

(1930) 03 AHC CK 0044
In the Allahabad High Court

Lakhmi Chand and Others

APPELLANT

Vs

Madho Rao and Others

RESPONDENT

Date of Decision : 27-03-1930

Acts Referred:

Citation : (1930) 03 AHC CK 0044

Hon'ble Judges : Bennet, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bennet, J.—This is a first appeal by the defendants Lakhmi Chand, Parshotam Das and Parbhu Lal against a decree of the learned Subordinate Judge of Agra and a cross-objection by the plaintiff Madho Rao, minor. The suit of the plaintiff Madho Rao, aged 10 years, is brought for a declaration that the decree of the Court of the Subordinate Judge of Agra in suit No. 18 of 1914 is null and void and that the muafi rights specified in list A and the ancestral property specified in list B are not saleable in execution of the aforesaid decree. The Subordinate Judge has granted the relief in regard to the muafi rights in list A and has dismissed the suit in regard to the ancestral property in list B. The pedigree of the plaintiff is as follows:

Manaji | Bogaji | Abaji _____ |
_____ | | | Shankar Rao alies Bhau Sahib Umaji
Rao alias Tentia | Sahib Madho Rao I | Mt Chaubai | | | Gobind Rao Lachhman
Rao Aba Sahib, defendant 4 | (adopted son) | Umaji Rao Madho Rao, plaintiff 2

2. The plaint sets forth that in mauza Rauta in Agra District the plaintiff and his ancestors had been muafidars for over a century under a sanad granted by Maharaja Scindhia; that the muafi was recognized by the British Government and the name of Abaji, son of Bogaji, was entered in the papers; that Madho Rao, the paternal grandfather of the plaintiff, whom we shall call for convenience Madho Rao I, was immoral and a spendthrift, and he executed for immoral purposes a

hypothecation bond for Rs. 15,000 on 26th October 1905 in favour of the defendants-appellants, hypothecating the property both in list A and list B. The plaintiff alleged that the muafi was untransferable, and that the ancestral property of the joint family could not be transferred by Madho Rao I, and that the transfer was without necessity and for immoral purposes and void because Madho Rao I previously made a family settlement. The plaintiff further sets forth that the defendants-appellants obtained a decree in suit 18 of 1914 on the hypothecation bond against Mt. Chaubai, the widow of Madho Rao, and Aba Sahib the father of the plaintiff, and that they did not make the plaintiff a party, and further that suit 36 of 1916 was instituted by the father of the plaintiff with the allegation that the decree in suit 18 of 1914 had been obtained collusively and fraudulently, but on account of collusion and fraud that suit 36 of 1916 was struck off in default. Further, that suit 36 of 1916 was null and void in the absence of a certificate of the Collector. The written statement admitted that Madho Rao, the mortgagor of the defendants, was a muafidar in mauza Rauta, and that the muafidars realized money from the zamindar, and that Madho Rao was owner of the zarnindari rights by virtue of purchase. The allegations in the plaintiff were otherwise denied, and it was pleaded that the present suit was barred u/s 11 and Order 9, Rule 9 Civil P.O., and that the present plaintiff had been fully represented through his father Aba Sahib in suit No. 18 of 1914, which was contested by Aba Sahib, and that the muafi hypothecated in the bond was by no means a non-transferable pension, nor was it necessary to obtain a certificate from the Collector for it. The learned Subordinate Judge framed a number of issues and held that the muafi in suit was untransferable; that the plaintiff had failed to prove that the mortgage of 1905 was for immoral consideration; that as regards the zamindari in that mortgage the suit of the plaintiff was barred by res judicata; but as regards the muafi the suit of the plaintiff was not barred by res judicata because a certificate was required from the Collector under the Pensions Act (Act 23 of 1871), and that certificate not having been granted, the decree in suit 18 of 1914 was void.

3. In first appeal in this Court the following points were argued. Firstly, whether the Pensions Act applies to the present case. Under this head Sections 4 and 6 as well as 11 and 12 have been considered.

4. Secondly, whether the plaintiff is barred by res judicata as his father had brought a suit 36 of 1916, as head of the family to contest the mortgage and decree on the mortgage, and his father should have taken all possible pleas. We may first of all set forth the details in regard to the muafi property. This muafi was obtained by a sanad granted by Maharaja Scindhia to Manaji, the ancestor of the plaintiff, in the year Samwat 1842 which corresponds to 1785 A.D. The original sanad was produced before the Subordinate Judge from the custody of the other branch of the family and a copy was taken. The translation on p. 57 of the paper-book is not quite accurate and the sanad may be translated as follows:

Sanad granted by Maharaj Dhiraj Sri Maharaja Alijah Subedarji Sri Madho Raoji Scirtdhia Bahadur. Be it known to zamindar, Chaudhri and kanungo of paragna

Karahra., Subah Akbarabad that mauza Rohta, a village in the aforesaid paragna, has been granted to Sri Manaji, son of Sivaji, as altamgha (paper torn). Be it acted upon.

