Privy Council Appeal No. 135 *of* 1936

Sardar Mohammad Nawaz Khan - - - - - *Appellant*

v.

Bhagata Nand (Gurdwara Committee Panja Sahib at Hassan Abdal since substituted) - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH MAY, 1938

Present at the Hearing:

LORD THANKERTON
LORD ROCHE
LORD ROMER
SIR SHADI LAL
SIR GEORGE RANKIN

[*Delivered by* SIR GEORGE RANKIN]

The appellant, Sardar Mohammad Nawaz Khan, a Muslim, is the principal proprietor of the village Kot Fateh Khan in the district of Attock in the Punjab. According to the *wajib-ul-arz* prepared at the time of the settlement of 1904 the appellant as proprietor is entitled to realise a tax or cess called *haq buha* (door-tax). So far as material the entry is as follows:—

> "*Haq buha* is realised annually from the *kamins* or non-proprietors living inside the *abadi* of our village at a rate ranging from Rs.1 to Rs.2. . . . *Haq buha* is taken by Sardar Mohammad Nawaz Khan only."

The original dispute in the present case was whether the appellant was entitled to claim this tax from one Parkasha Nand who was the head or mahant of an old shrine called Deri Baba Than Singh situate in the village, and who has died pending the litigation. The claim is not made against the shrine as an institution or against any mahant by reason of his office, but is a claim preferred against the individual as being a non-proprietor of the village residing therein.

Chapter VII of the Punjab Tenancy Act (XVI of 1887) deals with jurisdiction and procedure, and the material parts of sub-section (3) of section 77 therein, and of the definition section (s. 4) of the Act, are as follows:—

> "S. 77
>
> * * * *
>
> "(3) the following suits shall be instituted in, and determined by Revenue Courts, and no other Court shall take cognisance of any dispute or matter with respect to which any such suit might be instituted:—

" Provided that—

" (1) Where in a suit cognisable by and instituted in a Civil Court it becomes necessary to decide any matter which can under this sub-section be heard and determined only by a Revenue Court the Civil Court shall endorse upon the Plaint the nature of the matter for decision and the particulars required by Order VII, rule 10, Civil Procedure Code, and return the Plaint for presentation to the Collector.

* * * *

" (*j*) Suits for sums payable on account of village-cesses or village expenses . . ."

" S. 4.—In this Act unless there is something repugnant in the subject or context:—

* * * *

" (12) ' Village cess ' includes any cess, contribution or due which is customarily leviable within an estate and is neither a payment for the use of private property or for personal service nor imposed by or under any enactment for the time being in force . . ."

In addition to these provisions it may be noticed that the Act empowers a Revenue court (with the sanction of the court to which it is immediately subject) if it considers that a question is more proper for decision by a civil court to require any party to a proceeding in the Revenue court to institute a suit in the civil court for a decision on the question (section 98). Also that the Act empowers either civil or Revenue court to refer to the High Court questions as to jurisdiction (section 99) and contains provisions enabling the High Court where a suit has been determined by a court of the wrong class to order that the decree be registered in the court which had jurisdiction (section 100).

On the 9th August, 1925, the appellant sued Parkasha Nand in the court of the Revenue Assistant at Attock for Rs.28—being two rupees for each of the 14 years 1912-25 inclusive—on account of *haq buha,* which the plaint alleged to be a village cess realisable from Parkasha Nand in terms of the *wajib-ul-arz* on the ground that he was a non-proprietor living in the *abadi* of the village. The claim for 14 years' arrears was said to be saved from limitation by reason of the appellant's minority. Parkasha Nand disputed that he lived in the *abadi* or was a non-proprietor or was within the class of persons liable to the tax or that he or his predecessors had ever paid or been asked to pay it. He also disputed the jurisdiction of the Revenue court. On 17th November, 1925, the Revenue Assistant held that he had jurisdiction, and on the 5th January, 1926, Parkasha Nand brought in the court of the Subordinate Judge at Attock the suit out of which the present appeal has arisen. At that date the suit in the Revenue court had not been decided, but Parkasha Nand referred to it in his plaint and asked for a declaration from the civil court that he was not liable to pay *haq buha.* After unsuccessful endeavours by him to obtain a stay of proceedings in the Revenue court, judgment therein was given on 13th June, 1927. The Revenue Assistant held that the custom was valid, old and uniform and that Parkasha Nand was a non-proprietor,

having a particular house as residence in the village: he also believed the evidence of a number of old *sadhus* connected with the shrine to the effect that previous mahants had paid the tax, and held that there was no evidence to prove that Parkasha Nand was exempt. An appeal was taken to the Collector from this decision, but before that appeal was decided the Subordinate Judge, on 25th November, 1927, having refused to stay the civil suit, gave judgment against Parkasha Nand upon the merits, holding that *haq buha* was a customary cess and that Parkasha Nand was liable to pay it; but finding that neither he nor his predecessors had paid it in the past. In the next month (9th December, 1927), the Collector dismissed his appeal from the Revenue Assistant, holding that *haq buha* was a village cess and that it had been paid in the past by previous mahants. Parkasha Nand, having appealed to the District Judge against the Subordinate Judge's dismissal of his suit for a declaration, died while this appeal was pending and one Bhagta Nand was appointed by the District Judge (10th September, 1928), to be the appellant's representative for the purposes of the appeal.

