
(1928) 01 BOM CK 0002
In the Bombay High Court
Case No : First Appeal No. 263 of 1926

Lingo Raoji Kulkarni

APPELLANT

Vs

Secretary of State for India

RESPONDENT

Date of Decision : 16-01-1928

Acts Referred:

Bombay Hereditary Offices Act, 1874 — Section 15

Citation : AIR 1928 Bom 201 : (1928) 30 BOMLR 570

Hon'ble Judges : Mirza, J;Fawcett, J

Bench : Division Bench

Judgement

Fawcett, J.—The suit, out of which this appeal arises, was art brought by two of the three representative watandara of the of State village of Kurdikeri in the Dharwar District and the heirs of the third representative watandar of the same village for a declaration that their Kulkarni rights in that village were unaffected by certain transactions between them and the Government in 1916, and for damages. The main allegation was that the Collector of Dharwar had ordered a commutation of their service rights u/s 15 of the Bombay Hereditary Offices Act, 1874, without the consent of the holder of the watan that is required under that section, and therefore, that order was ultra vires, so that it did not affect the plaintiffs' rights in regard to this wafcan, The Secretary of State in his written statement denied that the order was ultra viras, and pleaded that the requisite consent had been given. He also pleaded that the suit was barred by Section 4(a) of the Bombay Revenue Jurisdiction Act, 1876, and by limitation under Article 14 of the Indian Limitation Act. The District Judge, without taking evidence, held that the suit was barred under the Bombay Revenue Jurisdiction Act and the Indian Limitation Act, as just mentioned. On appeal, this Court set aside the decree dismissing the plaintiffs' suit on those grounds and remanded the case for recording evidence and hearing further arguments, so that the District Judge should be in a position to decide what the final result of the case should be. The District Judge after taking evidence has held that plaintiffs Nos. 1 and 2 and the father of plaintiffs Nos. 3, 4 and 5, i. e., the three representative

watandars, had given consent to the commutation directed by the Collector; and that although there had been an application by them purporting to revoke that consent, that was done after their acceptance had already become final. He held accordingly that the main contention of the plaintiff is failed and that the suit was also barred under the Bombay Revenue Jurisdiction Act and the Indian Limitation Act, as pleaded by the Secretary of State, and accordingly dismissed the plaintiffs' suit with costs.

2. The plaintiffs appeal from this decision, and the main question before us is whether the Collector had in fact such consent when he passed his order in the matter as would justify his passing that order. It is not disputed before us that, unless the plaintiffs showed that that order was ultra vires, the suit is barred under the Bombay Revenue Jurisdiction Act, Section 4, Clause (a), and by Article 14 of the Indian Limitation Act.

3. It has, however, been contended by Mr. Thakor for the appellants that the judgment of this Court in the interlocutory appeal decides that, if it was established that the representative watandars had withdrawn their original consent on December 15, 1916, the Collector's order would be invalid, The actual remarks made are as follows:?

Although the plaintiffs on December 5, 1916, gave in writing their consent to a commutation of their watan. they withdrew their consent, it is alleged on December 15, 1916. If that were correct, no order u/s 15 of the Bombay Hereditary Offices Act could be passed by the Collector. In the written statement the allegations in the plaint were directly controverted.

4. It must be noted that the learned Judges, when this judgment was delivered, had not ascertained what the actual facts were, and also there could not have been a full argument upon the question whether, if there was this withdrawal of consent, that was valid or invalid, such as there has been in this appeal. And in the next paragraph they distinctly contemplate the Judge being in a better position to decide the final result when he has recorded evidence and heard further arguments. Therefore, it seems to me quite clear that the remarks about the effect of withdrawal of consent could not have been intended to be a definite decision upon a point, as to which no evidence had been taken and about which the parties had not been fully heard; and the only legitimate effect that, I think, can be given to these remarks, is that the withdrawal of consent meant by the learned Judges was one that had been validly made. I think that, when they said :?"If no order u/s 15 of the Bombay Hereditary Offices Act could be passed by the Collector" their Lordships contemplated only the case of there having been a valid withdrawal of such consent, that is to say, the word "validly" should be read in between the word "they" and the words "withdrew their consent," Accordingly, I do not consider that these remarks can be properly treated as a definite decision binding upon us in the hearing of the final appeal, under the limitations that are mentioned in *Balvant Ramchandra v. Secretary of Stated*. ILR (1908) Bom. 432: 10 Bom. L.R. 531. There the head-note of the report says :?

The remanding judgment was conclusive on all points therein specifically decided beyond possibility of revision, but that it was otherwise with regard to any part of the judgment which could be shown to be based on such mistake or error as it would have been the duty of that Bench to correct, as it had been brought to its notice when the judgment was delivered.

5. In my opinion, it cannot be said that this particular point has been specifically decided by these remarks that I have referred to, or that if the question of validity of the alleged withdrawal had been brought to the notice of their Lordships at the time the Judgment was delivered, the omission to say "validly withdrew" would not have been corrected.

