(1879) 07 AHC CK 0007

Allahabad High Court

Case No: None

Hira Lal		APPELLANT
	Vs	
Ganesh Prasad and Others		RESPONDENT

Date of Decision: July 10, 1879

Final Decision: Dismissed

Judgement

Spankie, J.

The plaintiff, appellant, alleges that Sheo Ghulam Singh, Beni Singh, and Maidan Singh were the owners of a six annas share in taluka Mawaiya in the district of Allahabad: they, joining with the owners of a five annas share in the same estate, sold, under a deed of sale of which the correct date is not known, their zamindari rights to one Ghulam Muhammad, on condition that the vendors should remain, in perpetuity, in possession of 1,845 bighas of land as their "malikana," without payment of rent, and the rateable Government demand, the latter being payable by the vendees, along with the revenue of the remaining portion of the estates sold: Ghulam Muhammad sold his right to Ghulam Ali, who again sold it to Dulhin Begam, the wife of Ghulam Ahmad, and she transferred it to the defendants; the original vendors sold, on the 7th January 1851, one half share of the resumed malikana, also called "nankar," land to Lala Madho Prasad : in the course of time after his death this share passed into the hands of Lala Makhan Lal by auction, in execution of a decree, held on the 20th January 1873: Makhan Lal died on the 15th June 1877, and the present plaintiff is his brother, and the proprietor and in possession of the lands in dispute: in the recent settlement the defendants prayed the Settlement Officer to exempt them from the payment of the rateable revenue of these lands, and to make the plaintiff responsible for it: the Settlement Officer on the 28th January 1875, rejected their prayer: on appeal to the Commissioner, that officer, on the 15th August 1875, held the plaintiff responsible in future for the rateable revenue payable on the land: the Board of Revenue, on the 1st September 1875, and again in review on the 23rd December 1875, affirmed the Commissioner''s order.

2. The plaintiff desires to enforce the original contract between the vendors and vendees, whose representatives the parties to the suit are, as against the defendants, and he avers that on the 14th March 1853, a similar claim regarding this "nankar" land was decided by the late Sudder Dewany Adawlat in, appeal Sheo Ghulam Singh v. Dulhin Begam 8 S.D.A. Rep. N.W.P. 138: that decision was final in the case, and is binding upon the present defendants. The relief sought by the plaintiff is as follows: (i) That in accordance with the original contract entered into between the contracting parties, the plaintiff be exempted from paying the rateable revenue as against the defendants without any injury to Government: (ii) That the defendants be ordered to pay, as heretofore, the revenue of those lands: (iii) That the defendants he ordered never to claim and demand from the plaintiff the revenue they may have to pay for those lands.

3. The defendants contended that the suit was not cognizable by the Civil Court, and the Settlement Courts had full power to assess the revenue upon the plaintiff, the revenue being payable by the person in proprietary possession of the land, whether or not it has been held as "nankar" and rent-free. They also contend that the plaint discloses no cause of action against them: the settlement orders are not an award of right in favour of defendants with respect to the land: the Commissioner and Sudder Board of Revenue simply declare the Government right. They further urge that the original vendees never remitted the rent in perpetuity (naslan bad naslan), and if they did, the remission could only be legally in force as against the grantor personally, it cannot be enforced against his heirs and representatives: the decree of the Sudder Dewany Adawlat Sheo Ghulam Singh v. Dulhin Begam 8 S.D.A. Rep. N.W.P. 138 referred to by plaintiff cannot control the authority and powers of Settlement Officers whose orders are final and conclusive. They also state that the extent of the "nankar" land has been wrongly given in the plaint.

4. The Subordinate Judge laid down two issues: (i) Whether the settlement order holding the plaintiff liable to pay the Government revenue gives rise to a cause of action against the defendants or not, and whether a suit for a cancellation of such a settlement proceeding is cognizable by the Civil Court or not: (ii) Whether the defendants'' predecessors, having remitted in perpetuity the rent of the land in suit, had taken on themselves the payment of it, and whether that act can be enforced in the plaintiff''s favour as against the defendants or not. On the first issue the Subordinate Judge held that, if the plaintiff claims to have been originally in possession of the land as "lakheraj" without payment of revenue, and that the Settlement Officer had assessed it with revenue, the Settlement Officer''s order might be the ground of an action, but the suit should be instituted against Government; but if the plaintiff means that the original vendees had taken upon themselves to pay the revenue of the land in dispute, the cause of action would accrue on the date on which the plaintiff was compelled to pay the revenue for defendants: it might be assumed that when the defendants presented this petition that the plaintiff should be made to pay the revenue, their proceeding gave a cause

