
(1896) 04 MAD CK 0012
In the Madras High Court

Fischer

APPELLANT

Vs

Secretary of State for India in Council
Orr and Another
Vs Fischer

RESPONDENT

Date of Decision : 30-04-1896

Acts Referred:

Specific Relief Act, 1877 — Section 42

Citation : (1896) ILR (Mad) 292

Hon'ble Judges : Arthur J.H. Collins, C.J;Benson, J

Bench : Division Bench

Judgement

1. In Original Suit No. 14 of 1892 on the file of the Subordinate Court of Madura (East), Mr. R. Fischer, claiming to be the duly registered holder

of the village of Kondagai in the Sivaganga Zamindari, sued the Secretary of State for India in Council, for a declaration that the order of the

Madras Government No. 1088, dated 14th November 1891, directing the Collector to cancel his separate registration and assessment of the

village, was ultra vires and illegal.

2. The Subordinate Judge dismissed the suit with costs, and the plaintiff now appeals (Appeal Suit No, 10 of 1895) to this Court against that

decree.

3. In Original Suit No. 20 of 1893 on the file of the same Subordinate Court, the plaintiffs, who are the present lessees of the Sivaganga Zamindari,

sued Mr. R. Fischer for the balance of poruppu, magamai and road-cess, with interest, alleged to be due on the said village of Kondagai for fasli

1300. The Subordinate Judge gave a decree for the sum which he found to be due, but in appeal the District Judge of Madura found that nothing

was due and dismissed the suit with costs. Against this decree the plaintiff's now bring this Second Appeal No. 1245 of 1895.

4. The evidence in Original Suit No. 14 was, by consent, taken as evidence in Original Suit No. 20 also, and both appeals were argued together.

5. In order to understand the matters in issue, it is necessary to set forth the transactions which preceded the present litigation. These may be stated

as follows, adopting, with but slight variations, the words of the District Judge:

For some years prior to 1872, Rani Kattama Nachiyar was Zamindarni of Sivaganga and in 1869 one Dhorasinga Tevar instituted a suit in the

District Court of Madura (Original Suit No. 2 of 1869) against the Rani, her son, and three daughters, in order to establish his right of succession

to the Zamindari. A decree was passed in his favour and the Rani and her children, after appealing unsuccessfully to the Madras High Court,

preferred an appeal to the Privy Council. Mr. Fischer proceeded to England in order to assist in the prosecution of this appeal and on the 13th

December 1872, the Rani, her son and three daughters executed in favour of Mr. Fischer an indenture (Exhibit A) of which the following are the

terms material to the suit: In consideration of the sums the said Robert Fischer is to spend on the appeal and in consideration of the services he has

rendered and is to render in future, we hereby convey and sell to the said Robert Fischer, his heirs and assigns the village of Kondagai attached to

the Tiruppuvanam Taluk, Sivganga Zamindari, Madura District, Sub-District of Madura...to be enjoyed by him from generation to generation as

long as the sun and moon endure without any obstruction and with full powers of alienation by way of gift, sale or otherwise, subject to a payment

to the circar, of Rs. 3,500 every year as peishcush.... We hereby bind ourselves jointly and severally to deliver possession of the said village to the

said Robert Fischer, his heirs and assigns and to inform the Collector of the said District and get the said village sub-divided under Regulation

XXV of 1802 and registered in the name of the said Robert Fischer, his heirs and assigns, and to arrange for receiving every year the amount of

peishcush above fixed from the said Robert Fischer, his heirs or assigns as soon as judgment is obtained in the appeal above mentioned, or as soon

as the said litigation comes to a close in any other manner... We do hereby empower the said Robert Fischer jointly and severally to conduct the

said appeal...and to do all that is necessary in the said appeal and to pay the necessary sums from his own funds towards the fees and all other

expenses of the said appeal and agree to accept and consider all suits to be paid on account of the said appeal by the said Robert Fischer as the

consideration money for this agreement as mentioned above as payments directly made to each and all of us.

6. On Mr. Fischer's return from England after the successful prosecution of the appeal in the Privy Council, the Rani put him in possession of the

village in 1874 and on the 14th May 1877 she, her son and her three daughters executed in favour of Mr. Fischer another instrument which is

called a Deed of Release (Exhibit B). This document, after reciting, inter alia, that by the agreement, dated the 13th December 1872 (Exhibit A)

All the exhibits referred to were filed in Original Suit No. 14 of 1892, in the subordinate Judge's court, Mudura (East) as well as by another

agreement, dated the 12th April 1872, the right to the village of Kondagai and all its lands and hamlets had been given to Mr. Fischer, that Mr.

