

(1920) 07 BOM CK 0040
In the Bombay High Court
Case No : Civil Reference No. 3 of 1920
In Re: Vasudeo Harihar Pandit

Date of Decision : 21-07-1920

Acts Referred:

Bombay Revenue Jurisdiction Act, 1876 — Section 12

Citation : AIR 1921 Bom 107 : (1921) 23 BOMLR 161 : 61 Ind. Cas. 146

Hon'ble Judges : Pratt, J; Norman Macleod, J; Fawcett, J

Bench : Full Bench

Judgement

Norman Macleod, Kt., C.J.—The Governor General in Council being desirous of having the decision of the High Court of Judicature at Bombay on the following question :?

Whether or not on the facts in the case stated the application of the Summary Settlement in or about the year 1864 to the villages and lands of Tatyah Maharaj situate in British India or to any and if so which was valid and legal ?

has referred the said question for the determination of this Court under the provision of Section 12 of the Bombay Revenue Jurisdiction Act X of 1876.

2. The parties to the reference are (1) H.H. the Maharajah of Kolhapur, (2) Shri Bala Maharaj, (3) Shri Jagannath Vasudev Pandit Maharaj, (4) the Secretary of State for India in Council. The last named holds no contentious attitude in relation to the matter, the real contestants being Shri Jagannath, who claims under a decision of the Privy Council to be the person entitled to the estate of Tatyah Maharaj, on the one hand, and His Highness the Maharajah of Kolhapur and Shri Bala Maharaj on the other.

3. The facts which require to be extracted from the case stated for the purpose of our decision are as follows.

4. Upon the downfall of the Peshwa, Sir Thomas Munro in 1818 when settling the Southern Mahratta Country which had fallen into the hands of the British Government, granted by Sanad dated the 2nd August to Bhau Maharaj, the youngest son of Sri Sideswar Maharaj appointed before 1800 to be the spiritual

preceptor of the then ruler of Kolhapur, three villages and one hamlet in the talukas of Chikodi and Manowlee as Inam Dharmadaya to be enjoyed from son to generation, etc., from generation to generation.

5. This grant was subsequently confirmed on the 24th October 1819 by a Sanad in the same terms signed by the Honourable Mountstuart Elphinstone.

6. Bhau Maharaj was at that time Prime Minister to the Maharajah of Kolhapur. On the same day as the Sanad was granted Sir Thomas Munro wrote to the Maharajah that the talukas of Chikodi and Hukeri had been given in charge of Bhau Maharaj, and requested His Highness to send orders to the Mamledar of the Company's Government and take possession of the talukas, and by a private letter of the same date His Highness was informed that it had been deemed necessary to grant four villages in the Talukas to Bhau as he was a particular friend of the Company.

7. In 1821 His Highness granted to Bhau ten villages several of which were within the said Talukas.

8. It was not until the 24th January 1826 that the cession of these talukas was recognized by treaty.

93 By Article 7 the Rajah of Kolhapur promised to continue to Bhau and his elder brother Baba their respective lands and rights agreeably to the Schedule annexed. The guarantee of the British Government to the enjoyment of the above lands and rights should only continue during the life-time of the abovementioned persons but the rights of their descendants as founded by Sanad or custom should not be prejudiced by the cessation of the said guarantee.

10. By a further Treaty confirmed by the Governor-in-Council on the 5th November 1827 after reciting the cession of these talukas to His Highness on his engaging to respect the right and privilege of the Zamindars, Inamdars and Vatandars of the said District, and the infringement of those rights by His Highness it was provided in Article 2 that His Highness should give back to the British Government the said talukas in the same state in which he received them. By Article 3 after reciting Article 7 of the previous Treaty and the guarantee given thereby to Bhau Maharaj and Baba Maharaj, and the fact that His Highness had never ceased to annoy and distress these persons by seizing their villages and other property, it was provided that it had been deemed necessary to extend the guarantee of the British Government to their descendants, and His Highness accordingly engaged never to molest them.

