Fatma Haji All Mohammad Hajiand Others vs The State Of Bombay on 5 February, 1951

Equivalent citations: 1951 AIR 180, 1951 SCR 266, AIR 1951 SUPREME COURT 180

Author: Mehr Chand Mahajan

Bench: Mehr Chand Mahajan, Saiyid Fazal Ali, B.K. Mukherjea, N. Chandrasekhara Aiyar

PETITIONER:
FATMA HAJI ALl MOHAMMAD HAJIAND OTHERS

Vs.

RESPONDENT:
THE STATE OF BOMBAY.

DATE OF JUDGMENT:
05/02/1951

BENCH:
MAHAJAN, MEHR CHAND
BENCH:
MAHAJAN, MEHR CHAND
FAZAL ALI, SAIYID
MUKHERJEA, B.K.
AIYAR, N. CHANDRASEKHARA

CITATION:
1951 AIR 180 1951 SCR 266

ACT:
Bombay Land Revenue Code, 1879, s. 48--Rules under the Code, r. 92--Agricultural land used for other purposes --Collector's duty to alter assessment--Mere confirmation of Collector's order refusing to re-assess--Whether amounts to direction to act otherwise--Right to re-assessment.
267

HEADNOTE:
Rule 92 of the rules issued under the Bombay Land Revenue Code, 1879, provided that when land assessed for purposes of agriculture only is subsequently used for any purpose unconnected with agriculture, the assessment upon

the land so used shall unless otherwise directed by the Government be altered under s. 48 (2) by the Collector in accordance with rr. 81 to 87: Held, that as the rule imposes an imperative duty on the Collector to alter the assessment, the power which has been given to the government to give directions to the Collector not to act in accordance with the imperative provisions of the rule has to be exercised in clear and unambiguous terms as it affects civil rights of the persons concerned and the decision that the power has been exercised must be notified in the usual manner.

Where the Government did not pass any resolution or issue any directions to that effect but merely confirmed on appeal an order of the Collector rejecting an application to assess nonagricultural assessment on agricultural lands which had been used for building purposes: Held, that the confirmation of the Collector's order by the Government did not amount to a direction to act otherwise within the mean- ing of r. 92 and the applicant was entitled to have the assessment on the lands altered under s. 48(2) in accordance with rr. 81 to 87 as laid down in r. 92.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Appeal (Civil Appeal No. 28 of 1950) from a judgment and decree of the High Court of Judicature at Bombay dated 19th March, 1945, in Appeals Nos. 68 and 190 of 1942.

H.D. Banaji (V. R. Desai, with him) for the appellants. M.C. Setalvad, Attorney-General for India (G. N. Joshi, with him) for the respondent.

1951. February 5. The judgment of the Court was deliv- ered by MAHAJAN J.--This is an appeal from a judgment of the High Court of Judicature at. Bombay modifying the decree of the trial court and decreeing partially the plaintiff's suit. The appellants are the legal representatives of the original plaintiff Haji Ali Mohamed Haji Cassum. The State of Bombay is the respondent.

The facts giving rise to this Controversy, briefly stated, are as follows ;--

Village Dahisar originally formed part of the Malad Estate comprising in all eight villages. The said estate was conveyed by the East India Company to two Dady brothers for valuable consideration by a deed of indenture dated the 25th January, 1819. By that conveyance all the lands in the eight villages were conveyed absolutely to the said purchas- ers and it was covenanted by the Company that the purchas- ers, their heirs and assigns shall peaceably and quietly enjoy the said villages and receive and take the rents and profits thereof without any hindrance or interruption from the said Company. By a sale deed dated the 13th December, 1900, Haji Cassum, father of the plaintiff, purchased the village of Dahisar from its proprietors for a price of Rs.

1,30,000 and after his death the plaintiff became the pro- prietor thereof and as such received rents and assessment from the tenants and holders of the lands in the village according to the rights prevailing under the survey settle- ment which had taken place in the village about the year 1864-65.

