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Mullar Rao Bajee(1) tend to the opposite conclusion,) we find sufficient in the evidence, and especially in the earlier letters written by Dayaram from Bombay, to show that Dayaram was not receiving pecuniary aid from his father, but on the contrary was supplying his father with such money as he could spare.

We are, therefore, of opinion that the appellant's case fails on all the grounds on which it has been rested; and we, accordingly, affirm the decree of the Subordinate Judge with costs.

Decree affirmed.

2 Knapp, 60.

APPELLATE CIVIL.

1880
September 13.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

NAWAB MIR KAMALUDIN HUSENKHAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* PARTAP MOTA (ORIGINAL DEFENDANT), RESPONDENT.*

The Summary Settlement (Bombay) Act VII of 1863, *Secs.* 2, 6, 9—*Jaghirdar—Inamdar—Suit for contribution—The Indian Contract Act IX of* 1872, *Secs.* 69 *and* 70.

The plaintiff was the *jaghirdar* of a village in which the defendant held certain land as *inamdar* on the annual payment of a certain quit-rent. The plaintiff's *jaghir* was, in point of time, subsequent to the defendant's *inam*. Ever since the time of the *jaghir*, the ancestors of the defendant (and, after them, the defendant himself) paid the quit-rent to the ancestors of the plaintiff, and, after them, to the plaintiff himself. In 1869 the summary settlement was introduced into the village under Bombay Act VII of 1863. Under section 9 of that Act, a notice was served upon the plaintiff by the Collector in respect of the village, and he accepted the settlement provided in sections 2 and 6 of the Act. Government, accordingly, granted the village to him at the summary settlement of two annas in the rupee of the full assessment. No notice was served upon the defendant under the Act, nor did the plaintiff inform the defendant of the notice which the plaintiff had received in respect of the village. The certificate issued by the Collector to the plaintiff, previously to the grant of the *sanad* regarding the settlement, contained the following passage:—"Before the villages (Vesu and Sanya) were granted in *jaghir*, lands were held by *peta-inamdars* over which the *jaghirdar* has no right. They are entered in the *sanad* only for the purpose of receiving the settlement and paying it over to the Sarkar." In 1877 the plaintiff sued the defendant for the amount of three years' summary settlement which he (plaintiff) had paid to Government on account of the defendant's land.

* Second Appeal, No. 150 of 1880.

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Held that the defendant was not liable to pay, whether regarded as an independent *inamdar* holding directly under Government or as a tenant of the plaintiff.

Held, also, that sections 69 and 70 of the Indian Contract Act IX of 1872 did not apply to the case.

Jaisingbhai v. *Hataji* (1) referred to and approved.

THIS was a second appeal from the decision of H. Birdwood, District Judge of Surat, reversing the decree of Chandulal Mathuradas, Second Class Subordinate Judge at the same place.

The Subordinate Judge allowed the plaintiff's claim, but his decree was reversed, in appeal, by the District Judge. The facts of the case are fully stated in the judgment of the High Court.

The principal question argued in the second appeal was whether the defendant was liable to pay the amount of the summary settlement claimed by the plaintiff.

Shantaram Narayan appeared for the appellant.

Pandurang Balibhadra appeared for the respondent.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—This is a suit to recover Rs. 7, being the amount of summary settlement assessment for three years which the plaintiff alleges that he has paid to Government in respect of certain lands in the village of Vesu held by the defendant.

The summary settlement under Bombay Act VII of 1863 appears to have been introduced into that village in 1869. The plaintiff is the *jaghirdar* of the village, which is said to have been granted to his ancestor by the Government of the Gaekwar when the village formed part of the territory of that prince.

The defendant is a *girasia*, and holds in *inam*, in the same village, thirteen bighas of *giras*-land, for which he pays a *khandni* (quit-rent) of Rs. 13-13 annually and no other Government land assessment. It is admitted on both sides that the ancestors of the defendant have held that *inam* from a period anterior to the grant of the village in *jaghir* to the plaintiff's ancestor, and ever since that grant have paid the Rs. 13-13 to the ancestors of the plaintiff or the plaintiff. It does not appear whether that payment was made to the plaintiff and his ancestors for their own benefit, or as the agents of Government for the benefit of the State, save so far as exhibit 16, leads to the inference that

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the latter was the case. If the thirteen bighâs were subjected to a full assessment, it has been proved that it would be Rs. 2-8 *per* bigha, *i. e.*, Rs. 32-8 annually for the whole of his *inam*. So it appears that the defendant, inasmuch as he has uniformly paid only Rs. 13-13, holds the lands "partially exempt from the payment of land revenue"—the words used in the preamble and text of Bombay Act VII of 1863.