11. Thereafter a question arose with regard to the villages in these talukas granted to Bhau Maharaj His Highness during the period they were in his possession, and, though it is not quite from the letters Nos. 16 and 17 in the appendix to the case it seems that these grants were confirmed. Bhau Maharaj died in 1837 leaving two sons, Tatya and Dada.

12. In 1838 four villages and lands in the Poona District were given in exchange

for Keroor, one of the villages granted by the Sanad of 1818. From 1841 onwards arrangements were being made for the investigation of the claims of persons to hold villages and lands as Inam in the Southern Mahratta Country, and in 1843 a Committee was appointed to conduct the investigation. The inquiry proceeded until by Act XI of 1852 an Inam Commission was given a statutory existence, and rules were framed for the determination of the titles of claimants. The preamble to the Act is as follows :?Whereas in the territories of the Deccan, Khandesh and Southern Mahratta Country and in other Districts recently annexed to the Bombay Presidency claims against Government on account of Inams and other estates wholly or partially exempt from payment of land revenue are excepted from the cognizance of the ordinary Civil Courts and whereas it is desirable that the said claims should be tried and determined without further delay.

13. In 1859 an inquiry was held under the Act as to the succession to the villages in the Poona District given in exchange to Tatya Maharaj in 1838, and on the report of the Sub-Assistant Inam Commissioner the acting Inam Commissioner decreed that the villages should be continued in Inam for so long as there might be in existence any male lineal descendant of Bhau Maharaj.

14. As sufficient progress was not made under the Act of 1852, a more summary mode of settlement was projected. It was proposed to offer an enlarged tenure on certain terms to claimants to Inams. A Bill was prepared and negotiations were entered into with such claimants pending its becoming law. Tatya Maharaj objected to the Summary Settlement being applied to his Inams on the ground that he held under Treaty and in reply to a letter from the Revenue Commissioner of the 1st February 1862 to Government asking for instructions, Government replied that it did not consider that a prima facie case had been made out for excluding Tatya Maharaj's lands from the benefit of the Summary Settlement on the ground of their being held on political tenure. If Tatya refused to accept the unassailable title thus offered to him it would remain for further consideration whether any and what inquiry should be instituted into the title he held

15. On the 29th March 1862 Tatya agreed to the Summary Settlement being applied to the loam villages and lands etc. in " his enjoyment.

16. The Summary Settlement Act (Bombay Act II of 1863) was passed on the 9th April 1863.

17. The preamble states:?

Whereas it has been deemed expedient to provide for the final adjustment!, summarily, of unsettled claims to exemption from the payment of land revenue and to fix the conditions which shall secure, in certain cases, 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 of the Legislative Council of India extends.

18. Section 1 says:

When the holders of lands in any of the districts (except as excepted in Clause 2 of this section), held either wholly or partially exempt from the payment of Government Land Revenue, whose title to exemption has not yet been formally adjudicated, shall have consented to submit to the terms and conditions hereinafter described, to in preference to being obliged to prove their title to exemption enjoyed by them, it shall be lawful for the Governor in Council to finally authorise and guarantee the continuance, in perpetuity, of the said land to the said holders, their heirs and assigns, upon the said terms and subject to the said conditions.

19. Meanwhile Ravji Maharaj, the representative of Baba's branch, had been contending against the (application of the Summary Settlement to his Inams, but he consented on the 19th December 1863.

20. The Summary Settlement was accordingly applied to all the possessions of Ravji Maharaj and Tatya Maharaj in British India.

21. In 1866, Tatya Maharaj died and eventually Baba Maharaj Was recognized as his successor by adoption.

45. Baba Maharaj died in 1897 leaving a will whereby he appointed five trustees and directed his widow in certain events which have happened to adopt a son. On the 28th June 1901 the widow " purported to adopt Jagannath. On the 19th August 1901 she purported to adopt Bala.

