

The Secretary of State - - - - - *Appellant*

v.

Sardar Rustam Khan and others - - - - - *Respondents*

FROM

THE COURT OF THE ADDITIONAL JUDICIAL COMMISSIONER
IN BALUCHISTAN, AT QUETTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 28TH APRIL, 1941

Present at the Hearing:

LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR GEORGE RANKIN
LORD JUSTICE CLAUSEN

[Delivered by LORD ATKIN]

This is an appeal by special leave from the judgment of the Additional Judicial Commissioner in Baluchistan, in which in the respondents' suit he made a decree declaring their title to and granting them possession of the lands in suit. The appeal raises an important question as to the powers of the British Government over the sub-division of Nasirabad, part of the territory of the Khan of Kalat under a document dated February 17, 1903, purporting to be an agreement made between the Khan of Kalat and Colonel Yate, Agent to the Governor-General in Baluchistan. The agreement was expressed to be subject to the confirmation of the Viceroy and Governor-General in Council, and was duly confirmed on May 14th, 1903. The circumstances in which the agreement was made appear to be that for many years part of this district had been irrigated by canals flowing from the Indus, and that arrangements had been made between the Khan and the British Government by which occupiers of land benefited were made subject to a water tax assessed by British officials, collected by Kalat officials, of which the proceeds were divided equally between the two governments. This species of dual control naturally proved irksome, and the remedy was found in the agreement in question styled, without prejudice to its accurate description in law, the Treaty of 1903. It is in the following terms:—

" Agreement entered into by His Highness the Khan of Kalat, Mir Mahmud Khan, G.C.I.E., on the one part, and by the Hon'ble Colonel C. E. Yate, C.S.I., C.M.G., Agent to the Governor General in Baluchistan, on the other part, subject to the confirmation of His Excellency the Viceroy and Governor General in Council.

" Executed at Sibi on the seventeenth day of February, one thousand nine hundred and three.

" I. Whereas it has been found by experience to be to the advantage of both the British Government and His Highness Beglar Begi Mir Mahmud Khan, G.C.I.E., Khan of Kalat, that the Niabat of Nasirabad should be exclusively managed by the officers of the British Government, it is hereby declared and agreed as follows:—

" His Highness Mir Mahmud Khan, Khan of Kalat, on behalf of himself and his heirs and successors, hereby makes over and cedes in perpetuity to the British Government the entire management of

the Nasirabad Niabat absolutely and with all the rights and privileges, state or personal, as well as full and exclusive revenue, civil and criminal jurisdiction and all other powers of administration, including all rights to levy dues and tolls on the following conditions:—

“(1) That the said Niabat shall be administered, on behalf of the British Government, by or through such officer or officers as the Governor General in Council may appoint for the purpose with effect from the 1st day of April, one thousand nine hundred and three, or such subsequent date as the Government of India may take it over.

“(2) That the British Government shall pay to His Highness on the first day of April, one thousand nine hundred and four and thereafter, annually, on the first day of April each year, fixed annual rent of Rs.1,15,000 (one hundred and fifteen thousand).

“(3) That the aforesaid sum of Rs.1,15,000 (one hundred and fifteen thousand), shall be paid to His Highness without any deduction of cost of administration.

“ II. The boundary of the Nasirabad Niabat as described by His Highness the Khan of Kalat's Naib, Ghaus Bakhsh in July 1902 is as follows:—

“ On the South the Sind Border, on the North, commencing eastwards at the Leni Burj, it runs North-Eastwards along the Mazari border to the Bugti Hills. It follows the foot of these Hills running in a westerly direction to their nearest point to the Shahpur Road near the Manak Garhi Nulla. It then follows this Nulla as far as the Shahpur Road, then follows the Shahpur Road South as far as the Deh Chattan lands (generally known as Dodaika) and then turns West following the boundary of Dodaika to the Nurwah Channel above the point to where the water reaches. It then follows the Nurwah as far as the junction of the latter with the Dur Mohammad Wah, which is shown on most maps as the Shahiwah, a continuation of the main desert canal. From this point it follows the Dur Mohammad Wah right along its course to the West and South-West crossing the railway at mile 368, five miles North of Jhatpat Station, until it meets the line of pillars erected about 4 years ago by the Magassis and Jamalis as their mutual boundary. It then follows this line of pillars Southwards to the Sind border, passing about 500 yards to the West of the point where the Sonwah has been closed.

“ III. Whereas it is possible that the lower portion of the Manjuti lands enclosed by a straight line drawn from the place where the Dur Mohammad Wah crosses the railway, near mile 368, to a point on the Jacobabad-Shahpur Road, 8 miles to the North of where the Dur Mohammad Wah crosses that road may hereafter be brought under irrigation, His Highness the Khan of Kalat hereby agrees, on behalf of himself, his heirs and successors, to make over and cede to the British Government in perpetuity that portion of the Manjuti land in the same manner as the Nasirabad Niabat above referred to, and it is hereby agreed that the British Government shall pay to His Highness annually an additional rent of rupees two thousand five hundred, making a total quit-rent of Rs.1,17,500 to be paid on the first day of April one thousand nine hundred and four and subsequent years.

