VITHAL YESHWANT JATHAR

v.

SHIKANDARKHAN MAKHTUMKHAN SARDESAI

1962

April 19.

(A. K. SARKAR, K. N. WANCHOO, K. C. DAS GUPTA and N. RAJAGOPALA AYYANGAR, JJ.)

Watan Lands—Perpetual lease—Fixation of higher rent by Government—Whether Watandar entitled to enhance rent—Compulsory acquisition—Apportionment of compensation—If Watandar entitled only to capitalised value of rent—Bombay Hereditary Offices Act, 1874 (Bom. III of 1874), ss. 5 and 9.

In 1863, the Watandar granted a permanent lease of watan lands at a fixed rent of Rs. 727/- per year. In 1907 the Watandar applied under s. 9 of the Watan Act for declaring the lease null and void and for possession of the lands. The Collector rejected the application but directed an additional amount of rent to be paid. The Watandar moved the Government and by an order dated May 23,1911,the Government fixed the rent at Rs. 1245/4/-. Some of the lands were compulsorily acquired and the compensation was apportioned between the Watandar and the tenant in the proportion of 10 : 6. On appeal the High Court held that the Watandar was entitled to claim that the tenant should pay enhanced rent and on that basis apportioned the compensation in the proportion of 55 : 45.

Held, that the Watandar was not entitled to enhance the rent and that he was only entitled to the capitalised value of the rent as his share of the compensation. In an application under s. 9 of the Watan Act the Collector has first to decide whether there are reasons for declaring the alienation null and void. If he decides that there are good reasons he is to give the declaration and thereafter he may either transfer the possession to the Watandar or take action under s. 9(2), maintain the possession of the alience and collect from him the proper amount as the profits from the land for payment to the Watandar. In such a case, where the alienation was a lease, the former lease ceased to be effective and the lessee henceforth continued in possession on the strength of the Collector's permission. But if the Collector found no reasons to declare the lease null and void, he could take no action under s. 9(2). In the proceeding of 1907 the Collector had refused the declaration and consequently he had no jurisdiction to make any

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order under s. 9(2) and his order directing the tenant to pay addition rent was without jurisdiction. From this order it could not be inferred that he had declared the lease null and void. Nor did the Government declare the lease of 1863 null and void; it merely ordered that the rent should be revised and fixed at Rs. 1245/4/-. It proceeded on the basis that the lease was subsisting the order of the Government was one giving sanction to the lease of the Watan lands to the person in possession at this revised rent keeping the other terms regarding the lease being permanent and the rent remaining fixed unaltered. The action of the Government must therefore be held to be under s. 5, and not under s. 9 of the Act.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 379 of 1957.

Appeal from the judgment and decree dated December 3, 1954, of the Bombay High Court in F. A. No. 287 of 1953.

S. B. Jather, E. Udayarathnam and *B. P. Maheshwari*, for the appellant.

S. G. Patwardhan, J.B. Dadachanji, S. N. Andley, Rameshwar Nath and *P. L. Vohra*, for the respondent.

1962. April 19. The Judgment of the Court was delivered by

Das J.

DAS GUPTA, J.—This appeal arises out of a reference under s. 30 of the Land Acquisition Act as regards the apportionment of Rs. 35,102-10-0, the compensation awarded for two plots of land numbered, Survey No. 37 Kambhapur and Survey No. 137 Narendra. It is no longer disputed that these form part of a Watan. The dispute as regards the apportionment has arisen between the Watandar and the person in actual possession of the land, the appellant before us.

The Land Acquisition Judge made an order that the compensation be apportioned in the ratio of 10, 6, the 10/15th to be given to the landlord and the remainder to the tenant. The correctness of

this was challenged in appeal. It was urged that the rent was fixed in perpetuity and the landlord had no right to increase the rent, and so, the landlord should get only the capitalised value of the rent payable for the acquired lands and the remainder should go to the tenant. The High Court held that the landlord had the right to claim that the tenant should pay enhanced rent and directed the compensation to be apportioned in the proportion of 55 to 45 between the landlord and the tenant.

Against this decision this appeal has been preferred on certificate granted by the High Court.

The real question in controversy is whether at the date of the acquisition, the landlord (the Watandar) had any right to enhance the rent in respect of these lands. It appears that in 1963 a permanent lease was executed by the then Watandar in favour of the appellant's predecessors. The rent also was permanently fixed by the lease at Rs. 727/- per year. In 1907 the Watandar made an application under s. 9 of the Bombay Hereditary Offices Act, 1874—which is described in short as the "Watan Act". In this application he asked for a declaration that the alienation by the lease of 1863 be declared null and void and the Watandar be put in possession of the land leased.