Fischer had paid the Rani and her children according to the terms of the said agreements the sum of Rs. 20,000 for the expenses of the appeal to

the Privy Council, that the decree of the District Court of Madura and of the Madras High Court had been set aside by the Privy Council and that

the executants had obtained, for the lifetime of the Rani, all the benefits that could be derived according to law in the matter of the said suit,

proceeds in the following terms: ""Whereas you have agreed to pay to the zamindari the peishcush that may be fixed according to law upon the said

Kondagai village...and whereas we have agreed to get the said village of Kondagai inclusive of its hamlets, registered in your name in the

Collector's office under Regulation XXV of 1802; now in consideration of all the considerations detailed above, we hereby agree to you, your son

and grandson from generation to generation, holding and enjoying the said village of Kondagai together with the eight kinds of products of an estate

and with full powers of alienation by sale, gift or otherwise : and we hereby agree to relinquish to you all the rights and connections which Kattama

Nachiyar, one of us, now possesses in the village and all the rights and connections which any of us may acquire after her lifetime.

7. In pursuance of these instruments and admittedly on or about the 14th May 1877, an application (Exhibit C) addressed to the Collector of

Madura was prepared by Rani Kattama Nachiyar and was expressly stated to be an application u/s 1 of Act I of 1876 and Section 8 of the

Istimirar Sannad and Section 9 of Regulation XXV of 1802. This application runs as follows: ""The village of Kondagai attached to the

Tiruppuvanam taluk of my zamindari was given to Mr. E. Fischer and has been in his enjoyment. As it has been arranged to pay through me the

amount that might be assessed separately on the village with reference to the accompanying statement showing the beriz of the zamindari and the

said village, I pray you will separately assess the said village and register the village in the name of the said Mr. R. Fischer."" This application,

however, was never presented to the Collector, because Rani Kattama Nachiyar died a few days after signing it and was succeeded by

Dhorasinga Tevar as Zamindar of Sivaganga.

8. There is no record of any transaction relating to the village of Kondagai during the next five years, but on the 22nd February 1883, Dhorasinga

Tevar the present zamindar's father, executed in favour of Mr. Fischer a deed of release and agreement of ratification (Exhibit D) in these terms:

Whereas the village of Kondagai...of my zamindari...has been granted to you in perpetuity by the late Bani Kattama Nachiyar and others and has

been in your possession according to the terms of the documents executed by them to you there for on the 13th December 1872 and on the 14th

May 1877; and whereas I have received from you Rs. 2,000 as the consideration for my ratifying your rights in accordance with the terms of the

said documents and for relinquishing whatever rights I possess therein, I hereby ratify your rights of every description in the said village and

relinquish all my rights therein in your favour. Wherefore, as per the terms of the said documents, dated 13th December 1872 and 14th May 1877,

you and your heirs and assigns shall hold and enjoy the said Kondagai village...in perpetuity...with full powers of alienation by sale, gift or

otherwise. You shall pay to my zamindari the sum of Rs. 3,500, the poruppu fixed on the said village, as well as road-cess, magamai, etc.,

according to custom.

9. This instrument was followed by an application (Exhibit E) presented to the Collector of Madura by Dhorasinga Tevar on the 25th March 1883

under Act I of 1876. In that application, Dhorasinga Tevar, after stating that the

village of Kondagai had been granted in perpetuity to Mr. Fischer

by the late Rani, said, "I have also ratified the same by means of a document, dated 22nd February 1883, and therefore, request you will get the

separate assessment fixed thereon according to the Act. I herein enclose a statement showing the 10 years' beriz of the zamindari for the purpose.

10. Mr. Fischer himself presented a similar application (Exhibit I) for the separate assessment and registration of the village on the 29th March

1883, but these applications were not disposed of until the 22nd September 1883. By that time Dhorasinga Tevar was dead and had been

succeeded by the present zamindar, who objected, by a petition, dated 27th August 1883, to the sub-division. On this the Collector held, in his

proceedings [Exhibit I(a)], dated 22nd September 1883, that Mr. Fischer's application must fail "because it is opposed by the ipso facto zamindar

who was the eldest son of the zamindar lately deceased.

