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AIR 1932 Bom 386 : (1932) 34 BOMLR 791 : (1932) ILR (Bom) 501 : 140 Ind. Cas. 171

Bombay High Court

Case No: First Appeal No. 116 of 1926

The Secretary of State for India in Council	APPELLANT
Vs	
Tatyasaheb Yeshwantrao Holkar	RESPONDENT

Date of Decision: Dec. 11, 1931

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Section 79#Contract Act, 1872 â€" Section 72

Citation: AIR 1932 Bom 386 : (1932) 34 BOMLR 791 : (1932) ILR (Bom) 501 : 140 Ind. Cas. 171

Hon'ble Judges: John Beaumont, J; Broomfield, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

John Beaumont, Kt., C.J.
This is an appeal from the decision of the Joint Judge of Thana. The plaintiff, the Secretary of State for India,

claims the re-payment of a sum of Rs. 37,000 and odd as money paid under a mistake, which, it is alleged, was discovered in 1922.

2. The moneys were paid in respect of a claim by the defendant under the Land Acquisition Act, and the facts giving rise to the claim were these.

In the year 1803 the East India Company made a grant to one Luke Ashburner of certain lands in Bhandup village and other villages. In the year

1817 Luke Ashburner sold his estate to Cawasjee Manekjee. In the year 1838 Cawasjee Manekjee applied to the Government for a grant of

certain other lands, and the Collector recommended to the Government that a grant should be made and in 1843 a grant was made, although the

actual document is net now forthcoming. In the year 1879 there was an administration suit in this High Court in respect of the estate of one

Cursetjee Cawaejee, who was the son of Cawasjee Manekjee. In that suit, in the year 1884, the estate was sold to the son of Cursetjee, viz.,

Dadabhai, and the conditions of sale and particulars used for the purpose of that sale are in evidence, and the suggestion is that what was sold to

Dadabhai was everything included in the grant of 1803 and 1888. In the year 1886 the defendant in the present suit obtained a decree against

Dadabhai, and in execution of that decree he purchased the estate which Dadabhai had acquired in the Court sale. In the year 1906 the

Government of Bombay notified certain land for acquisition under the Land Acquisition Act, and the particular laud which is in question in this suit

was deecrib-ed as "" Bhaudup"" (that is the name of the village) ""Khoti Khajan"", which denotes the character of the land and shows that it was not

Government land. The area required was mentioned as 480 acres and odd. The land acquisition officer awarded the sum of Rs. 2,210 and odd,

which was at the rate of Rs. 4 an acre. Dadabhai and the defendant both claimed the compensation money, and defendant requested the Collector

to refer the questions both of title and of amount of compensation to the Court. There were accordingly two references, one as to the amount of

compensation, and the other as to the title to the compensation. The District Judge increased the amount to Rs. 14 per acre, and decided the

question of title in favour of the defendant, the result being that the defendant became entitled to compensation at the rate of Rs. 14 per acre. There

were three appeals from the decision of the District Judge. The first was an appeal by Dadabhai against the defendant and the Collector of Thana.

In that appeal Dadabhai''s case was that the 480 acres in question were not included in the sale to the defendant. That appeal was dismissed. The

second appeal was by the defendant against the special officer of building sites of Thana claiming increased compensation, and in that appeal the

High Court raised the amount of compensation to Rs. 50 per acre, The third appeal was by the Collector against the defendant and Dadabhai

asking to have the amount of compensation reduced, and that appeal was dismissed. Those appeals were disposed of in the year 1912 Following

on the disposal of those appeals the Government paid to the defendant in this suit the amount of Rs. 37,731 and odd which is claimed in this suit.

3. It appears to me that as a result of those proceedings under the Land Acquisition Act, there was an adjudication by the High Court that this sum

of Rs. 37,000 and odd was payable by the Government to the defendant, and the Government as a result of those proceedings became entitled to

take possession, and did take possession, of the land in question under the provisions of the Land Acquisition Act.

