

(1951) 10 SHI CK 0002

In the High Court Of Himachal Pradesh

Case No : Civil Miscellaneous Petition No. 9 of 1951

Lal Chand

APPELLANT

Vs

The Collector of Sirmur and Another

RESPONDENT

Date of Decision : 29-10-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 79
Constitution of India, 1950 — Article 226, 300
Forest Act, 1927 — Section 82
Punjab Land Revenue Act, 1887 — Section 70, 97, 98

Citation : AIR 1952 HP 16

Hon'ble Judges : A.P. Choudry, J.C.

Bench : Single Bench

Advocate : Rup Chand, for the Appellant; Bakshi Sita Ram, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Chowdhry, J.C.

1. This is an application by one Lal Chand under Article 226 of the Constitution of India for issue of a writ of mandamus, and such other directions as may be necessary, to the Collector of Sirmur and the Assistant Collector of Pachhad District Sirmur (hereinafter referred to as respondents 1 and 2 respectively). The facts of the case, briefly stated, are as follows.

2. The petitioner was an employee in the forest department of the ex-Nahan State. On 10th, Poh, Samvat 2004, corresponding to 24-12-1947, the State and the petitioner entered into a contract whereunder the latter was to extract resin and supply the same at a factory on certain terms and conditions, including receipt of commission by the petitioner and bearing of expenses of extraction, collection and delivery of resin at the factory by the Government of the State. The contract was initially for a period of one year but subject to extension thereafter. There is a difference between the parties as to whether it was

extended after the expiry of the first year. In any case, on 19-3-1949 the petitioner was made to resume his post in the forest department of the Government of Himachal Pradesh, the successor to Nahan State. Subsequently a departmental enquiry was conducted by the Secretary Finance and Development to the Chief Commissioner Himachal Pradesh and by the Conservator of Forests Sirmur, and they recorded a finding on 26-6-1951 that a sum of Rs. 1435/ 12/6 was due from the petitioner to the Government for short supply of resin and non-return of certain Government stores. Reducing this amount to Rs. 1285/12/9, and treating it as payable to the Government under the Indian Forest Act (XVI of 1927), the Chief Conservator of Forests Himachal Pradesh moved respondent No. 1 on 17-1-1951 u/s 82 of the Act to recover it from the petitioner as arrears of land revenue. On the other hand, the petitioner served a notice upon the Secretary Finance and Development, Himachal Pradesh Government u/s 80, Civil P. C., on 5-4-1951, claiming a sum of Rs. 31612/8/- on account of commission and damages. On 19-6-1951 the Chief Conservator of Forests wrote to respondent No. 1 informing him that the Conservator of Forests Sirmur had been asked, by order of the Chief Commissioner, to examine the petitioner's claim and give him credit for any amount that might be found due to him, and directing him in the meanwhile to suspend further proceedings against the petitioner. In the reply to the present petition, filed on behalf of the respondents on 18-9-1951, it was admitted that the correct amount found due against the petitioner came to only Rs. 200/ 10/3. However, on 23-6-1951 respondent No. 2, in compliance presumably with respondent No. 1's order, distrained u/s 70 of the Punjab Land Revenue Act (XVII of 1887) three buffaloes, a bullock and two cows of the petitioner for recovery of the said sum of Rs. 1285/12/9 and Rs. 2/- process fees, total Rs. 1287/12/9. Thereafter, the present petition was filed on 26-7-1951 praying that a writ of mandamus be issued to the respondents directing them to withdraw the attachment and to forbear from demanding the said dues or enforcing the recovery of the same as arrears of land revenue from the petitioner till they have established their right to its recovery according to the law. The allegations on which this relief is claimed are that no amount is actually due by the petitioner to the Government, that attachment proceedings were taken out against him mala fide with a view to bringing pressure to bear upon him to prevent him from claiming the aforesaid sum of Rs. 31000/- odd, and that the proceedings of attachment are illegal and ultra vires since the amount claimed does not fall within the purview of Section 82 of the Forest Act.

3. The respondents traversed the above allegations, and they pleaded that breach of contract had emanated from the petitioner and, as a result, a sum of Rs. 200/10/3 was still due by him. It was further pleaded that a regular suit was the proper remedy for the petitioner to seek, specially in view of the terms of his notice u/s 80, Civil P C.; that the petitioner having been found guilty of breach of contract as a result of departmental enquiry, it was not open to him to claim the summary remedy by way of a writ; that the petitioner having come to know as early as January 1951 that the dues were to be recovered from him as arrears of

land revenue, the present petition must be thrown out on the ground of laches; and that the respondents were simply carrying out a duty enjoined upon them by the law, and therefore no writ should be issued against them.