11. The next event connected with this suit in chronological order is the acquisition of a lease of the Sivaganga zamindari by the present lessees on

the 23rd May 1887. Within three months of that date, that is to say, on the 12th August 1887, the lessees executed a deed of release (Exhibit F)

guaranteeing Mr. Fischer, in consideration of services rendered to them by him, undisturbed possession and enjoyment of the village of Kondagai,

so far as they are concerned, during the term of their lease and "accepted his position such as it may have been at or prior to the date of the

execution of the lease and were prepared in any formal way which it may be agreed necessary and expedient to confirm this guarantee."

12. Then on the 23rd January 1890 the present zamindar executed in Mr. Fischer's favour a deed of release (Exhibit G) and after expressly

mentioning therein the deeds executed by Rani Kattama Nachiyar on the 13th December 1872 and the 14th May 1877 (Exhibits A and B) and the

deed executed by his father Dhorasinga Tevar on the 22nd February 1883 (Exhibit D) and reciting that he himself had received Rs. 3,500 in cash

from Mr. Fischer as the consideration for ratifying Mr. Fischer's "permanent lease, without questioning it" made the following covenant: Therefore I

forfeit and relinquish the right 1 profess to have in me to question the said permanent lease or the terms of the said lease deeds, and 1 hereby ratify

your right. You and your heirs shall hold and enjoy the said villages absolutely

according to the terms of the aforesaid permanent lease deeds.

13. Mr. Fischer then applied by a petition (Exhibit III) framed under Regulation XXV of 1802 and Act I of 1876 to the Collector of Madura for

the separate registration and assessment of the village of Kondagai.

14. On this the Collector, acting in conformity with the provisions of Act I of 1876, sent notices [Exhibits O and O(i)] to the zamindar of Sivaganga

and to his lessees. The zamindar and the lessees both filed objections (Exhibits IV and V) to the grant of Mr. Fischer's application. After due

enquiry the Collector, in accordance with Section 2 of Act I of 1876, ordered the separate registration of the village of Kondagai in Mr. Fischer's

name, fixed the assessment on the portion thus sub-divided at Rs. 2,757-4-1 per annum and reported his proceeding's to the Board of Revenue in

his letter (Exhibit VI), dated 13th November 1890, for sanction as to the apportionment of assessment.

15. In its proceedings (Exhibit VI), dated 5th December 1890 the Board of Revenue sanctioned the separate assessment of the peishcush as

proposed by the Collector, and the lessees thereupon appealed [Exhibits VII and VII(a)] to the Board against the Collector's order directing the

separate registration and assessment. On this the Board of Revenue, in its resolution (Exhibit VIII), dated 21st April 1891, held that it had "no

power to interfere with the Collector's orders as to the separate registration of the village, which can only be set aside by a suit in Civil Court, vide

Section 5[1] of Madras Act I of 1876," but called for a further report as to the apportionment of assessment and, on receiving it, proceeded on the

17th August 1891, u/s 7[2] of Act I of 1876, to revise its original order on this point and fixed the assessment at Rs. 3,027-2-8 instead of at Rs.

2,757-4-1.

16. Dissatisfied with this result, the lessees appealed (Exhibit IX) on the 21st September 1891 to the Government of Madras against the resolution

of the Board of Revenue and, by its order (Exhibit X), dated the 14th November 1891, the Madras Government, without giving any notice to Mr.

Fischer, cancelled both the separate registration and the separate assessment of the Kondagai village and its hamlets.

17. These being the facts of the case, the suits out of which the present appeals arise were instituted with the results already stated in the first two

paragraphs of this judgment.

18. We do not think it necessary to decide, or to discuss, the many difficult questions dealt with by the Courts below. It seems to us that the rights

of the parties, so far as they are properly raised in the suits before us, may be decided on comparatively simple grounds. The claim of the lessees

for balance of poruppu, magamai and road-cess due by Mr. Fischer forma the subject of Second Appeal No. 1245 and its validity evidently

depends upon the terms under which Mr. Fischer holds the village of Kondagai from the zamindar. Those terms are contained in Exhibits A, B and

D, and the first question for our consideration is as to what was the real agreement evidenced by these documents. The Subordinate Judge held

that they evidenced merely the grant of a permanent lease of the village subject to a payment of Rs. 3,500 as quit-rent (his translation of the word

poruppu" in Exhibit D) together with "magamai" (contributions to the landlord for maintenance of temples and charities) and road-cess. The