of action to plaintiff; but the Settlement Officer was competent to cancel the maafi grant by a zamindar, and to make the settlement with any one, and although the plaintiff does not ask that his land should continue free of rent, yet his prayer, that the liability for payment of the rent of the land in suit which has been imposed on him by the Settlement Officer may be removed from him and transferred to the defendants, is one opposed to the terms of Section 241 of Act XIX of 1873. On the second issue the Subordinate Judge''s decision is not quite clear. He appears to think that the plea of defendants was based on Section 81 of Act XIX of 1873, and he cites it as in the margin *: the defendants had stated that the agreement was entered into in 1830, when the term of settlement expired: none of the parties to the contract were alive, and the performance of the contract could not be enforced against the defendants. This plea, however, the Subordinate Judge considers that he is not called upon to determine, because he finds that the suit in the shape in which it has been brought is not cognizable. He, therefore, dismissed the plaintiff''s claim with costs. It is now urged in appeal that the order of the superior settlement authorities declaring that the plaintiff was liable to pay rent on his holding having been made at the instance of the defendants, the lower Court is wrong in finding that there was no cause of action at the date of the suit. The second plea urges that the land being held rent-free under a valid and subsisting contract, and the defendants having ignored that contract in their petition to the Settlement Officer, plaintiff was compelled to sue them in order to establish their liability to himself to continue to pay to the Government the rent due on the holding under the terms of the contract. The third plea insists that as the land had been held rent-free for years prior to the passing of Act XIX of 1873, under a judicial decision, the Settlement Officer had no power to assess the said land with revenue : the lower Court had applied Section 241 erroneously to this suit: the plaint raises no question in or by which the interests of Government are concerned or prejudiced: the purpose of the suit is to have it declared that, as between plaintiff and defendants, the latter are liable for the payment of the rent of the former''s holding: the present claim in no way tends to weaken the security for the payment of the Government revenue : it is not denied that the land is liable for the Government demand.

5. On the assumption that the plaintiff can sue to enforce the original contract of sale, as made between the original vendors and vendees, it must, I think, be held that the act of defendants in moving the Settlement Officer to assess the revenue of the land against the plaintiff'', and to relieve them of all the liability on account of it, did give a cause of action to the plaintiff. I would, therefore, determine the first plea in his favour. I would also say that the object of the suit appears to be one for the purpose of obtaining a declaration that, as between plaintiff and defendants, the latter are bound to pay the rateable revenue assessed upon the land, and, therefore, it is not one which is barred by Section 241, Clause (b), Act XIX of 1873. The plaintiff does not sue to set aside the order of the Revenue Courts. Nor does he deny that the Government is entitled to its revenue upon the land. But he prays that

the defendants may be ordered for the future to pay the amount themselves in accordance with the terms of tire contract. With such an order in his favour plaintiff believes that he would be able to recover annually from the defendants whatever he may have been obliged to pay to the Collector as Government revenue. The circumstances of this case are not those of a grant of rent-free land by a proprietor. The vendors sold all their rights and interest in their property to the vendees, reserving to themselves the possession of 1,845 bighas of land to be held by them rent-free as "nankar," and the vendees bound themselves to pay the malguzari of these lands to the Government. It appears to have been part of the sale consideration, or of an "ikrar-nama" or deed of agreement dated the 26th April 1831, executed after the sale-deed. I fail, therefore, to see that these lands can be regarded as rent or revenue free grants by the proprietor or any other unauthorised person to which the provisions of the Bengal Regulation XIX of 1793, Act X of 1859, or of Act XIX of 1873 could apply. There was no application made by a proprietor to resume a rent-free grant, or to assess rent, as payable to the proprietor, on land held rent-free previous to the passing of Act XIX of 1873 under a judicial decision. Nor was there any claim to hold land free of revenue not recorded as revenue-free. The lands were held rent-free by a private arrangement between the original vendors and vendees, and by the same private arrangement, or one executed shortly afterwards, the vendees bound themselves to pay the revenue rate on the lands to the Government. This, therefore, is not a case in bar of which it might be pleaded that Section 79, and other sections of Act XIX of 1873, applied. The payment of the Government revenue has always been made, and the arrangement made in 1831 did not endanger it. These remarks dispose of the fourth and fifth pleas in appeal.