On the 24th December, 1928, the District Judge dismissed the appeal, holding that the civil court's jurisdiction was ousted by sub-section 3 of section 77 of the Act of 1887 and that in any case the matter was *res judicata* by reason of the decision of the Revenue courts. On the merits he rejected the contention that Parkasha Nand was not a non-proprietor or was not resident in the village, but he held that neither Parkasha Nand nor any predecessor of his had ever paid *haq buha*; and that the custom did not apply to a person holding so peculiar a position as the mahant of the shrine. From this decree a second appeal was preferred by Bhagta Nand to the High Court at Lahore: this was heard and dismissed by Johnstone J. on 28th October, 1930, on the ground that the suit was not cognisable by a civil court. A letters patent appeal having been brought by leave of the learned Judge to a Division Bench, Tek Chand and Monroe JJ., on 16th May, 1934, reversed all the previous decrees in the suit, held that the suit was within the jurisdiction of the Subordinate Judge; and as the District Judge had found as a fact that the village custom did not apply to a mahant of the shrine, held that the suit for a declaration must succeed. Thereafter this appeal to His Majesty was brought by special leave from the decree of the Division Bench and by an order of the High Court dated 6th April, 1936, the Gurdwara Committee, Panja Sahib, was appointed to contest the appeal in place of Bhagta Nand for reasons to which their Lordships see no need to refer.

Mr. Gover in his argument for the appellant took two points:—(1) that the suit brought in the court of the Subordinate Judge for a declaration that the appellant was not entitled to demand any amount from Parkasha Nand as *haq buha* was one of which that court was forbidden to take cognisance by the terms of sub-section (3) of section 77 above quoted; (2) that the matter was concluded by the

decision of the Revenue court—that is, *res judicata*. Their Lordships do not find it necessary to deal with the second point.

On the first point their Lordships are of opinion that the appellant's contention is right, but they will preface their decision by stating that had the suit brought in the civil court been a suit to declare that *haq buha* was not a village cess within the meaning of the Act of 1887 and that the Revenue courts had not jurisdiction in respect thereof, such a suit could not have been regarded as incompetent. On principle it is for the civil court to determine in the last resort the limits of the powers of a court of special jurisdiction and no statutory provision to the contrary has been drawn to their Lordships' attention in the present case. It is, however, found or assumed by all the courts in the present case that *haq buha* is leviable in this village by custom and is therefore a village cess: Johnstone J. in his judgment states that in his court this was agreed and the Division Bench clearly proceeded on that view.

Haq buha being a village cess, section 77 not only requires that a suit to recover sums payable on account thereof should be brought in the Revenue court but forbids any other court to take cognisance of "any dispute or matter with respect to which any such suit might be instituted." Their Lordships see no way of interpreting these words which would exclude from their scope the question of the liability of Parkasha Nand or any other person to pay the cess. His suit was not a "suit for a sum payable" within clause (*j*) because it was a suit for a declaration negativing his liability, but it raised a matter with respect to which a suit under clause (*j*) might have been instituted. The purpose of the prohibition in sub-section (3) is to prevent claims which are intended to be decided by the Revenue court being in effect carried before the civil court by altering the form in which the matter is raised. As many matters are brought under sub-section (3) of section 77 it is important to notice that the mere fact that the "dispute or matter" is one which might arise incidentally in a suit of the character mentioned in such a clause as (*j*) is not sufficient to exclude it from the jurisdiction of the civil court. For example, the ordinary suit in the civil court for declaration of title to immovable property would not become incompetent merely by reason that one consequence of the plaintiff getting a decree would be that as a proprietor he could not be charged with village cess. In such a title suit the "dispute or matter" of the action would not be the question of the plaintiff's liability to village cess. Of the present case it is clear that the matter in dispute is the very thing with respect to which a suit of the class described in (*j*) would be concerned as its subject-matter. Their Lordships are in agreement with the Full Bench decision of the Chief Court of the Punjab in *Gamu* v. *Karim Khan*, 33 P.R. (1908). The claim (according to the report) was for a declaration that

the plaintiffs as occupancy tenants were not liable to pay *haq buha* and Robertson J., delivering the judgment of the Court, observed:—