4. It is not necessary to go into the other grounds taken on behalf of the respondents as the last one is, in my opinion, incontrovertible. Before I deal with that ground it is necessary to dispose of a contention put forward in this connection on behalf of the petitioner, namely, that in asking for the said reliefs against the respondents the petitioner should be deemed to have done so against the Government of Himachal Pradesh for, according to him, the respondents represent that Government. This argument totally ignores the provisions of Section 79, Civil P. C., which lays down, inter alia, that the authority to be named as defendant in the case of a suit against a State Government shall be the State. To the same effect are the provisions of Article 300 of the Constitution of India. It follows therefore that the present petition cannot by any stretch be interpreted as directed against the Government of Himachal Pradesh, but only against the Collector of Sirmur and the Assistant Collector of Pachhad District Sirmur.

5. Reverting to the aforesaid contention put forward on behalf of the respondents, there is no doubt that in ordering, or making, attachment of the petitioner's property on receipt of the aforesaid precept dated 17-1-1951 for the Chief Conservator of Forests u/s 82 of the Forest Act the respondents were merely carrying out a duty imposed upon them by that section and Section 70 of the Punjab Land Revenue Act. They had no hand in the issue of the precept, and, although the point was strenuously pressed by the learned Counsel for the petitioner, he was not able to show that it was incumbent upon the respondents, before ordering or making attachment, to go into the merits of the precept. He referred to the provisions of Sections 70, 97 and 98 of the Land Revenue Act, but none of these provisions enjoins a duty upon the revenue authorities to enter into the merits of a precept u/s 82 of the Forest Act before executing it.

6. The law on this point has been stated as follows in Para. 1295 on page 763 of Volume IX of Halsbury's Laws of England, 2nd edition :

"The writ of mandamus will not be granted against one who is an inferior or ministerial officer, bound to obey the orders of a competent authority, to compel him to do something which is part of his duty in that, capacity."

The above dictum is based on the authority of "R. v. Bristow", (1795) 6 Term Hep 168. The verb "minister" has been interpreted in the Oxford Dictionary as "render aid or service to a person & c", and the adjective "ministerial" as "concerned with the execution of law." The respondents, who were concerned merely with the execution of the precept u/s 82, Forest Act, received from the Chief Conservator of Forests, were therefore nothing but "ministerial officers" within the intendment of the above quotation from Halsbury. Again, it was laid down by Coleridge, J., at page 401 in "R. v. Payn", (1837) 6 Ad & El 392, as

follows: "The result of the cases cited appears to be merely this : that where we find a public officer who has received an order from his masters or any competent authority, and who, upon disobeying that order will be liable to indictment, we do not proceed by mandamus. The Court leaves the case to the ordinary remedies, not because the party is too low, but because he has received an order from a competent authority." It is not contended in the present case that the Chief Conservator of Forests was not a competent authority for issuing the said precept for attachment u/s 82 of the Forest Act. It is quite immaterial whether the amount for the recovery of which attachment was sought was, or was not, recoverable u/s 82 of the Forest Act, for, as adverted to above, that was a matter into which the respondents could not have gone. It would certainly have been quite different had the present petition been filed against the Chief Conservator of Forests, or against the Government of Himachal Pradesh to whom he is subordinate. In that case it would have been open to the petitioner to challenge the precept by them or any of them; but, as he has chosen to direct the petition against the respondents alone, it fails on the mere ground that the respondents were doing nothing more than carry out an order which they were bound under the law to obey.

7. There is yet another reason why mandamus should not go in the present case. That reason is based on the principle enunciated by Halsbury (at page 772, Para. 1308, of the said volume) in the following- words : "A mandamus will not go when it appears that it would be futile in its result. Accordingly, the Court will not, by mandamus, order something which is impossible of performance because the party against whom mandamus is prayed does not, for some reason, possess the power to obey." The same principle was expressed as follows by Lee, C. J., at page 58 in "R. v. Ely (Bishop)", (1750), 1 Win. B1 52:

"The Court never grants a mandamus, except it indisputably sees that there is power lodged in the person to whom the mandamus is prayed."

So the Court refused to enforce by mandamus an order which sought to impose on a railway company the duty to replace a level crossing by a bridge since the company had neither the funds nor the power of raising any. "In re Bristol and North Somerset Rail. Co.", (1877) 3 Q BD 10 .

8. In the present case the relief claimed by the petitioner is that the respondents be ordered to withdraw the attachment and to forbear from demanding the amount claimed against him or enforcing the recovery of the same as arrears of land revenue. It was not the respondents, however, but the Himachal Pradesh Government through the Chief Conservator of Forests, who issued the attachment, and who have it in their power to forbear from demanding the dues in question or enforcing their recovery from the petitioner. That being so, any mandamus or other writ issued, as prayed, to the respondents would be entirely futile in its result. Such a mandamus or other writ will be merely brutum fulmen, for the respondents have no power lodged in them to obey it.

9. For reasons recorded above, the present application for issue of any writ to the respondents is, quite irrespective of the merits of it, wholly misconceived. It is accordingly dismissed with costs to the respondents, which I fix at Rs. 30/-.