6. With regard to the third plea, I cannot say that the Revenue Courts were bound by the decision of the late Sudder Dewany Adawlat Sheo Ghulam Singh v. Duthin Begwm S.D.A. Rep. N.W.P. 138 , dated the 14th March 1853. The Commissioner, whose order of the 15th April 1875, was affirmed by the Tata Engineering and Locomotive Co. Ltd. Vs. The Assistant Commissioner of Commercial Taxes and Another, Board of Revenue, states in his order that the decree was not with the papers in the record before him, but he did not think that it could have been intended to extend beyond the time of the then existing settlement, and irrespective of all the proprietary changes that might take place in these particular lands. But with reference to the terms of Section 83 of Act XIX of 1873 he considered that the land was chargeable with the payment of the Government revenue. This section provides that no length of rent-free occupancy of any land, nor any grant of land by the proprietor, shall release such land from its liability to be charged with the payment of Government revenue. The defendants moved the Settlement Officer to make it so chargeable as they were not the proprietors, whereas the plaintiff was the proprietor. Indeed, he now mentions that he is so. It is the rule of the Settlement Department to make u/s 43 of Act XIX of 1873 the settlement with the proprietor of

the land. In this instance, the defendants did not deny the plaintiff''s title to the land, and the judicial decision on which so much stress is laid is, as will be presently seen, not one declaring the land revenue-free as against the Government, but one that declares the defendants then could neither claim rent nor revenue from the plaintiff in that suit. I cannot, therefore, hold that the Commissioner and Sudder Board of Revenue were debarred by that decision from assessing the proprietor in possession of the lands with the Government revenue charged upon it, and in exempting the defendants who were not the proprietors of the land, and were not so recorded in the new settlement record, from all liability with respect to it. In the suit before the Sudder Dewany Adawlat in 1853, the Settlement Officer had enhanced the jama of the taluka, and had been induced by the defendants to charge the rateable rent of the increase upon the plaintiff''s predecessors. The Settlement Officer by an order dated the 15th January 1839, did so. The Judges of the Sudder Dewany Adawlat certainly do find that the conditions of the sale-deed were that the vendors should be allowed to retain possession of 1,845 bighas of sir-land free of either rent or revenue. But the Court also held that the Settlement Officer was of course justified in assessing the jama of the taluka with reference to the produce of every bigha which was not held rent-free under a recognised Government grant, but he was not at liberty to demand payment from those who had been by private contract exempted from payment of either rent or revenue, contrary to the agreement entered into between the parties. The Court''s judgment goes on to show that in 1831 the Benares Court of Appeal, by order dated the 6th May, distinctly ordered the malguzari of the 1,450 bighas should be taken from the purchasers, Shah Muhammad Khan and others, and not from the old zamindars. But this Ghulam Muhammad was one of the original vendees whose names were recorded in the sale-deed, though the real purchaser was Ghulam Ahmed, whose dependents they were, and as the Judges of the Sudder Dewany Adawlat found that these vendees had admitted their liability to pay the revenue, and in fact had paid it after the sale had fully operated, they very reasonably would and did hold that the defendant in that suit was not at liberty to take rent in any shape from the then plaintiffs, for the defendant was Dulhin Begam, the widow of Ghulam Ahmed referred to above as the real purchaser. During the current settlement at least she could not divest herself of the liability to continue to pay the Government revenue on these lands. When the settlement had expired and Act XIX of 1873 came into operation, Section 83 of which declares that no length of rent-free occupancy, nor any grant of land made by the proprietor, shall relieve such land from its liability to be charged with the payment of Government revenue, the judicial decision, of the Sudder Dewany Adawlat in 1853 might readily be regarded by the Revenue Courts as binding on the parties then before the Court, and for the term of the current settlement, and as not in any way controlling their power to assess the land and settle it with the admitted proprietor. So far then as the third plea contends that the superior Revenue Courts had no power to assess the land in dispute with revenue, and if it is meant to urge that they exceeded their jurisdiction in doing so, it fails

altogether.

