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[407] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

THE SECRETARY OF STATE FOR INDIA (*Original Defendant*), *Appellant* v. SHETH JESHINGBHAI HATHISANG AND OTHERS (*Original Plaintiffs*), *Respondents.** [19th April, 1892].

Land revenue—Bombay Summary Settlement Act VII of 1863—Settlement under that Act is an agreement and subject to the law of contracts—Settlement made and sanad issued under a mistake—Quit-rent paid by inamdars to Government under such settlement—Refund—Void agreement—Contract Act (IX of 1872), ss. 20 and 65—Sanad—Meaning and effect of.

Under the Bombay Summary Settlement Act VII of 1863, a settlement in respect of the village of Mankol was effected, in 1864, between the Government and the plaintiffs, who were the *inamdars*, and a *sanad* was granted to the plaintiffs, under the terms of which a certain yearly quit-rent was payable by them to Government in respect of the said village. At the time of the settlement the plaintiffs believed that they were the superior holders of all the lands in the village, including certain *wanta* lands. It subsequently appeared, however, that the *wanta* lands were the property of certain *girassias*, who were in possession as owners, and that the plaintiffs were not the holders of these lands within the meaning of s. 32 of Act VII of 1863. The Government, however, required the plaintiffs to pay the entire quit-rent of the village for the *Samvat* years 1939-1940, as fixed by the *sanad*. The plaintiffs paid under protest and brought this suit to recover the amount (Rs. 400-12-6) paid in respect of the *wanta* lands.

Held, that the plaintiffs were entitled to a refund of the quit-rent paid in respect of the *wanta* lands.

A settlement under Act VII of 1863 (Bombay) is an agreement effected by proposal and acceptance (see s. 2), and is subject to the ordinary rules applicable to contracts. Here both parties entered into the settlement in the belief that the plaintiffs were the superior holders of all the lands in the village. There was, therefore, a common mistake as to a matter of fact which both parties must have regarded at the time as essential to the agreement, it being made so by the Act itself under which they assumed to contract. Such a mistake under s. 20 of the Contract Act (IX of 1872) renders the agreement void. The settlement as to the *wanta* lands might be treated as distinct from that which applied to the remaining lands of the village, the former being void, and the plaintiffs being, therefore, entitled to a refund of the quit-rent paid in respect of such lands under s. 65 of the Contract Act.

A *sanad* issued under Act VII of 1863 merely declares what by s. 6 of the Act is stated to be the effect of the settlement to which both the Government [408] and the holders of the land have consented; but it is by virtue of the settlement itself, as provided by the Act, that Government are entitled to demand payment of such rent.

[R., 25 B. 714 (750)=3 Bom. L.R. 603; 15 Ind. Cas. 836 (837)=5 S.L.R. 267.]

SUIT to recover quit-rent paid under protest by the plaintiffs to Government in respect of certain *wanta* lands for the *Samvat* years 1939 and 1940, and for a declaration, &c., that the defendant was not entitled to levy a quit-rent on the *wanta*.

The said lands were situate in the village of Mankol, of which the plaintiffs were the *inamdars*. The plaintiffs alleged that under the Bombay Summary Settlement Act, VII of 1863, a settlement was effected in 1864 between them and the Government in respect of all the lands in the village, including the *wanta* lands; that at the time of this settlement they *bona fide* believed that they were the superior holders of the *wanta* lands as well as of the rest; and both parties being under that impression

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the amount of quit-rent was then fixed and a *sanad* was granted to them by Government. Certain *girassias* being in possession of the *wanta* lands, the plaintiffs subsequently brought a suit against them to compel them to contribute to the quit-rent leviable on the village under the settlement. In that suit, however, the plaintiffs failed, the Court holding that, at the time of the settlement, the *girassias* were the owners of the lands and that they were not liable, not having been parties to the settlement of 1864.