4. The plaintiff in this suit says that the defendant was not entitled to the land for which he was paid, but that the land in fact all the time belonged to

Government, and he says that the payment of the Rs. 37,000 and odd, therefore, can be recovered as money had and received to the use of the

plaintiff. The Advocate General based his claim on two grounds : first, that there was total failure of consideration; and, secondly, that the payment

was made by mistake so that the money is repayable u/s 72 of the Indian Contract Act.

5. The learned District Judge held, in the first place, that the claim of Government was res judicata having regard to the land acquisition

proceedings. He held, secondly, that on the merits the land did not belong to the plaintiff at all; and he held, thirdly, that the defendant had been in

possession of the land for sixty years before the action was brought and, therefore, at any rate, had a good claim by adverse possession against the

Crown, and from that decision this appeal is brought.

6. Now there seem to me many difficulties in the way of the Crown. In the first place, in my view, the whole action is misconceived. The claim of

the Crown is that they paid this money under a mistake. But as I view the facts they paid the money not under any contractual, or supposed

contractual liability, but because they were bound to pay it under the order of this Court in the land acquisition proceedings. It is laid down in the

leading case of Harriot v. Hampton (1797) 2 Sm. L.C. 386 that where money has been paid by the plaintiff to the defendant under the compulsion

of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received.

The case of Kishen Sahai v. Bakhtawar Singh ILR (1898) All. 237 is an authority in which that principle was applied in India. The learned

Advocate General says that the principle does not apply here, because the order of this Court under the Land Acquisition Act, as it stood in the

year 1912, was not a decree. But even assuming that to be so, the fact does not; in my opinion, exclude the principle of Marriot v. Hampton,

since, as was pointed out by Lord Halsbury in Moore v. Vestry of Fulham [1895] 1 Q.B. 399 the principle of law is not that money paid under a

judgment, but that money paid under the pressure of legal process, cannot be recovered. In that case a summons had been issued by the Vestry of

Fulham for recovery of money and the money was paid on the service of the summons and before any further proceedings were taken. Now here

undoubtedly under the land acquisition proceedings there was an order of this Court under which the Government were bound to pay this money

as a condition of their getting possession of the land. Whether if the amount had not been paid it would have been necessary, as the learned

Advocate General suggests, to bring a suit founded on the judgment of the Court, I do not pause to inquire. I will assume that that would have

been necessary. But even so, if a suit had been brought, it must necessarily have succeeded, and it would not have been open to the Government in

that suit to challenge the proceedings and the judgment of this Court in the land acquisition case. I think, therefore, that the money was paid under

the pressure of legal process, and that this action for money had and received does not really lie.

7. If, however, I am wrong on that point there are other objections to the Government''s claim. So far as the claim is based on a total failure of

consideration, the answer seems to me to be that there was not a total failure of consideration, and an action for money had and received does not

lie if the consideration fails only in part. It is not disputed here that the defendant was in possession of the land in question at the time of the

notification, and there can be no question that the Government succeeded in recovering possession of the land and in getting rid of whatever claim

the defendant had to the land, by means of these proceedings and by means of the payment. It is, therefore, in my opinion, impossible to say that

there was no consideration for the payment.

8. With regard to the claim of mistake, in my opinion the Government do not prove that they made the payment under a mistake. The only witness

called was a Mr. Antia who was the officer of Government employed to work this case up. He says in his evidence that he commenced

investigation in 1916 and complet-ed it in 1922. He admits in cross-examination that all the papers, from which he had got the map which he has

prepared and on which he based his case, were in Government custody when the notification was issued. He further admits that there is no

document directly showing that the land belonged to Government. Now the officer who was advising Government at the time of land acquisition

proceedings appears to have been the local Collector, that is, the Collector of Thana, and it seems to me that Government have not proved that the

