1894.

GOPA'L NA'NA' SHET v. JOHARMAL.

arising between them, we are of opinion, in the absence of authorities, that the Court below ought to treat the amount paid in by the surety as an asset available in execution of the partition decree. But as the guiding principle of an executing Court's procedure is to see that the decree is executed according to its terms, we are of opinion that the decrees, bonds and other property now in the custody of the Court should be brought into partition and the respondent be satisfied out of them as far as can be according to the terms of the partition decree. If the respondent does not obtain complete satisfaction in this way, the money paid into Court by the surety can then be made available. This procedure is, in our opinion, the one most consistent with equity.

For these reasons we reverse the order of the Court below and direct it to pass a new order in accordance with this judgment; but as the point now decided is new, and not without difficulty, we direct each party to pay his own costs in both Courts.

Order reversed.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1894.
July 12.

A'NANTA'CHA'RYA (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Watan—Bombay Act III of 1874, *Sec.* 17—*Collector's power to determine the amount of payments of a fluctuating character—Act X of* 1876, *Sec.* 4, *Cl.* (*c*)—*Jurisdiction.*

The payments referred to in section 17 of Bombay Act III of 1874 are those mentioned in section 4, namely, "customary fees or perquisites in money or in kind whether at fixed times or otherwise." It is the commutation of these customary and fluctuating payments that is provided for by sections 17—21. But the Collector has no power under section 17 to impose new burdens on the landowner in cases where the payment being constant already there is nothing to determine.

Plaintiff was the inámdár of a certain village. Defendant No. 3 was the watandár kulkarni of the village. He enjoyed for the performance of his duties some inám lands and a cash allowance of Rs. 5 paid annually by the inámdár. In 1884 defend-

* Appeal No. 62 of 1893.

1894.

A'NANTA'CHA'RYA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

ant No. 3 having failed to perform the service in person or by deputy, the Collector appointed defendant No. 2 to act as kulkarni. Defendant No. 2 officiated from 20th November, 1884, to 4th December, 1886. On the application of defendant No. 2 the Collector increased his remuneration according to the scale fixed for Government villages, known as the Wingate scale, and ordered plaintiff to pay the increased remuneration, so as to make up the amount due under that scale. On 26th September, 1890, the Collector recovered the sum of Rs. 171 from the plaintiff by attachment of his property. The plaintiff thereupon sued the Secretary of State for India in Council to recover this amount as being illegally levied. The defendant pleaded that the Collector, having determined the amount of defendant No. 2's remuneration under section 17 of Bombay Act III of 1874(1), the plaintiff had no cause of action against him, and that the suit was barred under section 4, clause 3 of Act X of 1876.

Held that as the cash payment made by the plaintiff to the watandár was certain, and not of a fluctuating or indeterminate character, the Collector had no power to increase the remuneration of the officiator under section 17 of Bombay Act III of 1874.

Held also that the suit was not barred by section 4 (*c*) of Act X of 1876.

APPEAL from the decision of Venkatráo R. Inámdár, Assistant Judge at Bijápur, in Suit No. 1 of 1891.

The plaintiff sued to recover back Rs. 171 as money illegally levied from him by the Collector by attachment of his property under the following circumstances :—

Plaintiff was the inámdár of the village of Ankalgi in the Bijápur district.

Defendant No. 3 was the watandár kulkarni of the village. An annual allowance of Rs. 5 payable by the inámdár and certain inám lands were attached to his office as remuneration for his services.

In 1884 defendant No. 3 having failed to perform the services of his watan either in person or by deputy, defendant No. 2 was appointed by Government to officiate as kulkarni of the village. Defendant No. 2 acted as kulkarni from 20th November, 1884, to 4th December, 1896.

(1) Bombay Act III of 1874, Section 17 :—

When all or any of the property of a watan consists of payments of whatever description, whether in money or kind, made by Jágirdárs Inámdárs, Mewási chiefs, or others owning or occupying immoveable property wholly or partially free from assessment, the Collector may from time to time determine the amount of such payments recoverable ; provided that no larger demand shall be made than one equivalent to the amount that would be payable under the scale in force for the time being in the case of Government villages.

1894.

A'NANTÁ-CHA'RYA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

When defendant No. 2 was appointed to the office of kulkarni, the Collector found that the watan property was not sufficient to provide adequate remuneration. He, therefore, proceeded under section 17 of Bombay Act III of 1874 and increased the amount of his remuneration according to the scale fixed for Government villages, known as the "Wingate scale."

On 2nd December, 1887, the Collector ordered the plaintiff to pay the increased remuneration so as to make up the amount due under the Wingate scale.