Notice under section 9 of that Act was served upon the plaintiff in respect, apparently, of the whole village, but he [on the ground that the grant, to his ancestor, of the village was made by the Gaekwar, and, therefore, as the plaintiff argued, that he (the plaintiff) was not liable to be served with notice under the Act,] declined to receive the notice. But he did not, as required by clause 8 of section 9, send any answer in writing to the Collector, demanding an inquiry into his (plaintiff's) title to hold the village in *jaghir* wholly or partially exempt from payment of land revenue, and he accordingly was deemed to have accepted the settlement as provided in sections 2 and 6 of the Act, and he appears to have acquiesced therein. And Government purported to grant the village to him at the summary settlement of 2 annas in the rupee of the full assessment. It is not pretended either that the Collector sent any notice under the Act to the defendant or to any of the other minor *inamdars* of the village, or that the plaintiff communicated to the defendant or to other minor *inamdars* the fact of such a notice having been sent to him in respect of the village of Vesu.

A document, numbered as exhibit 16 in the Regular Appeal, has been produced by witness (No. 17) and given in evidence on behalf of the plaintiff. It is an extract from the Collector's Outward Register, and is a copy of a certificate issued on the 28th August, 1869, by the Collector to the plaintiff, and runs thus :—

"Before the villages (Vesu and Sanya) were granted in *jaghir*, lands were held by *peta-inamdars* over which the *jaghirdar* has no right. They are entered in the *sanad* only for the purpose of receiving the settlement, and paying it over to the Sarkar. In this manner the *sanads* have been prepared. But as these villages have not been surveyed, the measurements have not been put in the *sanad* ; consequently the *sanads* are retained

here pending the survey, and this certificate has been given (to the *jaghirdar*). When the survey is held, this certificate should be produced, and the *sanads* will be granted to you (the *jaghirdar*) after the measurements have been inserted, and you should give to the registrar a fee of 1 anna for each *sanad*, 25th August, 1869." This arrangement made by Government (the Collector) with the plaintiff (the *jaghirdar*) is not alleged or proved to have been entered into with privity or consent of the defendant or other minor *inamdars*. The defendant must be regarded either as an independent *inamdar* holding directly under Government, or as a tenant of the plaintiff.

The Collector, by issuing the notice under section 9 to the plaintiff only, treated him as holder of the whole village. Neither the Collector nor the plaintiff gave to the defendant any opportunity of standing upon his rights as an independent *inamdar* (if such he were), and demanding an inquiry into his title.

Section 7, no doubt, provides that "any settlement made with the holder of land, held wholly or partially exempt from payment of land revenue, in accordance with section 6 and the rules annexed thereto, shall, so far as the right of Government to levy the annual quit-rent mentioned in the said section is concerned, not only be binding upon such holder, his heirs and assigns, but also on the rightful owner, his heirs and assigns, whosoever such rightful owner may be."

The portion of that section now quoted was intended to protect Government in the event of any mistake having been made in ascertaining the rightful owner to be served with the notice, but was not intended to authorize the Collector deliberately to overlook the rights of holders known by him to be such. Exhibit 16 shows that the Collector believed the *peta-inamdars* (of whom the defendant was one) to be holders perfectly independent of the plaintiff, and nevertheless the Collector ignored them as persons entitled to demand an inquiry into their title under the Act. We do not say whether or not they were so; as, whether they were so or were tenants of the plaintiff, it seems to us that the result of this suit must be the same. If the defendant were, in 1869, an independent holder in possession of his thirteen bighas,

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we cannot regard the plaintiff as a holder of the lands within the meaning of clause (*f*) of section 32, the glossarial portion of the Act. In this view there has not been service of notice upon any holder of the thirteen bighas; and, if we are to regard the plaintiff as the agent of Government under exhibit 16 to collect assessment from the defendant and other *peta-inamdars*, he is suing for that to which Government is not entitled, for there has not been any summary settlement in respect of the defendant's thirteen bighas either with any *de facto* or any *de jure* holder thereof. The fact that the defendant held thirteen bighas, and that the plaintiff held other lands in the village, does not constitute the plaintiff and defendant joint holders under clause 5 of section 9 of the Act. For, in the view that the defendant was an independent holder of those thirteen bighas, he was neither a joint holder nor a holder in common with the plaintiff. Their holdings were in that view separate.