The plaintiffs were subsequently required by Government to pay the quit-rent for the entire village, including the *wanta* lands, for the years 1939 and 1940 as fixed by the settlement of 1864. They paid it under protest, and now brought this suit to recover the amount (Rs. 400-12-6) paid in respect of the *wanta* lands, and for a declaration that they were not liable to pay in respect of the said *wanta* lands.

The defendant contended that the plaintiffs were liable to the whole rent until the *sanad* of 1864 was cancelled. It was stated that the Government was willing to issue a fresh *sanad* on the joint application of the plaintiffs and the *girassias*, or on the plaintiffs obtaining a decree showing their exact share of the village.

[409] The District Judge rejected the claim, holding that it was not cognizable by the Court under s. 28 (1) of the Bombay Summary Settlement Act VII of 1863.

On appeal to the High Court the case was remanded to be disposed of on the merits (see Printed Judgments for 1889, p. 82).

On remand the District Court passed a decree for the plaintiffs, awarding the claim in full, and making the declaration prayed for.

The defendant appealed to the High Court.

Rao Saheb *Vasudeo J. Kirtikar*, (Government Pleader), for appellant (defendant) :—On the plaintiffs' (respondents') representation of the facts, *viz.*, that they were the registered holders of all the lands in the village, the Government granted them a *sanad*, which has been acted on for more than fifteen years. They are, therefore, now estopped from objecting to it, and the mistake cannot be relieved against—Story on Equity, para. 151. The *girassias* ought to have been joined in this suit. They hold a third share of the village.

The Government has been willing to grant a fresh *sanad*, but this could only be done with the assistance of the plaintiffs, who are the *inamdars*, and they would not join except on conditions which Government could not admit. Until the dispute between the plaintiffs (respondents) and the *girassias* is settled, the Government can do nothing—*Dolsang* v. *The Collector of Kaira* (2). The plaintiffs are in the position of trustees for the *girassias*. They, therefore, cannot seek to set aside the *sanad* without the consent of the *girassias*.

Govardhandas M. Tripathi, for respondents (plaintiffs) :—The plaintiffs are willing to take a separate *sanad*, and have offered **[410]** to do so, but Government require them to apply jointly with the *girassias*.

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(1) Section 28 of Bombay Act VII of 1863 :—When any settlement of a claim or claims to total or partial exemption from land revenue has been made by the Governor in Council, or any duly authorized officer of Government under this Act, any appeal from or against the proceedings, orders or acts of the officers of Government engaged in making any such settlement shall be made to the Governor in Council or to such officer or officers as may be appointed by the Governor in Council to take cognizance of such appeals, and shall not be cognizable by any other authority.

(2) 4 B. 367.

Under the Bombay Summary Settlement Act, VII of 1863, Government cannot grant a *sanad* without the holder's consent. The term "holder" is defined by s. 32, cl. (*f*) (1). The plaintiffs are not the holders of the land in the possession of the *girassias*, and the plaintiffs' *sanad*, which related to that land, is *ultra vires*.

At the time of granting the *sanad* both the Government and the plaintiffs believed that the plaintiffs were the holders of the *wanta* lands. This was a mistake. The *sanad* is, therefore, void—s. 20 of the Indian Contract Act (IX of 1872). See also ss. 65 and 70; Pollock on Contracts (5th Ed.), p. 418. The *sanad* being void, the question of estoppel cannot arise—*Bingham* v. *Bingham* (2).

[SARGENT, C. J., referred to *Jones* v. *Clifford* (3).]

Rao Saheb *Vasudeo J. Kirtikar* in reply:—There was no mistake on the part of Government. The plaintiffs represented the facts to Government, and the *sanad* was granted. The mistake of one party does not make a contract void.

JUDGMENT.

SARGENT, C. J.—The plaintiffs seek to recover from Government the quit-rent paid to Government (under protest) for the *Samvat* years 1939 and 1940 in respect of certain *wanta* lands in the village of Mankol, of which the plaintiffs are *inamdars*, and which lands are admittedly in the occupation of the *girassias*, and also for a declaration that the defendant is not entitled to levy a quit-rent on the *wanta*.

