

[APPELLATE CIVIL JURISDICTION.]

1873.
February 19.

Regular Appeal No. 11 of 1869.

THE SUB-COLLECTOR of COLABA and
another *Appellants.*

GANESH MORESHVAR MEHENDALE and
another *Respondents.*

*Assessment in perpetuity—Power of Government to raise assessment—
Bombay Act I. of 1865, Sec. 25—Regulation XVII. of 1827, Section 4,
Cls. 2 and 3.*

Where a lease of lands to be reclaimed from the sea by the lessee, granted by a former Government to plaintiff, stipulated that the lands should be held free of assessment [*máphi*] for thirty-years, subject to assessment at Rupee 1 per *bighá* in the 31st year, to assessment increasing at the rate of $\frac{1}{4}$ of a Rupee per *bighá* during the six following years, and at the expiration of that *istawa* (period of annually increasing assessment) should be held at the full assessment of Rs. 3 per *bigha* ;

Held that after the expiration of the first thirty-seven years the lease was one in perpetuity, subject to the annual payment of the sum named as the full assessment and no more.

The words in Section 25 of Bombay Act I. of 1865 confer upon Government no absolute power in all cases to fix any assessment they may please. But that section, as also Section 4, Clause 2, Regulation XVII. of 1827, distinctly limit the power of Government to raise the assessment on land held partially exempt by right. Government, however, may set aside such limitations at their discretion by a Legislative enactment, as provided by clause 3 of the above Regulation. But Government can exercise this power only under "specific" rules.

In Bombay Act I, of 1865, Sec. 25, no such "specific" rules are to be found as would indicate that the Legislature intended to set aside the provisions of Cl. 2, Sec. 4, Regulation 1827, and to enable the Revenue officers to ignore all exemptions except those which they may themselves choose to recognize,

Where plaintiff had enjoyed "Savái Sut" or a remission of one-fourth for a period of more than thirty years with respect to lands on which assessment became leviabie in 1805 A.D., he was held by the High Court to have established a prescriptive right to such a remission.

THIS was a regular appeal from the decision of A. Bosanquet, Acting District Judge at Tanna, in Original Suit No. 30 of 1865.

The appeal was argued before SARGENT, Acting C.J., and MELVILL, J., on the 15th January 1873.

Mayhew, Legal Remembrancer, (with him *Dhirajlál Mathurádlás*, Government Pleader,) for the appellants.

Macpherson (with him *Vishvanáth Náráyan Mandlik* and *Ganpatráv Bháskar*) for the respondents.

The facts of the case will sufficiently appear from the following judgment :—

Cur. adv. vult.

19th February 1873, MELVILL, J. :—This is in effect an action to restrain the Government from raising the assessment on certain lands held by the plaintiffs, and to recover excess assessment levied from them in the years 1863-64 and 1864-65.

The land is held under 5 *kauls* or leases granted by the former Government. It will be sufficient to state precisely the conditions of one of these documents ; for, though the others differ from it in numerical details, their substance is, in all material points, precisely the same.

Exhibit No. 4 is a lease granted in the year A.D. 1809. It sets forth that the grantee had come to the Sarkár, and represented that if a lease, on certain favourable terms, were granted to him, he would undertake to embank, and so reclaim from the sea, certain land which was inundated by the tide and overgrown with wild vegetation ; and that, in order that the land might be brought under cultivation, and yield a revenue to Government, it had been determined to comply with the request. Accordingly, an officer had been sent to measure the land, but it had been found impossible to do this with any accuracy on account of the denseness of the vegetation and the marshy character of the ground. On a rough estimate, however, the whole area was taken to be 121 *bighás*

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from which 41 *bighás* were deducted on account of creeks, ditches, and marsh, leaving a balance of 80 *bighás*. From this, one fifth, or 16 *bighás*, was again deducted on account of "Savái" (the meaning of this term and the intention of the deduction will be considered presently), leaving a final balance of 64 *bighás* as the estimated extent of the grant. Then follows a detailed estimate of the expense of reclamation, amounting to Rs. 8,261; and finally are set forth the terms of the grant. The land is to be held free of assessment for 30 years. In the 31st year, it is to pay an assessment of 1 rupee per *bighá*; during the succeeding six years, the assessment is to be increased by a quarter of a rupee annually; and the seventh year is to be a year of full assessment at the rate of three rupees per *bighá*.

