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The appellant to pay the costs of respondent No. 2.
Respondent No. 1 to bear his own costs.

MAHAMAD
SAHEB
v.
THE SECRETARY OF
STATE FOR
INDIA.

HAYWARD, J.:—I agree.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

1919.

August 1.

FAKARUDINSAB AND TWO OTHERS, SONS AND HEIRS OF THE DECEASED MAHOMED ARIFSAHEB WALAD PIRASAHEB, KHATIB AND MULLA (ORIGINAL PLAINTIFF), APPELLANTS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Revenue Jurisdiction Act (Bom. Act X of 1876), section 4 (a), proviso (b) and section 5 (a) and (b)—Khatib Inam land—Alienation of land by Inamdar's widow—Adjudication passed by Inam Commissioner exempting the land from payment of assessment—Collector's order directing alienee to pay economic rent to the officiator appointed—Suit by alienee to set aside the order—Jurisdiction—Civil Court.

The lands in suit were originally granted in Inam to one Fakarudin for Khatibgiri services. In 1856 by an adjudication passed by the Inam Commissioner under Bombay Act XI of 1852, it was declared that the lands were to be held by the Inamdar free from payment of land-revenue. In 1864 Fakarudin's widow Pachhabi alienated the lands and transferred the Khatibgiri right to plaintiff's father. Thereafter the plaintiff enjoyed the lands free from assessment and performed the services as Khatib until 1911 when an order was passed by the Commissioner directing that the full economic rent be recovered from the plaintiff and be paid to defendant No. 3 as long as he officiated as Khatib on behalf of the Inamdar. The plaintiff sued for a declaration that the Commissioner's order was invalid and not binding upon him and also claimed the right to officiate as a Khatib. The defendants contended that the jurisdiction of the Civil Court was ousted under section 4(a) of the Bombay Revenue Jurisdiction Act, 1876; and the suit was not saved

*First Appeal No. 13 of 1916.

by clause (b) of the proviso to that section nor by section 5 (a) and (b) of the Act.

Held, that the plaintiff's claim being a claim to hold land wholly or partially free from payment of land revenue under an adjudication duly passed by a competent officer under Bombay Act XI of 1852, was cognisable by the Civil Court under clause (b) of the proviso to section 4 of the Bombay Revenue Jurisdiction Act. The fact that the plaintiff claimed as alienee did not take the case out of the proviso.

Held, further, that the claim to perform the services as Khatib apart from the claim to hold the lands exempt from the payment of land revenue, was, although in form a claim covered by the first part of the second paragraph of section 4 (a) of the Revenue Jurisdiction Act, 1876, in substance a matter between private parties and might be treated as falling under section 6 (b) of the Act, notwithstanding the suit was against Government and was thus cognisable by Civil Courts.

FIRST appeal against the decision of E. Clements, District Judge of Dharwar, in suit No. 3 of 1914.

Suit for a declaration.

Lands in suit were originally granted in Inam to one Fakarudin walad Mahomed Kasimsaheb for performance of Khatibgiri services. Fakarudin died in 1859.

In 1856, the Inam Commissioner ordered that the lands should be regarded as Inam of Khatib and be held free of assessment.

In 1864, Pachhabi, widow of Fakarudin, alienated the lands in favour of Pirasaheb (plaintiff's father) by a registered agreement under which, in consideration of certain sum in cash, Pirasaheb was to enjoy the lands and perform the services of Khatib from generation to generation.

The lands were accordingly enjoyed by the plaintiff's family till 1910 when disputes regarding the performance of Khatibgiri service having arisen between plaintiff and defendant No. 3 who was the male representative of the original Inam family and was willing

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to perform the service, the Commissioner of the Southern Division, on September 23, 1911, ordered as follows:—

“ I find that Pachhabi had no power to alienate the land as according to the Sanad the lands are inalienable. Also she had no power to alienate the right of service. It follows from this that the alienee family have no right to retain the profits of the Inam and should properly be evicted from the land. Such eviction however seems contrary to the existing practice approved by Government in accordance with which lands alienated for adequate consideration and continuously held for a long period by the alienee are allowed to remain in the alienee's possession subject to the payment of the full economic rent.

In this case therefore I order as recommended by the Collector that full economic rent be recovered from the present representative of the alienee Pirasaheb and be paid to Mohamadhanif so long as he officiates as Khatib on behalf of the Khatedar Inamdar.

“ The present economic rent is fixed at Rs. 450 per annum.”

Against the order of the Commissioner, the plaintiff appealed to the Governor-in-Council. His appeal being dismissed, he filed the suit for a declaration that the order passed by the Commissioner was invalid and not binding on him; that he was the full owner of the lands in suit and of the Khatibgiri right appertaining to them and for an injunction prohibiting the defendants from recovering Rs. 450 annually from him and for a refund of Rs. 750 recovered by the defendants.

