CHINNA-SWAMI v. DARMALINGA.

first Court. He has in this Court been given every opportunity of settling but has not taken advantage of it. We are asked further to say that, in our view, a further suit will not be barred by Order II, rule 2, of the Code of Civil Procedure. On that point we decline to express any opinion.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1932, March 17.

NARLA RAMAKRISHNAYYA (DEFENDANT-RESPONDENT), APPELLANT,

v.

MYNENI VENKATARANGA RAO AND ANOTHER (LEGAL REPRESENTATIVES OF FIRST PLAINTIFF—APPELLANTS TWO AND THREE), RESPONDENTS.*

Madras Hereditary Village-offices Act (III of 1895), sec. 6 (1) —Provision in—Directory—Mandatory or—Abolished office—Hereditary right of family of last holder of—Legal right—Infringement of right—Remedy—Suit for declaratory decree—Maintainability of—Secs. 13, 21 and 23—Effect of.

Section 6 (1) of the Madras Hereditary Village-offices Act (III of 1895) recognises and preserves the hereditary right existing in the family of the last holder of the abolished office, and that right is a legal right.

The provision in section 6 (1) that in filling the newly created offices the Collector shall select the persons whom he may consider best qualified from among the families of the last holders of the offices which have been abolished explains why the new offices are made hereditary and shows that, although the old offices are abolished, it is not the intention of the

* Letters Patent Appeal No. 14 of 1930.

Legislature entirely to destroy the old hereditary rights but rather to preserve them so far as possible in the new offices.

Kanthavadivelu Mudaliar v. *Ramaswami Mudaliar*, (1927) 54 M.L.J. 357, dissented from.

The provision in section 6 (1) that the Collector shall select persons from among the families of the last holders of the abolished offices is mandatory and not merely directory.

When the hereditary right preserved by section 6 (1) of the Act is infringed, the persons for whom it is preserved have a right to sue for its vindication by a declaratory decree. The remedy of appeal provided by section 23 of the Act is not the only remedy open to them.

The case is one in which an old right is preserved and a new remedy created, but no old remedy is explicitly taken away. Therefore the new remedy of appeal is not exclusive but must be regarded as additional to and not as substituted for existing legal remedies.

Section 21 of the Act does not exclude the jurisdiction of the ordinary Civil Courts to entertain a suit brought by a person whose hereditary right preserved by section 6 (1) has been infringed for the vindication of that right.

Sections 13 and 21 of the Act deal only with a claim to *succeed* to the office. When the old office is abolished and ceases to exist, the appointment to the new office cannot be said to be by virtue of a claim to *succeed*.

APPEAL under clause 15 of the Letters Patent against the judgment of KUMARASWAMI SASTRI J., dated 9th December 1929 and passed in Second Appeal No. 1379 of 1926 preferred against the decree of the Court of the Subordinate Judge of Bapatla in Appeal Suit No. 266 of 1925 preferred against the decree of the Court of the District Munsif of Repalle at Tenali in Original Suit No. 307 of 1923.

G. Lakshmanna for appellant.

S. Varadachari and *V. Pattabirama Sastri* for respondents.

Cur. adv. vult.

RAMA-KRISHNAYYA v. VENKATA-RANGA RAO.

ANANTA-KRISHNA AYYAR J.

JUDGMENT.

ANANTAKRISHNA AYYAR J.—This is an appeal against the judgment of KUMARASWAMI SASTRI J. in Second Appeal No. 1379 of 1926. The original suit which gave rise to this second appeal was instituted by two members of the Myneni family for a declaration that the last holder of the office of the village munsif of Dhulipudy was Myneni Bhushiah *alias* Nagabhushanam, that the plaintiffs are the only surviving members of the last male holder's family from whom on revision a selection should be made of the person best qualified for the office and that the appointment of the defendant (a member of the Narla family) as the permanent village munsif of Dhulipudy is illegal, and for some other reliefs. Both the District Munsif and the Subordinate Judge held that the Civil Courts have jurisdiction to try this suit, and the learned Judge of this Court was also of the same opinion. The first point raised by Mr. G. Lakshmanna, the learned Advocate for the appellant, is that the Civil Courts have no jurisdiction in the matter. To appreciate the arguments advanced by the learned Advocate for the appellant it is necessary to state a few more facts. The village establishments in Guntur District were revised once in 1900 and again in 1912. The revenue village of Dhulipudy was split into two revenue villages in 1900—Dhulipudy and Karankupalem. In 1912, these two villages were split up into three revenue villages of Dhulipudy, Karankupalem and Addankipalam. As observed by the Collector in disposing of an appeal filed before him by the present plaintiffs in a suit instituted under Madras Act III of 1895, and also by the lower Courts in the present suit, there were a number of changes in the appointments that were made at the time of these two revisions of the village

establishments which led to a lot of confusion as seen from various orders which were passed by the Revenue authorities which are not easily reconcilable. The final appointment to the village of Dhulipudi was of the defendant—a member of the Narla family. That led to the present suit.