“ IV. And whereas it is advisable that any further Kalat State lands outside the present boundary of the Nasirabad Niabat, which may hereafter possibly be brought under irrigation by branches and extensions from existing British Canals should also come under British administration in the same manner as the Nasirabad Niabat above referred to, His Highness the Khan agrees to make over on lease in perpetuity any lands in the Lehri Bhag and Gandawa Niabats that may hereafter be found to be irrigable from existing British Canals at a fair quit-rent which can be determined when the surveys have been completed.”

MIR MAHMUD KHAN

CHAS. E. YATE, Colonel,

Agent to the Governor General in Baluchistan.

CURZON

Viceroy and Governor General of India.

This agreement was ratified by His Excellency the Viceroy and Governor General of India at Simla on Thursday, this 14th day of May, 1903.

LOUIS W. DANE,

Secretary to the Government of India in the Foreign Department.

Over part of the land comprised in the agreement the predecessors of the plaintiffs held proprietary rights granted to them by the then Khan of Kalat. For the purposes of this case it may be assumed that the grants continued to be of full force up to the date of the agreement. After it had been made the Government of India decided that there should be a settlement of the territory on the lines of the settlement in Sind. A civil servant with experience of Sind, Mr. Smart, was appointed and began work in October, 1905, which he completed in April, 1907. The principles to be adopted in determining what existing titles, if any, were to be recognised in the settlement were decided from time to time in the course of the work. The district was treated as divided into two sections, the eastern and the western, the former being better irrigated and more cultivated than the western, in which the lands in suit are situate. This section has an area of about 372,000 acres, of which a large part was waste and uncultivated. In October, 1906 there was a conference between the Agent to the Governor-General and the Revenue Commissioners in Baluchistan and Mr. Smart, in which decisions were made which were carried out in the settlement record, and in respect of which the present dispute arises. It will be convenient to set out in the words of Mr. Smart in his settlement report the principles upon which the settlement proceeded.

" 3. The method of inquiry pursued in the preparation of the settlement records has been the same for the eastern and western sections with one exception. In the eastern section it was considered necessary to make detailed enquiries into all cases where possession of land had been acquired by a doubtful title.

" The principle which was adopted was as follows:—

" Wherever figures of cultivation for the last 12 years showed that an occupant had cultivated one-third of the holdings he claimed, no inquiry into title was to be made. Inquiries into title were made wherever this condition was not fulfilled, provided the claim of the occupant had not been established by some previous decisions of competent authority. The principle followed involved a great deal of trouble, and the nature of evidence to be collected was often extremely complicated.

" In the western section, owing to the existence of old Sanads from His Highness, the Khan of Kalat, it was decided in a note of the conference held on 5th October, 1906, between the Hon'ble the Agent to the Governor-General, Revenue Commissioner, and myself that the following principles should be employed. The total irrigable lands were to be divided in three classes. " A " lands already irrigated and cultivated (allowing for fallow years) were to be entered in the names of present occupants, provided they showed reasonable title, *e.g.*, continued possession for 12 years. " B " lands commanded by existing canals or Zemindari water-courses therefrom, which are in use but not irrigated owing to scarcity of water, were to be entered in the name of claimants showing the best title, on condition that the Sind Fallow Rules will apply to them from the Kharif Season of 1907; a notice was to be served to such claimants informing them that they would be liable to pay assessment in the fifth year, whether they had cultivated the land or not, provided they had not paid assessment once in the past four years.

" ' C ' land which is entirely waste or ' Pat ' was to be entered as Government unoccupied lands.

" These principles have been followed in the settlement of the western section. The method employed in the work of settlement is otherwise the same for both sections."

The area of the " C " lands thus entered as Government unoccupied lands extended to about 141,000 acres. The present suit is concerned with all the lands over which the plaintiffs held rights granted by the Khan of Kalat; but the controversy was particularly directed to the " C " lands, the plaintiffs claiming that as they were comprised in their grant from the Khan the Government have no title to them. The answer of the Government is that the Treaty of 1903 gave them full sovereign rights over the territory, that if they decided to ignore the rights of previous holders and to substitute as owners either themselves or anyone else, no one had a right to complain in a municipal Court. The acts of the Government in making the treaty and in exercising its powers under it were acts of State for which the Government could not be impleaded,

" It is necessary, therefore, to refer to the treaty to see what its juristic effect was. According to the plaintiffs, it was merely what their Counsel

styled " a commercial contract ", intended only to effect a more convenient method of collecting revenue, and granting powers only for that object. Their Lordships cannot take this view. It is opposed to the plain wording of the document, and to the obvious construction when the treaty is regarded as a whole. " Cedes in perpetuity the entire management of the Nasirabad Niabat absolutely and with all the rights and privileges, State or personal, as well as full and exclusive revenue, civil and criminal jurisdiction and all other forms of administration " are words creating rights between two sovereign States which were never yet found in any mere commercial agreement. It is true that the right ceded is the entire " management " and the consideration is an annual rent; and as is made clearer in para. 4 of the Treaty, the transaction is in fact a perpetual lease of the territory at a quit rent. Nevertheless the Sovereign of Kalat made over to the British State the whole of his sovereign rights, though as the cession takes the form of a lease the territory does not pass so as to become part of the British Dominions, but still remains Kalat territory. The Government therefore are entitled to rely, if necessary, upon the provisions of the Foreign Jurisdiction Act, 1890, s.1. :—