District Judge, however, held that the transaction was an absolute sale of the village, with an agreement that the village should be separately

registered and assessed by the Collector in Mr. Fischer's name, after which he would be liable to pay the assessment so determined whether more

or less than Rs. 3,500, but that until such separate assessment should be made, Mr. Fischer should pay Rs. 3,500, to the zamindar that being the

proportionate assessment which the parties estimated would be payable by the village when separately assessed. The Subordinate Judge observed

that even if Exhibits A and B evidenced a contract of sale, they were ineffectual to bind the Rani's successor as she had only a life-interest (like

that of a Hindu widow) in the estate, while her children had no interest at all, and he held that Exhibit D was intended to materially limit the extent of

the estate contemplated to be given by Exhibits A and B. In support of this view he referred to the substitution of the word "poruppu" in Eichibit D

for "peishcush" in Exhibits A and B, and to the absence in Exhibit D of any reference to separate registration and assessment. The District Judge

appears to regard the use of the word "poruppu" as unimportant and as meaning no more than "peishcush" when the sum was paid not direct to

revenue authorities but to the zamindar. We agree with the District Judge in concluding that the omission of all reference to separate registration

and assessment in Exhibit D is of no special import, since such registration and assessment was expressly agreed to in Exhibits A and B which

were confirmed by Exhibit D, and the latter was immediately followed by an application (Exhibit E) from the Zamindar to the Collector reciting the

deeds and adding "I, therefore, request that you will get the separate assessment fixed thereon according to the Act.

19. We do not think that either the Subordinate Judge or the District Judge has correctly understood the full force of Exhibit D. We do not think

that it was intended by that document to limit the quality of the estate conveyed by Exhibits A and B, or to disown the agreements therein that

application should be made to the Collector for the separate assessment and registration of the village; but in Exhibits A and B there was manifestly

an uncertainty as to whether Mr. Fischer was to pay the sum of Rs. 3,500 (Exhibit A) or was to pay the peishcush which might be fixed by the

Collector (Exhibit B) and there was no provision at all in Exhibits A and B for payment of magamai and road-cess. It was, we think, mainly to

define and provide for these matters that Exhibit D was written. In it the Zamindar accordingly accepts all that is in Exhibits A and B, and

relinquishes all his own rights in the village, but adds at the end, as if to clear up the uncertainty of Exhibits A and B as to the payments, "you shall,

as usual, pay into my Zamindari Rs. 3,500, being the poruppu fixed for the said village, as also road-cess, magamai, etc." It is to be observed that

even in Exhibits A and B the agreement is that the peishcush is to be paid "to the zamindari," and the same condition occurs in Exhibit 0 where the

Rani says: "It has been arranged to pay through me the amount that might be separately assessed, etc." Thus though the village was to be

separately registered and assessed, the assessment, even after such separate registration, was to be paid not direct to the Collector, but to the

zamindar. The separate registration and assessment was of importance to the parties, and especially to Mr. Fischer, since it would save each party

from liability except in respect of his own portion; but the fact that the sum due by Mr. Fischer is all through stipulated to be payable to the

zamindar supports the view that the parties intended the sum to be fixed permanently at Rs. 3,500, and not to be liable to alteration according to

the apportionment which the Collector might make. We think it is impossible to hold that the express sum named in Exhibit D as payable by Mr.

Fischer can be held to be controlled by the indefinite terms of Exhibit B. It seems to us clear that, instead of accepting those indefinite terms,

Exhibit D fell back on the definite terms of Exhibit A, and reaffirmed them, with an addition regarding magamai and road-cess, regarding which

there is now no dispute. Exhibit D with the subsidiary instruments Exhibits A and B are the title-deeds by which Mr. Fischer is bound. Exhibits F

and G by which the lessees and the present zamindar confirmed Mr. Fischer's title do not introduce new terms.

20. On the true construction, then, of Exhibits A, B and D, we are of opinion that Mr. Fischer is bound to pay the lessees Rs. 3,500, with magamai

and road-cess, whether his village is separately registered and assessed or not. On this finding the decree of the Subordinate Judge in Original Suit

No. 20 was right, and the decree of the lower Appellate Court was wrong.

21. In Second Appeal No. 1245, we reverse the decree of the District Judge with costs, and restore that of the Subordinate Judge.

