and Chiefs tributary to him, through the intervention, and under the guarantee of the British Government; engagements being then taken for the payment of a fixed revenue by those Chiefs whose estates were not held rent-free. The amount of tribute then fixed for the Kattywad estates of the Thakore of Bhaunagar was 74,000 rupees; and, as it was thought expedient to consolidate the whole of the claims over all the Thakore's estates, an agreement was made, with his consent, for the transfer of the revenue payable by him to the Gaikwar for his Kattywad estates to the British Government, as part of the consideration for certain arrangements, which were at the same time made for the support of a contingent force. In 1820, by further agreement, the Gaikwar engaged to send no troops into Kattywad and to make no demands upon the province except through the British Government. Since that date the supreme authority in Kattywad (as far as it had been previously vested in the Peishwa, or in the Gaikwar) has been exercised solely by the British Government. The tribute payable by the different Chiefs has been collected by the British authorities; the Gaikwar receiving from them the share of it to which he is entitled according to the existing agreements. The tribute payable in 1871 by the Thakore of Bhaunagar (in respect of the aggregate of his Kattywad estates included in the alleged cession of 1866) is stated in the "Kattywad Local Calendar and Directory" of that year (a book referred to during the last argument as containing correct information on public matters relating to the province) as amounting in the whole to 1,54,917 rupees per annum, of which 1,28,060 rupees were collected in right of, and retained by, the British Government; 3,999 rupees were collected in right of, and paid over to, the Gaikwar; and the sum of 22,858 rupees was a customary sub-tribute, paid, under the name of "Zortullubee," to the Nawab of Junaghar, one of the Chiefs of the province, who appears formerly to have established some kind of superiority

over the rest.

8. Their Lordships have now to refer to the judicial administration of Kattywad. Down to 1831 this appears to have been left, without any regular control, in the hands of the Chiefs. But in that year (a "Political Agency" having been established at Rajkot in 1820) the British Government constituted a Criminal Court of Justice in Kattywad, under the presidency of the Political Agent, with three or four Chiefs as assessors, for the trial of capital crimes in the estates of Chiefs who were too weak to punish such offences, and of crimes committed by petty chiefs upon one another, or otherwise than in the exercise of their recognized authority over their own dependents. Until 1853 every sentence passed by this Court was submitted to the Bombay Government for their approval. (Aitchison, Vol. VI, p. 367). In 1862 the whole of this administration was reorganized. The province was then divided into four districts (the eastern district including all the talooks belonging to the Thakore of Bhaunagar), in each of which were placed officers, called "Political Assistants," with other British Magistrates under them, all under the control of the Political Agent. The entire number of Kattywad States under separate Chiefs (large and small) is 188, of whom 96 pay tribute to or in right of the British Government only; 70 to or in right of the Gaikwar only; and nine (of whom the Thakore of Bhaunagar is one) to or in right of both Governments ("Kattywad Directory," pp. 54-56). These Chiefs were, by the arrangements made in 1862, distributed into seven different classes. To the first class (consisting of four or five, of whom the Thakore of Bhaunagar is one), unlimited criminal and civil jurisdiction, with the exception of criminal jurisdiction in certain cases over "British subjects," (however that expression ought to be interpreted), was allowed. The jurisdiction of the second class (either originally, or by the effect of a Circular Order afterwards issued, No. 14 of 1866) was substantially the same. The jurisdiction of the four next classes was restricted, in criminal matters, to limited powers of fine and imprisonment, and, in civil matters, to the cognizance of suits of limited amount; the greatest powers (those of the Chiefs of the third class) being to imprison for seven years, to impose fines of 10,000 rupees, and to decide civil suits of 20,000 rupees" value; while the sixth class could only imprison for three months, impose fines of 200 rupees, and decide civil suits of 500 rupees" value. The seventh, or lowest class of all, was entirely deprived of all civil jurisdiction; but, in criminal cases, might imprison for not more than fifteen days, and impose fines not exceeding 25 rupees. All other jurisdiction, both civil and criminal, throughout the province, beyond the limits of that allowed to the Chiefs, was reserved to the British Officers and Magistrates, under the authority of the Political Agent; and, in 1871, there was an establishment of thirty-one such Officers and Magistrates in the whole. ("Directory," pp. 520-527.)

9. In 1863 two elaborate Codes of Regulations (based upon the Indian and other Codes) were promulgated, with the sanction of the Indian Government, for the guidance of British Judicial Officers and Magistrates in Kattywad. ("Directory," pp. 176, 253). These Codes established, both in name and in substance, regular and

fully-organized Courts of Justice, with powers to execute warrants and issue commissions throughout the province, and to take security from suspected persons in the name of the Queen. (Articles 39, 55, 154 of the Criminal, and Article 104 of the Civil Code). It may be added that, on the face of these Codes (especially by Article 10 of the Civil Code, which pointedly distinguishes the Chiefs of Kattywad from "Sovereign Powers" and "Independent Chiefs"), and by several later Circular Letters of the Political Agents (No. 11 of 1866, No. 2 of 1867, No. 11 of 1869, and that of the 7th May 1868), the whole jurisdiction exercised by the Chiefs of all the seven classes is treated as conferred upon them by the British Government.