On 26th September, 1890, a sum of Rs. 171 was levied from the plaintiff by attachment of his property.

Thereupon the plaintiff filed the present suit to recover back the sum of Rs. 171 with interest, on the ground that it had been illegally and wrongfully levied from him.

Defendant No. 1 (the Secretary of State for India) contended (*inter alia*) that the Collector had authority under section 17 of Bombay Act III of 1874 to increase the amount of remuneration payable to defendant No. 2, and levy the same from the plaintiff under section 81 of the Act, and also that the suit was barred under paragraph 3 of section 4 of Act X of 1876.

Defendant No. 2 pleaded that the plaintiff had no cause of action against him. Defendant No. 3 did not appear to contest the claim.

The Assistant Judge dismissed the suit, holding that the plaintiff was bound to pay the increased remuneration as ordered by the Collector.

The plaintiff appealed from this decision to the High Court.

Shámráo Vithal for appellant:—The question in this case is whether the Collector can levy from the inámdár any sum over and above that which he has hitherto paid as remuneration to the kulkarni. Section 17 of Bombay Act III of 1874 does not apply to a case like this, where the inámdár pays a fixed sum of money to the village kulkarni. It is only where the watan property consists of customary fees or perquisites, which are fluctuating in their character, that the Collector can substitute in their place a fixed determinate amount under

1894.

A'NANTA'-CHA'RYA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

section 17 of the Act. The kulkarni watan in this village is a *kadim* or old watan, older than the grant of the village to the plaintiff's ancestors. The watandár enjoys the profits of certain inám lands and an annual cash payment of Rs. 5 made by the inámdár. The plaintiff as inámdár is liable to make this payment only and nothing more. The Collector has no power to place any additional burden on him. Even assuming that the Collector could interfere under section 17, he ought to have determined the amount after holding the inquiry contemplated by section 73, and after obtaining the sanction of Government under sections 21 and 23 of the Act. No such inquiry was held, and no sanction obtained. The Collector's order was, therefore, illegal and *ultra vires*.

Ráo Sáheb *Vásudev J. Kirtkar*, Government Pleader, for the respondent No. 1 :—Defendant No. 3 is a watani kulkarni who failed to appoint a deputy when called on to do so. The Collector, therefore, appointed defendant No. 2 under Part VIII of Bombay Act III of 1874. The remuneration was fixed according to what is known as Wingate's scale quoted in Nairne's Hand-book, pp. 551-516. This remuneration was in the first instance payable from the watan property to which defendant No. 3 was entitled, and if this was insufficient, the plaintiff was liable to make good the deficiency. Section 17 of the Watan Act applies to this case.

[JARDINE, J. :—Defendant No. 3 is a *kadim* kulkarni. Plaintiff gets nothing out of the lands held by him.]

The lands are in plaintiff's village and constitute defendant No. 3's "watan property" within the meaning of section 4 of the Watan Act just as the fees and perquisites which the kulkarni gets on watan property. They are the emoluments of his office. His enjoyment of the lands in plaintiff's village by virtue, and in consideration of his office, is a payment to him of an equivalent in kind within the meaning of section 17.

[JARDINE, J. :—What power has the Collector to deal with the cash payment of Rs. 5 made by the plaintiff to defendant No. 3?]

The Collector has the power to "determine" the amount of the officiator's emoluments "from time to time," which implies the power to increase or decrease the amount according to the

exigencies of the case. This is a matter entirely within the discretion of the Collector. If the officiator was not paid his remuneration by the person liable to pay, he was entitled to the assistance of the revenue authorities to enforce the payment. The amount is recoverable under section 81 of the Watan Act as arrears of land revenue. Such assistance was given to defendant No. 2 in the present case. Moreover, the suit is barred under section 4 (*c*) of Act X of 1876.

RÁNADE, J.:—In this case the appellant (original plaintiff) is the inámdár of Ankalgi in Bijápur Táluka. Respondent (defendant No. 3) is the watandár kulkarni of the village, the watan being described as Kadim Watan. The watan property, held for the performance of the duties of a kulkarni, consists of a cash payment of Rs. 5, and inám lands assessed at Rs. 60. Defendant No. 3 failed to perform the service himself, or to appoint a deputy. The Secretary of State (defendant No. 1), represented by the Collector of Bijápur, thereupon appointed defendant No. 2 as deputy, and defendant No. 2 officiated from 20th November, 1884, to 4th December, 1886. Defendant No. 2 applied for suitable remuneration, and defendant No. 3 agreed to pay him Rs. 80 a year, which sum was accordingly paid in part by, and levied in part from, defendant No. 3. Subsequently defendant No. 2 applied to the Collector for an increased remuneration according to the scale fixed for Government villages, and the Collector on 2nd December, 1887, ordered the plaintiff to pay the increased remuneration so as to make up the full amount due under the Wingate scale, and on 26th September, 1890, a sum of Rs. 171 was recovered from the inámdár plaintiff. Plaintiff claims that this sum was illegally levied from him, and he seeks in this suit to recover the same with interest.