In the year 1879 the Bombay Land Revenue Code was enact- ed. Section 48 of the Code is in these terms :--

"48. (1) The land revenue leviable on any land under the provisions of this Act shall be assessed, or shall be deemed to have been assessed, as the case may be, with reference to the use of the land--

(a) for the purpose of agriculture, (b) for the purpose of building, and

(c) for a purpose other than agriculture or building. (2) Where land assessed for use for any purpose is used for any other purpose, the assessment fixed under the provi-

sions of this Act upon such land shall, notwithstanding that the term for which such assessment may have been fixed has not expired, be liable to be altered and fixed at a differ- ent rate by such authority and subject to such rules as the Provincial Government may prescribe in this behalf ..... "

After the Act came into force, the Government drafted rules under the provisions of section 214 for promulgation. The inamdars represented to the Government that the rules should be so framed as not to prejudice their rights under the conveyances executed by the Company in their favour. The draft rules were promulgated by a notification issued on the 5th June, 1907. On that date, the Government adopted a resolution ordering that the rules be promulgated and also giving an assurance to the inamdars to the following effect :-

"Government will, however, be prepared to amend or abrogate these rules if they are found to be detrimental in any material respects to the interests of the inamdars."

Rule 92 is one of the rules promulgated under the provisions of the Act and it runs thus :-

"When land assessed for purposes of agriculture only is subsequently used for any purpose unconnected with agricul- ture the assessment upon the land so used shall, unless otherwise directed by Government, be altered under sub- section (2) of section 48 by the collector in accordance with rules 81 to 87 inclusive."

On the 25th July, 1923, the plaintiff requested the Commissioner of Bombay, Suburban District, for a revision of the survey of Dahisar village. He executed an agreement under the provisions of section 216 of the Bombay Land Revenue Code and made a formal application in that behalf as required by the Code and the rules made thereunder. The Commissioner by his letter dated the 14th March,

1925, authorised the extension of the provisions of chapters 8 and 9 of the Land Revenue Code to the village in question. The plaintiff also deposited the necessary expenses required for the revision of the survey. The revision was made by the Superintendent of the Land Records who submitted his report to the Commissioner on the 15th December, 1926. This report was sanctioned by Government. The order sanctioning the revised survey was communicated to the plaintiff on the 23rd December, 1927. Under the revised survey the assessment of Rs. 4,217 on the village lands was increased to Rs. 6,057-3-2, and the plaintiff from that date started recover- ing the increased assessment from the tenants of the lands in the village.

At the time of the revision of the survey it was found that nine plots of land comprised in eleven field numbers which were formerly agricultural had been built upon and these were being used for non-agricultural purposes. The survey officer formed them into a separate group and showed them as kharaba and no assessment, either agricultural or non-agricultural, was levied on these nine plots and the plaintiff could not therefore recover any assessment in respect of these plots after 1926. On the BOth April, 1934, he requested the Collector to assess non-agricultural assessment on these plots. This request was refused by the Collector on the 17th July, 1935, in these terms:--

> "With reference to your letter dated 30-4-1934, I have the honour to state that I regret your request cannot be granted."

It has to be observed that this refusal was in contra- vention of the provisions of rule 92 which imposes on the Collector a duty to make alteration in the assessment, unless he has been directed to the contrary by Government. It was not denied that by the 17th July, 1935, no such direction had been given to the Collector by Government. If the Collector had done his duty as enjoined by rule 92, this lengthy and unnecessary litigation might well have been avoided.

Against the order of the Collector the plaintiff ap- pealed to the Commissioner. In his appeal he pointed out that certain additional lands in the village had been con- verted to non-agricultural uses subsequent to the revision of the survey in 1926. The Commissioner declined to inter- fere. This information was conveyed by the Collector to the counsel for the plaintiff on the 22nd May, 1937. Against the Commissioner's decision, the plaintiff appealed to the Governor in Council and on the 20th December, 1937, he received a copy of the fol- lowing communication from Government to the Commissioner :--

> "The undersigned presents compliments to the Commis- sioner, Northern Division, and with reference to his letter, No. L.N.D. 3124, dated 20th April, 1936, on the subject noted above, is directed to invite his attention, to the orders issued in Government Resolution, No. s235/3a, dated 8th March, 1937, and to state that Government confirm the action of the Collector, Bombay Suburban District, in refusing the Khot's request for the levy of nonagricultural assessment in the village of Dahisar.
>
> By order of the Governor in Council, for Under Secretary to the Government of Bombay."