22. Turning now to Appeal Suit No. 10, we do not think that it is necessary for us to say anything further on the disputed question as to the

character of the estate conveyed by Exhibits A, B, D, F and G. Looking to the special agreements in Exhibits A and B, which are confirmed in the

subsequent instruments, and which specially provided for separate registration and assessment, and looking to the importance to Mr. Fischer of

these agreements, it may well be that, in a suit properly framed for the purpose, u/s 6, Act I of 1876, the Civil Court would grant him a ""declaration

that separate registration ought to be made"" if the Collector refused such registration on application being made to him. But this is not what Mr.

Fischer has sued for. His suit is for a declaration that the order of the Madras Government (Exhibit X) directing the Collector to cancel the

separate registration and assessment of the village previously made by him is invalid and ultra vires. No consequential relief is sought, unless,

indeed, it be in the general words of prayer ""and for such other relief as the circumstances of the case may require."" If these words contain a prayer

for a declaration that the registration and assessment of the Collector ought to be restored, the suit is clearly bad for nonjoinder of parties. It is, as

now framed, against the Secretary of State for India only; but if the Collector's order is to be restored, it is clear that the lessees [303] and the

zamindar should have been made parties and given an opportunity of contesting a claim which they regard as injurious to them.

23. If, however, the above, words are mere surplusage, and the suit is really for a bare declaration that the order of the Madras Government is

ultra vires and illegal, it is clear that the suit is not sustainable with regard to the provisions of Section 42 of the Specific Relief Act, for long before

the date on which the suit was filed (7th March 1892), the order had been communicated to the Collector and had been carried out by that officer

on the 13th January 1892 (Exhibit X). Mr. Fischer, therefore, when he filed the suit ought to have asked for substantial relief and not for a mere

declaration. It is suggested that he would not ask for this relief lest he should be met by a plea of limitation founded on the Collector's refusal in

1883 (Exhibit I) to grant separate registration and assessment. Whatever the reason for the omission, we are of opinion that, under the

circumstances, the suit for a mere declaration was not sustainable. These considerations are sufficient to justify the Subordinate Judge's dismissal

of the suit and our dismissal of this appeal. We do not think it necessary to go at length into the questions which were debated in both the lower

Courts as to the powers of the Collector and of Government under Act I of 1876 and under the old Regulations XXV of 1802 and III of 1803.

We think it is clear, for the reasons stated in paragraph 20 of the Subordinate Judge's judgment in Original Suit No. 14, that when the Collector

ordered the separate registration and assessment (Exhibit VI), all the parties to the alienation had not concurred in applying therefor. It is beside the

mark to say that the zamindar's father had applied in 1883. That application was refused. It is also idle to say that under Exhibits A and B the

zamindar was bound to join in the application. Section 2 of Act I of 1876 does not require that the party should be merely entitled to registration,

but that the parties to the alienation should concur in applying"" for it. It is equally idle to say that the objection was not so much to separate

registration as to the amount of assessment to be fixed. Whatever the cause was, it is clear that the zamindar and the lessees not only did not

concur in the application but opposed it. That being so, we are of opinion that the Collector ought to have refused registration and left the party

aggrieved to his remedy by suit u/s 6[3] of the Act. The Collector, however, granted separate registration and assessment; but afterwards, under

the orders of Government, cancelled the registration. This cancellation must be regarded as a final refusal by the Collector to grant the separate

registration applied for by Mr. Fischer. If the latter was aggrieved by this refusal, his remedy was by a suit u/s 6 of the Act against the Secretary of

State as the authority in whose name the Collector acted, and against the zamindar and lessees, as persons whose interests would be affected by

the declaration to be asked for. He has not thought fit to adopt the remedy prescribed by the Act, and for the reasons already stated we are of

opinion that he cannot be granted the relief for which he has asked in the present suit.

24. We, therefore, confirm the decree of the Subordinate Judge and dismiss this appeal with costs.

[1]

[Section 5: Any person aggrieved by the fact of the separate

Persons aggrieved by re-registration of such portion may sue in a Civil Court for a

portion of registration may sue declaring that such separate registration ought not to be made in Civil Court.]

[2]

[Section 7: Any person aggrieved by the apportionment of the

Persons aggrieved by assessment u/s 2 of this Act may appeal to the Board

reason of assessment may of Revenue within ninety days from the date of the declaration

appeal to Revenue Board. of such assessment; and the order of the Board of Revenue

shall be final.]

[3]

[Section 6.--Any person aggrieved by the Collector's refusal to

Persons aggrieved by register may sue in a Civil Court for a decree declaring that Collector's refusal to such separation ought to be made.]

Register may sue in

Civil Court.