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Subordinate Judge is, therefore, right in holding that the period of limitation is three years,—the bond, as we presume, not having been registered.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás, Mr. Justice Birdwood, and Sir W. Wedderburn, Bart., Justice.

1885. *April* 23.

NA'RA'YAN VENKU KALGUTKAR, PLAINTIFF, *v.* SAKHA'RA'M NA'GU KOREGAUMKAR, DEFENDANT.*

Jurisdiction—A'bkári—Land revenue—Toddy spirit—Bombay Revenue Jurisdiction Act No. X of 1876, *Secs.* 3, 4, 5—*Bombay A'bkári Act No. V of* 1878, *Secs.* 24, 29, 54 *and* 67—*Land Revenue Code, Bombay Act No. V of* 1879, *Sec.* 87—*Regulation XXI of* 1827, *Sec.* 60.

The plaintiff sued to recover from the defendant, a farmer of ábkári duties on the manufacture of spirits, under section 60 of Bombay Regulation XXI of 1827, a sum of money alleged to have been illegally levied by him as tax or rent through the mámlatdár in respect of certain cocoanut trees tapped by the plaintiff in 1877-78 and 1878-79.

Held, that the Civil Courts have jurisdiction to entertain such a suit. If the claim be held to be one in respect of land revenue, it falls within the exception contained in clause (c) of section 5 of Act X of 1876. If it is not, section 4 of the Act has no application.

Per BIRDWOOD, J.—The expression "land revenue" as used in Act X of 1876 does not include either the duties leviable, under Regulation XXI of 1827, on the manufacture of spirits, or the taxes on the tapping of toddy trees, the levy of which in certain districts was legalized by section 24 of the Bombay A'bkári Act No. V of 1878. A farmer of duties on the manufacture of spirits is not authorized to levy a duty on any juice in trees, either under Regulation XXI of 1827, or Act X of 1876, or Bombay Act V of 1878.

Juice in toddy-producing trees is not spirit, which includes toddy in a fermented state only.

THIS was a reference, under section 13 of Act X of 1876, by Ráv Sáheb V. V. Wágle, Subordinate Judge of Vengúrla, who stated the case thus:—

"The plaintiff sues to recover Rs. 102-8-0 principal and Rs. 12-4-0 interest on that sum wrongfully recovered by the defendant. The plaint alleges that the defendant, being the farmer of ábkári revenue of the Vengúrla Táluka under the

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British Government for the years 1877-78 and 1878-79, levied, with the aid of the mámlatdár, from the plaintiff Rs. 102-8-0 on the 14th June, 1882, as tax or rent on some cocoanut trees alleged to have been tapped by the plaintiff during the said years in the *thikan* called 'Sunktankar' or 'Sukadbag' and other lands situated in the Vengúrla Táluka, but owned by the Vádi Sarkár, and that the said levy is illegal, inasmuch as the British Government, or their farmer, was not entitled to recover any tax or duty by drawing toddy from trees owned by the Vádi Sarkár, and as the defendant recovered tax on more trees than were actually tapped by the plaintiff. Hence this suit to recover the amount illegally levied by the defendant, with interest.

"2. The defendant answered *(inter alia)* that a suit for the recovery of rent levied through the assistance of the Revenue authority could not lie in a Civil Court (under Act X of 1876 amended by Act XVI of 1877, and under the Bombay Land Revenue Code, Act V of 1879), and was barred as *res judicata* under section 13 of the Code of Civil Procedure.

"3. The questions thus raised between the parties, and which I humbly beg to submit for the decision of the High Court, are:—

"(*a*). Whether this suit is barred under Act X of 1876 as amended by Act XVI of 1877?

"(*b*). If not, whether it is barred by the Bombay Land Revenue Code, Act V of 1879?

"4. My opinion on either point is in the negative * * * * * * * * *."

No one appeared in the High Court on behalf of the plaintiff.

Vásudeo Gopál Bhándárkar appeared for the defendant.—The plaint is for the recovery of money received from the defendant as ábkári duty; and the only question is, whether the Civil Courts have jurisdiction to entertain the suit. The defendant got his farm under section 60 of Regulation XXI of 1827. The plaintiff is a manufacturer of liquor. He is a toddy-drawer under section 54, clause 2, of the Regulation. His trees belong to the Sávant-

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vádi State, and he seeks total exemption from the payment of duties on the manufacture of spirit, on the ground that the trees, on which the duty has been levied, are exempt, as being the property of a foreign State. We say the maintenance of the suit is barred by clauses (*b*) and (*c*) of section 4 of Act X of 1876. This is a suit either in the nature of an objection to the incidence of an assessment or land revenue authorized by Government; or is a claim connected with, or arising out of, proceedings for the realization of land revenue, or the rendering of assistance, by Government or by any officer authorized by Government, to a superior holder for the recovery of dues from an inferior holder. The definition of the word "land" in section 3 of Act X of 1876, the Bombay Revenue Jurisdiction Act, which includes juice in trees, is sufficiently wide to include toddy. Before Act X of 1876 such claims were never cognizable by the Civil Courts: see section 71 of clause 2 of Regulation XXI of 1827. A claim, like the present, is not a suit for damages; and the only remedy to enforce it was by a complaint to the Government whose acts could not, by Act VII of 1836, be questioned in any Court of law whatever.