Defendant No. 1 pleaded that, on the application of defendant No. 2, the Collector, acting under section 17 of Bombay Act III of 1874, determined the amount payable by plaintiff as remuneration to defendant No. 2, and under section 81 levied that amount. The amount awarded was Rs. 158-15-8, and the sum levied was Rs. 171. Defendant No. 1 gave notice to the plaintiff to take back the excess (Rs. 21-6-4), but he refused to do so at

1894.

A'NANTÁ-CHA'RYA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

the time, though the sum was, since the institution of the suit, received by the plaintiff. Defendant No. 1 contended that he was not liable to the plaintiff, who had no cause of action as against him. At a late stage, it was also urged that the suit could not be maintained under para. 3, section 4 of Act X of 1876.

Defendant No. 2 urged that plaintiff had no cause of action against him, as he was entitled to receive the remuneration fixed according to the scale.

Defendant No. 3 did not appear to defend the suit.

The Assistant Judge held (1) that the suit was not barred under section 4 of Act X of 1876; (2) that plaintiff, and not defendant No. 3, was liable to make good the remuneration as fixed by the Collector; and (3) that plaintiff's claim could not be awarded.

Plaintiff appealed from this decree on several grounds, which it is not necessary here to state in full, as his pleader chiefly relied upon the contentions raised in the 3rd and 5th objections in the memorandum of appeal—namely, that the Collector had no power to raise the scale of payment, and that the Assistant Judge erred in not finding expressly whether the Collector could, under section 17 of the Watandárs' Act, order plaintiff to pay the enhanced amount. Mr. Shámráo, the appellant's pleader, urged that the plaintiff, as inámdár, could not be saddled with any payment not included in the sanad, and that the Collector's procedure was defective in that he held no inquiry under section 73 before he passed his order, and further that the Collector was bound to obtain the sanction of Government under section 21 of the Watandárs' Act. He also urged that section 17 of the Act applied only to old customary payments in kind or money, and at the most under section 23 the Collector could grant increased remuneration from the watan property only, and he had no power to levy the same from the revenues of the village.

The Collector professedly passed his order under section 17 of the Watandárs' Act, and the chief question we have to consider is, whether that section, or any other section, gave authority to the Collector to require plaintiff to make up the deficient

amount of defendant No. 2's remuneration according to the scale in Government villages.

On a careful consideration of the several provisions of Bombay Act III of 1874, we feel satisfied that appellant's contention is well-sustained, and that neither section 17, nor any of the other provisions of the Act, authorized the procedure followed, and the order issued by the Collector. Section 17 must be read along with the other sections which together form Part 3—headed the Commutation of Watans, as opposed to Part 4, which relates to the creation or lapse of a watan. This heading of commutation is itself suggestive of a strict restriction on the exercise of the powers conferred on the Collector. Section 15 empowers the Collector to relieve a watandár of his liability to perform service, but this relief is under section 16 not to affect the rights of individuals or village communities to exact customary services from village servants, the relief extending only to the service due to the State. Next comes section 17 with its complementary sections 18 and 19, the former applying to payments in kind or money made to watandárs by jághirdárs, inámdárs, Mevási chiefs, or others, owning or occupying immoveable property wholly or partially free from assessment, while the latter sections relate to the inferior watans, where the payments in money or kind are due to the watandár from individuals generally, without any particular specification. In the case of the holders of alienated lands, the Collector is himself to determine the amount of the payments due to the watandárs. In the case of cultivators generally, the inquiry is to be entrusted to a panchávat, and if the panchávat fixes the profits, which are of a fluctuating nature, the Collector is empowered to determine the amount payable. The words used both in sections 17 and 19 are exactly the same, and they must be construed alike. These amounts so determined under sections 17—19 are, moreover, to hold good for such periods as the Governor in Council may from time to time direct.

It is thus plain that section 17 clearly relates to the power of the Collector to determine payments of a fluctuating character. The word watan property, as defined in section 4, expressly in-

1894.