5. The argument has been advanced before us by the learned counsel for the appellants that this sanad is a grant of zamindari rights, and on the other hand it is contended for the respondent-plaintiff that it is a grant or assignment of the revenue. It is to be noted that internal evidence from the sanad itself shows that it is addressed among other persons to the zamindar and the zamindar is directed to take note that this village mauza Rauta has been granted to Manaji. It is clear that what was granted must be something of which the zamindar was not in possession, otherwise he would be dispossessed.

6. The next mention we have of this property is contained in "Treaties., Engagements and Sanad, India" Vol. 4 by Aitchison. Order 42 and onwards give the treaty dated 30th December 1803, signed by Sir Arthur Wellesley on behalf of the Hon'ble East India Company and on behalf of Maharajah Scindia of Gwalior. Article 7 states:

Whereas... lands in Hindustan ceded by the second article of this treaty to the Honourable Company and their allies, are held in jaghire by persons of the family of the late Madhajee Scindia and others by principal sirdars in his service, all of whom would suffer distress if deprived of the advantages they enjoy in those countries; it is agreed... that... Boogaji Jamdah... shall continue to hold their lands in jaghire under the protection of the Honourable Company.

7. Accordingly this Article 7 of the treaty recognized the rights of Boogaji Jamdah to hold this village as jagir. In the khewat of the year 1263 F, printed on, pp. 54 and 55 of the printed book, there are the names of a number of Jats who owned the zamindari in this village of Rohta. In each case, these Jats have mortgaged their zamindari to Tantia Sahib and Bhau Sahib, sons of Abaji, members of the family of the plaintiff, and remarks in the last column for various years between 1860 and 1864 show that these mortgages were made by the Jat zamindars to the family of the plaintiff. On p. 59 there is a "certificate of rent free tenure" dated in the original paper No. 181-C, Agra Collector: 20th March 1863, which date has been omitted from the printed page. This states that the entire mauza of Rohta is released in perpetuity in favour of Abaji, son of Bogaji Jamadar, by order of the Special Commissioner dated 12th June 1838 and confirmed by the final order of Government accepting the award through the Resident of Gwalior, dated 18th September 1842. On p. 61 there is a similar extract from the list of muafidars and this states that the muafi was under the sanad of Maharaja, Madho Rao Scindhia for maintenance. On p. 63 we have a sale deed by Deojit, one of the Jat zamindars, dated 12th June 1862, to Bhau Sahib, son of Abaji muafidar of mauza Rohta. On p. 67 we have the will of Madho Rao, and he sets forth that his property consists of: firstly, a moiety muafi share in the entire 20 biswas of mauza Rohta; and secondly, his share in the zamindari property of mauza Rohta. Further, we have the hypothecation bond by Madho Rao, dated

26th October 1905 printed on p. 79, in favour of the appellants. This bond sets forth that he holds his muafi property under a certificate dated 26th March 1863 granted by the Collector of Agra and under order of the Resident of Gwalior dated 18th September 1842, and he holds zamindari property in the said mauza which he purchased. The detail of the property hypothecated in mauza Rauta of which the mortgagor is both muafidar and zamindar is given firstly as his moiety share in the 20 biswas muafi property which comprises an area of 2098 bighas 5 biswas and of which the jama of Rs. 3,460 has been made a muafi grant by the Government and secondly all shares of zamindari held as mortgagee; and thirdly there was a further share of zamindari partly owned and partly held as mortgagee. Taking these details and also taking into consideration the admission in paras. 3, 4 and 5 of the written statement it appears to us clear that there is no doubt whatever that what was granted by Maharaja Scindhia to Manaji was the revenue of the village of Rauta. That in fact was what the Maharaja Scindhia owned at that time.

8. As the question, however, has been raised, it may be of some interest to consider briefly the circumstances of the times and the nature of these jagir grants. The Gazetteer of Agra District, p. 164, states that Maharaja Scindhia invaded Agra which was then held on behalf of the Moghul Emperor in the year 1784 and acquired it. It is in the next year, 1785, that the Maharaja Scindhia made the grant in question of mauza Rauta to his Sardar Manaji. That grant does not indeed specify that the land is held as jagir, but in the treaty of 1803, Article 7, it is set out that the son of Manaji Boghaji holds a jagir. The nature of jagir tenure is stated by Al-Barni in his Memoir of the Emperor Alauddin Khilji which gives an account of the Empire about the year 1300. This account is quoted in the Revenue Administration of the United Provinces by W.H. Morland, 1911, at p. 12, as follows:

The superior officers of the State all held military command and were remunerated for their services not by cash salaries, but by the grant of lands (jagir) from which they were entitled to collect the revenue.