7. I am now brought to the consideration of the most important plea in the case, and that is the second. If the alleged contract is valid and still subsisting between the parties, it may be that the plaintiff is entitled to the declaration for which he prays. There is no doubt that there was a deed of sale, and that there was subsequently on the 26th April an "ikrar-nama" or agreement between the original vendors and vendees, which latter instrument the Judges of the Sudder Dewany Adawlat believed to have been executed because the vendors doubted the good faith of the vendees. The Court also has held that this "unankar" land was included in the sale. The judgment states that "in a proceeding of the Benares Court of Appeal under date 6th May 1831, the Court find it stated that Shah Muhammad Khan and others, petitioners, had represented to the Court that Mehdu Singh and other zamindars had sold their eleven-anna share to them with the reservation (ba istasnai) of 1,450 bighas sir do biswe nankar malikana haq-i-khud, and that as the malguzari of this excepted land was payable by them (the petitioners) and not by the sellers, they prayed that the revenue might be demanded from the petitioners, and not from the sellers, and that the dastaks which had been issued against the latter might be recalled, and an order to the above effect was passed accordingly: the obvious meaning of the passage in the vernacular above quoted is that the old zamindars had stipulated that they should be allowed the 1,450 bighas free of rent, and the Court cannot accept the construction which the respondent would put upon the words, viz., that the land was altogether excepted from the sale, nor that suggested by the Principal Sudder Amin, viz., that all the petitioners meant was that the revenue of the 1,450 bighas should be paid by the old zamindars through them, and not direct into the Government treasury."

8. We must, therefore, accept the Court''s judgment as final as to the fact that the land in suit was included in the sale in 1831, and this, indeed, is not denied by the defendants. We must also admit that the vendees remitted the rent of 1,450 bighas, and also that they bound themselves to pay the Government revenue on the land.

9. But the Court''s judgment is by no means clear as to the exact conditions of the deed and ikrar-nama on certain very material points, and if the decision is obscure on these points, the decree is not clearer. The Court decreed in favour of the appellants (before the Court) for possession of the land exempt from the payment of revenue and wasilat to the amount claimed by them. But the decree is silent as to the duration of this exemption from paying revenue. Neither the sale-deed nor the ikrar-nama were before the Court; the latter instrument, indeed, was filed in appeal, but was not produced in the Court of First Instance. The Court, therefore, would not admit it in evidence, considering that it would be improper and opposed to judicial usage to do so. At the same time, however, they state that they "are enabled to form an opinion regarding its contents and purport from the secondary evidence adduced by the appellants." This admission of secondary evidence to prove the

contents of a document which they might have allowed to be filed, if they pleased, would now be regarded as equally opposed to judicial usage and practice. It is most unfortunate that the document was not considered, as the excuse assigned by the appellants for not producing it before the Subordinate Judge was not to my mind at all satisfactory. They said that the opposite party had by a ruse contrived to get temporary possession of it, and that while it was thus in their custody they fraudulently made certain alterations in it, which rendered its production in a Court of justice impossible. Yet they did produce it before the Sudder Dewany Adawlat and they do not explain how they again got possession of it. The other side might have said with some show of reason that it was not produced in the first Court, because it bore marks of fraudulent alteration, and that its production before the Appellate Court was with a view to prejudice the case against respondent.

10. However, the Court accepting the secondary evidence has not gone further in declaring the nature and conditions of the deed of sale, or after-agreement, than this that the sellers were to be allowed to retain possession of 1,450 bighas of sir-land free from either rent or revenue. The decision does not say whether the arrangement is one solely between the parties and to have force during the current settlement, or whether it is binding for ever on the parties or their heirs and successors. I cannot find in the judgment any trace of a condition making the arrangement one that was to last for ever. I can understand the vendors receiving for their own support a certain extent of sir-lands, but no plausible reason is assigned why the vendee should pay the rateable revenue on the land beyond the term of settlement, apparently then about to commence and lasting for thirty years. We meet with cases where indulgence is shown for a term of settlement, but I have not found it usual in my experience that vendees, in leasing a plot of land to the vendors and remitting the rent, have also undertaken to pay the rateable Government demand on the land for ever.