In order to find out whether there was any resolution of the Government as mentioned in the above communication, during the pendency of the suit the plaintiff issued the following interrogatory to the Government of the State of Bombay :--

> "When was the decision, not to assess the lands men- tioned in Schedule II of the plaint and other lands under rule 92, referred to in para. 8 of their written statement arrived at by the Government ?
>
> Produce a copy of the said decision which may have been embodied in a Government resolution along with the opinion of the Government officers with which Government may have concurred."

The answer given on behalf of the State Government to this question was as follows :--

> "(8) Government Memorandum, Revenue Department, No. 5235-B/33, dated the 8th March, 1937, confirmed the Collec-

tor's action in refusing the proprietor's request for the levy of non-agricultural assessment. ' ' This answer indicates that the Government acting under rule 92, neither adopted any resolution nor issued any notification giving any directions to the Collector contrary to the provisions contained in that rule. All that it did was to confirm the Collector's order rejecting the request of the plaintiff for making the as- sessment of non-agricultural lands in the village. During the interval between 1927-37 a large number of plots of land mentioned in schedule II were put to non- agricultural uses by the tenants in possession of them and a number of buildings were constructed thereupon. The plain- tiff having failed in persuading the Government to make an assessment under rule 92 of such lands, after service of notice under section 80 of the Code of Civil Procedure, instituted the present suit, (a) for a declaration that he was entitled to have nonagricultural assessment made on all lands in the village of Dahisar which were used or which may thereafter be brought into use for purposes other than agricultural, and (b)for an order that the Collector of Bombay, Suburban District, be directed to determine the amount of non-agricultural assessment on the lands mentioned in schedules I and II of the plaint and to levy the same under clause 2 of rule 96 and pay it to the plaintiff, or in the alternative, to direct the defendant to issue a commission to the plaintiff under section 88 of the Land Revenue Code. Schedule I gave details of the nine plots of land that had been converted into non-agricultural use before the survey of 1926, while schedule II gave details of those lands which since 1926 up to the date of the suit had been converted to such use. The plaintiff also claimed damages to the extent of Rs. 120 as compensation for loss of agricultural assessment for six years in respect of lands mentioned in schedule I and he claimed similar damages to the extent of Rs. 300 for loss of non-agricultural assess- ment in respect of the other lands. He also claimed future damages and costs.

The suit was resisted by the State Government on a number of grounds. It was contended that it was barred under section 4 (c) of the Revenue Jurisdiction Act and under article 14 of the Indian Limitation Act. On the merits it was pleaded that the action of the survey officer and the Collector in refusing to levy non-agricultural assessment on lands contained in the two schedules was lawful and

proper and that the civil court could not question the discretion of the Government in such matters.

The trial Judge negatived all the technical objections raised by the defendant and on the merits held that the Collector's action in refusing to levy nonagricultural assessment on the lands in question was wrongful. He, there- fore, granted the declaration prayed for. He, however, refused to give further relief to the plaintiff and disal- lowed the prayer for a direction for levying non-agricultur- al assessment on the lands given in the two schedules and for paying it to the plaintiff. He observed that the Govern- ment would be well advised if it levied such assessment and paid it to the plaintiff.

Two appeals were taken to the High Court against the decree of the trial Judge. That Court modified this decree and granted a declaration to the plaintiff that he was entitled to receive non-agricultural assessment on all lands which are and which may hereafter be used for non-agricul- tural purposes. It ordered the defendant to levy such altered assessment on the lands mentioned in schedule I and decreed consequential damages to the plaintiff in respect to these lands. As regards the lands in schedule II, the plain- tiff's suit for a direction to assess and levy non-agricul- tural assessment on them was dismissed. The court drew a distinction between lands that had been converted to non-agricultural use before the survey of 1926 and those which had since then been converted to such use. As regards the former, it was held that the survey officer had erroneously declined to make non-agricultural assessment on those lands and his action was ultra vires. Relief was given to the plaintiff regarding those lands as prayed for. As regards the latter, it was held that it was within the discretion of the Government to order an alteration of the assessment on such lands and this discretion could not be questioned in a court of law. The plaintiff being dissatisfied with this part of the decision made an application for leave to appeal to. the Privy Council on the 15th September, 1945. During the pendency of the application the plaintiff died and his heirs and executors were implead- ed as his legal representatives. A certificate for leave to appeal to the Privy Council was granted on the th February, 1947, and the appeal preferred under the certificate is now before us for decision. There is no controversy in this appeal as regards the reliefs that have been given to the plaintiff by the High Court. The appeal concerns the fur- ther relief refused to the plaintiff in respect to the lands mentioned in schedule II. It was contended on behalf of the appellant that under the terms of the conveyance dated 25th January, 1819, and of the covenants contained therein it was not open to the Government or the Collector to refuse the alteration of the assessment claimed by the plaintiff and that the Government could not give any direction under rule 92 which would be contrary to these covenants and assur- ances. It was said that the Government was bound to use its power to levy assessment as trustee for the transferee and that the exercise of this power could not be arbitrarily refused by it. It was urged that the Government Resolution dated 5th June, 1907, clearly indicated that the rules framed under the Land Revenue Code were not intended to affect adversely the owners of alienated lands and the Collector was bound to make an assessment as required by the plaintiff. Lastly, it was argued that as a matter of fact Government never exercised its power under rule 92 and never gave a direction to the Collector to a contrary effect and that the mere affirmation of the erroneous order of the Collector by Government did not amount to a direction con- templated by the provisions of rule 92.

