Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Fischer v. *Secretary of State for India in Council and Fischer* v. *Orr and Another, from the High Court of Judicature at Madras; delivered 10th December* 1898.

Present:

LORD CHANCELLOR OF IRELAND.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

These two Appeals were heard together and argued on the materials contained in one Record.

The first Appeal in which alone the Secretary of State is interested has reference to an order of the Government of Madras by which the Collector of Madura was directed to cancel the separate registration of a certain village belonging to the Appellant known as Kondagai and formerly part of the Zemindari of Shivaganga. In the Court of First Instance the order in question was upheld by the Subordinate Judge. With his judgment before them the learned Judges of the High Court said nothing in approval or condemnation. They passed the matter by as one of "the many difficult questions dealt with "by the Courts below" which in their view it was not "necessary to decide or to discuss" in order to determine the rights of the parties. But the rights of the parties depended on the validity of the Government order and on nothing else. It was the beginning and the end of the controversy. Mr. Cohen very properly and very wisely admitted that he could not justify the

action of the Government. This frank admission relieves their Lordships from the duty of commenting upon what took place in terms which otherwise the occasion would require. At the same time their Lordships cannot help observing that it would have been better if the Government had been wise in time and had recalled their order without suit instead of trying to shelter themselves on technical grounds and under a dilatory plea. There was no room for a defence on the merits. And therefore the whole argument of the learned Counsel for the Respondent was directed to show (1) that the suit was demurrable in consequence of the provisions of the Specific Relief Act No. I. of 1877 and (2) that even if the suit were not demurrable it would be defective for want of parties.

The question raised in the second Appeal is one of more difficulty. It depends on the true construction and effect of the grant under which the Appellant's title is derived.

Following the course of the argument their Lordships propose in the first instance to deal with the Appeal to which the Secretary of State is a party.

On the 13th of March 1890 the Appellant as proprietor of Kondagai applied for separate assessment and registration. Notice of the application was duly sent by the Collector to the Zemindar and to certain persons who had obtained a lease of the Zemindari and who are the Respondents in the second Appeal. Separate objections were lodged on behalf of the Zemindar and the lessees. The Collector disallowed both sets of objections and decided that "separate "registration and sub-assessment of the village "be ordered under Section 8 of Regulation XXV. "of 1802 and Act I. of 1876." Taking the average income of the Zemindari and of the village for the past three years he fixed the peishcush for Kondagai at Rs. 2,757. 4. 1. The Collector then

submitted the case with the Records connected with it to the Board of Revenue. By resolution dated the 5th of December 1890 the Board confirmed the separate assessment as proposed by the Collector.

In March 1891 the lessees addressed a petition by way of appeal to the Board of Revenue alleging that the village had been "unlawfully "sub-divided and the peishcush improperly "reduced." They objected to sub-division altogether. They complained of the assessment as inadequate and inequitable being in their view "based upon figures which did not fairly re- "present the average revenue of the village."

The Board of Revenue replied to this petition through the Collector by a resolution of the 21st of April 1891 declaring that the Board "had no power to interfere with the Collector's "orders as to the separate registration of the "village which" could "only be set aside by a "suit in a Civil Court (*vide* Section 5 of Madras "Act I. of 1876)." At the same time they requested the Collector "to report the result of "taking a longer period say of seven or ten "years instead of the three-year period on which "the calculation has now been made."

The Acting Collector of Madura reported that taking the income of the village on an average for ten years the peishcush would be Rs. 3027. 2. 8. Thereupon the Board of Revenue under Section 7 of the Act revised their original order and by resolution dated the 17th of August 1891 substituted that figure for the former assessment.

So far the proceedings appear to have been perfectly regular. And it was open to the lessees under the express provisions of Section 5 of the Act of 1876 if they were "aggrieved "by the fact of the separate registration" of the village to "sue in a Civil Court for a decree

" declaring that such separate registration ought
" not to be made."

Instead however of taking that course Mr. Orr one of the Respondents in the second Appeal describing himself as Resident lessee wrote on behalf of the lessees to the Chief Secretary to the Government complaining of the action of the Collector and the inaction of the Board of Revenue. He stated that the lessees were prepared to sue the Government and that he had in fact served notice on the Collector of their intention to do so. But he suggested that whatever the powers of the Revenue Board might be the Government itself had " complete power " and he prayed " the Government to exercise that power " with the result of saving both the Government " and the lessees the loss of time trouble and " expense which a suit " would " entail."