" It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or hereafter may have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

By section 16, " In this Act ' foreign country ' means any country or place out of His Majesty's dominions. The expression ' jurisdiction ' includes power." It is perhaps unnecessary to say that the statute does not increase the powers given to His Majesty in the foreign country. It is the power given and no other which may be exercised as if acquired by conquest or cession. In the present case the powers given are " all the rights and privileges, State or personal." It is plain that these rights and privileges are to be exercised in as ample a manner as if acquired by conquest or cession. On the legal position that arises in such circumstances there is a wealth of weighty authority. In the *Secretary of State in Council of India v. Kamachee Boze Sahaba* (1859). 7 Moo. I.A. 476, the East India Company, who had entered into treaties with the Rajah of Tanjore not dissimilar from the treaty in the present case in 1855, had seized the whole Raj of Tanjore on the death of the last Rajah without leaving issue male. It was held that the East India Company were possessed of sovereign powers; that they had exercised these powers not under colour of law but as acts of State, and that they and their successors could not be impleaded in any municipal Court for what was so done. In the judgment of the Judicial Committee, delivered by Lord Kingsdown, occur the following words (p. 540).

" The result of their Lordships opinion is that the property now claimed by the respondent has been seized by the British Government, acting as a sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to state that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy."

In *Cook v. Sprigg* [1899] A.C. 572 the plaintiffs claimed to be grantees of concessions made to them by the paramount chief of Pondoland before annexation of Pondoland by the British Government. Lord Halsbury, L.C., in his judgment of the Judicial Committee, said :

" It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which Municipal Courts administer. It is no answer to say that by ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be

properly meant by such a proposition is that, according to the well understood rules of international law, a change of sovereignty ought not to affect private property, but no Municipal tribunal has authority to enforce such a delegation."

In *Secretary of State for India v. Bae Rajbai* (42 I.A. 229) the circumstances were that in 1817 the Gaekwar had ceded the district of Ahmedabad to the British Government. In 1898 claims were made by the plaintiffs against the Government asserting permanent rights to lands within the district existing before the cession. The Judicial Committee came to the conclusion that the question entirely depended upon the extent to which the British Government had recognised pre-cession rights:

"The relation in which they stood to their native sovereigns before this cession, and the legal rights they enjoyed under them are, save in one respect, entirely irrelevant matters. They could not carry on under the new régime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have against their new sovereign were those, and only those, which that new sovereign, by agreement, express or implied or by legislation, chose to confer upon them (p. 237)."

Their Lordships will conclude this review of authorities with the words of Lord Dunedin in giving the judgment of the Board in *Vayjesingji v. Secretary of State for India* (1924) 51 I.A. 357 at p. 360. In that case territory in Gwalior had been ceded to the British Government by the Maharajah Scindia by a treaty which expressly provided that each Government should respect the conditions of existing leases. The appellants had brought a suit for a declaration that they were pre-cession proprietors of the lands in question:

"A summary of the matter is this: When a territory is acquired by a sovereign state for the first time, that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the Municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay, more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the Municipal Courts. The right to enforce remains only with the high contracting parties."

These decisions were again adopted by the Board in *Dattatraya v. Secretary of State for India in Council* (1930) 57 I.A., 318, where they were applied to a claim to enforce pre-cession rights in territory leased in perpetuity by H.H. the Nizam to the British Government in 1902. It follows therefore that in this case the Government of India had the right to recognise or not recognise the existing titles to land. In the case of the lands in suit they decided not to recognise them, and it follows that the plaintiffs have no recourse against the Government in the Municipal Courts. An explanation for Government action was at one time given that the plaintiffs were in breach of their conditions of tenure to the Khan of Kalat. Whether this be true or not is clearly irrelevant in view of the established law regulating the position of the Government as against former proprietors. Neither it nor any action of Government officials indicates any intention on the part of Government to recognise this existing title in these lands. On the contrary, the decision made in October, 1906, by the high officials, together with Mr. Smart, that the plaintiffs were only to be given inalienable occupancy rights over some of the lands while the "C" lands were to be entered as Government lands indicates conclusively what the intention of Government was; and it only needed the confirmation of the report by the Government of India, which was signified on April 1, 1908, to conclude the matter.

In accordance with these authorities their Lordships have not considered whether the decision was just or unjust, politic or impolitic; and it must not be considered that they have had any material placed before them to indicate that it was, in the circumstances, either unjust or impolitic. Their Lordships will humbly advise His Majesty that this appeal should be allowed and the respondent's suit dismissed with costs. The respondents must pay the costs of this appeal.

In the Privy Council

THE SECRETARY OF STATE

v.

SARDAR RUSTAM KHAN and others

DELIVERED BY LORD ATKIN