The Assistant Collector, before whom the application come up for hearing rejected the application and refused to put the Watandar in possession or to cancel the lease of 1863. On appeal the Collector by his order dated March 16, 1908 maintained the Assistant collector's order with the modification that he directed an additional amount of rent equal to the case paid on the land to be paid by the lessees. An appeal to the Commissioner was unsuccessful. Then the Watandar moved the Government of Bombay. The Government, made an order on May 23, 1911, fixing the rent payable

for the lands covered by the lease at Rs. 1245/4/-. The effect of this order by the Government requires careful consideration.

It is to be mentioned, however, that in the year 1926 the Watandar again moved the Government for a further increase of the rent, or for the restoration of the lands; and thereupon the Government made an order in 1927 fixing the rent at Rs. 4300/- and also directing that the rent leviable should be revised periodically at intervals of 10 years.

In 1928 the tenant brought a suit against the Secretary of State for India and the Watandar in the Court of the First Class Subordinate Judge, Dharwar, praying for a declaration that the lands mentioned in the Schedule to the plaint—which are the lands in respect of which the orders mentioned above were made by the government—did not form part of the Watan lands, that in any case the plaintiffs had acquired the statue of Watandars and further that the government resolutions of 1911 and of 1927 were *ultra vires.* The learned Subordinate Judge held that the lands did form part of the Watan and that the Watan Act was applicable to these lands. He also held that the order of the Collector in 1908, though defective in form was in substance one under s. 9, sub-s. 2 of the Watan Act and therefore it could not be said to be *ultra vires.* He also held however that the order of Government in fixing rent at Rs. 1245/4/- which was well above that the Collector had fixed was *ultra vires*; but that the plaintiff was not entitled to any declaration that the Government resolution of 1911 was *ultra vires* because of the law of limitation. The learned Judge further held that the government resolution of 1927 was *ultra vires.* Accordingly he made an order directing the first defendant, the Secretary of State for India in

Council, not to levy a rent higher than Rs. 1245/4/- in enforcement of the resolution of 1911 and declaring that the higher rent levied by the Collector purporting to be under the 1927 resolution was unauthorised. He also made an order directing the realisation of the excess amount of Rs. 4582-2-0 from defendants Nos. 1 and 2.

Against this decision, the Secretary of State for India, the defendant No. 1 as also the Watandar, the defendant No. 2 appealed to the High Court. No appeal was however preferred by the plaintiff. The High Court (Beaumont C. J. and Wassoodew J.) dismissed the appeal, except as regards the order directing both the defendants Nos. 1 and 2 to pay the excess amount. The learned Judges altered this to a direction that the amount should be recovered from the defendant No. 2, the Watandar, only. Except for this they dismissed the appeal. They held in agreement with the learned Subordinate Judge that the government's order of 1927 was ultra vires. The learned Judges were of opinion: (1) that the order by government in 1911 was not an order under s. 9 and could only be considered to be legal on the basis that it was a grant of a fresh lease by the Watandar at the rent of Rs. 1245/4/- with the sanction of government under s. 5 of the Watan Act; and (2) that in any case in making the order in 1927 the government was acting beyond their powers as any action under s. 9 of the Watan Act must in the first instance be taken by the Collector and could not be taken initially by the Government.

The result is that as between the parties, viz., the Watandar and the tenant it can no longer be disputed that the government resolution fixing the rent of the Watan lands at Rs. 1245/4/- is legally binding. In deciding the question whether it is open to the Watandar to increase the rent it is necessary to decide whether the government's

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action can be properly held to be one under s. 9 or sanctioning a fresh lease at Rs. 1245/4/-.