The defendants contended *inter alia* that the plaintiff's family had no right to officiate as Khatib; that the Commissioner's order was justified under the rules contained in Government Resolution No. 10336, dated the 12th October 1908; and that the suit was barred under section 4 (a) of the Bombay Revenue Jurisdiction Act, 1876.

The District Judge held that the suit was barred under section 4 (a), paragraph 4 of the Bombay Revenue

Jurisdiction Act, as it was a suit against Government relating to lands declared by Government to be held for service.

Plaintiff appealed to the High Court.

G. S. Mulgaonkar, A. G. Desai and M. H. Vakil, for the appellants:—We submit that the suit is not barred by section 4 (a) of the Bombay Revenue Jurisdiction Act, because the plaintiff in this case is not a hereditary officer under Bombay Act III of 1874 nor is he a village officer or servant. The words "village officer or servant" would mean those officers who are useful to the State and the village community but Khatib's office is useful to the community only.

The suit is saved by proviso (k) of section 4 as the property in question was duly declared free from payment of land revenue under Bombay Act XI of 1852. The definition of "Land Revenue" in this Act is different from that in the Land Revenue Code and includes the economic rent demanded by the Commissioner; see section 3. The present suit is in substance one to establish the right to hold the land free from payment of land revenue.

Further, the suit is saved under section 5 (a) of the Bombay Revenue Jurisdiction Act, as it is a suit to contest the amount of land revenue claimed as economic rent on the ground that it is in excess of the authorised amount, namely, the amount of full assessment on the land which the Government would be entitled to levy in case of resumption. Lastly, the suit falls under section 5 (b) of the Act, because the contention between the parties is who is the preferable claimant between the plaintiff and the defendant. We not only deny that defendant is the heir but also claim as heirs ourselves. So it is a suit between private parties.

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Coyajee, with Government Pleader, for respondent No. 1:—We submit that the suit falls under section 4 (a), paragraphs (1), (2) and (4) of the Bombay Revenue Jurisdiction Act.

As to paragraph (1), the plaintiff's claim to hold the office of a hereditary officer appointed or recognised under "any other law for the time being in force" and under Bombay Act XL of 1852, the office of Khatib is recognised as hereditary: see schedule B, section 8. The suit, therefore, falls under this paragraph. As to paragraph (2), the effect of the Commissioner's order being to exclude the plaintiff from enjoying the office of Khatib, the suit brought by the plaintiff claiming the right to officiate as Khatib, falls under this paragraph. As to paragraph (4), the lands being held for service, and the claim being against Government relating to these lands the present suit is one falling under this paragraph. The proviso clause (k) of section 4 would not save the suit as the plaintiff is only an alienee from the Inamdar and the proviso does not cover a claim of an alienee. Section 5 (a) also would not save the suit, as the economic rent claimed is the amount authorised by Government which cannot be said to be in excess as contemplated in this paragraph. Section 5 (b) cannot save the suit, as Government is a party defendant in this case and this is not a suit purely between private parties.

Nilkant Atmaram, for respondents Nos. 2 and 3.

C. A. V.

SHAH, J.:—The plaintiff sues for a declaration that he is the full owner of the lands in suit and of the *khatib-giri* right appertaining to them, for an injunction prohibiting the defendants from recovering Rs. 450 annually from him and for a refund of Rs. 750 recovered by the defendants.

It is alleged that Fakarudin-walad Mahomed Kasim-saheb was originally the *khatib* in Hangal and that as such he held certain lands in Inam. These lands were allowed to remain with him in 1856 by the Inam Commissioner under Act XI of 1852. Under circumstances detailed in the plaint the lands and the *khatib-giri* came to be alienated to the plaintiff's father in 1864 by Fakarudin's widow Pachhabi. Thereafter the plaintiff claims to have enjoyed the lands free from assessment and performed the services as *khatib* until the Commissioner (Southern Division) made an order on the 23rd September 1911 directing that the full economic rent be recovered from the present plaintiff and be paid to Mahomed Hanif (defendant No. 3) as long as he officiated as *khatib* on behalf of the Inamdar. The Commissioner made this order under the rules framed by the Government in 1908 under Act XI of 1852 and Bombay Act VII of 1863, section 2, clause (3) and their general powers. The plaintiff now claims reliefs in this suit on the footing that the said order of the Commissioner is invalid and not binding upon him and that the alienation in favour of his father is good. The plaintiff also claims as an heir to Pachhabi.