It is convenient at this stage to refer to some of the relevant provisions of Madras Act III of 1895. Under section 6 of the Act,

> "the Board of Revenue may . . . divide any village into two or more villages, and thereupon all hereditary village offices in the villages or portions of the villages or village divided shall cease to exist and new offices, which shall also be hereditary, shall be created for the new village or villages. In choosing persons to fill such new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished."

A right of suit before the Collector is given under section 13 of the Act in respect of the offices for recovery of emoluments of such offices and for registry as heir; jurisdiction of the Civil Courts is barred under section 21 in respect of certain matters. Section 23 deals with appeals against orders passed by the Collector under section 6 of the Act and from decrees and orders passed under section 13. Section 20 provides for the framing of rules not inconsistent with the Act, in regard, among others, to the holding of inquiries under section 6 and the hearing of appeals under section 23.

The first question raised before us is whether a right of suit in the Civil Court is available to the plaintiffs for the reliefs, mentioned already, claimed by them.

It is admitted that the office of the village munsif of the village of Dhulipudi was hereditary before 1900, and continued to be so at the time of the revisions in 1900 and 1912. The plaintiffs contend that the family

RAMA-KRISHNAYYA v. VENKATA-RANGA RAO.

ANANTA-KRISHNA AYYAR J.

of the last holder of the office is Myneni, and that, under the last clause of section 6 (1) of the Act,

"in choosing the persons to fill the new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished."

For the purpose of this argument, we must assume that the family of the last holder of the office is Myneni and that the plaintiffs are properly qualified for the office, it being admitted that the defendant belongs to a different family—Narla family. The scheme of the section seems to be that, at the time of such revision and when a village is divided, the old hereditary village office should cease to exist, and new offices should be created for the new villages. It is specifically declared that in such cases the new offices shall also be hereditary. The dispute turns on the exact meaning to be given to the last sentence in section 6 (1). For the appellant, it was argued that it only means that the Collector should also consider whether there are any persons in the family of the last holder of the office who have got the requisite qualifications, but that the Collector's discretion in selecting the best candidate from among all the persons available is not in any way hampered by the section. The contention was that the reference to the family of the last holder was only a sort of suggestion to the Collector in making the selection, and that it was in no sense a mandatory provision. I am unable to agree with this view. The office of the village munsif has been hereditary generally in the Presidency from very early times. That hereditary right is valued very much. The Legislature has in section 6 recognized these facts. It is specifically provided that, though the old hereditary village offices shall cease to exist in such cases, the new offices shall also be hereditary. It is in recognition of the important nature of these hereditary offices, and

the great value attached to the same by the persons interested, that the Legislature has specifically stated that, in choosing persons to fill such new offices, "the Collector shall select the persons whom he may consider the best qualified from the families of the last holders of the offices which have been abolished". The use of the word "shall" is very significant. In Craies on Statute Law, third edition, page 204, it is stated as follows:—

"It should be observed that the word 'shall' is now avoided in statutes except where it creates a duty."

In my opinion the hereditary right is a legal right and the same has been preserved by the Act; the present is therefore a case where in respect of an existing right some remedy has been provided for by the Act. Under section 23, there is a right of appeal provided from an order passed under section 6; but that does not take away the right of recourse to Civil Courts when the legal right is infringed. It is a well understood principle of law that, when a statute does not for the first time create a right in favour of a person but only provides for a new mode of enforcing the pre-existing legal right, then, in the absence of any clear indication in the statute to the contrary, the right of suit in the Civil Court to enforce the right is not taken away from him. The new remedy is taken to be an additional remedy. Here, the inquiry under section 6 is admittedly of an administrative character, and the appeal from an order passed under section 6 is also of the same character. In fact, the appellant asks us to construe the last sentence of section 6 (1) as only a piece of administrative instruction to the Revenue Officers to whom power is given under section 6 to pass orders relating to the matter. It is difficult to hold that, by providing for such administrative orders, the Legislature intended to take

RAMA-KRISHNAYYA v. VENKATA-RANGA RAO.

