Privy Council Appeal No. 15 *of* 1933.

The Secretary of State for India in Council - - - - *Appellant*

v.

Parashram Madhavrao - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH FEBRUARY, 1934.

Present at the Hearing:

LORD TOMLIN.
LORD RUSSELL OF KILLOWEN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

In the year 1704 the Maharajah of Satara by sanad confirmed to an ancestor of the plaintiff the right in perpetuity to collect the revenue of two divisions (viz., Kharepatan and Salshi), each comprising various villages within its boundaries. In regard to Kharepatan the remuneration was fixed at 2 per cent. of the Government assessment. In regard to Salshi the percentage was not expressly mentioned in the grant, but the rights in respect of Salshi were treated as in all respects upon the same footing as the rights in respect of Kharepatan. Kharepatan and Salshi are situate in the Talukas of Devgad and Malwan, of the Ratnagiri District.

The British Government acquired this territory in 1817 and for many years thereafter the ancestors of the plaintiff and the other hereditary officers were continued in the enjoyment of their offices and emoluments.

Later on, the Government desired to supersede the hereditary officers, and in or about the year 1865 an offer of a commutation settlement was made by Government to the Ratnagiri office holders, as a result of which, if accepted, they would cease to

discharge the duties of their offices and would receive a reduction in their emolument of $5\frac{1}{2}$ annas per rupee. This commutation or non-service settlement was enforced compulsorily by a Government resolution (No. 6260) of the 16th September, 1887, with the result, as regards the plaintiff or his predecessor in title, that he only became entitled to receive 1 rupee 5 annas per cent. of the Government assessment.

The Government resolution, No. 6260, recites that the Government had undoubtedly full authority to enforce the above settlement upon the office holders, and the existence of that authority (however it may have arisen) has not been in dispute in the present action.

Later, however, the Government took further action in the matter, and it is their authority and power in relation to that further action which has been questioned by the plaintiff in these proceedings. What the Government did was to take the average amount paid to the district hereditary officers over a period of five years, 1882–1887, and to fix the resulting amount (less $5\frac{1}{2}$ annas per rupee) as an annual sum to be paid, irrespective of what the amount of the Government assessment might be from time to time. In the case of the plaintiff, the fixed annual sum was Rs. 642.

There does not appear to have been any formal order of Government substituting these fixed annual sums for the annual percentages, but there were put in evidence two documents which, it was said, operated to effect the change. One is a document (dated the 20th April, 1889) signed by J. Pollen, acting collector of Ratnagiri, which runs thus :—

> "Submitted to the Commissioner S.D. for orders. The acting Collector is of opinion that the average of five years' receipts should be taken as the basis for fixing future payments which should be declared permanent and not liable to revision."

The other is the reply (exhibit D. 35) of the Commissioner of the Southern Division (dated the 3rd July, 1889), in which he says :—

> "The acting Commissioner S.D. agrees with Doctor Pollen and directs that the average of five years' receipts should be taken as the basis of fixing the future payments of the District Hereditary Officers which should be declared permanent. This course has been followed in other Districts in the Presidency."

Doubts were suggested before their Lordships whether this direction of the Commissioner was an act of the Government at all, but there is no doubt that the Government approved and acted upon it, because thenceforward payments were, in fact, made upon the five years' footing. Their Lordships must, they think, treat the matter as though the substitution of the fixed annual sum for the percentage payments was an act of the Government. The question, however, still remains whether such act was within the Government's power.

In the year 1900 the plaintiff made an application to Government in the following circumstances:—The Survey Settlement was first made applicable to Malwan in the year 1882–83, and to Devgad in the year 1892–93. The result in each case was an increase in the Government assessment. The plaintiff, on the 7th March, 1900, applied to the Collector Saheb Bahadur of the Ratnagiri District, claiming to be paid his percentage on the larger assessments, having for the first time ascertained that he was being paid an insufficient sum. Incredible though it may seem, it was not until the end of the year 1913 that the Government made reply to this application. By Government resolution, No. 11396, dated the 16th December, 1913, it was decided that as regards Malwan the sum should be calculated on the Survey Settlement. As regards Devgad, the application was not granted. From this it would appear that Government revised the fixed sum in relation to Malwan because it should originally have been calculated in relation to the new assessment, and this had not been done. They declined to revise the fixed sum in relation to Devgad because the increase in the assessment had taken place subsequently to the fixing of the permanent sum. This was a refusal by the Government to admit any right in the plaintiff to a variable annual sum.