10. These being the circumstances which their Lordships think material to a correct understanding of the arrangements between the Indian Government and the Thakore of Bhaunagar, and of the steps taken to carry them into effect, it now becomes necessary to advert to those arrangements. It appears that the difference between the position of the Thakore in his Kattywad estates, in which he continued to exercise his ancient powers, paying a fixed revenue, and his position in his British estates (including his two largest towns and his place of residence), in which, since 1815, he had been subject to ordinary British laws, was (in the language of Mr. Aitchison, Vol. VI, p. 374), "very irritating to him." With a view (among other things) to remove or diminish this source of discontent, an agreement was concluded between him and the Indian Government in 1860, which is printed at pp. 416-420 of the same volume of Mr. Aitchison's work.

11. It is entitled "Settlement, framed according to resolutions of the Bombay Government, Nos. 3826 and 3829, dated 23rd October, 1860"--a title which has the aspect of an agreement as to rent and other terms of tenure, rather than that of a treaty between the head of a Sovereign State and a foreign or independent power. When the particular terms of this agreement are examined, they confirm that impression.

12. By the 1st and 8th articles the Thakore of Bhaunagar and the British Government reciprocally agreed to cancel, from and after the 1st May 1861, "the lease of the villages of the Thakore's talooks in the districts of Dhundooka, Ranpur, and Gogo, which was executed in A.D. 1848," and, "instead thereof, the Thakore agreed to pay, for the whole of the villages enumerated in that lease, a fixed jumma of 52,000 rupees yearly forever," which sum "shall not be in any way affected by the result of any action or other process brought by any party against the Thakore's right of possession, in any part of the said talooks; nor shall the said estates (excepting Bhaunagar, with Wudwa, Sehore, and the ten villages thereof, about to be attached to Kattywad), be exempted on account of this payment from any general taxation, not coming under the head of land-tax or rental which Government may impose on their districts under the Regulations."

13. It appears, therefore, that the talooks in Gogo, including Gangli, which were "about to be attached to Kattywad," had been included in the lease of 1848,

which was then to be cancelled; and that, although the Government did not reserve, as to those particular talooks, the same right of "general taxation" which they expressly reserved as to the residue of the Thakore's British estates, which were intended to continue subject to the Bombay Regulations, still those talooks were included in the estates, in respect of which a fixed jumma of 52,000 rupees was to be paid in perpetuity by the Thakore.

14. By the 2nd article the Thakore agreed, (certain questions of account between himself and the British Government being thereby adjusted) "to pay up "his Kattywad tribute," (i.e., the jumma for his Kattywad property) which had been fixed in perpetuity in 1807, yearly in full, according to settlement."

15. By the 3rd and 9th articles it was reciprocally agreed that the port dues and customs of the port of Bhaunagar should continue to be collected at British rates, and by the British Government; but that, when collected, the whole net produce of the port dues, and three-fifths of the net produce of the customs, (as "the share of the Thakore") should be paid over to the Thakore by the Government, who were to retain, as the share of Government," the other two-fifths of those customs.

16. The town and port of Bhaunagar were part of the territory to which the 7th article, (that directly bearing upon the present question) relates. That article is in these words: Upon the above conditions Her Majesty's Government agree as follows: Government concede, as a favour, and not as a right, the transfer of Bhaunagar itself, with Wudwa, Sehore, and ten subordinate villages, from the district of Gogo, subject to the Regulations, to the Kattywad Political Agency."

17. This is not the language of cession. It is *prima facie* nothing more than an engagement for the transfer of the places mentioned (including Gangli), which were then, beyond question, British territory, from a Regulation Province to an extraordinary jurisdiction. The other articles are consistent with this view.

18. After the conclusion of this agreement in 1860, a delay of some years followed before anything was done with a view to give effect to the provisions of the 7th article; "owing" (as Mr. Aitchison states, Vol. VI, p. 374) "to some doubts as to the precise status of Kattywad with respect to British laws."

19. In 1865, however, the Thakore pressed for the completion of the arrangement. In the letter from the Secretary to the Government of India of the 31st of May 1865, to the Acting Secretary of the Government of Bombay (printed at page 181 of the Record), the measure is described as "the contemplated transfer of the town of Bhaunagar, of the District of Sehore, and of the villages in Dhundooka and Gogo, to the supervision, laws, and regulations of the Kattywad Political Agency." By that letter the Governor-General in Council authorized the contemplated arrangement" being at once carried into effect; with the reservation, however, (for which the Government of Bombay were directed carefully to provide), that, "in the event of gross misconduct on the part of the Thakore" (of which the Government of Bombay were to be the judges), "these

territories should revert." A reason was added for holding that "the projected transfer would have been legalized" by the agreement of 1860, viz., that "Her Majesty's Secretary of State for India had decided that Kattywad was not British territory."