ANANTA-KRISHNA AYYAR J.

away the right of suit to enforce the pre-existing hereditary right. In this connection, I may also mention that section 6 is not the natural place where one would expect any administrative advice or instructions to be enacted; such advice and instructions would be more appropriate in respect of rules to be framed under section 20 of the Act.

If the Act had provided for a suit in the Revenue Court under section 13 of the Act in respect of such a matter, then, having regard to the provisions of section 21, it might, at least plausibly, be contended that the right of suit in the Civil Court has been taken away; but, having regard to the scope of sections 13 and 21 (to be noticed later on), no suit is maintainable under section 13 of the Act in circumstances like the present.

In my opinion, it is not from the mere fact that an obligation has been cast on the Collector by section 6 (1) in making the selection that "we spell out a right" in the family. Hereditary rights were well known to law as administered in this Presidency. The Legislature enacted that the new offices to be created for the new villages by that very Act should also be hereditary. As I read the section, what has been done by the Legislature is this—hereditary rights existing in the family of the last holder have been recognized and preserved by the Legislature by section 6. In my view, it is not a case of any right being "created" for the first time in the family, but the case is one of recognition and preservation by the Legislature of a pre-existing legal right existing in the family. The law is familiar with (*a*) rights vested in an individual; (*b*) rights vested in a family; and (*c*) rights vested in the public. The present is a case of a "right vested in a family"—which was a well-known right before the Act—being recognized and

provided for by the Legislature. If the Legislature intended that such pre-existing rights should cease once for all and be no longer entitled to any sort of legal recognition or enforcement, it would surely have chosen other words than those that exist in the section to express its intention. It is a principle of law that existing legal rights should not be intended to be interfered with or taken away, except to the extent to which it is reasonably clear under the terms of a statute that they have been. A provision like the one contained in the last sentence of section 6 (1) of Madras Act III of 1895 finds a place also in Madras Act II of 1894, section 15; and, under that Act, learned Judges of this Court have held that the last holder's family has got a legal right of suit in the Civil Court when the hereditary right is infringed by the Revenue Officials in the matter of making appointments in such cases; see *Krishnaswami Naidu* v. *Akkulammal*(1), *Kodandaramayya* v. *Ramalingayya*(2) and *Alagiasundaram Pillay* v. *Midnapore Zamindari Co., Ltd.*(3) (per ODGERS J.) See also per WALLACE J. in *Subba Rao* v. *The Secretary of State*(4). In those decisions learned Judges of this Court have held that Civil Courts have jurisdiction to entertain suits in cases similar in principle to the present, and that necessary declarations could be granted to the family of the last holder. If the right possessed by the family be not a legal right, it is difficult to support the decisions mentioned above by those learned Judges. As remarked already, it is difficult to say that the obligation cast on the Collector by section 6 is not mandatory. If not mandatory, the provision should be treated as only in the nature of an administrative instruction, and to be really directory only; but it is

(1) (1918) 9 L.W. 80.
(2) (1920) 12 L.W. 668.
(3) (1919) 51 I.C. 816; 12 L.W. 767.
(4) (1929) 58 M.L.J. 698.

RAMA-KRISHNAYYA v. VENKATA-RANGA RAO. — ANANTA-KRISHNA AYYAR J.

impossible *prima facie* to understand that the Legislature intended to do any such thing in the main enacting section of the Act, which admittedly deals with important legal rights, and that it enacted a clause with the use of the word "shall" intending thereby only to give some sort of administrative advice to the authority which it empowered to make such appointments. Such a suggestion is, in my opinion, most unlikely, having regard to the wording of the enactment and to the circumstance that the same clause occurs both in the Act of 1894 and in the Act of 1895. As already remarked, different language would have been employed if the provision was not intended to be mandatory in its character, and any administrative instructions would naturally be dealt with under section 20 which makes provision for rules to be framed by the Board of Revenue.

I may remark that in *Alagiasundaram Pillay* v. *Midnapore Zamindari Co., Ltd.*(1) BAKEWELL J. made the following remarks towards the end of his judgment:—

> "For the same reason I am of opinion that the ruling of NAPIER J. in the case already cited, *Krishnaswami Naidu* v. *Akkulammal*(2), does not apply, because the plaintiffs claim a personal right and not as members of the public. I do not understand that ruling to apply to an appointment outside the family of the last holder, in which case the member of the family might sue on behalf of himself and all other members of the family, because their joint right to be considered had been infringed."