In 1916 the plaintiff filed a suit against the Secretary of State for India in Council claiming that in regard to Devgad he was entitled to his percentage on the assessment from time to time, but this suit was dismissed on technical grounds, viz., that it was not maintainable without a certificate under the Pensions Act, 1871 (Acts of the Government of India, XXIII of 1871).

Meanwhile (1914–15) the revision survey was made applicable to Malwan, and resulted in an increased Government assessment. An application by the plaintiff for a corresponding increase in payment resulted in his obtaining the necessary certificate under the Pensions Act, 1871, which enabled him to file the present suit in 1923, against the Secretary of State for India in Council. The plaintiff claimed in that suit a declaration of his rights, and payment of a sum calculated upon the footing that he was entitled to receive a percentage of the amount of the Government assessment for the time being.

The defendant raised three defences, viz.: (1) that the suit was barred under the Limitation Act; (2) that the plaintiff was not entitled to more than what would be payable in accordance with the exhibit D. 35; and (3) acquiescence by the plaintiff.

The District Judge decided in favour of the plaintiff on limitation and acquiescence; but he dismissed the suit upon the ground that the Government by their resolution of the 16th December, 1913, had accepted the decision of the Commissioner contained in exhibit D. 35 and had "acted under an express authority conferred upon them by rules under a statute."

The rules in question are certain rules made under two Bombay Acts, viz., Act XI of 1852 and Act VII of 1863. They will be considered by their Lordships later.

On appeal to the High Court at Bombay, that Court reversed the decree of the lower Court and decreed the plaintiff's claim with costs in both Courts, the amount decreed to carry interest at 6 per cent. per annum from date of suit till realisation.

Both the learned Judges in the High Courts decided against the plea of limitation. The plea of acquiescence does not appear to have been pressed in the High Court any more than it was pressed before their Lordships' Board.

Baker J. thought that under the terms of the sanad the percentage was payable on the Government assessment as it varied from time to time, and that the Bombay Act VII of 1863, under or by virtue of which the Government claimed to have the power to substitute and to have substituted a fixed invariable sum, had upon its true construction no application to the case, inasmuch as the Act dealt only with payments to be made by the subject to Government and had no reference to payments to be made by Government to the subject. He also held that the rules made under the Act, while authorising the reduction of the percentage, did not authorise the substitution of a fixed annual sum.

Nanavati J. took the same view as to the inapplicability of Act VII of 1863 and the construction of the sanad. He further held that exhibit D. 35, substituting a fixed annual sum, was not authorised by the Government resolution No. 6260, which only authorised the reduction of the percentage by $5\frac{1}{2}$ annas per rupee; and that no subsequent ratification or approval by the Government could avail the defendant who had based his case on the resolution alone.

The defendant has appealed to His Majesty in Council and has sought to argue his case primarily on different grounds. He contended that irrespective of the provisions of Act VII of 1863 and the rules thereunder, the Government were entitled to dispense with the services of the hereditary officers, that with the cesser of the services the right to any payment ceased, that therefore, the Government were not compellable to make any payment to the plaintiff, that any payments to him were *ex gratia* payments, and that accordingly he had no cause of action. In their Lordships' opinion, the defendant ought not to be allowed to raise this defence at this stage. It is not raised in the written statement, nor was it apparently urged or considered in any of the Courts below. There is no trace of it in any of the judgments, and indeed, in answer to an interrogatory framed in these terms, "State under what law according to your contention the Commissioner got the power to make (or issue) the Tharav (decision or resolution), exhibit 35," the defendant made the following statement :—

> "As stated . . . the Government issued Resolution No. 6260, dated the 16th September, 1887, and it was issued according to the rules made under sub-clause 3 of clause 3 of Section 2 of Act VII of 1863 and in accordance therewith the Commissioner by Exhibit 35, decided that the non-service settlement should be made applicable and that the amount to be paid on the basis of (the average of) five years should be fixed."

Whatever may be the merits or demerits of the new plea advanced before the Board (and as to these their Lordships are not in a position to express any opinion), it would not, they think, be right to admit it against the plaintiff at this stage; and their Lordships accordingly have excluded it from consideration upon this appeal.

It remains to consider the other points which were argued before their Lordships' Board.