22. By the decision of the Privy Council in Appeal No. 33 of 1914 Jagannath was declared to be the validly adopted son. His Highness the Maharajah did not give his consent to the adoption of Jagannath and supported the adoption of Bala. Although many grounds are stated in the case under which His Highness and Bala Maharaj contest the validity of the application of the Summary Settlement to the villages and lands of Tatya Maharaj only two have been argued before us, It has been contended that at the time the Summary Settlement was applied these villages and lands were either lands held under treaty, or under political tenure and therefore were excepted from the provisions of Act II of 1863.

23. I am of opinion that the villages and lands of Tatya were Inam and did not come within the exception in Clause 2 of Section 1 of the Act.

24. My learned brothers agree with me and have given very full and sufficient reasons for the conclusions they have arrived at; and so there is no need for me to go over the ground again at length.

25. The 1st and 2nd parties appear to me to have entirely misread the provisions of the Treaties of 1826 and 1827. The Sub-Assistant Inam Commissioner in his report (Appendix 18) seems to have fallen into the same error. When the two talukas came back to the British Government, they were to be taken back in the same state in which His Highness received them, that is to say, the Sanads

granted by His Highness would not be recognised. His Highness" guarantee not to molest Bhau Maharaj and Baba Maharaj could only refer to those possessions which they continued to hold in the territories of His Highness. These appear in the Schedule annexed to the Treaty of 1826. Bhau's title to the villages in the two talukas granted to him by His Highness after 1818 was not recognised by the British Government under the treaty, but was recognised afterwards in accordance with principles which the Government considered just and expedient. The Political Agent in his letter of the 18th April 1828 (Appendix 18) considered that such Inams might have been resumed according to the strict letter of the Treaty, but he had allowed them to remain in the possession of the proprietors in consequence of their having been restored at the suggestion of the British Government or granted with its concurrence. Tatya's title thereafter to these villages depended more on the goodwill of the British Government than on any regular grant. But as regards the villages mentioned in the Sanad of 1818 his title would be based on the Sanad after the talukas of Chikodi and Manowlee reverted to the British Government, and not on the treaty of 1827.

26. The fact that by that Sanad the villages were granted to Bhau Maharaj as Inam Dharmadaya is conclusive against the villages being held on political tenure.

27. Generally it may be pointed out that lands held on Saranjam, Jagheer or other political tenure were excepted from the provisions of the Summary Settlement Act for the protection of Government, and not for the protection of persons. We claiming exemption from the payment of land revenue. For the terms offered were extraordinarily favourable especially when the title to exemption was at all doubtful, as Government relinquished all claims whatever to the land on payment of a Nazrana, and in some cases of a fourth of the assessment. Subject to that the Inam would be held by the grantees to use an English expression, as freehold. It would not, therefore, be open to an Inamdar to question the validity of the application of the Summary Settlement to his lands and certainly not when he had agreed to such application. It might be open to the Government of India to criticise the application of the Summary Settlement to an Inam on the ground that the favourable terms which had been offered to the holder were beyond the powers of the Local Government.

28. The answer to the question propounded is that the application of the Summary Settlement in or about 1864 to the villages and lands of Tatya Maharaj situate in British India was valid and legal.

29. The 1st and 2nd parties must pay the costs of the 3rd party. No order as to the costs of the Government.

Pratt, J.

30. This is a reference by the Bombay Government u/s 12 of the Bombay Revenue Jurisdiction Act 1876.

31. The question referred is : " Whether or not on the facts herein stated the

application of the Summary Settlement in or about the year 1864 to the villages and lands of Tatyah Maharaj situate in British India or to any and if so which of them was valid and legal?"

32. The question has arisen out of a disputed adoption.

33. Baba Maharaj died in 1897 holding Inam villages both in British and Kolhapur territory.

34. In 1901 his widow Tai adopted first Jagannath in June and Bala in August.

35. The adoption of Jagannath has been held to be valid by the Privy Council. But the Maharajah of Kolhapur has refused his sanction to the adoption and has recognized the second adoptee, Bala.

36. For want of this sanction Jagannath, it is said, cannot succeed to the villages in Kolhapur territory. That is a question with which we have no concern. But it is further contended that the adoption is ineffectual in regard to the succession to the British villages also.

