
(1912) 01 CAL CK 0014
In the Calcutta High Court

Maharaja Birendra Kishore Manikya Bahadur	APPELLANT
Vs	
Akram Ali	RESPONDENT

Date of Decision : 04-01-1912

Acts Referred:

Citation : 13 Ind. Cas. 513

Hon'ble Judges : D. Chatterjee, J;Caspersz, J

Bench : Division Bench

Judgement

Caspersz, J.—The plaintiff is the Maharaja of Hill Tipperah. He also owns what the plaint describes as "a vast zemindari" that is Chakla Roshanabad in the British District; of Tipperah. The suit giving rise to this second appeal was brought by the Maharaja to have his zemindari title declared in respect of a tank and its banks and for khas-possession and masne profits. In the alternative, plaintiff claimed to have the lands assessed with fair rent. The defence was that the tank had been niskar (rent-free) since the time of the defendant's ancestor in virtue of a sanad chati dated the 14th Magh 1259 (26th January 1850), granted by the pre-decessor of the plaintiff.

2. The first Court dismissed the suit on the ground of limitation; and, on appeal, the District Judge has arrived at the same conclusion.

3. The plaintiff appeals. This is one of many appeals involving the same question, the light to assess the niskar tanks in the Chakla. We have heard the arguments in this appeal and in Maharaja Birendra Kishore Manikya Bahadur v. Bilwar Ali 13 Ind. Cas. 517; Asalat Khan v. Maharaja Birendra Kishore Manikya Bahadur 13 Ind. Cas. 519; Maharaja Birendra Kishore Manikya Bahadur v. Roshan Khan 13 Ind. Cas. 517 which may be regarded as test cases, the result of which, it is said, will govern both the other connected appeals pending in this Court as also the thousands of suits and appeals that are awaiting disposal in the lower Courts in the district of Tipperah and Noakhali.

4. It is argued for the plaintiff-appellant that the sanad chiti amounted to a mere

license to re-excavate the silted up tank, and it was revocable by the grantor or at all events by his successor-in-interest; that the tenant never set up any hostile title to, or adversely possessed, the land of the tank, and that the suit was instituted within 12 years from the 25th May 1896, the date of the final publication of the Record of Rights prepared under Chapter X of the Bengal Tenancy Act.

5. The duty of zemindars to maintain the tanks on their zemindaris was plainly pronounced by their Lordships of the Privy Council in the *Madras Railway Co. v. The Zemindar of Carvetinagaram* 1 I.A. 364 : 14 B.L.R. 209 : 22 W.R. 279: "The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognised by Hindu and Muhammadan Law, by Regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed, to the existence of the large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on zemindars, of whom the defendant is one. The zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged, under Indian Law, by reason of their tenure, with the duty of preserving and repairing them."

6. The facts of the case from which these remarks are quoted are different from those now under consideration, but the relative rights and obligations of the present parties are similar. The plaintiff, a Hindu Raja, should be slow to depart from the ancient laws and customs regulating the supply of water for the necessary purposes of his tenants. The Maharaja did not maintain the tanks in the Chakla; consequently, they silted up, and were re excavated by the tenants concerned under sanad chitis one of which has been produced by the defendant respondent. This sanad provides that the tenant having applied for re excavating the ancient, and unclaimed tank called Nasir Muhammad, an Amin was appointed to ascertain the area and boundaries thereof; that the area was ascertained (2 kanis 2 gands 2 karas 2 krant) of the four banks; that this chiti was granted in order that the tenant should construct embankments on the former sites of the embankments of the tank lying within the boundaries so ascertained and specified, and that the tenant should re-excavate the tank by means of motials (earth-cutters). Nothing was said in the sanad about rent being payable either for the watery portion or the area of the four banks of the tank.