The main contention between the parties is as to the right which the plaintiffs claim, to hold the land in perpetuity under this and the other leases at the rates specified therein as the full assessment. That portion of Exhibit No. 4, which bears upon this point, is as follows: "In accordance with the above, for six years [there shall be] an annually increasing assessment [*istawa*] and the seventh [year shall be] a year of full [assessment]. The regular assessment (*ain dast*) has been agreed for at the rate of three rupees per *bighá*. The land assessment [being agreed for] to be levied according to the money payment system (*i.e.*, as distinguished from payment in kind), an agreement has been made for [the levy of] the regular assessment at Rs. 3 per *bighá*. Now on the expiry of the [term of] thirty-seven years as above [partly] of [*máphi*] exemption from assessment [and partly of the imposition of] the annually increasing assessment [*istawa*] the salt ground will be surveyed every year, and payment will be received every year according to the above system for the cultivated land which will be entered in the land survey [books] as brought under cultivation."

Exhibit 5 is a lease granted in the same year, and on similar terms, extending over the same period of 37 years. The

only material difference is that the full assessment in the 37th year is fixed at 4 rupees per *bighá*.

In Exhibit 6, which is a lease granted in the year 1791, the full assessment, which was to be levied after 20 years, is 5 rupees. The words of this lease, importing that the assessment is to be levied at this rate annually, are very clear: "After the expiration of the 'Istawa,' the regular 'sherasta' at the rate of Rs. 5 per *bighá*. * * * shall be recovered from year to year."

Exhibit No. 7, a lease granted in 1813, contains similar terms:—"After the expiration of the 'Istawa,' from the thirty-sixth year, [assessment] is to be recovered at the rate of Rs. 5 per *bighá* annually."

Exhibit No. 8, granted in 1814, contains the following:—"After the expiration of the 'Istawa,' from the thirty-sixth year, you should pay [the assessment] at the regular 'sherasta,' at the rate of Rs. 5 per *bighá*."

The words, which we have quoted from the leases, leave little room for doubt that the intention of the parties was that the sum named as the full assessment, and no more, should be charged in perpetuity. It is contended for the Government that the term "the full assessment" must be understood as meaning the full assessment for the time being, and that the intention was that the land should be held on exceptionally favourable terms for a certain number of years only, and should be then assessed at the same rate as other similar land in the same district. But, if so, why was the amount of the full assessment specified at all? To this the answer given is that the rates specified were the rates in force at the respective times when the leases were granted. But how could it have been assumed that the ordinary rate of assessment at the end of 37 years, or any other period, would be neither more nor less than at the time the leases were grant-

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ed ? or how can it be said that Rs. 3 or Rs. 4, or any other rate, was the ordinary assessment at the date of the leases on salt land, inundated by the sea, over-run by wild vegetation, and unfit for cultivation ? Or finally, how are we to explain the two different rates of Rs. 3 and Rs. 4, specified in the two leases, Exhibits 4 and 5, which were granted in the same year, and for the same number of years, and relate to precisely the same description of land ? There can be little doubt that the true explanation is to be found in the difference in the amount to be expended in reclamation, which would naturally be regarded as a ground for greater or less indulgence to the lessee. Thus, under the lease No. 4, Rs. 8,261 was the estimated expenditure, and the full assessment is fixed at the low sum of Rs. 3. In the lease No. 5, the estimate of cost is Rs. 6,980, and the assessment is Rs. 4. In the other leases, the land evidently required less costly works of reclamation, and the assessment is fixed at Rs. 5.

Looking at the matter in this light, we must regard the difference between the rates fixed in the leases and the assessment now paid on similar lands as part of the consideration for a contract mutually beneficial to the lessor and the lessee. The benefit to the lessor is well described in the lease No. 5, and is clearly indicated in the other leases also :

“Taking into consideration that without the embankment the Government is losing its revenue, and that you are prepared to contribute to the Government revenue by spending money out of your own pocket, and having in view the bringing of the land under cultivation, you are hereby permitted to build an embankment to the *Khár* at the village aforesaid.” The consideration to the lessee for his risk and expense was an exemption from assessment for a certain number of years, and a guarantee that in subsequent years his assessment should not be raised. Now that the lessee has performed his part of the contract, how can the Government be allowed to draw back from theirs ? It would be contrary to all principle to allow them to do so, unless, as