37. These British villages came under Summary Settlement under Bombay Act II of 1863. If the Summary Settlement is valid Jagannath is entitled to succeed.

38. But Bala who is a lineal descendant and the Maharajah of Kolhapur who supported Bala contend that the settlement is invalid; and that being set aside there is no right under the antecedent title of the adopted son either to succeed at all or to succeed unless recognized by Kolhapur.

39. It is thus that the validity of the Summary Settlement comes to be agitated after the lapse of half a century.

40. It is first necessary to trace the history of the title to the villages up to the time of the settlement.

41. Bala's grand-father Bhau was Prime Minister and spiritual preceptor to the Maharajah of Kolhapur and had rendered valuable services both to Kolhapur and to the Company's Government.

42. In 1818 on the settlement of the Southern Mahratta Country on the downfall of the Peshwa two talukas of Chikodi and Manoli were ceded to Kolhapur and at the time of the cession four villages in those talukas were granted in Inam to Bhau. The Sanad (Appendix 2) is of the 2nd August 1818. It is of the same date as the transfer of the talukas (Appendix 7) It describes the villages as Dharmadaya Inam to be enjoyed from generation to generation.

43. In 1821 the Maharajah of Kolhapur granted Bhau ten villages some in the same two talukas and some without those talukas.

44. In 1826 there was a treaty between Government and the Maharajah of Kolhapur (Appendix 11).

45. By Article 4 Government finally acknowledged that the two talukas had been ceded to Kolhapur and Kolhapur undertook to respect the rights of Inamdars.

46. By Article 7 Kolhapur promised to continue to Bhau villages specified in a Schedule which included the four villages granted by the British Sanad of 1818 and ten villages granted by Kolhapur in 1821. The British Government guaranteed Bhau enjoyment of these villages for life.

47. The Maharajah of Kolhapur did not perform his promise not to molest Bhau and by a treaty of 1827 (confirmed in 1829) the British government resumed the two talukas.

48. Article 3 of this treaty (Appendix 15) is as follows :?

In the 7th article of the said Treaty the possessions of Bhau Maharaj and Baba Maharaj were guaranteed to them for the terms of their respective lives only (provision being made that the rights of the descendants as founded on Sannud or custom should not be prejudiced by the cessation of the Bald guarantee). As, however, His Highness Chhatrapati Saheb has never ceased to annoy and distress these persons by seizing their villages and other property, it has been deemed necessary to extend the guarantee of the British Government to their descendants and His Highness accordingly engages never to molest them.

49. After this treaty Bhau held (a) four villages in the two talukas, in British territory in respect of which the British Sanad of 1818 had been granted, (b) other villages in the same two talukas in British territory granted by Kolhapur in 1821, and (c) other villages in Kolhapur territory also granted by Kolhapur in 1821.

50. In 1838, one of the four villages was exchanged for villages in Poona.

51. In 1843, Mr. Goldsmith's Inam Committee was appointed to investigate alienations in the Southern Mahratta Country. The rules of this Committee are subsequently embodied in the Schedule to Act XI of 1852. Under these rules lands held under Sanad declaring them to be hereditary were to be continued according to the terms of the Sannad (Rule 2, Schedule B, of Act XI of 1852).

52. In 1859, following this rule the Poona village was decreed by the Inam Commissioner to be continued in Inam so long as there may be in existence a lineal descendant of Bhau Maharaj (Appendix 18).

53. The procedure of the Inam Commission led to such lengthy and complicated inquiries that it was proposed to cut the matter short by a Summary Settlement under which the tenure of all personal Inams would be enlarged to a transferable freehold with descent not only to heirs by inheritance but to heirs by adoption. This was to be with the consent of the holders on payment in the case of lands already adjudicated by the Inam Commission of a Nazzerana of one anna of the assessment; and in the case of lands not adjudicated on payment of Nazzerana of four annas of the assessment; the extra three annas being the consideration

for waiver of the inquiry under Act XI of 1852. This proposal was enacted in Bombay Act II of 1868.