It is not necessary to note all the defences, which may be gathered from the several issues framed by the lower Court. Three issues out of them were taken up as preliminary issues. Two out of these three issues were dropped as having been unnecessarily framed. The only preliminary issue considered and decided by the lower Court relates to the jurisdiction of the Court to entertain the suit. The lower Court held that the suit was barred by section 4 (a) of the Bombay Revenue Jurisdiction Act and accordingly dismissed the suit. The plaintiff has appealed to this Court and has urged in support of the appeal that the jurisdiction of the Civil Courts is not ousted by section 4 (a) and that the suit

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is covered by the exception indicated in the proviso clause (k) of section 4 and is also saved by section 5 (a) and (b). On behalf of the defendants it has been contended that the jurisdiction of the Courts is ousted under the first, second and fourth paragraphs of section 4 (a) and that clause (k) does not apply as the plaintiff is only an alienee and further that the claim relating to the *khatibgiri* service is not covered by the proviso. Further it is contended that section 5 (a) does not apply as the amount ordered by the Commissioner to be recovered as the economic rent is really the amount authorized by the Government, and that, therefore there is no excess such as is contemplated in the first part of section 5 (a). Section 5 (b), it is urged, cannot apply to the present suit as it relates not merely to a claim between private parties but to a claim against Government.

In the present case there can be no doubt that in 1856 the lands in question were continued as the permanent official emolument of the hereditary office of a *khatib* in Inam under the decision of the Inam Commissioner. The office of *khatib*, though not expressly mentioned in Act XI of 1852, schedule B, rule 8, clause 1, is one of the type contemplated by that clause and not by the 5th provision of that rule. The plaintiff no doubt claims the right to officiate as a *khatib*; but his suit in substance is to establish his right to hold the land free from assessment. It is common ground that the Hereditary Offices Act (III of 1874) does not apply to this office. The fact that the Commissioner has acted under the rules framed by the Government under Act XI of 1852 also confirms the view that Act III of 1874 has no application. The claim may be treated as relating to property appertaining to the hereditary office of *khatib* recognized under Act XI of 1852 under the first paragraph or in part as a claim to perform the duties of the

office under the second paragraph or as relating to lands declared by Government or any officer duly authorized in that behalf to be held for service under the last paragraph of section 4 (a) of Act X of 1876. These provisions are, however, subject to the exceptions mentioned in the section. The plaintiff's claim to hold the land wholly or partially free from payment of land revenue under an adjudication duly passed by a competent officer under Act XI of 1852 is cognizable in the Civil Courts under clause (k) of the proviso to the same section. I do not think that the circumstance that he claims as an alienee takes the case out of the proviso. It is not necessary to consider the further argument based on section 5 (a), though I am by no means satisfied that the present suit is not saved under that clause so far as it seeks to get rid of the order of the Commissioner as to the economic rent. The case is very similar to the second appeal which we have just decided; and the point of jurisdiction here must be decided in the same way.

The claim to perform the service as *khatib* apart from the claim to hold the lands exempt from the payment of land revenue stands on a somewhat different footing. That claim is covered in form by the first part of the second paragraph of section 4 (a) and may be in form not cognizable by the Civil Courts: but in substance that part of the claim is a matter between private parties. The suit is no doubt against Government and properly so as regards the other reliefs. But this relief by itself could well be treated as falling under section 5 (b). Besides it is a prayer of secondary importance in the suit, the principal thing being the claim as to lands being exempt from the payment of land revenue. It may be that on the merits as to which I express no opinion, the plaintiff may fail to establish

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that he is entitled to officiate as a *khatib*; but the claim is cognizable by Civil Courts.

Several other questions have been argued in this appeal as bearing on the question of jurisdiction. But they are all questions which may affect the merits of the plaintiff's claim and will have to be considered by the lower Court when it comes to deal with the case on the merits. For instance it has been argued that the rules of 1908 under which the Commissioner has acted are not justified by Act XI of 1852, schedule B, Rule 8, clause 5 so far as they are sought to be made applicable to an hereditary office, not falling under the said clause 5. It is further argued that the Sanad relating to the land shows that the land is inalienable and that what is granted is land and that what can be resumed is the land and not merely the assessment and further that the Government have the right to determine as to who shall perform the service of *khatib*. It is also argued that whatever may be the powers of Government with regard to the office, they can only resume what they granted in Inām under Act XI of 1852, that is, they may levy full assessment, but they cannot resume the possession of the lands nor can they levy the full economic rent. But these are all questions which touch the merits of the case and do not affect in any way the point with which we are concerned at present.

I would, therefore, reverse the decree of the lower Court and remand the suit to that Court for disposal according to law.

Costs up to date to be costs in the suit. Two sets of costs for respondents (one for respondent No. 1 and the other for respondents Nos. 2 and 3).

HAYWARD, J. :—I agree.

Decree reversed

J. G. R.