9. Similarly in Field's Regulations of the Bengal Code, p. 53, para. 54 of the Introduction, it is stated:

Jagirs were grants of land to retainers still in service in lieu of wages. When granted by the Emperor, they were assignments, not of the land but of the revenue.

10. Similarly we find that in the preamble of Regulation 7 of 1822, it is stated:

And whereas it appears to be expedient to declare and explain the views and intentions of Government relative to the rights to be enjoyed and exercised by the Sirdars, Malguzars, or persons admitted to engage for the payment of Government revenue, and by persons collecting the rents of the land or revenue of Government, without being subject to the payment of any portion of it to the public Treasury, such as jageerdars, and other owners or managers of lakhiraj

lands.

11. These extracts show that jagirdars were persons who had grants without payment of revenue to Government. There were no doubt other jagirdars who received smaller grants, and at that particular time at the end of the 18th century, in Regulation 43 of 1793, provision was made that invalid sepoys and commissioned and non-commissioned officers of the Indian Army should receive grants of waste land which would be held by them rent free for life without being subject to any tax or demand whatever. This system was further amended in Regn. 1 of 1804 and Regn. 9 of 1808 and was finally abandoned in Regn. 2 of 1811 which abolished the system and substituted a scale of cash pensions. The preamble of Regn. 9 of 1808 states that land, when it was held as a jagir, was not included in the assets on which the jama payable by the zamindars to Government had been adjusted. Therefore we see that even in the case of the small grants of land as jagirs there was always the condition that no revenue would be payable to Government in respect of these grants. But the grant of the entire village as a jagir was naturally the assignment of the revenue on that village. The rights which Government possessed in a village, towards the end of the 18th century were the rights to receive the assets of the village, less the sum which was usually fixed at 10 per cent for the trouble of collecting those assets. Regn. 9 of 1805 was a regulation which was issued in regard to the Provinces ceded by the Maharaja Scindhia to the East India Company and for which the Treaty of 1803 was drawn up. This regulation states that the persons who were zamindars in this property should have the option of renewing the settlement for three years and that if they did not care to renew it for three years, they would receive nankar at a rate not exceeding 10 per cent on the jama and settlement would be made with other persons (para. 8). This shows that the rights of a zamindar at the period in question were only to receive 10 per cent of the jama and Government received the other 90 per cent. The gift therefore by the Maharaja Scindhia of mauza Rohta of the revenue would be a valuable gift, whereas a gift by the Maharaja Scindhia of the zamindari rights, supposing the zamindari rights had been forfeited and had been in his power to grant, would be a gift of very much less value, only amounting to one-ninth of the value of the revenue. We find therefore that the family of the plaintiff received by this sanad from the Maharaja of Gwalior assignment of the revenue of mauza Rohta and the family of the plaintiff by subsequent deeds of mortgage and sale obtained from the Jat zamindars in mauza Rohta shares of the zamindari rights in mauza Rohta.

12. The next question is whether the Pensions Act will apply to the property of the plaintiff. As regards the assignment of the revenue we find that Section 4 states:

Except as hereinafter provided, no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment,

claim or right for which such pension or grant may have been substituted.

13. Section 6 states:

A civil Court, otherwise competent to try the same, shall take cognizance of any such claim, upon receiving a certificate from such Collector, Deputy Commissioner or other officer authorized in that behalf, that the case may may be so tried.

14. The question, therefore, is whether the rights possessed as assignee of revenue of mauza Rohta by the plaintiff can be the subject of any suit without the certificate in question. For the present suit, the plaintiff has obtained a certificate which is printed at p. 111. In the two previous suits there were no such certificates obtained either by the present appellant or by the father of the plaintiff. For the purpose of Sections 4. and 6, it is clear at once that a grant of land revenue requires a certificate. As we have no doubt found that the plaintiff is the assignee of land revenue in mauza Rohta, it is clear that any case in regard to this land revenue, would require a certificate u/s 6 and, therefore, without such certificate, a civil Court could not take cognizance of such a claim. This has a bearing on the question of res judicata, because Section 40, Evidence Act, lays down:

The existence of any judgment, order or decree, which by law prevents any Court from taking cognizance of a suit, or holding a trial, is a relevant fact, when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

15. It is, therefore, u/s 40 that the defendants-appellants would produce their decree of 1914 and the decree of 1916 dismissing the suit of the plaintiff's father.

16. But Section 44 lays down as follows:

Any party to a suit or other proceedings may show that any judgment, order or decree, which is relevant under Sections 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

17. It is, therefore, always open to the plaintiff to show u/s 44 that the decrees of the two Courts in 1914 and. 1916 were decrees by Courts not competent to deliver those decrees. Section 9, Civil P. C, lays down:

The Courts shall have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred.