A'NANTA'-CHA'RYA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

cludes not only property assigned or held for service, but also a right to levy customary fees or perquisites in money or kind, whether at fixed times or otherwise. It is the commutation of these customary and fluctuating demands which is provided for in sections 17—21. Unless the payments claimed already formed part of the watan property by force of custom, there is no foundation for the exercise of the authority to determine their amount conferred by these sections. The payments and the right must exist beforehand, and then, if the payments or the right are of a fluctuating or indeterminate character, the Collector in the one case, and the panchâyat in the other, can determine the amounts of such payments (section 17), and *such* rights and duties (section 18). In the present case, it is admitted that the inámdár has only been paying Rs. 5 in cash to the watandár. The Collector had, therefore, no occasion to determine the amount, as it was not of a fluctuating nature. It does not follow from the fact of this payment of Rs. 5 in cash, that the Collector had authority under section 17, while professing to determine the amount, to raise the cash payment from Rs. 5 to Rs. 80. The Collector can only determine the amounts of *such* payments as were already payable, and it is not open to him under this section to increase the amounts as he has done in this case.

This view of the scope of the section is strengthened by the fact that in the first draft of the Bill, the words used were that "it shall be lawful for the Collector to assess the amount of *such* payments recoverable upon an average of the ten years next preceding." This limit of ten years' average was subsequently given up, and in its place the proviso was added that the amount to be determined was to be equivalent to the amount payable under the scale in force for the time being in the case of Government villages. These words were not intended to refer to the scale of remuneration fixed by Government, known as the Wingate scale, for this latter scale has no reference to uncertain customary payments of the kind contemplated in sections 17—21. Under section 216 of the Land Revenue Code the holder of an alienated village is not bound by the provisions of Chapter VIII relating to survey settlement, not introduced with his consent, which was the case in plaintiff's village.

A number of opinions of the Legal Remembrancer to Government have been filed in this case on defendant No. 1's behalf. Such opinions cannot well be admitted in evidence, as they are opinions given in a one-sided inquiry. Such as they are, they do not go far enough to support defendant's contention. In one, Exhibit 22, however, it is stated that there can be no objection to the Collector proceeding under section 17, and if the inámdár objects, he is required to report for further orders. In another, Exhibit 20, it is stated that there can be no injustice in *primâ facie* holding that section 17 applies, and the inámdár may be left to show cause to the contrary. In a third it is directed that the defect in the law should be noted when the Act is next amended. No value can attach to opinions so obviously one-sided and halting.

We feel satisfied accordingly that section 17 cannot be regarded as authorizing the interference of the Collector in this case. We have next to see if any other section can be held to support it. The Collector had no doubt power under section 46 to appoint a deputy, and such a deputy would be an officiator under section 3. Under section 23, the Collector had power to fix the annual emoluments of the deputy, and to direct the payment thereof to the officiator. These words are large enough to cover the order issued by the Collector in this case, but the second para. of this same section provides a limitation on this power, in that it directs the Collector to assign watan property or the profits thereof towards the emoluments of officiators. The emolument is to come from the profits of the watan. This was in fact the procedure followed by the Collector in this case in the first instance, when he directed defendant No. 3 to increase the amount of the remuneration payable to defendant No. 2. Section 23 did not authorize the subsequent procedure of the Collector when he ordered plaintiff to make good the deficiency. The scale in British territory was not obligatory on the plaintiff. It was, moreover, only a maximum limit. Defendant No. 3's inám land was assessed at Rs. 60. Plaintiff, however, was not bound by this limit, as he did not accept the survey settlement. Plaintiff in fact asserted that the land yielded a profit of Rs. 105, and his assertion was not challenged by defendant No. 3. This

1894.

A'NANTÁ-CHA'RYA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

resource was open to the Collector to make good the deficiency. Anyhow neither section 23 nor section 17 authorized the Collector's procedure so far as plaintiff was concerned. Section 16 of the Land Revenue Code also does not provide for the present case, because it does not extend to alienated villages. We accordingly hold that the levy of Rs. 171 made by the Collector was one not authorized by law, and that, under the circumstances, plaintiff had a right to recover the amount minus the sum of Rs. 21-6-8 already received by plaintiff. Defendants Nos. 2 and 3 need not have been made parties to this suit.

At a late stage of the suit, as also in the argument before us, it was urged that the present suit was not maintainable under para. 3, section 4, of Act X of 1876. If the Collector had *primâ facie* jurisdiction to pass the order he did, plaintiff would certainly have no right to sue to set aside or avoid the order. As it is, the Collector had no power to levy the money from plaintiff as ordered by him. The order was not passed by Government, and the Collector cannot be regarded as having been duly authorized to act illegally and without jurisdiction.