Having considered this case in all its aspects, we have reached the decision that the High Court's decision have in so far as it refused relief to the plaintiff in respect to the lands mentioned in

schedule II should be reversed. Rule 92 cited in the earlier part of this judgment in imper- ative terms directs the Collector to alter the assessment in case agricultural lands are Converted to non-agricultural use. The Collector has no option in the matter and as soon as an application is made to him he should proceed to make an assessment and levy it on the non-agricultural lands. When the Collector de- clined to accede to the request of the plaintiff he acted in contravention of the clear provisions of the rule, because admittedly at that time no "directions to the contrary" had been given to him by the Government. There was no resolu- tion of the Government in existence and no notification had been issued under the provisions of rule 92 directing the Collector not to make an alteration in the assessment when required to do so. The Commissioner, in dismissing the plaintiff's appeal, also contravened the provisions of rule

92. When the matter went up in appeal to the Governor in Council, no decision was taken under the provisions of rule

92. The High Court assumed that the confirmation of the action of the Collector by the Government amounted to a direction by the Government to the contrary in respect of the lands in question.

We are unable to agree with this conclusion. When Gov- ernment has been given the power to give directions to the Collector not to act in accordance with the imperative provisions of a rule which enjoin upon him to make the altered assessment, that power has to be exercised in clear and unambiguous terms as it affects civil rights of the persons concerned and the decision that the power has been exercised should be notified in the usual manner in which such decisions are made known to the public. It was conceded by Mr. Joshi that no such decision was taken by Government and no direction was issued by Government under rule 92 Dismissal by the Government of the plaintiff's appeal and affirmation by it of an erroneous order of the Collector could not be held to amount to action under the provisions of rule 92. In these circumstances, the plaintiff was clearly entitled to further relief in respect to lands mentioned in schedule II and a direction should have been issued to the State Government for making altered assessment on non-agricultural lands and levy it on them and pay it to the plaintiff.

Mr. Joshi contended that the true effect of the provi- sions contained in section 48 (2) and rule 92 was that the Government was not bound to levy altered assessment on lands converted to non-agricultural use, that the section merely provided that the persons in possession of land were liable for such assessment but it did not say that it was obligato- ry on the Government to make it and that the court had no jurisdiction to interfere with the discretion of the Govern- ment in the matter. We think that when a liability is imposed by a statute, that liability cannot be defeated by the exercise of any discretion by Government or by making rules which may negative that liability, but it is not necessary in this case to finally decide the point as the appeal stands decided otherwise. It is also unnecessary to express an opinion as to the precise scope of the power conferred on Government by the language of rule 92. The plaintiff's learned counsel very properly did not press his appeal in respect to the claim of damages concern- ing lands mentioned in schedule II. Plaintiff's suit to that extent fails.

For the reasons given above the appeal is allowed and the plaintiff's suit is decreed with costs except in regard to the claim for damages in respect to the lands mentioned in schedule II. The defendant is directed to make an assess- ment on lands mentioned in schedule II in the same way as in respect of the lands mentioned in schedule I and levy the same and pay it to the plaintiff.

Appeal allowed.

Agent for the appellants: K.J. Kale.

Agent for the respondent: P.A. Mehta.