

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

NA'RA'YAN VENKU, (ORIGINAL PLAINTIFF), APPLICANT, v.

SAKHA'RAM NA'GU, (ORIGINAL DEFENDANT), OPPONENT.*

1887
March 3.

Parties—Suit for money illegally levied by a farmer of ábkári revenue—Collector not a necessary party to such a suit—Bombay A'bkári Act (V of 1878), Secs. 29 and 67.

The Collector is not a necessary party to a suit brought against a farmer of ábkári revenue for a refund of money illegally levied at his instance by the Collector under section 29 of the Bombay A'bkári Act (V of 1878)(1). Section 67 of the Act expressly exempts the Collector from responsibility.

Though a person subjected to an undue demand may, under section 29 of the Act, take steps by which the Collector's proceedings may be stayed, still his abstinence from such a course will not deprive him of his ordinary right to recover money wrongfully taken from him for the benefit of a third person.

THIS was an application under section 622 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued to recover the sum of Rs. 102-8-0 which had been illegally levied from him by the defendant, who was a farmer of ábkári revenue. The plaintiff alleged that he was a tenant in occupation of *thikán* "Sukadbag," which was the property of the Vádi State; that the British Government had no right to levy any ábkári tax within the area of the said *thikán*; that the defendant had in the year 1880 for the first time claimed the right to levy a tax on cocoanut trees which were tapped by the plaintiff in this *thikán*; that the Collector had at the instance of the defendant attached the plaintiff's property to enforce payment of the new tax; and that, to prevent his property from

* Application under Extraordinary Jurisdiction, No. 36 of 1886.

(1) Section 29 of Act V of 1878 provides as follows:—"When any amount is due to any such farmer from such farmer's licensee in respect of a license, or to any farmer of the right of drawing toddy from any person who has drawn toddy from any toddy-producing tree, such 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, and shall pay any amount so recovered to the applicant. Provided that the execution of any process issued by the Collector for the recovery of such amount shall be stayed if the person from whom it is sought to recover the same institutes a suit in the Civil Court to try the demand of the farmer, and furnishes security to the satisfaction of the Collector for the payment of the amount which the Court may adjudge to be due from him to such farmer: Provided also that nothing contained in this section or done thereunder shall affect the right of any such farmer to recover by suit in the Civil Court or otherwise any amount due to him from any such person as aforesaid.

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being sold, the plaintiff was obliged to pay Rs. 102-8-0 on account of the tax. The present suit was brought to recover this sum wrongfully taken from him by the defendant.

The defendant pleaded that the plaintiff could not sue in a Civil Court to contest the orders passed by the revenue authorities under the Bombay Land Revenue Code (Act V of 1879); that a farmer under the British Government possessed the right to levy a tax on trees tapped in the *thikans* of the Vadi State; and that the plaintiff not having paid the amount directly to the defendant, had no cause of action against him.

Both the lower Courts dismissed the suit, on the ground that the plaintiff had no cause of action against the defendant alone, and that the Collector was a necessary party to the suit.

The plaintiff thereupon applied to the High Court under section 622 of the Civil Procedure Code.

A rule *nisi* having been granted on the 22nd March 1886,

Vasudev G. Bhandarkar showed cause.

Ghanasham Nilkanth supported the rule.

WEST, J.—The plaintiff in the present case is a holder of land at Vengurla, under the Chief of Savantvadi. The land contains cocoanut trees subject, as the defendant says, to *abkari* dues, to which the defendant is entitled as farmer of the *abkari* or liquor excise of the petha of Vengurla. It seems that the Collector considers that the trees are subject to taxation, while the plaintiff thinks they are exempt, as growing on land the property of the Savantvadi Chief, and enjoying immunity under the terms conceded to the Chief by the British Government. The defendant insisting on payment to him, and being refused payment by the plaintiff, sought the aid of the Collector, and so realized what was by the Collector recognized as due to him under section 29 of the *Abkari Act* (Bombay Act V of 1878).

The plaintiff thereon filed a suit in the District Court against the farmer and the Collector together, but on further consideration he withdrew that suit and brought the present suit against the farmer alone in the Court of the Subordinate

Judge. He sought to recover the money which the Collector had forced him to pay. The farmer (defendant) answered that the plaintiff having withdrawn from the suit against the defendant and the Collector together, could not now sue the defendant alone on substantially the same cause of action, that the suit was barred by limitation, and that the Collector was a necessary party to the suit. The Courts below have held the last-named objection fatal to the suit. The Collector, they have held, was a necessary party; the suit as against him could not be brought in the Subordinate Judge's Court, and they have accordingly dismissed it.