The lands in question were included in a settlement effected between the plaintiffs and Government in 1864, in respect of all the lands in the village, under the Bombay Summary Settlement Act, VII of 1863. The case for the plaintiffs is that the **[411]** settlement was effected on the assumption that they were the holders of all the lands in the village, whereas the *girassias* were then and are now in possession of the *wanta* lands as owners, as subsequently determined by this Court in *Jesingbhai* v. *Hataji* (4). The judgment of this Court in the suit brought by the plaintiffs against the *girassias* to compel them to contribute to the quit-rent leviable on the village lands under the settlement is doubtless conclusive as between the plaintiffs and the *girassias*, that the *wanta* lands in the village were the property of the latter at the time of the settlement; and no attempt has been made in this suit by Government to dispute the correctness of that decision. We must, therefore, in this state of the evidence, regard it as settled that, neither at the time of the settlement, nor when the payments to Government in question were made, were the plaintiffs the "holders" of those lands within the meaning of s. 32 (*f*) of the Summary Settlement Act, VII of 1863, or indeed of the *sanad* itself, which was the result of that settlement.

The plaintiffs' case is that, at the time of the settlement, they *bona fide* believed themselves to be the superior holders of the *wanta* lands, and entered into settlement under that belief. The question is whether, having under that impression settled with Government for the payment of a

(1) Section 32, clause (*f*):—For the purposes of this Act the word "holder" shall be taken to signify the person who by himself, his tenants, sub-tenants or agents is in possession of the land held wholly or partially exempt from land revenue assessment, and shall include a mortgagee in possession as aforesaid. The committee, manager or trustee of any temple, who may be in possession of such lands, shall be considered the holder thereof.

(2) 1 Ves. Sen. 126. (3) 3 Ch. D. 779. (4) 4 B. 79.

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certain quit-rent in respect of all the lands in the village, they are now entitled to any and what relief. It appears that, on the discovery by the plaintiffs that they were not the superior holders of the *wanta* lands, they applied to Government to have the *sanad*, which relates to all the lands in the village, amended; and this the Government assented to, provided the plaintiffs and *girassias* joined in their application, or on plaintiffs' obtaining a decree as to their exact share in the village; and such is the answer which they now, by their written statement, make to the present plaint, contending at the same time that, until such amendment is made, the plaintiffs are liable for the entire quit-rent. With respect to this latter objection to the plaint, it is to be remarked that the *sanad* merely declares what, by s. 6 of the Act, is stated to be the effect of the settlement, to which both the [412] Government and the holders of the land have consented. But it is by virtue of the settlement itself, as provided by the Act, that the Government are entitled to demand payment of the quit-rent; and the present question, therefore, as to the right of Government, under the circumstances of the case, to insist upon the entire quit-rent as settled in respect of all the lands in the village, is one to be determined quite independently of the *sanad*; and we agree, therefore, with the Joint Judge, that this suit will lie although the *sanad* may not have been amended.

We may here remark that the provision in s. 28 of the Act VII of 1863, which precludes a Civil Court from questioning a settlement made under the Act, so far as regards the right of the Government to levy from the holder for the time being of the lands the annual quit-rent fixed by s. 6, is repealed by Act X of 1876; and the present suit is not included in the suits over which the jurisdiction of the Civil Court is taken away by s. 4 of that Act.