54. The representatives of the Inamdar family?Bhau's son Tatyā and his cousin Raoji?accepted the adjustment and the villages have been held ever since under this Summary Settlement.

55. Now of the various objections raised to the Summary Settlement only two have been argued before us. These are that the settlement is invalid or the villages are excepted from the re operation of Bom. Act II of 1863?

(1) Because they are held under treaty?section 2, Clause 1(1), of the Act.

(2) Because they had been granted under Jagheer or political tenure?section 2, Clause 1(2), of the Act.

56. It is said that when the villages were ceded by Kolhapur in 1827 Bhau had no title which he could enforce against the British Government : Cook v. Sprigg 1899] A.C. 572Bhau's title was therefore extinguished but as Bhau and his descendants continued to hold the villages it is argued that they must have done so under the guarantee in Article 3 of the treaty of cession.

57. Now when territory is ceded by one Sovereign State to another the latter may either ratify or repudiate existing grants. According to International Law change of sovereignty by cession does not affect private property and there is an obligation to ratify. All that was decided in Cook v. Sprigg was that this obligation cannot be enforced by Municipal Courts, In the present case the question of ratification was left in abeyance to be dealt with by the Inam Commission; and in the end the claim to ratification was compromised and adjusted under Bom. Act II of 1863.

58. It is, therefore, not correct to say that Bhau had no rights after the cession. He continued to hold under his original title?a title precarious until ratified.

59. Nor does the fact that he continued to hold pending ratification lead necessarily to the conclusion that he held under the treaty. To establish this it must be shown either that the original title was under a term of a treaty which remained in force or that the treaty of cession guaranteed title.

60. Now it is true that the original title was guaranteed by Article 7 of the treaty of 1826 but as that term of the treaty was superseded by the treaty of 1827 that guarantee was determined at the time of the cession.

61. There was a further guarantee in Article 3 of the treaty of 1827?but I am unable to construe this as affecting the British villages at all. The two talukas were resumed in order to save Bhau from molestation by Kolhapur. Kolhapur was in no way solicitous for the welfare of Bhau and his descendants and could not have requested the British Government to guarantee Bhau's enjoyment of villages in British territory. The British would not and Kolhapur could not molest Bhau in British villages. But Kolhapur could molest Bhau in the villages that were

not resumed. By Article 7 of the treaty Kolhapur engaged not to do so and the British Government gave a guarantee for the protection of Bhau and his descendants in those villages.

62. It is true that the Sub-Assistant Inam Commissioner in his report in 1859 (Appendix 18) described Bhau's title as resting partly on the guarantee of the British Government. This is an erroneous construction and the report cannot prevail against the plain words of the treaty. On the other hand the Alienation Settlement Officer in 1803 correctly construed the guarantee as limited to Kolhapur villages (Appendix 30). I am satisfied that at the time of the Summary Settlement the villages were not held under treaty.

63. The second contention that the Inam was a Jagheer or held under political tenure is easily disposed of. The points urged are that Bhau had rendered political services, that he is described in the Sanad as well-wisher of Company's Government, and that the Inam was described as of Jagheer in letters written in 1818. But these circumstances cannot prevail against express terms of the Sanad in which the Inam is described as Dharmadaya, i. e., charitable or religious. Bhau was both a Prime Minister and a spiritual preceptor and the Inam was given to him in the latter capacity. Again if the Inam was Jagheer it was liable to resumption u/s 38 of Regulation XVII of 1829 and the Poona village would have been settled under the Jagheer rules and not under Rule 2 of the Schedule to the Act of 1859. And lastly Government on the 6th March of 1862 decided that the Inam was not Jagheer (Appendix 21) and this decision is conclusive u/s 16(c) of the Act of 1862. The decision was given shortly before the Act came into force but that makes no difference. The Act was the last stage of a laborious process that had already lasted nineteen years and provision was made by Section 13 for the validation of prior orders.

64. I, therefore, find that the Inam was not Jagheer.

65. The application of the Summary Settlement was, therefore, valid and that is the answer to the reference.

Fawcett, J.