18. In our opinion the civil Courts in 1914 and 1916 had no jurisdiction to try the suits in question, because their cognizance was expressly barred by Sections 4 and 6, Act 23 of 1871. Accordingly, as those Courts were without jurisdiction, their decrees are invalid altogether, so so far as the assigned revenue in mauza Rohta is concerned, and those decrees cannot be pleaded as res judicata. But as regards, the zamindari property and the mortgagee rights in zamindari property

there is no such bar arising from the Pensions Act. In regard to this portion of the plaintiffs' claim which relates to relief B we agree with the finding of the Subordinate Judge expressed as follows:

As regards the pleas of want of legal necessity the amount of the debt and the binding nature thereof in respect of the zamindari, I think Section 11 helps the contesting defendants, and the plaintiff cannot raise them.

19. One further question remains and that is issue 5. Was the muafi in suit transferable? This issue was framed in accordance with the pleading in para. 7 (a) of the plaint that according to law the said muafi is untransferable. This raises a more difficult question in regard to Sections 4 and 6, Pensions Act. For the plaintiff it is alleged that the assigned revenue is untransferable because it amounts to a pension, u/s 11, Pensions Act, and Section 12 lays down that pensions u/s 11 are not transferable. The question is: Does this assignment of the revenue amount to a pension within the meaning of Section 11, Pensions Act, or does it not? It is to be noted that Section 11 refers merely to pensions whereas 8. 4 refers not only to pensions, but to grant of money or land revenue conferred whatever may have been the consideration of any such grant, and Section 3 states that the expression "grant of money or land revenue" includes

anything payable on the part of Government in respect of any right, privilege, perquisites or office.

20. Section 4, therefore, is a wider section than Section 11 and Section 4 will include matters which do not come u/s 11. Nothing will come u/s 11 except pensions. It was argued for the appellants that pensions comprise only payments in money. On the other side it was argued that pensions would also include grants made in lieu of past service. In *Harnam Das v. Fiazi Begam* AIR 1922 All. 22 there was a case in consideration whether the Emperor Akbar had assigned some villages for the maintenance of the descendants of a saint Shaikh Salim Chisti at Fatehpur Sikri in Agra District. The head-note does not quote the points in the case very accurately, but on p. 359 it is stated:

It is not to be doubted that the Government in 1838 came to the decision that it was just and politic to continue the grant of the land revenue which Akbar had assigned for the purposes indicated above, and we agree with the learned District Judge that the continuance of the pensions to the descendants of the saint was based upon what may fairly be called political considerations. This being so, the pension now in dispute is one of those mentioned in Section 11, and is clearly within the definition laid down by the Bombay High Court for the grant was, without doubt, originally made either in recognition of the past services of Sheikh Salim Chishti or in acknowledgment of his particular merits. It follows, therefore, that the assignment of the pension to the plaintiff-appellant upon which he founds his claim in the present suit is null and void as provided by Section 12 of the Act.

21. We consider that the present case is similar to this case and that in the

present case the assignment of the land revenue is in the nature of a pension. The sanad does not state the exact purpose for which the pension was granted, but in the treaty of 1803 it is stated that the pension is for Manaji as a principal Sardar in the service of the Maharaja and for his maintenance. It is stated in the extract from the list of muafidars printed at p. 61 of the paper book that the grant was under sanad of the Maharaja Madho Rao Soindhia for maintenance. A similar case is reported in *Karar Hassan v. Mustafa Hassan* [1914] 86 P.R. 1914, where the Punjab Chief Court held that a pension does not cease to be a pension merely because it takes the shape of an assignment of land revenue. Reference for the appellant was made to *Balkrishna Bhao v. Gobind Rao* [1902] A.W.N. 161, but this was not a case of an assignment of land revenue for services, but an assignment for different reasons altogether. Reference has been made to *Lalla Babu and Another Vs. Lal Bahadur*, to which one member of this Bench was a party. In this case there was an assignment of land revenue to certain parties. When the zamindars died out, with the same party the zamindari property was settled, with the result that the assignees of land revenue became also the zamindars. It was held that although the rights as assignees of land revenue could not be transferred the zamindari rights conferred by the Government could be transferred. That case, therefore, does not support the defendant's appeal.

22. We consider, therefore, that the assignment of revenue in the present case amounts to a pension within the meaning of Section 11, Pensions Act, and, therefore, is not transferable as laid down by Section 12 of that Act. Accordingly we hold that so far as the plaintiff has rights as an assignee of land revenue those rights could not be mortgaged by the mortgage in favour of the appellants of 1905, but there is no bar from the Pensions Act on the mortgage of 1905 so far as it relates to the zamindari rights and mortgagee rights of the predecessor of the plaintiff. The result is that we dismiss this appeal with costs and we also dismiss the cross-objection with costs.