7. The case is clearly not one within the ancient prohibition, which, we are told, was in force in the early days of last century, that a rent-free grant was not valid against the heir or purchaser of the grantor. The sardar did not confer any rent-free title; admittedly, it was valid to allow a tenant to spend money and re-excavate an old tank, no contrary view is possible. It is likewise clear that a license to do a thing, to effect improvements, cannot be revoked after the improvements have been carried out, for, in such a case the parties cannot be

relegated to their former positions. The sanad is merely a piece of evidence showing the intentions of the parties and the nature of the subject-matter. If it had been intended to assuage the tank at some future, date some apt and necessary provision would have been made among the terms of the document. If any rent had been previously paid for the tank, or any part of it, that fact, also, would have been mentioned. The grantor is, in the circumstances, estopped from asserting that the subject-matter of his grant should come under a new liability of which there is no indication whatever in the previous history of the tank. I take it as beyond controversy that the word tank includes the banks which are necessary for the enjoyment of the water.

8. The rule of estoppel stated in *Ramsden v. Dyson* (1868) L.R. 1 H.L. 129 : 12 Jur. (N.S.) 506 : 14 W.R. 926 was applied by the Judicial Committee in *Ahmad Yar Khan v. The Secretary of State for India in Council* 28 C. 693 : 28 I.A. 211 (P.C.), where the persons undertaking to construct a canal were deemed to have acquired a proprietary interest in so much of the Government lands taken for the purpose of the, canal as was required for its construction and maintenance and also a right to have the waters of the Sutlej admitted into the canal so long as the canal was used for the purpose for which it was originally designed." The case of *Ramsden v. Dyson* (1868) L.R. 1 H.L. 129 : 12 Jur. (N.S.) 506 : 14 W.R. 926 was also approved in *Himmer v. The Mayor Councillors and Citizens of the City of Wellington* (1884) 9 App. Cas. 699 : 53 L.J.P.C. 104 : 51 L.T. 475 : 49 J.P. 116 where a wharfinger who had spent money on land, on which he had entered under a license, was deemed to have acquired a perpetual right to the same. The Privy Council held that such a license could not, in view of subsequent events, be revoked.

9. It is also well settled that if a person, having a right to avoid a transaction on any legal ground, and, being aware of, and reasonably capable of enforcing, such right, manifests an intention to confirm the transaction, he cannot afterwards avoid it *Wright v. Vander plank* (1855) 2 K. and J. 1 : 25 L.J. Ch. 753 : 2 Jar. (N.S.) 599 : 4 W.R. 410; *Jarratt v. Aldom* (1870) L.R. 9 Eq. 463 : 39 L.J. Ch. 349 : 22 L.T. 192 : 18 W.R. 51. The plaintiff had every opportunity, both before and particularly in the settlements proceedings, to have the niskar tanks assessed with fair rent. He deliberately abstained from so doing¹. He now comes but not within a reasonable time.

10. Again, it is a matter of common knowledge that private owners in this country, have, in times past, granted lands for various public purposes--such lands are liable to resumption when the particular purpose has been exhausted. There is, in such cases, a reversion in the grantor. On the finding that these niskar properties are still used as tanks, and not for the purpose of cultivation or otherwise, in opposition to the intentions of the grantor, the time has not arrived for the plaintiff to re-enter or to insist upon the payment of rent.

11. The plaintiff's suit is, therefore, not maintainable. But it remains to consider and decide the plea of limitation upon which we have heard the arguments of the

learned Vakils engaged. In my opinion, the District Judge has fallen into error in dismissing the suit on this ground. Article 130 of the first Schedule of the Limitation Act, 1908, provides a period of twelve years within which a suit must be brought for the resumption or assessment of rent-free land, and the period begins to run when the right to resume or assess the land first accrues. In the views already expressed, the plaintiff's right has not yet accrued. He will have his remedy when, if ever, the tank again becomes silted up and is no longer used for the purposes contemplated in the year 1850, Apart from this, when the settlement proceedings were being conducted on the 21st November 1834, the tenant never asserted any right to hold rent-free for ever either the tank or its banks. He merely set up his sanad chiti and the Revenue officer caused a formal entry to be made that, as a fact, the tank with its banks was held rent-free "as not paying rent." There was, in my opinion, no clear and unequivocal assertion of adverse possession by the tenant in this case. And as the obligation to pay rent is a recurring obligation the landlord cannot be barred by Article 130.