> "Liability for the payment of a cess alleged to exist in the village is the subject matter of the dispute and the dispute or matter is one in regard to which a suit could be brought under section 77 (3) (*j*). We think that a suit like the present for a declaration is of the same nature as a reply to a suit under section 77 (*j*), which suit is clearly triable by a Revenue Court; and the mere fact that the form of the suit is one for a declaration that the cess is not payable, instead of an assertion that a definite sum is payable by way of cess, does not alter its character, or give the civil Courts jurisdiction, when the dispute or matter itself is clearly one as to which a suit could be brought under section 77 (3) (*j*)."

This principle was not followed in the present case by the learned Judges who heard the letters patent appeal, partly because of other decisions but chiefly because the Full Bench found in a case which had been previously decided by one of its members: *Sheikh Muhammad* v. *Habib Khan*, 67 P.R. (1905) a distinction which they deemed to be applicable to the present case. In that case the civil court had been held competent to entertain a suit for a declaration that certain village dues were recoverable only from *kamins* who construct houses on land belonging to proprietors and that the plaintiffs as owners of their houses and cultivators were not liable therefor. The learned Chief Judge considered that "the dispute must be closely allied to the suit, in this case a suit for a sum payable" and that this could not be said of a suit for a declaration that the plaintiffs "shall be lifted out of a category affected by a clause in the *wajib-ul-arz* under which they are liable to pay *kamiana*." The Division Bench in the present case regarded the Full Bench decision as explained by the fact that the plaintiffs in the Full Bench case had asked for a declaration that *haq buha* was not leviable at all in the village—a circumstance which they discovered from the record. Their view was that the civil court has jurisdiction where the plaintiffs claim a declaration that though certain cesses are payable the plaintiffs are not liable to pay by reason of not belonging to classes from which payment can be claimed. Their Lordships cannot accept this as a sound construction or application of the terms of section 77 (3). If the Revenue court is the only court competent to try a suit for a declaration that no *haq buha* is leviable at all in the village, it is impossible to hold that the civil court can try a suit for a declaration that the plaintiff is not a member of the class liable therefor. The latter claim is more exactly the counterpart of the suit described in clause (*j*) than the former, but both are suits which have for their subject matter the liability of the plaintiffs for the cess. To lift the plaintiff out of the category of persons liable to the tax according to the village custom is only to hold that the custom does not apply to the plaintiff or that the plaintiff is not liable for the tax. The decision in *Sheikh Muhammad's* case is in their Lordships' view open to the criticism that it permitted the fact that the plaintiff's

suit was for relief of a very different kind from that mentioned in clause (*j*) to obscure the fact that what the Act calls " the dispute or matter " was the same in both. A suit to take the plaintiff out of any other category than that defined by a custom as to village cesses or expenses would not be rendered incompetent by the section so far as clause (*j*) is concerned; and if the suit was not a suit about the custom or the plaintiff's liability under the custom, it would be equally competent notwithstanding that the plaintiff's rights in the subject matter of the suit depended upon his proving something which would be inconsistent with his being liable under the custom. After all, the same " category " may be employed for many different purposes. Their Lordships are of opinion that *Sheikh Muhammad's* case and the cases which follow it (e.g., *Singh Ram* v. *Kala* (1926) I.L.R. 7, Lahore 173) should be overruled.

It was suggested in argument for the respondents that clause (*j*) must be interpreted as applying only to cases where the sole dispute is as to the amount payable, but this is not consistent with the language of the statute or with the decisions. What clause (*j*) characterises is a class of claim: whether a suit comes within it or not does not depend on the defence taken to the claim.

Their Lordships think it convenient to notice that the sole question before the civil as before the Revenue court was the liability of Parkasha Nand, deceased, to pay the cess in his lifetime. Neither the shrine nor the office of mahant nor any successor of Parkasha Nand was a party to either suit or is bound by the result. If in the future any claim for the cess be made against a successor of Parkasha Nand it will presumably be against him personally and as an individual, and he will not be precluded from contesting it anew. In view of the divergence of opinion disclosed by the present case upon the question whether a mahant of such a shrine as Deri Baba Than Singh is within the custom of this village, any Revenue court will doubtless scrutinise the evidence as to the scope of the custom with especial care, unless indeed it sees fit to use its powers under section 98.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the suit dismissed with costs throughout.

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In the Privy Council

SARDAR MOHAMMAD NAWAZ KHAN

v.

BHAGATA NAND (GURDWARA COMMITTEE PANJA SAHIB AT HASSAN ABDAL SINCE SUBSTITUTED)

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