6. The main facts regarding the question of consent are that the representative watandars made statements before the Mamlatdar of the Taluka, in which this village is situated, on November 21 and December 5, 1916, consenting to a commutation of their watan on certain terms which had been communicated to them. On December 15, they sent in an application to the Collector in which they asked that they should be given a certain fallow No. for their maintenance free of assessment, and that one-third Potgi allowance should also be given. The application continues:

If the same be not given, we are not willing to give up our right we can maintain ourselves by officiating as Kulkami and as there are at present competent persons in our respective families to of officiate as Kulkarni. Therefore as to the statement taken in writing by the Mamlatdar on the date December 5, 1916, to the effect that we had given up our right the same should not be sanctioned.

7. The Collector from a marginal note upon p. 43 of Exhibit 36, appears to have ordered that the three representative watandars should be called before him, and on February 16, 1917, there is a record as follows in the Collector's own handwriting:?

All throe present. They each request their son should be appointed as a Talathi and now they say they are willing to pay reasonable price for the land they require. They now say the best of the three sons should be chosen. They are told to bring their sons on 22nd.

8. Then, on March i9; 1917, the Collector passed an order, which saya that the representative watandars had agreed in writing to commute their right of service on conditions laid down by Government, and that accordingly he was pleased to accept the commutation u/s 15 of the Watan Act, and passed subsidiary orders upon the matter, including some orders about the representative watandars being given the option of purchasing the fractions mentioned in para. 5 of his order. Subsequently their statements were taken accepting the offer that they should be paid so many times the fractions in question; and on November 20, 1917, payment was made accordingly to the third representative watandar Bhaurao, as shown by the evidence in the case.

9. The District Judge has held that, although the representative watandars had sent this petition on December 15, 1916, it was not open to them then to revoke their prior acceptance on November 21 and December 5, 1916. He says that those acceptances had come into the hands of the Mamlatdar, who was the agent of the Government, and after those dates the acceptors had no longer the right to revoke their prior consent. In a previous part of the judgment he says that the acceptance was complete as against the acceptor when it came to the knowledge of the prior consent. In this he of course refers to the provisions of Sections 4 and 5 of the Indian Contract Act, which lay down that proposition. I am not prepared to go as far as the District Judge, and to hold that the consent given on November 21 and December 5 could not have been withdrawn, at any rate, up to the time when the matter was before the Collector for his decision u/s 15 of the Act. No doubt there is authority for applying the provisions of the Indian Contract Act to a case of this kind, just as they were applied to the case of summary settlements in *The Secretary of State for India v. Sheth Jeshingbhai Hathisang* I.L.R.(1892) Bom. 407 But, on the other hand, it is to be remembered that agreements of the kind contemplated by Section 15 are not ordinary agreements, because they are made by persons in the position of life tenants, and are to bind not only those life tenants but their successors. Statutory authority was, therefore, necessary for authorizing agreements of this kind, especially as any alienation by a watandar without the sanction of Government was forbidden in the case of such wataus; and these agreements being authorized by statute, the provisions of the enactments which authorize them as to the conditions under which such agreements can be made must of course be treated as conditions precedent to the exercise of the powers conferred by the statute, in accordance with the ordinary principle applicable in such cases. The section lays down two conditions: (1) that there must be a consent of the holder of a watan commuted; and (2) that there must be an agreement between the Collector and such holder with regard to the conditions on which the commutation has been made. And I agree with Mr. Thakor's argument to this extent that under Clause (1) of Section 15 in order to have a valid order, there must be an existing consent of the holder of the watan when the order is made, and that if it is shown that that consent was not in existence that would affect the validity of the order. To this extent, I think, that the provisions of the Indian Contract Act, so far as they may be in any way inconsistent with the provisions of this Clause (1), cannot come into operation. The Indian Contract Act itself in Section 1 excepts the provisions of any statute which is not repealed by the Act. That, of course, primarily refers to statutes that were in existence at the time the Indian Contract Act was passed. But the same exception should necessarily be applied to the case of any statute passed after the date of the Indian Contract Act, such as Section 15 of the watan Act, 1874, if its provisions are inconsistent with any provisions contained in the Indian Contract Act. The general provisions of the Indian Contract Act cannot supersede the provisions of a special later enactment. Therefore, even if it were shown that the revocation of consent was communicated to the Collector after the date on which he had

knowledge of the original consents of November 21 and December 5, that would not, in my opinion, be good ground for saying that the subsequent revocation was in law ineffectual. And even supposing that the District Judge was right in applying Sections 4 and 5 of the Indian Contract Act, still it is not shown that in fact the Collector had knowledge of the acceptances of November 21 and December 5, before he had knowledge of the application of December 15. It seems probable from the evidence of the Chitnis, and the marginal note that the Chitnis made on the original paper that "they made no request at first," that the Collector really got knowledge of both the first statements of consent and of the subsequent application at the same time; and, in so far as Section 15 and the connected Section 73 emphasize the personal responsibility of the Collector, it is not a case where the knowledge of the Mamlatdar or Chitnis can be said to be also the knowledge of the Collector. At any rate the question is so open to doubt that I am not prepared to accept the view taken by the District Judge.