20. Their Lordships think that, if such an opinion had been expressed by the Secretary of State for India (of which no direct evidence is found in the papers before them), and if that opinion could be proved to be well founded, it would still not have the effect of converting a transfer of certain British territories from ordinary British jurisdiction "to the supervision, laws, and regulations of the Kattywad Political Agency," into a cession of British territory to a Native State. Such a cession would be a transaction too important in its consequences, both to Great Britain and to subjects of the British Crown, to be established by any uncertain inference from equivocal acts.

21. Their Lordships assume (though the precise language used does not seem to be quite apt for that purpose), that what was intended was to confer upon the Thakore of Bhaunagar, within the "transferred" districts, as large a criminal and civil jurisdiction as that which he exercised in his estates situate within the proper limits of the Kattywad Political Agency, subject only to the same supervision and control of the Kattywad Political Agent to which he was subject in respect of those estates.

22. But such a grant of jurisdiction, (if the Government of India or the Crown, without a legislative Act, had been able to grant it), would not have deprived the Crown of its territorial rights over the "transferred" districts, or the persons resident therein of their rights as British subjects. Whatever may have been the opinion of the Indian Government as to the effect of what was done, (concerning which their Lordships will only observe that the documents of 1870 and 1871, printed at pp. 185 and 184 of the Record, take it for granted that a cession of territory to a Native State had been made, which is the point to be determined), their Lordships' judgment must be founded, not on mere opinions, but on facts; and they find, in point of fact, that there was no cession of territory in this case, unless it can be deemed to have been made by the agreement of 1860, or by the notification in the Bombay Government Gazette of the 29th January 1866, (issued, no doubt, in obedience to the directions of the Indian Government, contained in the letter of the 31st May 1865), which merely declared that, "in accordance with the Convention, &c," (i.e., with the agreement of 1860), the villages in question were, "from and after the 1st of February 1866, removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency, and transferred to the supervision of the Political Agency in Kattywad, on the same conditions as to jurisdiction as the villages of the Talooka of the Thakore of Bhaunagar heretofore in that province." (Record, p. 176).

23. Their Lordships agree in the reasons given by the Judges of the High Court of Bombay, on the 2nd December 1870, for holding this notification insufficient for the purpose intended; and they are unable to find, in any of the other documents

afterwards submitted to that Court on the application for a review, any good reason for the subsequent departure of the High Court from that opinion, so far as to admit a review. The second notification of the 4th January 1873, which appeared in the Indian Gazette after the review had been ordered, also left the case substantially where it stood before. That notification was merely to the effect that the villages, mentioned in the Schedule, "were, on the 1st February 1866, ceded to the State of Bhaunagar." The nature and effect of the act, so described as a "cession to the State of Bhaunagar," remains (as it was before) a proper subject for judicial inquiry. What was attempted was, in their Lordships' judgment, neither more or less than a rearrangement of jurisdictions within British territory, by the exclusion of a certain district from the Regulations and Codes in force in the Bombay Presidency, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a Native jurisdiction under British supervision and control. But this could not be done without a legislative Act, which, in this case, was never passed. By the Imperial Statute, 3rd and 4th Wm. IV, cap. 85, Section 43, a general power of legislation (with certain exceptions not material for this purpose) was given to the Governor-General in Council as to (among other things) "all Courts of Justice, whether established by Her Majesty's charters or otherwise, and the jurisdiction thereof." This power is, in substance, continued by 24 and 25 Vic., cap. 67, Section 22, though the particular clause of the former statute is thereby repealed. By the 24th and 25th Vic., cap. 104, Section 9, the High Courts of the several Presidencies were established with such jurisdiction as Her Majesty should, by her Letters Patent confer upon them; and, under the same statute, each of those Courts was also to have and to exercise, "save as by Her Majesty's Letters Patent might be otherwise directed, and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General in Council," all jurisdiction, power, and authority previously vested in any of the East India Company's Courts within the same Presidency, which were abolished by that Act. It is unnecessary to refer to later enactments, which only modified these provisions in a way not affecting the present case. The jurisdiction, therefore, of the Courts of the Bombay Presidency over Gangli rested, in 1866, upon British statutes, and could not be taken away or altered (as long as Gangli remained British territory) so as to substitute for it any Native or other extraordinary jurisdiction, except by legislation, in the manner contemplated by those statutes.

24. Upon two subordinate points in this case their Lordships think it right to add that they agree with the view taken by the High Court of Bombay.

25. Nothing, in their judgment, turns in this case upon the Indian Evidence Act of 1872, Section 113. The Governor-General in Council being precluded by the Act 24 and 25 Vic., cap. 67, Section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any legislative Act, purporting to make a notification in a Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that

cession. And with respect to the competency of the Courts of the Bombay Presidency to proceed with the suits between these parties, if Gangli had, by any valid cession, ceased to be British territory, their Lordships agree with the High Court, that the foundation of the jurisdiction of those Courts over the subject-matter of this suit, and the parties thereto, was territorial, and that it could no longer be exercised (whatever might be the stage or condition of the litigation at the time) after such a valid cession had been made.

26. Their Lordships will humbly advise Her Majesty to dismiss the appeal. Messrs. Lavford and Waterhouse were agents for both parties.