For these reasons, and speaking with all respect, I think that the decision in *Kanthavadivelu Mudaliar* v. *Ramaswami Mudaliar*(3) has not properly taken into consideration the wording of section 6 and the inference following from the same and would also seem to be in

(1) (1919) 54 I.C. 816; 12 L.W. 767. (2) (1918) 9 L.W. 90.
(3) (1927) 54 M.L.J. 357.

reality inconsistent with the decisions of various learned Judges in the cases mentioned above, and I would accordingly respectfully dissent from the same.

The second point raised is that, even if it should be held that the plaintiffs have a legal right, the same is not available to be enforced in the Civil Courts having regard to the provisions of section 21 of the Act. It has been decided by SADASIVA AYYAR J. in *Krishnaswami Naidu* v. *Akkulammal*(1), by AYLING and COUTTS TROTTER JJ. in *Kodandaramayya* v. *Ramalingayya*(2), by ODGERS J. in *Alagiasundaram Pillay* v. *Midnapore Zamindari Co., Ltd.*(3) and by MILLER J. in *Kesiram Narasimhalu* v. *Narasimhalu Pantulu*(4) that section 21 of the Act takes away the jurisdiction of the Civil Courts only in cases in which jurisdiction is conferred on the Revenue Courts by section 13 of the Act. Sections 13 and 21 deal only with a claim to *succeed* to the office. So far as the case before us now is concerned, when the old office is abolished and ceases to exist, the appointment to the new office could not be said to be by virtue of a claim to *succeed*. This was the view of SADASIVA AYYAR J. and ODGERS J. in the cases mentioned, and is the view taken by KUMARASWAMI SASTRI J. in second appeal in the present case; and, with respect, I agree with those learned Judges in that view. As observed by AYLING and COUTTS TROTTER JJ. in *Kodandaramayya* v. *Ramalingayya*(2),

> "that a suit should be in a Civil Court regarding a newly-created village office and its emoluments, whereas it would not be in the case of an older office, is anomalous and may be the result of oversight in drafting; but we cannot see that it involves any injustice or real inconvenience; and, however it may be, it seems to be the only proper interpretation of the two Acts."

(1) (1918) 9 L.W. 90.
(2) (1920) 12 L.W. 663.
(3) (1919) 54 I.C. 816; 12 L.W. 767.
(4) (1907) I.L.R. 30 Mad. 126.

RAMA-KRISHNAYYA v. VENKATA-RANGA RAO.

ANANTA-KRISHNA AYYAR J.

It may be mentioned for what it is worth that, though the Act was amended in 1930 in respect of some other matters, the Legislature did not make any amendments to sections 6, 13, or 21 as it might be expected to do having regard to the difference of opinion that prevailed in this Court about the construction of section 13 of the Act (since BAKEWELL J. had taken a contrary view) if the Legislature thought that its intention had been misunderstood by Courts.

On the merits, I think the learned Judge, KUMARASWAMI SASTRI J., is clearly right in his opinion that the family of the last holder is Myneni. As remarked by the learned Judge, Exhibit C is practically conclusive on the question. It may be observed that the Collector on appeal in fact decided that Myneni family was the family of the last holder. It would appear that, by reason of some other proceedings, the Board of Revenue came to a contrary conclusion. But the Collector's decision on appeal in such cases is final, and it has not been made clear in this case how the Board of Revenue happened to interfere with that decision of the Collector. In fact, when the Board of Revenue was subsequently approached to interfere with a later order passed by the Collector on appeal relating to the appointment of the present defendant to the office, the Board held that it had no jurisdiction to interfere with an order passed by the Collector on appeal in such a matter; see Exhibit P-2. The plaintiffs before filing the present suit had also filed a suit under section 13 of Madras Act III of 1895 before the Deputy Collector, Tenali Division. Having failed to obtain relief from the Deputy Collector, the plaintiffs appealed to the District Collector (Exhibit Q-3) who held that "any suit for a newly-created office will, if maintainable at all, lie only to the ordinary Civil Courts." In the present case, it is

clear that the last holder's family was Myneni family, and therefore the appointment of the defendant as the permanent village munsif of Dhulipudi is illegal. The declaration granted by the learned Judge to that effect will stand, but not the other declarations. With this modification, the letters patent appeal is dismissed with costs.

REILLY J.