We accordingly reverse the decree and direct defendant No. 1 to pay Rs. 149-9-4 with costs to plaintiff. We disallow interest. Defendant No. 1 should bear his own costs, and plaintiff should pay the costs of other defendants Nos. 2—3.

JARDINE, J.:—This appears to be the first case in which the construction of section 17 of Bombay Act III of 1874 has come before this Court. I concur with Mr. Justice Ránade in holding that the order made by the Collector is not one that can be made under Bombay Act III of 1874, and that it is *ultrâ vires* of section 17, which is pleaded for the Collector as giving warrant of law. I am of opinion that the payments to which section 17 refers are those mentioned in section 4, where it is said that the term watan property "includes a right to levy customary fees or perquisites, in money or in kind, whether at fixed times or otherwise." What the Collector did is analogous to what may be done under section 22; but while that section places the cost of creating new watan on the Government, the Collector has placed that of the additional watan property his order seeks to

create, upon the inámdár. The words of the two sections 17 and 22 differ much; and we may, therefore, infer a different meaning in each, especially as section 23 limits the Collector to the existing watan and its profits in assigning emoluments to the officiator. Under section 17 "the Collector may from time to time determine the amount of such payments recoverable" from the inámdár. As the scope of the section appears to be misunderstood, perhaps because the old order of things is changed, I may refer to the earlier printed records of Government where the nature of these payments is described. In Mountstuart Elphinstone's Report on the Deccan, the following statements are made:—that the pátels are entitled to lands and fees, and have various little privileges and distinctions, of which they are as tenacious as of their land; that the kulkarni has lands but oftener fees; that the deshmukh, besides percentages on the revenues collected, has various claims in kind, as a pair of shoes every year from each shoe-maker, a portion of ghee from those who make that preparation, &c., &c., that the watchman was paid by a small share of the grain and similar property belonging to each house, which kept him always on the watch to ascertain his fees, whereby he knew all that took place. In the appendix to Mr. Elphinstone's Report is one from Captain Grant, Political Agent at Sátára, which refers to payments in grain or money to pátels and kulkarnis, called Mushaira and Sirpáo. The knowledge of these customary payments was present in 1874 to the framers of the Watan Act; and in such a matter I can hardly refer to a higher authority than the Hon'ble A. Rogers, then Revenue Member of Council, who gave his reason for proposing the inclusion of customary fees in section 4 by making an historical statement as follows on the 24th August, 1874, when section 17 was finally settled by the Bombay Legislative Council. "In different parts of the country it was the custom to levy fees and perquisites for service in various ways, sometimes in money and sometimes in kind." I notice too that on the 15th October, 1874, when the Bill passed, the Hon. F. S. Chapman, then Chief Secretary to Government, spoke of it as intended to build up from their foundations the ancient village forms of Government: and one means of doing this was by making the Collector's

1894.

A'NANTA' CHA'RYA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

kacheri a tribunal where the village servants of inferior status, like the Mhárs, could enforce their rights to their customary fees from the rayats.

This look into the past revenue history enables us to find appropriate meaning for section 17; and fortifies the conclusion we arrive at through the rules for interpreting statutes. The function of the Collector does not extend to the whole watan property but only to what is meant by the words "such payments." It is merely one of commutation of payments of uncertain amount by ascertaining a fixed equivalent therefor, which apparently he may express either in money or kind. There is no warrant whatever, in the language of section 17, for supposing that he could thereby impose new burdens on the landowner in a case like this where the payment being constant already there was nothing to determine. He resembles the Land Commissioners in England under the Tithe Commutation Act or the Copyhold Acts where provision is made for ascertaining the value of such rights as heriots. But though it is not necessary for our decision to interpret the word minutely, I think the addition of the word "recoverable" in section 17 has reference to section 81 (though possibly it may be argued that it bars civil suit, a matter on which I express no opinion); and that what the Collector fixes is the amount which may be recovered by revenue process; he is not to recover more from the inámdár than is payable in Government villages for the same thing or on the same occasion. Thus the coercive action of the Collector is limited by the customary scale of the country as in some other revenue matters. The Collector's award of commutation appears not to be so final a judgment, as a decision under section 18. But for the addition of the word "recoverable" I would interpret the word "determine" as was done in *Queen* v. *Land Commissioners of England* (1), where that word in the Copyhold Act 50 and 51 Vict., c. 73, was held to give finality.

We agree that the plaintiff has no cause of action against the defendants Nos. 2 and 3; and in the decree to be made by this Court.

Decree reversed.

(1) 23 Q. B. D., 59.