11. I would also add that there seems to have been contention from the very first regarding the transaction. We have the authority of the Sudder Dewany Adawlat for the fact that a deed of agreement was executed in April 1831, to make matters clearer, because the vendors had commenced to doubt the good faith of the vendees. If this were so, the conditions could not have been very fully stated in the deed of sale. It may be urged that the circumstance that the defendants and their predecessors have continued to pay the revenue for so many years is in favour of the assumption that they were bound by the contract, and must do so for ever, as long as they were simply transferees by private sale. But I would answer to this, that so far back as 1831 litigation commenced in regard to the plot, that it recommenced in 1853, when the opportunity presented itself, and that when the settlement had expired, and a new settlement and record, were in progress, the defendants at once endeavoured to relieve themselves of any liability for the revenue of this land. These circumstances show that the liability was not at first readily accepted, and has not been admitted subsequently. There was little expectation after the judicial decisions

in 1831 and 1853 that any attempt to impose rent upon the land would be successful and since 1853 and during the currency of the settlement any attempt to make the plaintiff responsible for the revenue would have been hopeless. But when Act XIX of 1873 had come into force, a new settlement was in progress, an opportunity was offered whereby when the proprietary nature of the plaintiff was admitted and recorded, the latter should be treated as proprietor and made responsible for the revenue. If the defendants are to be made liable to plaintiff for the revenue assessed upon his holding, it must be shown that they are so liable under the terms of the contract and deed of agreement. These instruments are not before us. The decision of 1853 was binding on the parties then before the Court, one of whom was the widow of the real purchaser of the zamindari rights of the vendors. That decision binds those parties, but as pointed out it nowhere declares the extent of the liability of the successors of the original vendors. In the absence of the deed of sale and of agreement I cannot say whether or not the arrangement was to go beyond the current settlement, and whether or not the contract bound the present defendant. I have advanced reasons for believing that the arrangement was not one that bound the parties "naslan bad naslan," and in the absence of the original documents and of any evidence of a conclusive character that the arrangement was intended to be something more than a personal liability attaching to the vendors during the current settlement, and that it was to be regarded as imposing a charge on the property of the vendors in future, I could not decree the present claim, which is one of unusual character, unsupported by the evidence which a Court ought to have before it when declaring any liability under a contract, and resting solely upon a decision passed more than twenty years ago, and which appears to be conclusive solely as between the parties then litigating.

12. Entertaining this view of the case, I would dismiss the appeal and affirm, though for different reasons, the decision of the lower Court with costs.

Oldfield, J.

13. Upon the questions which arise in this appeal, I am of opinion that the plaintiff, who is proprietor of the land, cannot escape his liability to the Government for the revenue assessed on this land, with reference to the provisions of Sections 83 and 43, Act XIX of 1873, since by Section 83 no length of rent-free occupancy of any land, nor any grant of land made by the proprietor, shall release such land from its liability to be charged with the payment of Government revenue, and by Section 43 it is obligatory on the Settlement Officer to make the settlement with the proprietor of the land. The effect of these sections appears to me to be to render the plaintiff liable to pay revenue to the State upon this land, and the Court cannot give the relief sought, as it would in effect annul the settlement and relieve the plaintiff of a liability for revenue to the State, which the law imposes, nor could it be granted in this suit to which the Government is no party.

14. The plaintiff further seeks substantially to have it declared that as between him and defendants the latter are bound to make good to the plaintiff the rateable amount of revenue assessed on the land and payable by plaintiff to the State; and he seeks to impose this liability with reference to a breach of the terms of the original contract by which the original vendors, now represented by plaintiff, sold their property to the original vendees, from whom it has passed to the defendants; one of the conditions of the sale being that the original vendors should not be liable to pay revenue on a certain quantity of land, exempted from the sale, and which is part of that now in suit. But I am not of. opinion that this liability for breach of the original contract is shown to be incurred by defendants. There is nothing to show that that liability was other than one personal to the parties to the original contract. The defendants are some of a series of purchasers of the property sold, and the circumstance of their purchasing the property will not suffice to saddle them with a liability for breach of the conditions of the original contract.

15. The decision of the Sudder Dewany Adawlat on which plaintiff relies was one in which Dulhin Begam from whom the defendants have obtained the property was defendant, but it cannot be said to have gone so far as to fix this liability on these defendants, by determining that the possession and ownership of the property sold under the original contract, carries with it a liability on the part of whoever is owner to make good loss to the original vendors or their representatives incurred by a breach of the original contract. I therefore concur in dismissing the appeal with costs.

----------Foot Note----------

* Grants of land held under a written instrument (whether executed before or after the passing of this Act) by which the grantor expressly agrees that the grant shall not be resumed, shall beheld valid as against him (but not as against his representatives after his death) during the continuance of the settlement of the district in which the land is situate, which was current at the date of the grant.