Before the High Court it was urged on behalf of the tenant-appellant that the earlier decision of that Court, which has been mentioned above, that the order of the government fixing the rent at Rs. 1245/4/- was not an order under s. 9 and amounted in law to the sanction of the government to the grant of a fresh lease at Rs. 1245/4/- to the former tenant operated as res judicata between the parties. The learned Judges of the High Court have rejected this contention in the view that what the Court said on the earlier occasion was obitor. The correctness of this view is challenged before us by the appellant. It is urged that the fact that another ground was given by the High Court (on the earlier occasion)for its conclusion that the government order of 1927 could not stand does not alter the position that this ground that the government order of 1911 was not one under s. 9, sub-s. 2 but amounted to a sanctioning of a fresh lease, was also decided as a basis for the ultimate conclusion. It is well settled that if the final decision in any matter at issue between the parties is based by a Court on its decisions on more than one point—each of which by itself would be sufficient for the ultimate decision—the decision on each of these points operates as res judicate between the parties. (Vide *Kishori Lal* v. *Devi Prasad* : [1] *Annamalai* v. *Lakshmanan*; [2])

It was pointed out, however, on behalf of the respondent that the tenant did not file any appeal at all against the Subordinate Judge's decision refusing to interfere with the government's order and so before the High Court no question as regards the government's order of 1911 was at issue. For that reason, it is argued the High Court's decision on the earlier occasion as regards the nature of the order of 1911 cannot operate as res judicata.

(1) A. I. R. (1950) Pat. 50. (2) A.I.R. (1939) Mad. 433.

We do not propose to investigate the question whether the High Court's earlier decision that the government's order of 1911 amounted in law to sanctioning a fresh lease operates as res judicata or not, as, quite independently of that decision, we think it proper to hold that the government's order of 1911 is not an order under s. 9 (2) of the Watan Act but amounted only to a sanction of a fresh lease.

Section 9 of the Watan Act is in these words :—

> "(1) Whenever any watan or any part thereof, or any of the profits thereof, whether assigned as remuneration of an official or not, has or have, before the date of this Act coming into force, passed otherwise than by virtue of, or in execution of, a decree or order of any British Court and without the consent of the Collector and transfer of ownership in the Revenue records, into the ownership or beneficial possession of any person not a watandar of the same watan, the Collector may, after recording his reasons in writing declare such alienation to be null and void, and order that such watan, or any part thereof, or any of the profits thereof, shall from the date of such order belong to the watandar previously entitled thereto, and may recover and pay to such watandar any profits thereof accordingly.
>
> (2) If such part of a watan be land, it shall be lawful for the Collector, instead of transferring the possession of the land, to demand and recover the full rent ordinarily paid by tenants of land of similar description in the same locality, and the amount so recovered shall be considered as the profits. The decision of the Collector as to what is the full rent shall be final."

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The relief which a Watandar can obtain under this section is in the first place a declaration that the alienation by which a transfer of ownership or possession was effected was null and void. When such declaration is given the Collector may do one of two things. He may either transfer the possession of the land of the Watan to the Watandar as a consequential relief of the declaration; or instead of transferring such possession he may recover for the Watandar the profits of the land. The measure of such profits would be the full rent ordinarily paid by tenants of land of similar description in the same locality.

The first thing which the Collector has therefore to decide when an application is made by a Watandar for relief under s. 9 is : whether there are reasons for declaring the alienation null and void. If he decides that there are no such reasons the application must be rejected. If, on the contrary, the Collector is satisfied that there are good reasons for declaring the alienation null and void he is to record his reasons and give a declaration as prayed for that the alienation was null and void. Having made such declaration he is then to decide whether the possession should transferred to the Watandar or action should be taken under s. 9(2) that is, instead of transferring the possession of the land, he should collect from the person in possession the proper amount as the profits from the land, for payment to the Watandar. It is important to notice that action under sub-section 2 can be taken only on the basis that the alienation has ceased to have any legal force. Thus where the alienation was by way of lease, action under s.9(2) can be taken only on the basis that the lease is no longer effective in law and the relationship of landlord and tenant has ceased between the Watandar and the person in possession. Where the Collector takes action under s. 9(2), the person

formerly in possession as a lessee, continues in possession henceforth not as a lessee but on the strength of the Collectors's permission only. In other words, in taking action under s.9(2) the Collector is not creating a fresh lease in place of the lease that has been declared null and void but only directs that the person in possession is to continue in possession subject to the payment of such amount as he decides to be the full rent ordinarily paid by tenants of land of similar description in the same locality.