Neither is the jurisdiction of the Civil Court saved by the Bombay Land Revenue Code Act V of 1879: see the definition of the word "land" in section 3.

NÁNÁBHÁI HARIDÁS, J.—We think we must order the Subordinate Judge, who has made this reference under section 13, Act X of 1876, to proceed with the case.

The suit is to recover from the defendant a sum of money alleged to have been illegally levied by him as tax or rent from the plaintiff through the mámlatdár, on the 14th June, 1882, in respect of certain cocoanut trees tapped by the plaintiff in 1877-78 and 1878-79, the defendant being described as a farmer, for those years, of ábkári duties on the manufacture of spirits under section 60, Bombay Regulation XXI of 1827. This Regulation was repealed by the Bombay Ábkári Act V of 1878, which came into force on the 1st January, 1879. The levy of the tax was, therefore, made apparently under section 24 of that Act, and not under the Regulation.

The defendant contends that the Civil Court has no jurisdiction to entertain such a suit, and refers to Act X of 1876, sec. 4 (*c*), and to Bombay Act V of 1879, in support of his contention. We think that the jurisdiction of the Civil Court is not taken away by either of those enactments in respect of such a suit as the present. The former enactment applies only to claims in respect of "land revenue" (1), whereas the present is a suit in respect of ábkári revenue, which has always been regarded as distinct from land revenue.

Whether the tax or duty levied in this case is, strictly speaking, 'land revenue,' we are not called upon to determine on the present occasion. If it is not, section 4 of Act X of 1876 has no application to this case. If it is "land revenue" within the meaning of section 3, taking "land" to include "juice in trees", and the tax or duty to have been levied on juice in plaintiff's trees, then we think that the case would come within the exception contained in section 5 of the Act, which distinctly provides that "nothing in section 4 shall be held to prevent the Civil Courts from entertaining," among other suits, "(*c*) suits between superior holders or occupants and inferior holders or tenants regarding the dues claimed or recovered from the latter." See also Bombay Act V of 1879, sec. 87, last clause.

The pleader for the defendant has not referred us to any thing in the latter enactment (Bombay Act V of 1879), which takes away the Civil Court's jurisdiction; whereas section 29 of "the Bombay Abkári Act, 1878" (Bombay Act V of 1879), clearly contemplates suits in the Civil Court between "a farmer of the right of drawing toddy" and "any person who has drawn toddy from any toddy-producing tree".

WEDDERBURN, J., concurred.

BIRDWOOD, J.—I concur in thinking that the Subordinate Judge must be directed to proceed with the case, not only on the ground that, if the claim be held to be one in respect of land

(1) "Claims connected with, or arising out of, any proceedings for the realization of land revenue or the rendering of assistance by Government or any officer duly authorized in that behalf to superior holders * * * for the recovery of their dues from inferior holders * * *."

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revenue, it falls within the exception contained in clause (c) of section 5 of Act X of 1876, but also because I am distinctly of opinion that the expression "land revenue", as used in that Act, does not include either the duties leviable, under Regulation XXI of 1827, on the manufacture of spirits, or the taxes on the tapping of toddy trees, the levy of which in certain districts was legalized by section 24 of the Bombay Abkári Act, V, 1878.

The word 'land' is defined in Act X of 1876 as including "juice in trees", and the expression 'land revenue' includes all sums received or claimable by or on behalf of Government from any person on account of any land held by him. If, therefore, the defendant was legally empowered, as a farmer of duties on the manufacture of spirits, to levy a duty on any "juice in" plaintiff's trees, or if he was authorized by section 24 of the Abkári Act to levy the tax complained of by plaintiff, and if that tax was really one on the "juice in" plaintiff's trees, then, no doubt, such duty or tax would be 'land revenue' within the meaning of Act X of 1876, and the defendant would occupy the position of a superior holder, the plaintiff being an inferior holder.