Their Lordships are in agreement with the views which prevailed in the High Court as to the percentage rights conferred under or by virtue of the sanad, viz., that the percentage thereunder must be calculated by reference to the Government assessment for the time being; in other words, that the amount payable was liable to variation with a change in the assessment. It follows that the reduced percentage ($1\frac{5}{16}$ instead of 2) must still be calculated upon the assessment for the time being in force, unless the act of the Government in substituting a fixed annual sum was within their powers, and is binding upon the plaintiff. This question (which is the second point of defence referred to above), their Lordships now proceed to consider.

For this purpose their Lordships will assume (without deciding) that the Act VII of 1863 does apply, notwithstanding the reasons for the contrary view stated in the High Court judgments. It is, however, still essential for the defendant's case to show that the rules made under the Act apply to the present case, for the defence and justification of the Government are that the substitution of the fixed sum was an executive act which the joint effect of the Act and rules gave them power to do.

The main object of the Act is to provide for the summary settlement of claims to exemption from the payment of Government land-revenue. Of that, there can be little doubt. But some of its provisions are framed in language capable of covering a wider range. In particular, section 2, clause 3 (3) provides as follows:—

> "Lands held for service shall be resumable or continuable under such general rules as Government may think proper from time to time to lay down."

By section 32 it is provided that:—

> "(B) the word 'lands' shall, for the purposes of this Act, be understood to include villages, portions of villages, shares of the revenues thereof, and landed estate of every description."

The effect of including this artificial meaning is that section 2, clause 3 (3) enacts that not only lands held for service but also shares of revenues held for service are resumable or continuable

under such general rules as Government may think proper from time to time to lay down.

In the present case the Government, in order to succeed, must be able to point to some rule, made under the Act, providing for the resumption or continuance of shares of revenues held for service. This they cannot do; for the only rules under which they claim to have acted are certain rules made in 1878 (exhibit D. 64) which only relate to what are called in the rules "lands held for service," and "service lands." There is nothing in the rules to extend the meaning of these words; and apart from some legislative enactment, it is not permissible to read into the rules the artificial definition which is contained in the Act. Indeed, the impossibility is emphasised in the present case by the fact that the rules are expressed to be made also under the Act XI of 1852, which contains no such artificial definition. An Act of much later date (No. 1 of 1904) provides by Section 20 that:—

> "Where by any Bombay Act a power to issue any . . . rule . . . is conferred, then expressions used in the . . . rule . . . if it is made after the commencement of this Act, shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act conferring the power."

The corresponding Act, however, which was in force in 1878, was No. 10 of 1866, and it contained no similar provision.

It follows therefore that the rules put forward by the defendant as establishing the existence in the Government of a power to substitute a fixed annual sum for a percentage on a variable amount, were incompetent for that purpose, because they had no application to shares of revenues held for service.

Their Lordships prefer to base their views upon this part of the case, upon the inapplicability of the rules rather than upon the considerations which influenced the respective learned Judges in the High Court.

There remains for consideration the question of limitation. The defendant by his pleading, as well as here and in India, relied upon articles 14 and 131 of the Limitation Act. Article 14 has, their Lordships think, clearly no application, for the plaintiff is not seeking to set aside any Act or order. Nor does article 131 bar the plaintiff's suit, because in the view of their Lordships there was no refusal within the meaning of that article before, at the earliest, 1913, and the present suit was instituted well within the period of twelve years from that year. Before their Lordships' Board the defendant argued that the case fell within article 120. Their Lordships, however, feel no doubt, that the appropriate article is article 131 and that this suit has been instituted within the requisite period of time.

Their Lordships desire to make two further observations. The first is that the decree of the High Court cannot stand in its present form. Under section 6 of the Pensions Act, 1871, it is

not open to the plaintiff to obtain an order for payment. He can, however, obtain a declaration of his rights. The second is this, that this case only decides the rights and obligations of this plaintiff and the Government. It decides no question as between the Government and any other person. As between them, for instance, it may be open to the Government to raise the defence which their Lordships have declined to consider upon the hearing of the present appeal.

In the result this appeal fails ; but in view of section 6 of the Pensions Act the case must be remitted to the High Court in order that the decree may be amended by confining it (apart from costs) to a declaration of the plaintiff's rights as prayed in the plaint ; but in calculating any sum to which the plaintiff may be entitled, the calculation (if not already made) must be made at the rate of Rs. 1 annas 5 (instead of Rs. 2) per cent. per annum. The appellant must pay the respondent's costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

PARASHRAM MADHAVRAO.

DELIVERED BY LORD RUSSELL OF KILLOWEN.

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