10. It has, however, been contended by the Government Pleader that in fact such revocation as was contained in the petition of December 15 was subsequently withdrawn by the representative watandars as shown by the proceedings of the Collector on February 16, 1917, to which I have already referred. There he says "They (i. e. the three representative watandars) now say they are willing to pay reasonable price for the land they require." That is, as I have already mentioned, a statement written by the Collector himself, find it is a statement which is admissible in evidence under ss. 82 and 85 of the Indian Evidence Act, It is also I think, clearly a statement to which very great weight must be attached because it is most unlikely that he would have recorded this particular statement, unless in fact it was true. But beyond that it is also corroborated by the subsequent action of the three representative watandars in accepting commutation of certain fractions, to which I have already referred. It is argued that that was merely due to their feeling themselves obliged to acquiesce in the orders of the Collector, But it does not seem to me that that is likely to have operated upon them, so much as the fact that they had really consented to the commutation. These people are not of the class that will do things they don't want to do meekly and without protest; and in fact they had taken Secretary action in regard to their consent which shows that they did not simply acquiesce in official pressure, for they had asked that, in addition to the terms that Government were willing to give, they should be given certain other advantages. No evidence was given by any of the representative watandars, so that the statement of the Collector is uncontradicted. No doubt, the three representative watandars had died at the date when the suit was heard, so that the fact that their testimony is not recorded is not in itself a factor that goes against them. But at the same time the fact remains that the Collector's statement is not contradicted, and there is, in my opinion, no reason whatever to distrust its truth. The application of December 15 had reference to the conditions upon which the commutation should be made. The representative watandars asked for something more, and according to the written statement they were given the one-third of Potgi allowance that is

mentioned; but they did not succeed in regard to their request for the land they wanted free of assessment, and it is said in para. 7 of the written statement that they withdrew the said demand before the Collector on February 16, 1917. That, I think, is a correct statement, and if that is so, then there was agreement between the Collector and the representative watandars as to the conditions upon which the commutation should be made. It is contended that if there was any such withdrawal, the Collector should have recorded a separate statement of the watandars withdrawing their request and renewing the consent that they had previously given. There might be some force in that contention if the petition of December 15 had been an absolute revocation of the previous consent. But it was not. It was only a request to get certain other advantages, and a statement that if that request was not granted, their previous consent should not be acted on. There was the consent on record that they had previously given, and the later petition did not affect that consent except in regard to the question of the agreement that has to be made about the conditions of commutation. Therefore, in my opinion, there was no sufficient reason why the Collector should have taken a statement of the kind in question. The facts prove that there was in fact an agreement as to the conditions. Thus, having regard to the consent already given to the general scheme or idea of commutation, the conditions precedent on which the Collector was empowered to pass his order in my opinion existed.

11. It was objected by Mr. Thakor that the issue raised did not cover this particular question. Issue No. 5 was? Do plaintiffs prove that on December 15 they revoked their consent, dated November 21 and December 5, 1916. That, no doubt, does not cover this particular question. But, on the other hand, the last issue was? Does the retraction made by the plaintiffs on December 15 1917, invalidate the commutation? The evidence shows the retraction was not persisted in; so I think the answer is that it did not invalidate the commutation. As I have already mentioned, the point was specifically taken in the written statement, and evidence has been given on this point, and there is no question of surprise. Therefore, in my opinion, the contention of: the Government Pleader that this objection was withdrawn is correct. The representative watandars, to use familiar language, appear to have attempted a "try on" to get something more than was going to be granted under the ordinary conditions laid down for commutation, and they partly succeeded and partly failed. This being so, there obviously is, I think, no substance in the objection that the Collector had not obtained a proper consent at time he passed his order. It follows, therefore, that, in my opinion, his order was not ultra vires, and that the suit fails both on the merits and also on the objections under the Bum hay Revenue Jurisdiction Act and the Indian Limitation Act.

12. With regard to the question of the validity of the withdrawal of consent that is discussed above, I may add a few remarks. No doubt, if Section 15 had been differently worded, as, for instance, it had said that "on the undertaking of the holder of a watan" to do such and such things, the Collector may direct a commutation, then possibly the case might be different. For instance, Section 4

of the Partition Act, 1H93, says that if a certain undertaking by a party is given, the Court shall direct a sale; and it was held in Ilias Ahmad v. Bulaqi chand ILR (1917) All. 672 that a party having once given such an undertaking could not subsequently resale from it. But thy language of Section 15 and the circumstances of a commutation are quite different. Nor is it a case of an unconditional deed of resignation being "made with great formality, of the kind that is referred to in Reichel v. Bishop of Oxford (1889) 14 App. Cas. 259.

13. I would, accordingly, confirm the decree of the lower Court dismissing the suit with costs. But these costs will not include the costs of the appeal No. 365 of 1924 to this Court, where the Court has ordered that the appellants, that is to say, the plaintiffs, were entitled to their costs of that appeal.

Mirza, J.

14. I Concur