12. In *Beni Pershad Koer v. Dudhnath Roy* 27 C. 156 : 26 I.A. 216 it was observed by Lord Davey that a mere notice by a person holding for his life, that he claimed to be holding on a perpetual or hereditary tenure, would not. make his possession adverse within the meaning of the Limitation Act, so as to bar a suit, for possession on the expiration of his life tenancy. No such claim was ever advanced by the niskar holders in the present litigation. Their contention merely extended to the enjoyment of the tanks, rent-free, for so long as they were required for the legitimate purposes which the parties had in view when the tanks were re-excavated. It is also impossible to conceive of a claim to hold adversely being made in respect of a right to receive rent. That right is not a limited interest it is, in fact the entire interest of the landlord. Therefore the rule adopted in *Ishan Chandra Mitter v. Raja Ramranjan Chakarbutty* 2 C.L.J. 125 with regard to the dispossession of a landlord in a limited sense is not applicable to the present facts: the plaintiff's tenants have not encroached on any lands not covered by the niskar tenants.

13. The case of *Bir Chunder Manickya v. Rajmohun Goswami* 16 C. 449 to which our attention has been called, originated in the same part of the district (Chakla Roshnabad) but the facts were widely different from those of the present litigation. It is, however, some authority, for the plaintiff's contention that Article 130 really covers cases of resumption under the old Regulation and does not apply to suits such as these under appeal, It, is manifest that the tanks with which we are now concerned were never dissociated from being a part of the revenue paying properties of the zemindar and no question of limitation can arise in such a case as this.

14. The result of this appeal coincides with the decision of Chitty and N.R. Chatterjee, JJ., in an unreported case S.A. No. 2551 of 1908 dated the 3rd February 1911. The decision on the question of a belagan, entry in the Record of blights in S.A. No. 1327 of 1909 (dated the 6th December 1910) is also

consistent with that now arrived at. As I decided that case, I may observe that the facts are distinguishable, but that the word belagan (not assessed with rent) which has a special significance in Behar has its counterpart here in the expression kar dhariya rai and means that rent was not imposed in the settlement proceedings.

15. The decree of the lower Appellate Court is affirmed but not for the reasons given in the judgment of the District Judge. The appeal is dismissed with costs.

D. Chatterjee, J.

16. The facts shortly are that in the year 1850 the ancestor of the defendant applied to the then Maharaja of Tipperah for being allowed to re-excavate an unclaimed silted up tank in the Maharaja's Zemindari Chakla Roshanabad. This permission was given by a chitti bearing the Maharaja's seal and the grantee was required to re excavate the tank by employing earth-labourers and the only restriction imposed was that the limits of the ancient tank were not to be exceeded: there was no provision for the payment of any rent presently or in future and nothing was said as to the duration of the grant. The ancestor of the defendant re excavated the tank at a considerable expense and it has been in the exclusive possession of the family of the defendant from father to son and still supplies good drinking water.

17. There was a survey and settlement of the Chakla in 1894 and the tank with its banks was numbered as 253 and 252 and included within the nij jama of the defendant. The defendant objected that he held both these numbers under a niskar title granted by the chitti of 1350 which he produced. The Maharaja's agent asserted that the banks of the tank were included in the jama of the defendant but did not say anything as to the tank. The Settlement Officer recorded both numbers as separate from the jama and not paying rent." The order of the Settlement Officer is dated the 21st November 1894. The exclusive possession of the defendant continued as before and no action was taken by the Maharaja until the 25th of February 1908 when he filed the suit giving rise to the present appeal on the allegation that the tank and its banks were his property and the defendant had no right to retain possession of the same without his consent. He prayed for recovery of possession and in the alternative for assessment of fair rent.

18. The defendant pleaded niskar title under his sanad, estoppel and limitation.

19. The first Court dismissed the suit as barred by limitation and the learned District Judge not only upheld the decision on the question of limitation but held that the sanad intended to grant a rent-free title.

20. The Maharaja has appealed mainly on two grounds, first that the sanad does not confer a rent-free title and is at best a license which can be revoked at any time and, secondly, that the suit is not barred by limitation.

21. I will deal with the sanad first. In construing this document it must be borne

in mind that it was granted by a Hindu Raja for the re excavation of an old tank. According to the Hindu Shastras the grant of land for digging tanks, the digging of new tanks and wells and the re-excavation of old ones is supremely meritorious.