66. The objection that the application of the Summary Settlement is invalid because the property was held on political tenure can be shortly disposed of.

67. In the first place the decision of the Bombay Government that a, prima facie case had not been made out for excluding the lands from the Summary Settlement on the ground of their being held on political tenure (which was communicated to the Revenue Commissioner in the letter of 6th March 1862 (App. 21, p. 48, of the statement) is conclusive and cannot be questioned in a Civil Court. This follows from the enactment in Section 16(c) of Bom. Act II of 1863. It is true the decision was made prior to the date when that Act came into force; but the Commissioner's letter of 1st February 1862, referring the point for determination, shows that a similar provision was contained in the Rules issued

for effecting the settlement?which receives legislative validation as an " order issued " falling u/s 12 of the Act.

68. Secondly, there does not appear to be any substance in the contention that the lands were, " granted or held as Jagirs or Saranjams or on similar political tenure," so as to be excepted u/s 1, Clause 2, of the Act. The original Sanads (App. 2 and 3, pp. 12, 14) and the Schedule annexed to the Treaty of 24th January 1826 (App. 10, i describe the grant as one of " Inam Dharmadaya", i. e., of a religious nature. This would scarcely have been done, if the grants were really intended to be Saranjam or Jagir grants. Such grants by the British Government in Bombay generally contained the words "as Jagir": cf. *Gulabdas Jugjivandas v. The Collector of Surat* (1878) ILR 3 Bom. 186; *Dosibai v. Ishwardas Jagjivandas* I.L.R(1895) Bom. 561; and *Dosibai v. Ishvardas Jagjivandas*. It is true that in two letters of 1818 Sir Thomas Munro describes the grant as a "Jagir" (App. 4 and 5, pp. 14, 15): but the word there was probably used in a loose sense and cannot prevail against the terms of the formal Sanads. Nor was any such claim apparently set up before the Inam Commissioner, when he enquired into the title on which the Poona villages were held; and his decision appears to treat them as held in ordinary Inam (App. 18, pp. 43-46). When Taty and Raoji Maharaj protested against the Summary Settlement being applied, they did not set up a claim to exception on the ground that the lands were held on political tenure, but on the ground that they were Inam Dharmadaya grants, guaranteed hereditarily under the Treaty of 23rd October 1827 (App. 20 and 29, pp. 47 and 53). In para 5 of his letter of 6th July 1863, Raoji again describes the grant as one of Khairat, i.e., of a religious or charitable nature. The Commissioner's letter of 1st February 1862 also specifically states that the latter's claim was that the lands should be excepted as held " under treaty. " In these circumstances, even supposing the point is open to reconsideration, there seems no good ground for differing from the view taken by the Bombay Government in 1862.

69. The other objection that the lands were " held under treaty " and so fall under the 1st head of Clause 2 of Section 1 of the Act requires more consideration. The 3rd article of the Treaty of 1827 (as I read it) undoubtedly contains a guarantee of the British Government for the continuance of the lands entered in the Schedule to the Treaty of 1826 to the descendants of Bhau and Baba Maharaj; and it is contended by the learned Advocate-General that this guarantee is the foundation of the title of those descendants to the lands. This is based on the argument that, under the cession of the talukas containing the lands in question by the Rajah of Kolhapur to the British Government (Article 2 of the Treaty of 1827), the lands came back to the British Government free from any rights, so that the holders of the lands and their descendants can only claim a title to them by virtue of the Treaty. In support of this contention, the case of *Cook v. Sprigg* [1899] A.C. 572 was cited. That, however, only decides that upon annexation of territory by the British Government persons to whom concessions have been made by the former sovereign cannot enforce them against its