Collector of Thana was under any mistake. He had got all the documents available, and if he had looked at them he could have found out what the

position as to title was. He may well have looked at them, and have come to the conclusion that the title on paper was doubtful. But he may have

been satisfied that in fact the defendant or his predeceassors-in-title had been in possession, as the defendant claims in his written statement, from,

at any rate, the year 1839-40, if not from the year 1803. He may have been satisfied that if the defendant were put to the proof he could prove

possession for sixty years against the Crown, and the Collector may very well have taken the view that it would be cheaper and more expeditions

to deal with the matter under the Land Acquisition Act instead of risking the bringing a suit against the defendant. It seems to me that we should not

be justified in inferring that the Collector in 1906 must have made a mistake, merely because it is now suggested that the defendant had no good

paper title to the property.

9. Another objection raised by the defendant to the Government''s claim is based on estoppel and I think that claim is also well founded. Having

regard to the terms of the Government notification which described the land in such a manner as to negative the suggestion that it was Government

land, and having regard to the whole course of the land acquisition proceedings which were utterly inconsistent with the land being Government

land, I think the Government must be taken to have represented that in 1906 the land did not belong to Government. The learned Advocate

General did not really dispute this, but Bays that assuming that to be so, there is no evidence that the defendant altered his position as a result of

that representation. But to my mind the defendant clearly did alter his position. If the Government had said in 1906 that the land was their land, it

appears to me obvious that there would never have been any proceedings under the Land Acquisition Act, and the defendant, therefore, would

never have made the claim he did make and would not have given up possession under the Act. He could have said. "" I am in possession of the

land and if Government claim it they must bring a suit against me."" The whole course of conduct by the defendant was altered by the fact that the

Government represented that the land was not their land, and I see no reason why they should be allowed now to contradict that representation on

which the defendant has acted to his detriment. I would, point out, because this is relevant on the various defences, that there is no suggestion of

any fraud or any suppression of facts by the defendant. The Government had in their possession all the material documents in 19C6 and the whole

trouble has arisen because, as it is suggested by them, they did not take the trouble to find out what their own title was.

10. Another point which was taken against Government and on which the learned District Judge decided in favour of the defendant is the issue of

res judicata. It is not really necessary, in the view which I take of the other defences, to deal with that defence. But as it has been raised I will say

that my present view is that the plaintiff is not barred by res judicata. This suit is brought by the Secretary of State for India in Council and having

regard to Section 79 of the CPC he is the only person who could bring the suit. In the land acquisition proceedings the Secretary of State for India

was not a party, but the land Acquisition officer, that is the Collector of Thana, was a party to the proceedings and in all the appeals to this Court.

The learned trial Judge takes the view that Government were parties to the land acquisition proceedings, and that it is a mere matter of form

whether they are represented by the Secretary of State or by a local officer. I am not, however, satisfied that it is only a matter of form. It may very

well be that the Secretary of State for India has machinery for dealing with suits in which he is a party and that machinery may not be applicable to

suits in which a local Government officer is a party. I think that it would not be right to hold that the Secretary of State is barred by res judicata, the

bar being based on previous proceedings in which he himself was not a party, though some local Government representative may have been.

11. With the actual merits of the dispute. I will deal very shortly. Having looked at the various documents in the case to which the learned

Advocate General referred us, particularly the grant of 1803 and the application and recommendation of the Collector of 18S8, I think it is a

matter of grave doubt what land was granted to the predecessor-in-title of the defendant. I am disposed to think that the party on whom the

burden of proof rests of proving title to this particular land must fail. No doubt in the land acquisition proceedings, if the defendant''s title had been

challenged, the burden would have been upon him to show that he had got title, either by grant, or by adverse possession. But in this suit in which

the plaintiff is claiming repayment of moneys paid under a mistake, the burden is upon him to prove his case and in order to discharge that burden

he must prove that the defendant had not got title either by grant or by adverse possession. In my view he does not succeed in discharging that

burden.

12. In my judgment, therefore, the appeal must be dismissed with costs.

Broomfield, J.