If we take the other view, and regard the defendant as a tenant of the plaintiff, we find no provision in the Act which enables a landlord or superior holder to distribute the summary settlement assessment amongst his tenants or sub-holders, such as there is in the Bombay Local Fund Cess Act (III of 1869, sec. 8) with respect to the recovery of local cess by superior holders from their tenants. There is nothing in the Bombay Act VII of 1863 which indicates any general intention on the part of the Bombay Legislature to enable the holders, from Government, of lands wholly or partially exempt from payment of land revenue to alter existing contracts as to rent between those holders and their sub-tenants. The preamble of Act VII of 1863 only speaks of an intention to deal with "the relative rights of Government and the holders"—evidently by the expression "holders" meaning those who hold directly from Government. And in section 4, where the Legislature outsteps that intention by treating of "any special or extra cess, fine or tax" customarily levied from the holders, *occupants* or *cultivators* of land, and enacts that Government may, in lieu of such extra cess, fine or tax, impose on the land "any sum, which may be deemed a fair equivalent, as an annual assessment to be paid under all circumstances," the second clause provides that "whenever, under the preceding clause, any such cess,

fine or tax, hitherto payable by the occupant, cultivator, or other person not being the owner, shall be made leviable from the owner, it shall be lawful for such owner to recover from such occupant, cultivator, or other person, so long as the said occupation, cultivation or other tenure of the land shall endure, the amount of the commuted assessment fixed in lieu of such cess, fine or tax." This section shows clearly that it was the intention of the Bombay Legislature to confine the right of the owner (that is, superior holder) to recoup himself, as against his sub-tenants, in respect of annual assessment by way of summary settlement to be levied from him by Government under the Act, to cases in which such annual assessment was substituted for a special or extra cess, fine or tax previously payable by such sub-tenants. It is easy to understand why the Bombay Legislature should not empower the landlords to recoup themselves as against their tenants in other instances than those in which a burden, theretofore directly borne by the latter, was rendered payable in the first instance by the former.

The immunity to be gained by the landlord under the Act from inquiry into his title to total or partial exemption from payment of land revenue, and for which immunity he was to pay a quit-rent of two annas in the rupee of what would be a full assessment, was not necessarily any benefit to his sub-tenants, many of whom were, no doubt, already paying to him rack-rents, and could not in fairness be subjected to any additional burden. Nor, in such a case as the present, does there appear to be any just reason why the summary settlement assessment, payable under the Act by the plaintiff, should, so far as it respects the lands held by the defendant, be ultimately chargeable on him. His title is admitted to be older than that of the plaintiff. When "the village of Vesu" was granted by the Gaekwari Government to the ancestor of the plaintiff, it must be taken as so granted subject to rights which were good as against that Government, which could not lawfully grant more than belonged to itself. We cannot presume that it intended to confiscate such rights in favour of its grantee, and no evidence of any such intention in this case has been brought to our notice. That the State cannot, by its grants, destroy rights in the land which are good against itself, is very

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clearly expressed by Professor H. H. Wilson in his observations quoted in 12 Bombay High Court Reports, Appendix, page 34, and in those of Mr. Mountstuart Elphinstone quoted in the same volume, Appendix, page 39 ; and see *R. N. Mandlik* v. *Dadaji Bapuji Desai*(1), *Desai Himatsingji* v. *Shivsang Bhavabhai*(2). It matters not whether the *sanad* or grant contains a reservation of such rights. The State cannot grant what does not belong to it. And whether the defendant is to be regarded as the immediate tenant of Government or as the tenant of the plaintiff, we do not see how the defendant's elder title could justly be made to bear the annual charge, or any part of it, incurred by the plaintiff as the price of evading an inquiry into his junior title, or how the circumstance that the plaintiff has so escaped, can benefit the defendant. If the defendant's rights were good against the Gaekwari Government, which granted the village to the plaintiff, those rights would be equally good against the present Government, if it resumed the village, or if it caused the village to be sold for non-payment, by the plaintiff, of the summary settlement assessment so long as the defendant paid regularly to the person who, or the Government which, might at the time be entitled to receive it, the annual *khandni* of Rs. 13-13, with which only his thirteen bighas were chargeable.

Section IV of Bombay Act VII of 1863 has been repealed by section 2 and Schedule A of Bombay Act V of 1879, but is re-enacted in sections 49 and 50 of the same Act.

We see no reason for holding that, under the circumstances above detailed, sections 69 and 70 of the Indian Contract Act could be properly applied in this case.

The decision of a Division Bench of this Court in *Jaisingbhai* v. *Hataji*(3) seems to be in accordance with that at which we have arrived in this case.

For the foregoing reasons only we affirm the decree of the District Judge with costs.

Decree affirmed.

(1) I. L. R., 1 Bom., 523, 528. (2) Printed Judgments of 1880, pp. 185, 187.
(3) I. L. R. 4 Bom. 79.