successor, or (as it is put in Halsbury's Laws of England, Vol. XXIII, Article 652 at p. 311) "nor can privileges or rights obtained from the predecessor be directly enforced against the successor." This does not apply to the present case, for the rights in question to these lands were obtained not from the predecessor (i.e., the Kolhapur Maharajah) but from the successor itself, i.e., the British Government which had granted them prior to the original cession of the talukas to Kolhapur under the Treaty of 1826. There could never be any question of the British Government repudiating such rights, especially as the Treaty of 1827, Article 2, provides that the talukas shall be given back "in the same state in which he (the Rajah of Kolhapur) received them." This is confirmed by the letter of the Political Agent (App. 16, p. 41), which only discusses the validity of grants subsequent to the cession of 1826. The appended statement (p. 42) accordingly deducts all "old Inama in the enjoyment of the proprietors at the time the District was ceded by the Honourable Company," as well as the grants to Bhau Maharaj, which are now in question. The original rights under the Sanads, therefore, remained undisturbed, pleno vigore. This is borne out by the report of the Inam Commissioner regarding the Poona villages (App. 18, pp. 43-46), which recites the Sanads, as well as the Treaty of 1827, as part of "the evidence produced by the claimant in support of his title," and says (para 15) that the holder's claim "appears to be firmly based on the recognised competency of the grantor and the guarantee of the British Government" contained in the Treaty of 1827. The guarantee is not there regarded as the sole basis of his title : it also rests on the grant by a grantor, recognised as competent. This is in conformity with Rule 2 of Schedule B to Act XI of 1852, under which "any land held under a Sanad declaring it to be hereditary shall be so continued according to the terms of the Sanad," where the grant was by a competent authority and was not afterwards revoked, disallowed or altered. Apart from the guarantee contained in the Treaty of 1827, the Sanads, which directed the Inam to be continued "from son to grandson, etc., from generation to generation," would clearly justify the Inam Commissioner's decision that the villages "be continued in Inam for so long as there may be in existence any male lineal descendant of Bhau Maharaj."

70. It may be added that in the Schedule to the Treaty of 1826, the title to the four villages is shown as based on the Sanad of Sir Thomas Munro, confirmed by subsequent Sanads of the Honourable Mount Stuart Elphinstone (App. 10, item 15, cols. 4 and 8, pp. 22 and 23): and as the talukas were re-ceded to the British Government in the same state in which "the Rajah received them," that title would (as already pointed out) survive.

71. That being so, it seems to me that the lands cannot properly be treated as "held under treaty" within the meaning of Section 1 of Bom. Act II of 1863. The Treaty of 1827 is not the foundation of the holder's title, nor does the treaty itself specify the terms on which the lands were to be held, as would ordinarily be done in the case of such lands (cf. Clause 31st of Section 2, of Bom. Act VII of 1863). In other words the Treaty is not "the root of the title" of Bhau Maharaj and his descendants. This distinguishes the case from one like that which was

dealt with in *Shekh Sultan Sani v. Shekh Ajmodin* I.L.R.(1891) Bom. 431. where a treaty of July 1820 was held to be the root of the grantee's title (See at bottom of pp. 446, 456 of the report). In such a case the lands granted by Treaty would of course be "held under treaty."

72. This case (*Shekh Sultan Sani v. Shekh Ajmodin*) helps to show why the guarantee of the British Government regarding the enjoyment of the lands and rights conferred on Bhau and Baba Maharaj was inserted in the treaties of 1826 and 1827. The judgment (p. 446 of the report) shows that in a similar Treaty with the Rajah of Satara in 1819 "it was provided that the possessions of the Jaghirdars within the Raja's territory were to be under the guarantee of the British Government, which engaged to secure the performance of the service due to the Raja according to established custom." The guarantee was obviously for the protection of the grantees; there was an agreement given by the Rajah of Kolhapur to respect their rights accordingly; and in the Treaty of 1827 the pith of the matter is contained in the engagement of the Raja "never to molest" the descendants of Bhau and Baba Maharaj in the possessions guaranteed them. This was necessary, as a large number of Inams specified in the Schedule to the Treaty of 1826 still remained in the Kolhapur State. Col. Etheridge, the Alienation Settlement Officer, whose opinion is entitled to great weight, took this view of the effect of Article 3 of the Treaty of 1827. In his letter of 2nd December 1863 to Tatyah Maharaj (App. 30, p. 54) he says : " If your objection is, that Government have guaranteed the possessions (villages) granted to you by the Maharajah of Kolhapur by an article of the treaty, that treaty is not applicable in the present case at all. The Maharajah of Kolhapur constantly interfered with the possessions of Baba Maharaj and Bhau Maharaj and therefore, so long as the villages were continued to them, the Maharajah of Kolhapur was not to disturb their possessions. That is the only provision in the Treaty." Similarly Sir W. Lee Warner, in summarizing this Treaty, says : "In 1827 the Kolhapur Government began to oppress certain landed proprietors who possessed claims on British protection, and a right of intervention on their behalf was secured by Treaty " (see *Protected Princes of India*, p. 185). The guarantee of the British Government was subsidiary to this object.