The Government did not disavow or disclaim the arbitrary power ascribed to them by Mr. Orr and they seem to have accepted readily his view as to the undesirability of the litigation with which they were threatened. By an order dated the 12th of October 1891 addressed to the Board of Revenue they pointed out that " by Section 5 of " Regulation II. of 1803 Collectors were bound to " obey all orders communicated to them by the " authority of the Board of Revenue." They considered (they said) that the Board had " full general " authority and power in the event of its deeming the Collector's action to have been wrong " to order him to revise his procedure." The order however went on to say that his Excellency the Governor in Council desired to be furnished with " a full report on the merits of the case " before issuing definite orders thereon." In their resolution in reply dated the 29th of October 1891 the Board referred the Government to the Collector's original report on the case pointing out that the formalities prescribed by Act I. of

1876 were duly observed by the Collector before he decided to register the village separately under the Act. " But " they added " the " Board is and at the time it passed its pro- " ceedings was of opinion that his decision was " wrong " assigning for that conclusion a reason which seems to have been founded on a mis-apprehension of their own. Then the reply proceeds as follows :—

" 2. Still, even so, as his proceedings had already " been passed and were judicial under the Act " the Board was of opinion that it could not then " interfere with them in the absenee of a special " provision in the Act enabling it to do so and " there is no such special provision, the remedy " by the Act itself against the Collector's action " being by Civil Suit.

" 3. The Board was of opinion that the general " control confered on them by Section 5 of " Regulation II. of 1803 did not cover the " case."

This remonstrance provoked the following peremptory order dated the 14th of November 1891 :—

" His Excellency the Governor in Council is " unable to accept the views of the Board of " Revenue expressed in paragraphs 2 and 3 " . . . . A Collector's action in separately " registering and assessing a portion of a per- " manently settled estate is not judicial but " purely fiscal. In such matters the Collector's " proceedings are those of a Revenue official and " are therefore clearly subject to the control of " the Board and Government under Regulation II. " of 1803. The fact that the Collector takes " action under an Act giving him power to do so " and that parties aggrieved may sue in the " Civil Courts does not oust this general control.

" 2. In the present case the proceedings of " the Collector of Madura were wrong and the " Board should have set them aside in exercise

" of its powers under Regulation II. of 1803.
" The Collector will now be directed to cancel
" the separate registration of Kondagai village
" and its hamlets."

This order was issued without notice to the Appellant and without giving either the Collector or the Appellant any opportunity of being heard upon the matter. It will be observed that while the order of the 14th of November states that the Collector's proceedings were wrong it does not attempt to explain in what the alleged error consisted. On receipt of the order which was communicated to him "for information and "guidance" the Collector cancelled his order for the separate registration of Kondagai and informed the Appellant of the fact.

It is not disputed now that the Government were mistaken in their view of the Act of 1876. It is perfectly plain on the face of the Act and it was conceded by the learned Counsel for the Secretary of State that the decision of the Collector in a case within his jurisdiction whether for or against separate registration when once duly sanctioned as provided by the Act can only be questioned in a Civil Court. As regards the apportionment of the assessment an Appeal limited in time does lie to the Board of Revenue —Section 7. But the only power reserved to the Governor in Council is the power unlimited in point of time of requiring re-adjustment of the separate assessment if it appears that there has been fraud or material error in the apportionment —Section 8. The apportionment of the assessment is a matter which concerns the Government. It may affect the security of the Revenue. Separate Registration is a matter of private right with which the Government has no business to interfere.

The sole question therefore now left for decision is the question whether the Appellant's claim can be sustained having regard to the

nature and extent of the relief sought and the frame of the suit.

The plaint prays that the order complained of may be declared "*ultra vires* and illegal and of "no binding effect on Plaintiff." It asks no further specific relief. In that it is said the plaint sins against the Specific Relief Act which forbids the Court to entertain a suit for a declaratory decree which may be followed by consequential relief unless that relief be asked for specifically—and so it was held by the High Court.

Now in the first place it is at least open to doubt whether the present suit is within the purview of Section 42 of the Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of Section 50 of the Chancery Procedure Act of 1852, 15 & 16 Vict. ch. 86. as interpreted by judicial decision. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is in substance a suit to have the true construction of a statute declared and to have an act done in contravention of the statute rightly understood pronounced void and of no effect. That is not the sort of declaratory decree which the framers of the Act had in their mind. But even assuming that the Specific Relief Act applies to such a suit as this what is the result? What further relief can be required? If the so-called cancellation is pronounced void the order of the Government falls to the ground and the decision of the Collector stands good and operative as from the date on which it was made. The vitality of the decision is not impaired or affected merely by destruction or mutilation of the entry in the Collector's book.

Cancellation in obedience to illegal commands of the Government can have no more effect than cancellation made at the dictation of a lawless mob which the officer in charge has no power to resist. It does not appear what steps the Collector took when the commands of the Government were communicated to him beyond sending a notification to the Appellant. Presumably his proper course would have been to make a note or memorandum against the entry of the decision in his book to the effect that the decision was cancelled by virtue of an order of the Government of such and such a date and then on the determination of a suit such as this adversely to the Government it would be his duty to make a further note or memorandum to the effect that the cancellation was declared void by the order of the Court in such and such a suit. And so the cancellation or obliteration if there was actual cancellation or obliteration would be virtually effaced and the temporary cloud upon the decision cleared away. But then it was asked what would happen if the Collector ignored the order of the Court? What remedy would the Appellant have if he had omitted to ask for specific relief against the Collector? It is highly improbable that any officer of the Government would set the Court at defiance. It is impossible to suppose that the Government would countenance such conduct as that. But the remedy in such a case if it did occur would be simple enough. Every order such as that which the Appellant asks for carries with it liberty to apply. On a proper application and on proper notice being given it would be found that the arm of the Court would be long enough to reach the offender whatever his position might be.