The Assistant Collector, before whom the application of the Watandars, predecessors of the present respondent under s.9 of the Watan Act came up for consideration rejected the application of Matunkhan asking that the lands enjoyed by Bhaskarrao Jather on a perpetual lease should be fully restored to his possession cancelling the lease passed in 1863." That is, he refused the prayer for a declaration that the alienation was null and void necessarily refused the prayer for consequential relief. As has been already indicated, the Collector who heard the appeal was of opinion that the order appealed against "was undoubtedly correct in the main" but still he ordered "an additional amount of rent equal to the cess to be paid." There is no suggestion in the Collector's order that in his view the Assistant Collector had been wrong in thinking that there are no reasons for declaring the alienation to be null and void. On the contrary, the Collector's order indicates that he agreed with the Assistant Collector in the view that the alienation could not be declared null and void. To read this appellate order as making by implication a declaration that the lease of 1863 was null and void is not only to read into it words which are not there but indeed to go against the clear tenor of the words which have been actually used. There is no justification in our opinion, to hold that when the

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Collector made the order that an additional amount of rent equal to the cess be paid he must have had in mind the provisions of s.9(2) of the Watan Act and so the entire order should be read as giving first, by implication a declaration that the lease was null and void and, secondly, making an order for collection of profits on behalf of the Watandar from the person in possession. It is true that under the law the Collector was not entitled to make this order for payment of additional rent unless he first declared the previous lease to be null and void and then found that the previous rent together with the additional amount of rent represented the full rent ordinarily paid by tenants of land of similar description in the same locality. From the mere fact that this order was made by him for payment of additional amount of rent equal to cess, it is not however permissible to work back and imagine something which was not said by him. When the matter came up to the government after the Commissioner had dismissed the appeal from the Collector's decision the government also made no declaration that the lease of 1863 was null and void. But, after setting out certain circumstances which seemed to show that at the time when the lease was granted the interests of the Watandar were not properly considered by the lessee who held a quasi fiduciary relation towards the Watandar, the government ordered :—"The rent should therefore now be revised and fixed at Rs.1245/4/- being a sum equal to the present a rental plus the judi plus the local fund cess." The government was thus clearly acting on the basis that the person in possession was a tenant of the Watandar but rent for the tenancy should be fixed at Rs.1245/4/-. Such action can not by any stretch of imagination be considered to be an action under s.9 of the Watan Act. The only legal basis that can be found for the government's action is in s.5 of the Watan Act.

That section provides that without the sanction of the State Government...................................... it shall not be competent to a Watandar to mortgage, charge, lease or alienate, for a period beyond the terms of his natural life, any watan or any part thereof, or any interest therein, to or for the benefit of any person who is not a watandar of the same watan. By necessary implication this section authorises the State Government to sanction the mortgage, charge, alienation or lease, by a Watandar, for a period beyond the term of his natural life of any watan, or any part thereof, or any interest therein, to or for the benefit of any person who is not a watandar of the same watan, and on such sanction being given the Watandar has power to act accordingly. It is known that after the order of the government made in 1911, the former tenant continued in possession and the Watandar received from him the rent fixed by the government, that is Rs.1245/4/- for the Watan. In all these circumstances, it is reasonable to hold that by the order of 1911 the government was giving its sanction to the lease of the watan lands to the person in possession at this revised rent. In consequence of the government's order therefore a lease came into existence at the rate of Rs. 1245/4/- in place of the old lease of 1863.

If that be the position, is the Watandar entitled to increase his rent? There was no document in writing for the lease which came into existence after the government's order of 1911. It is quite clear, however, from the order of the government that the only change it sanctioned in the terms of the former lease was as regards rent. That was changed from Rs.727/- to Rs.1245/4/-; but the other terms, namely, that the lease was permanent and the rate of rent would remain fixed from the date of creation of the lease remained unaltered. To use the words of Chief Justice

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Beaumont in the earlier litigation between the parties: "the Government resolution dated the 23rd May, 1911 amounts to an opinion to a confirmation of the 1863 lease with a modification as to the rent." The Watandar had therefore no right to increase the rent.

The result is that out of the amount of compensation awarded for these lands, the respondent being the landlord, is entitled to only the capitalised value of the rent. The rent for the entire Watan, which is stated to be 400 acres of land, being Rs.1245/4/- the proportionate rent for the lands acquired, that is, 30 acres and 32 gunthas works out at about Rs.95/9/-. The capitalised value of this at twenty-five times, amounts to Rs.2389/1/-. The apportionment should therefore be that Rs.2389/1/- of the amount of compensation be awarded to the respondent and the remainder to the appellant.

For the reasons mentioned above, we allow the appeal and direct the compensation to be apportioned in the manner mentioned above. The appellant will get his costs here and below.

Appeal allowed.