13. The trial judge has held in this case that the plaintiff''s suit is barred by res judicata by reason of the course of the acquisition proceedings in the

year 1906 and the following years and especially by reason of the judgment of the High Court in those acquisition proceedings in appeal No. 191

of 1910. That conclusion the learned Advocate General has attacked on the ground that in a proceeding under the Land Acquisition Act

Government could not put forward its own title, the title of the claimants in the proceedings being for the purposes of these proceedings assumed.

It has been held by the Privy Council in T.B. Ramchandra Rao Vs. A.N.S. Ramchandra Rao, that, although an award under the Act is not a

decree, and not an adjudication of title so far as it merely determines the amount of compensation to be paid, a decision as to the apportionment of

the money is an adjudication of title as between the parties interested. But the Advocate General says that this cannot affect Government''s position

in the present case because Government did not at the time of these acquisition proceedings put forward any claim to title on its own account. The

question of Government''s title according to him did not arise at all, and it would not have been open to Government to put forward its present case

in the land acquisition proceedings. In that connection he referred to Section 48 of the Act which provides: ""Except in the case provided for in

Section 36 (with which we are not concerned) the Government shall be at liberty to withdraw from the acquisition of any land of which possession

has not been taken."" In the present case possession of the land had been taken and therefore it was not open to Government to withdraw from the

proceedings, and the setting up of title in Government itself as a ground for getting the award of compensation to the defendant set aside would

have been, it is suggested, tantamount to withdrawal from the proceedings. A farther point has also been made that u/s 79 of the CPC :"" Suits by

or against the Government shall be instituted by or against the Secretary of State for India in Council."" This is a mandatory provision and it is urged

that the Secretary of State could not be bound by any decision passed against the Collector of a District, Mr. Thakor who appears for the

defendant argues that Section 79 of the Code does not apply, because proceedings under the Land Acquisition Act are not suits, and in

proceedings under that Act Government is represented by the Collector. There is, however, Section 141 of the Code which lays down that the

procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil

jurisdiction. In my opinion the arguments of the learned Advocate General on this point ought to prevail. I think the learned Joint Judge was wrong

in treating the matter as one of form and not of substance. It is true in a sense that the Collector in the land acquisition proceedings and the

Secretary of State in a suit both stand for Government or the Crown, but it by no means follows that all decisions binding upon the Collector

should be regarded as binding upon the Secretary of State. If the Crown is not properly represented that is not a matter of form.

14. On the other hand, I consider that there is considerable force in Mr. Thakor''s contention that the principle of estoppel applies, although the

principle of res judicata does not. The representation by Government which is relied on by the defendant as constituting an estoppel is the

notification of this land as khoti khajan land, which description implies that it was land not belonging to Government, and the whole course of the

land acquisition proceedings presupposed that Government had no claim to the land and that it belonged to one or other of the claimants. Mr.

Thakor rightly points out that if instead of instituting acquisition proceedings Government had challenged the defendant''s title, it would have been

necessary to bring a regular suit, and if that had been done in 1906 the defendant would have been in a better position than he now is to prove his

case, at any rate so far as possession of the land is concerned. Besides, the defendant spent money in litigation in order to establish his claim as

against Dadabhai in the land acquisition proceedings, which he need not have done if Government had not taken steps to acquire the land on the

basis that it belonged to the defendant. Under the circumstances I cannot agree with the trial Judge that the defendant has not altered his position

for the worse, and I think Government may fairly be held to be estopped from recovering the compensation money.