The suggestion that no order ought to be made in the absence of the Zemindar and the lessees will not bear a moment's examination. If the order of the Government which is impeached in

this suit is pronounced void and of no effect how can it have the effect of setting the matter at large and making it incumbent on the Appellant to proceed as if the collector had refused his application for separate registration instead of granting it as in fact he did ?

Their Lordships are of opinion that the Government have been wrong throughout and that the suit is properly framed and not open to objection under the Specific Relief Act.

They will therefore humbly advise Her Majesty that the appeal ought to be allowed with costs in both Courts and that it ought to be declared that the order of the Government of Madras of the 14th of November 1891 is void and of no effect.

The Respondent will pay the costs of the Appeal.

The Respondents in the second Appeal are the lessees of the Zemindari of Shivaganga. They were Plaintiffs in the suit which was brought to recover a sum of money claimed to be due from the Appellant to them as such lessees under or by virtue of the provisions contained in certain documents of title constituting or connected with the grant of the village of Kondagai.

The question stated shortly is this:—What was the measure of the obligation undertaken by the grantee in respect of the Government revenue in the event of Kondagai being separately registered ? Was the proprietor of that village as between himself and the Zemindar of Shivaganga then to become liable simply for the Government revenue whatever it might be or was he to be bound in any event to pay to the Zemindari annually Rs. 3,500 a sum which might be greater or possibly might be less than the Government revenue assessed upon the village when separately registered ?

There are three documents to be considered. The earliest in date is the most important for the

purpose of the present controversy. It was made on the 13th of December 1872 between Kattama Nachiar a Hindu widow then Rani of Shivaganga her son and her three daughters of the one part and one Robert Fischer the Appellant's father of the other part. It purports to be an agreement for the absolute sale of the village of Kondagai to Fischer the father in consideration of past and future services but only in case of the happening of some one of several events therein mentioned. The event was not in fact determined and according to the decision of this Board in a suit then pending could not be determined during the Rani's life-time. The next document was subsequent to that decision. It is dated the 14th of May 1877. By it the five persons parties to the agreement of the 13th of December of the first part purport to grant Kondagai to Fischer the father on the terms of that agreement.

On the Rani's death Doraisinga Tevar the son of an elder sister of the Rani established his title to the Zemindari to the exclusion of the Rani's children. On the 22nd of February 1883 Doraisinga Tevar executed a deed confirming the Rani's grant in favour of Fischer the father and thereupon as was admitted at the Bar Fischer's title to the village became absolute. In the course of the argument their Lordships were referred to a document which was executed by Doraisingi's successor but in their Lordships' opinion that document cannot affect the present question.

The deed of the 22nd February 1883 declares that Fischer is to hold the village "under the "terms of the deeds dated 13th December 1872 "and the 14th May 1877." It does not purport to alter the conditions of the holding in any respect. Nor in their Lordships' opinion does the deed of the 14th of May 1877 show any intention to depart from the terms of the agreement of the 13th of December 1872.

The deed of the 13th December 1872 is not free from ambiguity. At that time of course the village of Kondagai was not assessed separately and provision had to be made for the grantee bearing his proper share of Government revenue. The deed declares that the grantee is to pay " every year to the Circar as peishcush Rs. " 3,500." It is not disputed that until separate registration of the village that sum was to be paid to the Zemindari as the proper proportionate contribution to the revenue assessed on the whole Zemindari. But then in the very next paragraph the deed clearly contemplates and provides for the separate registration of Kondagai and payment by the proprietor of Kondagai to the collector of the peishcush which the collector was to fix.

On the whole it appears to their Lordships that according to the true construction of the documents in question the sum of Rs. 3,500 was provisionally fixed as a sum sufficient to cover the proportionate amount of the Government revenue attributable to the village of Kondagai until the separate registration of the village but that the intention was that when the separation was effected it should be a final and complete separation and that thenceforth the proprietor of Kondagai should only be liable for the burthens properly incident to the property and should discharge those burthens in the ordinary way by direct payment to the collector.

This was the view of the District Judge who reversed the judgment of the Subordinate Judge and was in turn reversed by the High Court.

Their Lordships will therefore humbly advise Her Majesty that the Appeal should be allowed and the suit dismissed with costs in the three Courts below.

The Respondents will pay the costs of the Appeal.