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Section 29 of the Ābkāri Act provides that "when any amount is due to a farmer of the right of drawing toddy from any person who has drawn toddy . . . such 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, and shall pay the amount so recovered to the applicant." This process may be stayed by a suit being filed and security furnished by the person charged. The farmer may, if he prefers it, proceed by a suit in the Civil Court.

For the discretionary exercise of his authority in a case under the section just quoted the Collector is not subject to any action in a Civil Court. He is protected by section 67 of the Act. No protection is expressly afforded to the farmer; but whether he is liable or not to refund a sum levied at his instance which the Civil Courts would hold not to have been justly due, is not the question immediately before us. The Civil Courts are, by section 4 of Act X 1876, deprived of jurisdiction, in any case of a claim against the Government whom the Collector represents, to set aside any cess or rate authorized by Government under the provisions of any law for the time being in force, so that a tax imposed in the exercise in good faith of fiscal functions legally constituted, is exempted from the cognizance of the law Courts. But this exemption was thought by the Legislature to be consistent with a jurisdiction still to be exercised in cases of dues recovered by superior from inferior holders of land—sec-

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tion 5 (c). These arrears would be recovered like arrears of land revenue under Regulation XVII of 1827; and the Land Revenue Code (Bombay Act V of 1879) by sections 86, 87, entitles the superior holder to the assistance of the Collector after a summary inquiry, while leaving him still subject to a suit for any sum levied at his instance in excess of what was due—*Ganesh Hathi v. Mehta Vyankatram Harjivan*⁽¹⁾. There is thus nothing inconsistent, according to the view of the Legislature, in a responsibility to be enforced by the Civil Courts resting on a person who has put the Collector in motion, while the Collector himself stands exempt from their jurisdiction.

The provision in section 29 of the A'bkári Act, by which the person on whom a demand is made may stay the summary process of the Collector by instituting a suit in the Civil Court against the farmer, may suggest a doubt whether, after having failed to adopt this course, the same person can subsequently bring a suit to recover the sum, which, he thinks, has been wrongfully levied from him. The last clause of the section applies only to a suit by the farmer. But though the person subjected to an undue demand may take steps by which the Collector's proceedings will be stayed, still we think that his abstaining from this course will not deprive him of his ordinary right to recover money wrongfully taken from him for the benefit of a private person. The discretion given to the Collector is obviously not a judicial, but an administrative, discretion. It does not conclude the right without an express provision to that effect. In *Winter v. Attorney General of Victoria*⁽²⁾ the Judicial Committee held that a construction was to be avoided, if possible, which would transfer the determination of liabilities from the ordinary Courts to a board of executive officers. The principle is one of general application, and it justifies the conclusion that the responsibility of the farmer for the acts induced by him under section 29 of the A'bkári Act is not affected by the Collector's irresponsibility. The Collector acting "on his behalf" acts as his bailiff or agent, and he is answerable for having set the Collector in motion.

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

(2) L. R., 6 P. C., at p. 380.

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It may well be doubted whether any exercise of discretion by a Collector could supersede the jurisdiction of the Courts on the question of whether the place whereon toddy had been drawn was or was not within the area subject to his authority. His right to interfere where he has authority, by no means implies that his interference is conclusive of the existence of the authority, and where that does not exist, the exercise of force is a wrong which the Courts must remedy.

It appears, then, that a suit may be maintained against a farmer of the liquor contract under the circumstances of the present case without the Collector's being a necessary party. If he were a necessary party, because of his official act in aiding the farmer, the consequence would be that the farmer also would take the benefit of this, exemption and escape responsibility. The Collector does not at all stand in the position of the registrar in the case of *Wishwambhar Pandit v. Prabhakar Bhat*⁽¹⁾, for there the registrar exercised a *quasi* judicial function, but he is expressly exempted from liability. The farmer is not; and the suit may, we think, be entertained against him alone.

Without determining the other questions that may arise in the case, we reverse the decrees of the Courts below, and direct that the suit be entertained as against the farmer alone. Should the Collector desire to become a defendant, in order to protect the revenue, he can apply for that purpose, and the District Judge can, if he thinks it expedient, transfer the cause to his own Court. Costs to abide the final decision.

Decree reversed.

(1) I. L. R., 8 Bom., 269.