But the defendant clearly had no right, under Regulation XXI of 1827, to levy a duty on the "juice in" any trees. According to clause 2 of section 54 of the Regulation, the term 'spirit' includes "toddy in a fermented state", and the term "manufacture" includes "the process by which the said fermented toddy is procured, whether the fermentation be produced by natural or artificial means." Toddy in an unfermented state is not spirit; and the framers of the Regulation seem to have thought that some process was necessary to induce fermentation after the toddy was drawn from the tree; for the word "toddy" is evidently used in the Regulation in its ordinary sense as meaning the juice of toddy-producing trees after it has been drawn. There is nothing in the Regulation which would warrant the supposition that the word was intended to apply to the sap of the trees before they were tapped. The process by which fermentation is understood to be induced, is not the tapping of the trees, but clearly some chemical process, natural or artificial, which practically constitutes the manufacture of the "spirit", which the

"toddy" becomes when "fermented". It may be that fermentation actually commences, under some natural process, before the sap is drawn. But it was on no such understanding, apparently, that the Regulation was enacted; for a distinction is made in section 54 between "toddy" and "fermented toddy" or spirit. It was only on the process, whatever it was, by which the unintoxicating fluid which came from the tree became, after some appreciable lapse of time, a spirituous intoxicating liquor that the defendant was entitled to levy a duty under the farm held by him. A duty so leviable would not be land revenue within the meaning of Act X of 1876.

Nor, again, would "a tax on the tapping of toddy trees" be a tax on the "juice in" the trees. For, till the trees are actually tapped, there is clearly no provision in section 24 of the A'bkári Act which justifies the levy of a tax on their sap. But so soon as they are tapped, and the sap leaves the tree, it is no longer "juice in" the trees. It is no longer a constituent part of the tree. It at once ceases to be "land", just as crops, when reaped, cease to be immoveable property. Moreover, a tax on the process of tapping is not, strictly speaking, a tax on juice at all. No duty legalized under section 24 of the A'bkári Act would, therefore, be land revenue within the meaning of Act X of 1876.

If the plaintiff and the defendant really occupy towards each other the positions of inferior and superior holder, it is to be observed that the third paragraph of section 87 of the Land Revenue Code, 1879, contemplates suits between persons occupying such positions in respect of amounts of rent or land revenue due or levied in excess of what was due. And so it was held in *Ganesh Hathi* v. *Mehta Vyankatrám*[1] that a mámlatdár's order, under section 87, does not preclude the parties from having recourse to the Civil Courts, if dissatisfied with it.

Again, it is to be noted that under section 29 of the A'bkári Act, which is a later law than Act X of 1876, when any amount is due to any farmer of the right of drawing toddy from any person who has drawn toddy from any toddy-producing tree, such

(1) I. L. R., 8 Bom., 188.

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farmer may apply to the Collector to recover such amount on his behalf; and the Collector may, in his discretion, "recover such amount as if it were an arrear of land revenue." Such a provision would be superfluous, and would not, probably, have found a place in the A'bkári Act if the toddy drawn from toddy-producing trees had been held by the Legislature to be "land" within the meaning of any existing enactment. And although the farmer has the right of applying to the Collector, the section expressly recognizes his right also to recover the amount due to him "by suit in the Civil Court or otherwise." It was not, apparently, the intention of the Act to affect, except as provided by section 67, any right to seek a remedy by civil suit which might belong either to the farmer or to the person to whom any duty was payable.

The costs of this reference should be dealt with by the Subordinate Judge when disposing of the case.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Sir W. Wedderburn, Bart., Justice.

1885. *April* 29.

SAKHA'RA'M GOVIND KA'LE, APPLICANT, *v.* DA'MODAR AKHA'RA'M GUJAR AND KESO GOVIND NANDGIRI, OPPONENTS.*

Decree—Execution—Sale in execution, the judgment-debtor being ignorant of the execution proceedings through the fraud of the decree-holder—Setting aside proceedings in execution—Civil Procedure Code (XIV of 1882*), Secs.* 244, 294, 311*—Separate Suit—Limitation Act XV of* 1877*, Sch. II, Art.* 166.

In 1879, D. obtained a decree against S. S. gave security for the satisfaction of the decree, whereupon D. agreed not to take proceedings in execution. In breach of this agreement, D. in the same year applied for execution, and sold certain immoveable property belonging to S., of which K. became the purchaser. K. did not apply for possession until 1883, in which year he applied for and obtained possession of the property. S. alleged that he then for the first time became aware of the sale, and that by the fraud of D. and K. he had been kept in ignorance of the execution proceedings taken by D. in breach of the above-mentioned agreement, and within thirty days after K. obtained possession, he (S.) applied for a reversal of the orders which had been passed in the aforesaid fraudulent proceedings. The Subordinate Judge held that the application was barred by article 166 of Schedule II of the Limitation Act XV of 1877, and referred the applicant to a separate suit to set aside the sale. On application to the High Court,

* Extraordinary Application, No. 93 of 1884.