73. The passage in *Shekh Sultan Sani's* case (p. 447) referring to Sir Thomas Munro's minute of 15th March 1822 was cited in support of the view that the guarantee, and not the Sanads, formed the basis of the hereditary title to these lands. That minute, however, appears to refer to Sanads granted by pre-British authorities, and cannot rightly be applied to a Sanad granted by Sir Thomas Munro himself. Even in the case of Jagirs, granted by the British Government, which *prima facie* is an estate only for life, the rule laid down is that where there 1880 is a grant to a man and his heirs, and nothing to control the ordinary meaning of the word, the grantee takes an absolute interest. In this case the grant in terms was to Bhau Maharaj and his lineal male descendants ("son to grandson etc"), and this condition is specified in the Schedule to the Treaty of 1826 (App. 10, p. 23). The Sanads were confirmed by Government; and

therefore their hereditary nature had to be recognised under Act XI of 1852, Section 4 and Schedule B, Rule 2.

74. I am, accordingly, of opinion that the lands cannot be treated as "lands held under treaty," so as to be excepted under Bom. Act II of 1863, Section 1, Clause 2.

75. Even if the lands were "held under treaty", I do not think this would suffice to invalidate the application of the Summary Settlement, made with the consent of the then holders. The effect of Section 1, Clause 2, of the Act is that the Governor in Council would not then have the authority of adjustment and guarantee conferred upon him by Clause 1 of the section. Such authority is one derived from the Government of India and the Secretary of State, who under 21 & 22 Vic. c. 108, Section 40 and 22 & 23 Vic. c. 41, Section 1, had the main power to dispose of Immovable property vesting in Her Majesty for the purposes of the Government of India. If the authority conferred by Section 1, Clause 1, of the Bombay Act II of 1863 is wanting, still it can be conferred by ratification, as is recognised in *Collector of Masulipatam v. Cavalry Vencata Narrainapah* (1861) 8 M.I.A. 529 Such ratification would almost necessarily be given, in view of the circumstances and the lapse of time since the settlement was made. And as the settlement was assented to by the then holders of the lands, with full knowledge of their rights and all the material facts, and such assent was the real basis of the contract constituting the settlement (cf. *The Secretary of State for India v. Sheth Jeshingbhai Hathisang* I.L.R.(1892) Bom. 407 it is not, in my opinion, open to any legal representatives of those holders to impeach the validity of the transaction on the ground of want of authority by the Governor in Council to make the contract. It is not as if any repudiation of the contract by superior authority had been made or threatened, or is in any way probable. The stricter rule that applies to public agents as opposed to private agents is one based on the public interest and not the private interest of any person with whom the public agent may contract. See *Story's Law of Agency*, 9th Edn., Section 307(a), cited in *The Secretary of State v. Kasturi Reddi* I.L.R.(1902) Mad 268. The objection of want of actual- authority (not expressly or impliedly repudiated by the principal) is, therefore, one which, in my opinion, is open only to the Government of India or the Secretary of State for India in Council, and not to a party, who has freely contracted with the public agent and been in no way prejudiced by the latter's want of authority. Such an objection by a person, who is not shown to be a legal representative of the party to the contract, is still less maintainable.

76. I, therefore, concur in the decision that the application of the Summary Settlement to the lands in question was valid and legal.