has been contended, the words of the law, under which they profess to act, give them an absolute power in all cases to fix any assessment they may please. But the words of Section 25 of Bombay Act I. of 1865 confer no such absolute power. That section contains the following proviso: "Provided that it (the assessment) shall not be leviable from any land held and entered in the land registers as wholly or partially exempt from payment of land revenue except to such amount as is in accordance with previous practice, or any law which has been, or may hereafter be, enacted, relating to lands so held." The lands now in question have hitherto been held at a certain fixed assessment, the amount of which has of course been entered in the land registers. It may be that hitherto the land registers have not shown any entry, distinctly declaring the lands to be "partially exempt from payment of land revenue." The reason of that may be that the rate of assessment fixed upon them has not hitherto been less than the ordinary rate of assessment. But however this may be, the words of Cl. 2, Sec. 4, Regulation XVII. of 1827, (and we may observe that, at the time when the rates complained of received legal sanction under Section 3 of Bombay Act I. of 1865, that Act formed part of the Regulation), are very clear and express and distinctly limit the right of Government to raise the assessment on land held by right partially exempt. Cl. 3 of the same section, no doubt, states that the Government may set aside such limitations on the exercise of its discretion by a legislative enactment—a power which it would of course possess, even if there were no such statement. But this clause requires that any rules having such an effect should be "specific." And reading Section 25, Bombay Act I. of 1865, in conjunction with Cl. 2, Sec. 4, Regulation XVII. of 1827, we are unable to find in the former section such specific terms as would indicate that the Legislature intended to set aside the provisions of the latter clause, and to enable the revenue officers to ignore all exemptions except those which they may themselves choose to recognize.

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We are of opinion and decide that the lands in question are partially exempt, in so far that they are only liable to assessment at the rates specified in the leases. It remains to consider the plaintiffs' claim to hold one-fifth of the lands altogether free of assessment.'

'This claim is founded upon the circumstance that in the leases Nos. 4 and 5, a deduction of one-fifth (*savái*) is made from the estimated area of the lands, and the balance only is entered as the extent of culturable land granted. From this, it is argued that it was the intention to grant one-fifth of the lands free of assessment, and the same exemption is claimed in regard to the lands held under the leases Nos. 6, 7, and 8, though no mention of 'Savái' is made in them. But it is clear from the terms of the leases Nos. 4 and 5, that the deduction of 'Savái' is made not because there was any intention of exempting from assessment any of the culturable land, but simply because it was impossible to ascertain at the time how much culturable land there was. The deduction is made simply as a correction of error in the necessarily imperfect measurements. It occurs only in that part of the leases which sets forth the details of the measurements (which are really as superfluous, so far as the terms of the leases are concerned, as the details of the projected expenditure), and it is not alluded to in the operative part of the leases, which, on the contrary, provides for an annual measurement of the land under cultivation and the levy of a uniform assessment upon the whole of such land. The claim of the plaintiffs to the deduction cannot, therefore, be maintained on the ground that it is granted to them by the leases. Can it then be maintained on the ground of prescription? It is in evidence that 'Savái sut,' or a remission of one-fourth, was made to the plaintiffs on all the lands held by them up to the introduction of the survey in 1862-63. In order that the plaintiffs may establish a prescriptive title to this remission, which they have enjoyed without right, they are bound to show that they have enjoyed it for 30 years. It is clear that they cannot make out their case in regard to the lands held

under any of the leases except No. 6 ; for the date at which assessment first became payable under the other leases all occurred within 30 years preceding the introduction of the survey. Under the lease No. 6, however, assessment became leviabie in A.D. 1805, so that the plaintiffs have enjoyed the exemption claimed in respect of the lands mentioned in this lease for nearly 60 years ; so far therefore as these lands are concerned, and so far only, they must be held to have established a prescriptive title.

We amend the decree of the District Court and declare that the plaintiffs are entitled to hold in perpetuity the lands specified in the leases, Exhibits 4 and 8, on payment of assessment on the whole of the culturable land mentioned in the leases Nos. 4, 5, 7, and 8, and four-fifths of the culturable lands mentioned in the lease No. 6, at the following rates, viz., Rs. 3 per *bighá* under the lease No. 4, Rs. 4 per *bighá* under the lease No. 5, Rs. 5 per *bighá* under the leases Nos. 6, 7, and 8.

And we further direct that the defendants do pay to the plaintiffs all sums levied by them as assessment for the years 1863-64 and 1864-65 in excess of the sums which should have been levied in accordance with the terms of this decree. The amount due will be determined at the time of execution of the decree.

The defendants will bear all costs in the District Court. The parties will bear their own costs in appeal.

Decree amended.

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