Now, it is to be remarked that what is termed a settlement in the Act, as made by Government with the holder of land, arises from the acceptance by the holder, as stated in s. 2, of the terms and conditions offered by Government, as set out in s. 6. In other words, it is an agreement effected by proposal and acceptance and subject to the ordinary rules applicable to contracts. In the present case we see no reason to doubt that both parties entered into the settlement in the belief that the plaintiffs were the superior holders of all the lands in the village. They were the registered holders in the Government books, and the subsequent conduct of the plaintiffs and more specially the suit they brought against the *girassias*, shows that they regarded themselves as being entitled as such holders. Both parties, therefore, engaged in the settlement under a common mistake as to a matter of fact which they must both have regarded at the time as essential to the agreement, it being made so by the Act itself under which they assumed to contract. For there is not a particle of evidence to show that they intended to contract on any other basis. Such a mistake by s. 20 of the Contract Act (IX of 1872) renders the [413] agreement void. Here, doubtless, it affects only a portion of the subject-matter of the contract, *viz.*, the *wanta* lands; but, looking at the nature of the contract, the object of which was to settle in a summary manner claims to exemption from payment of assessment on lands on payment of a quit-rent, assessed on the lands at a uniform rate, as provided by s. 6, the settlement as regards the *wanta* lands may be treated as distinct from that which applies to the remaining lands in the village; and we arrive at the conclusion that the plaintiffs were entitled to contend that the settlement was void

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as regards the *wanta* lands, and that, as provided by s. 65 of the Contract Act, they were entitled to a refund of the quit-rent paid in respect of such lands. It is plain, however, that the amount of the refund must depend on the extent of the *wanta* lands, which cannot be ascertained, so as to bind the Government, in the absence of the *girassias*. The third and fifth issues could not, therefore, be determined in this suit without making the *girassias* parties.

We must, therefore, reverse the decree and send back the case for a fresh decision with due regard to the above remarks, after making the *girassias* parties and recording fresh findings on issues third and fifth. The parties to pay their own costs of this appeal.

Decree reversed and case sent back.

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Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Candy.

KASTURCHAND BAHIRAVDAS AND OTHERS (*Original Defendants*), *Appellants v.* SAGARMAL SHRIRAM AND ANOTHER (*Original Plaintiffs*), *Respondents.** [4th July, 1892.]

Parties—Partnership—Non-joinder—Suit in name of a firm by its manager—Addition of name of other partner as co-plaintiff—Misdescription of plaintiff—Civil Procedure Code (Act XIV of 1882), s. 27—Amendment of plaint—Limitation—Limitation Act (XV of 1877), s. 22—Practice—Procedure.

In this suit, which was brought to recover a debt due to the firm of Kondanmal Sagarmal, the plaintiff was described as "the firm of K.S. by its manager S.S." The defendants objected that one Malamchand was a partner in the firm and should [414] be a party to the suit. He was accordingly joined as a co-plaintiff on the 27th January 1888. The defendants then contended that the suit was time-barred under s. 22 of the Limitation Act, XV of 1877.

Held, that the case was one of misdescription and not of non-joinder, for the action was brought in the name of the firm by its manager. The order of the words in the vernacular plaint showed that Sagarmal, the manager, did not sue in his own name. The defendants were entitled to have the name of the other partner disclosed, but it being found as a fact that Sagarmal was entitled to sue for the firm, the addition of Malamchand's name on the record came within the provisions of s. 27 of the Civil Procedure Code, Act XIV of 1882.

[F., 27 B. 157 (161); R., 20 B. 767 (775); 18 M. 33 (37); 7 C.W.N. 817 (821); 3 O.C. 347 (349); 127 P.R. 1906=58 P.L.R. 1907=10 P.W.R. 1907; 149 P.R. 1907; 1 S.L.R. 191 (193, 195); D., 21 B. 580 (584).]

SECOND appeal from the decision of M. H. Scott, District Judge of Satara.

This was an action brought to recover a debt due to the firm of Kondanmal Sagarmal. The suit was filed on the 21st November 1884, upon a document dated 1st December 1881. In the plaint the plaintiff was described as "the firm of Kandanmal Sagarmal by its manager Sagarmal Shriram."

The defendants objected (*inter alia*) that the plaint did not disclose the names of all the partners in the firm of Kondanmal Sagarmal.

The Subordinate Judge found that one Malamchand was a partner with Sagarmal in the firm of Kondanmal Sagarmal, and that he should

* Second Appeal No. 759 of 1890.