* * * * * He who makes a tank becomes devoid of thirst for all time and enjoys the abode of Varuna,--Vishnu 61. 2.

* * * * * Whoever causes the digging of a tank or a well in a place destitute of water goes to the heaven for a hundred years for each drop of water"--Nandi Puran quoted by Raghunandan.

* * * * * In respect of wells, gardens, tank³ and temples the repairer gets the same merit as the original maker.--Yisnu 61. 19.

The great Rishi Narada when on a visit to the great King Judhistir asked him:

* * * * * Are the cultivators contented? Have you constructed large tanks full of water in proper places in your kingdom? Is agriculture independent of the rains?"--Mahabarat Savaparba Chapter V 76. 77.

* * * * * Sukracharya when speaking of the duties of kings says:

When any one digs a tank or a canal or does some other similar work tending to the improvement (of his country) or reclaims new land the King shall not realize any rent for these until double the cast of the work has been realized from the usufruct.--Sukra Niti IV. 2. 121, 122.

This is when such works are done without permission.

* * * * * Whoever makes a gift of land for the purpose of making a reservoir" of water attains the abode of Varuna?Vishnu Dharmottar quoted in Raghunandan's Jalasay of sargatature.

23. As a Hindu Raja presumably possessing all the instructs and traditions of a Hindu Raja it is impossible to conceive that the ancestor of the plaintiff intended anything other than the grant of the land for the purpose of the re-excavation of the ancient tank. He could never have meant to grant a mere license as understood by English lawyers and a consistent course of conduct makes it quite clear that that was so. It is admitted that it was an ancient tank previously possessed by some one or other of the tenants, for the sanad calls it a bewaris tank, i.e., one in respect of which there were no claimants as heirs: there is no suggestion that it was ever assessed to rent: there are no zemindari papers showing that it was ever considered as a part of the rent paying lands of the mehal: it has come down from father to son for at least sixty yea"s without any claim having ever been made for rent or resumption even in 1894 during the settlement operations the Raji"s agent did not even assert that the tank was assessable and in respect of the banks of the, tank merely said that they were parts of the sspa-rate holding of the defendant: even after that for over 12 years, i.e., until February 1908 we see no attempt to assess or resume the land.

It may be noted that there are hundreds of such tanks in Chakla Roshanabad, possessed by the tenants of the Maharaja in the same manner, some with sanada and some without and in respect of none of them any claim for assessment or resumption has ever been made and I have no doubt that neither the Maharaja nor the tenants ever understand that these would be ever resumed or assessed to rent, and I am of opinion that the defendant is entitled to hold the tank with its banks without payment of rent so long as the tank serves the purpose for which the grant was made.

24. The matter may also be considered in another light. When the former Maharaja granted permission to the ancestor of the defendant to spend an indefinite amount of money for the reconstruction of the tank, he encouraged and created an expectation in the grantee that he would be allowed to enjoy the improved property without any let or hindrance, and his heir the present Maharaja is equitably bound to give effect to such expectation. If that were not, so, the Maharaja might evict him at any time after the money had been spent or demand an impossible rate of rent. This principle was followed by their Lordships of the Privy Council in the case of *Ahmad Tar Khan v. The Secretary of State* 28 C. 693 : 28 I.A. 211 (P.C.) and is eminently applicable to the facts of this case.

25. In this view of the rights created under the sanad as interpreted by the surrounding facts the question of limitation does not arise. For so long as the tank continues to be a tank no assertion of adverse title by the defendant can give the Maharaja a cause of action for resumption or assessment of rent, see *Bent Pershad koer v. Dwlnath* 27 C. 156 : 26 I.A. 216. Besides, as the defendant relied upon his sanad as the root of his title and claimed niskar title under the sanad and not by adverse possession as an alternative source of title, his possession cannot be used for any purpose other than that of explaining the grant on which he relies: See *Labrador Co. v. The Queen* A.C. 101 at P. 122 : 67 L.T. 730 per Lord Hannon.

26. In this view of the case, I agree in dismissing the appeal with costs.