15. The learned Advocate General has admitted that his cause of action in this suit must be based either upon mistake or upon failure of

consideration. The cause of action, if based on mistake, is to be derived from Section 72 of the Indian Contract Act, which lays down that "" a

person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it"". On this point Mr. Thakor''s

argument is that the money cannot be recovered as having been paid under a mistake because it was paid under the order of the Court. He

contends that the only remedy, assuming that one exists, would be under the Land Acquisition Act, Whatever Government''s claim to title may be,

and whether or no there was any mistake, Government cannot be entitled to get possession of the defendant''s land by the summary procedure

provided by the Land Acquisition Act and then afterwards recover the money which was paid for it. It has frequently been laid down that money

which has been paid under the compulsion of legal process cannot be recovered on the ground that it was paid under a mistake. In Mathura Nath

Kundu v. Steel ILR (1886) Cal. 533 the Court was dealing with a suit to recover money alleged to have been paid by the plaintiffs to the

defendants in excess of the sum demandable by the latter from the former on account of road cess. The Court held that Article 96 of the Indian

Limitation Act applied, that is the Article appropriate to a suit based on Section 72 of the Indian Contract Act. Some of the payments referred to

had been recovered under Court decrees and in respect of those sums the Court observed as follows (p. 534):-

We may observe that those sums, which are said to have been recovered under decrees, cannot be obtained back in the present suit. The proper

course is to apply for a review of the decrees under which those sums were recovered, that is, if the plaintiffs are so advised, and if they are within

time.

16. That appears to me to support Mr. Thakor''s argument that the plaintiff''s remedy, supposing that there was any remedy open, was to recover

the money under the Land Acquisition Act, that is by some application in the course of the proceedings taken under that Act. The case just cited

was followed in Tofa Lal Das v Syed Moinuddin Mirza ILR 1924 Pat. 448 the relevant portion of the judgment being at p. 458, and there is a

decision of our own High Court in Wolf & Sons v. Dadyba, Khimji & Co. ILR (1919) Bom 631 : s.c. 21 Bom. L.R. 986 to the same effect.

17. The Advocate General has argued that in this case the payment was not really made under legal process. He says that an award under the Act

is not a decree, or was not a decree at the time of which we are concerned, Section 26 (2) not being at that time part of the Act. That, however,

appears to me to be a technical point and not a point of substance. Whether the award of the High Court could have been enforced as a decree or

not, there is no doubt that Government was bound to pay the money. To all intents and purposes the money was paid under compulsion of legal

process, and I consider that the authorities to which I have referred apply in principle. That being so, the plaintiff has no ground of action u/s 72 of

the Indian Contract Act, even if there was a mistake.

18. But, further, the plaintiff has not satisfied us that there was a mistake as to the ownership of this land as a matter of fact. It is clear that in this

suit Government must prove that they had a title to the land at the time of the land acquisition proceedings in 1906. Mr. Thakor has gone further

and contended that it is necessary for Government to prove not only that they originally had a title, but that their title still subsisted in 1906, and had

not been extinguished by the defendant''s adverse possession. The latter proposition appears to me to be doubtful in view of the decision of the

Privy Council in Secretary of State for India v. Chellikani Rama Rao ILR (1916) Mad. 617 But it is perfectly clear that the burden of proving title

is upon the Government.

19. [After discussing evidence bearing on the point, his Lordship concluded.] In my opinion the evidence relied upon by the learned Advocate

General is not sufficient to establish that the land in dispute is the property of Government...It has been held by the Privy Council that in appeals the

burden of showing that the judgment appealed from is wrong lies upon the appellant. ""If all he can show is nicely balanced calculations which lead

to equal possibility of the judgment on either the one side or the other being right, he has not succeeded ""(p. 349)-Nabakishore v. Upendrakishore

(1921) 24 Bom. L.R. 346 On that principle it appears to me that the plaintiff has failed in this appeal even upon the merits,

20. As regards the question whether the suit can be based upon failure of consideration, I think there is no doubt at all that it cannot. As I have

mentioned, it is possible, so far as we know, that in 1906 Government may have supposed that the defendant had a good possessory title, whether

or no his title could be made out from the documents. In any case it is not disputed that in 1906 the defendant was in possession. Government by

taking proceedings under the Land Acquisition Act obtained possession of the land; they acquired whatever rights the defendant possessed in the

land. It could not be said, therefore, that there was failure of consideration, even if the defendant was not really the owner.

21. I agree that the appeal must be dismissed with costs.