REILLY J.—Section 6 (1) of the Madras Hereditary Village-offices Act provides that on the grouping, amalgamation or division of villages all hereditary village offices of certain classes in the villages so affected shall cease to exist and new hereditary offices shall be created for the new villages formed as the result of the grouping, amalgamation or division. The sub-section then lays down that in filling the new offices so created the Collector shall select the persons whom he may consider best qualified from among the families of the last holders of the offices which have been abolished. It will be seen that the sub-section provides for very serious matters—the abolition of hereditary offices and the creation of new hereditary offices in their stead. Between the old and the new offices a link is maintained: the Collector must fill the new offices with the persons whom he considers best qualified from among the families of the last holders of the old offices. It is a very serious thing indeed for Legislature to destroy a private right, and still more a hereditary right; and we must be very sure before we attribute that meaning to a provision in a statute. It is a serious and unusual thing for the Legislature to create new hereditary offices. Here we find a provision for the abolition in the public interest of highly-prized hereditary offices, and in the very same sub-section of the Act we find provision for the creation of new hereditary offices in their stead. Then in the same sub-section

RAMA-KRISHNAYYA v. VENKATA-RANGA RAO.

REILLY J.

words are introduced showing that it is the intention of the Legislature that the new offices shall be filled by men selected from the families which held the abolished offices. Surely that provision explains why the new offices are made hereditary and shows that, although the old offices are abolished, it is not the intention of the Legislature entirely to destroy the old hereditary rights but rather to preserve them so far as possible in the new offices. That is certainly a possible way of interpreting the intention of the Legislature in making the sub-section, and, remembering that very clear words are required entirely to destroy a private right, if we approach the sub-section in the right way in my opinion it is clear that that is the proper interpretation. With great respect I am unable to agree with *Kanthavadivelu Mudaliar* v. *Ramaswami Mudaliar* (1) in which the fact that the abolition of the old offices need not carry with it, and is apparently not intended to carry with it, the entire abolition of the old hereditary rights appears to have been overlooked. I agree with my learned brother that sub-section 6 (1) of the Act preserves certain legal rights in the families of the holders of the abolished offices.

That view is confirmed by the language of the sub-section regarding the Collector's duty in the matter. It lays down that the Collector shall select persons from among the families of the last holders of the abolished offices. I cannot agree with the contention for the defendant that those words are merely directory, not mandatory. That is against the plain meaning of the words themselves, which fits in with the apparent intention of the sub-section. There is no suggestion that the Collector shall choose persons from those

(1) (1927) 54 M.L.J. 357.

families, if he thinks fit: there is a plain order that he shall do so. And, as my learned brother has pointed out, if a mere direction was to be issued to the Collector how he was to use his discretion, section 6 is not the place where such a direction would naturally appear.

If there is a right preserved in the families of the last holders of the abolished offices, by what remedy is that right to be vindicated when infringed? For the defendant it is contended that a new remedy of appeal is provided by section 23 of the Act and that that is the only remedy. But here we have not a new right and a remedy created simultaneously by statute, in which case the ordinary interpretation will be that the remedy created is the only remedy available. Here we have an old right preserved and a new remedy created; but no old remedy is explicitly taken away. In those circumstances the new remedy of appeal is not exclusive; it must be regarded as additional to and not as substituted for existing legal remedies. On general principles, if the hereditary right preserved by section 6 (1) of the Act is infringed, the persons for whom it is preserved have still a right to sue for its vindication by a declaratory decree.

It is contended for the defendant that at any rate the jurisdiction of the ordinary Civil Courts is excluded by the Act. The excluding provision is in section 21; but that must be strictly construed, as must all provisions shutting out the jurisdiction of the ordinary Courts, and no reasonable interpretation of it will go so far as to shut out from the jurisdiction of the ordinary Courts such a matter as is the subject of this suit, *Muvvulu Seetham Naidu* v. *Doddi Rami Naidu*(1)

(1) (1909) I.L.R. 33 Mad. 208.

RAMA-KRISHNAYYA v. VENKATA-RANGA RAO.

REILLY J.

and *Kodandaramayya* v. *Ramalingayya*(1). I agree that the ordinary Civil Court has jurisdiction in this case.

On the question who was the last holder of the office of village munsif of Dhulipudi within the meaning of section 6 (1) of the Act I agree that Exhibit C is conclusive.

In my opinion the plaintiffs are entitled to a declaration that the appointment of the defendant as permanent village munsif of Dhulipudi is illegal. But I do not understand how the findings of fact that Myneni Bhushiah was the last holder of the office or that the plaintiffs are the only surviving members of the last holder's family, from whom a selection should be made, can properly be made parts of the declaratory decree in their favour. I would modify the declaration made by the learned Judge by striking out all except the declaration that the appointment of the defendant is illegal.

A.S.V.

(1) (1920) 12 L.W. 663.