1876.

REG. v. SAMBHU RA'GHU.

Honourable R. S. Vishwanáth Náráyán Mandlik, Government Pleader, for the Crown:—The real question in the case is, had the caste authority to declare Narbadá's first marriage void? I say it had not. In absence, therefore, of a *pharkhut* from Narbadá's first husband, her second marriage was clearly an offence. The belief of the parties does not affect the legal question at all.

PER CURIAM:—The Acting Session Judge has considered this case very carefully, and the Court agrees in his conclusion. The Court does not find it established that there is any valid custom by which a woman of the caste of the first accused can claim a right to marry again, because her husband is a leper, and without having obtained a release from him. The Court does not recognize the authority of the caste to declare a marriage void, or to give permission to a woman to re-marry. The wife in this case, and the appellant, who performed the ceremony of re-marriage, probably acted in a *bonâ fide* belief that the consent of the caste made the second marriage valid; but though that circumstance may be taken into account in mitigation of punishment, it does not constitute a defence to a charge under Section 494 of the Indian Penal Code, or under that section combined with Section 109 of the Code. The Court confirms the conviction; but, as the appellant has already undergone imprisonment for 25 days, it remits the remainder of his sentence.

[APPELLATE CIVIL JURISDICTION.]

Cross Special Appeals Nos. 185 *and* 244 *of* 1875.

No. 185.

September 26.

THE COLLECTOR OF THA'NA' (SPECIAL APPELLANT) *v.* DA'DA'BHA'I BOMANJI (SPECIAL RESPONDENT).

No. 244.

DA'DA'BHA'I BOMANJI (SPECIAL APPELLANT) *v.* THE COLLECTOR OF THA'NA, (SPECIAL RESPONDENT).

Court Fees' Act VII. of 1870, *Sections* 5 *and* 7—"*Value*"—*Land in Salsette—Survey Act (Bombay) I. of* 1865, *Section* 35—*Ultra vires—Power of Government to frame rules under the Bombay Survey Act—Government Land—Building—Prescription—Title.*

The meaning of Clause viii, Section 7, of the Court Fees Act VII. of 1870 is that a person suing to set aside an attachment on land shall in no case be called

1876.

THE COLLECTOR OF THA'NA' v. DA'DA'BHA'I BOMANJI.

upon to pay a higher fee than he would have to pay if he were suing for possession of the land.

Accordingly, in a suit for setting aside a summary attachment, under Bombay Act I. of 1865, placed by the Collector on land held on a settlement for a period not exceeding thirty years, the value was held to be five times the assessment, and the stamp duty calculated upon it irrespective of the actual market value, or the amount for which the land was attached.

The holder of a cocoanut oart in Bandora in the island of Salsette in the Thána District, paying an annual assessment of Rs. 39 to Government, built a bungalow upon it without the permission of the Collector, who, under the rule purporting to have been issued by the Government of Bombay on the 1st February 1869 in accordance with the provisions of Section 35 of Bombay Act I. of 1865, demanded from him a fine equal to sixty times the assessment, and, on the plaintiff's failure to pay the fine, summarily attached the land under the provisions of Section 48 of that Act;—

Held (1st).—That the Government of Bombay had no authority to make the rule of 1st February 1869, and that Section 35 of the Survey Act providing no penalty for building without the Collector's permission, the attachment was illegal.

(2ndly).—That the expressions "Government Land" and "Land belonging to Government" in Bombay Act I. of 1865 mean land of which Government is the proprietor, and do not apply to land in which the proprietary right in the soil vests in a private individual, whether or not it be subject to the payment of assessment to Government.

(3rdly).—That by virtue of uninterrupted enjoyment for more than thirty years the plaintiff had, under Section 1 of Regulation V. of 1827, acquired a prescriptive title to the land, and had become its absolute proprietor.

Quære—whether the amount of the fine, contemplated in Section 35 of Bombay Act I. of 1865, if not paid, is a charge leviable by summary attachment under Section 48.

THESE were special appeals in the same suit from the decision of W. M. Coghlan, Judge of the District of Thána, amending the decree of W. H. Crowe, Assistant Judge.

The material facts of the case are as follows:—

The plaintiff occupies a piece of land in the village of Bandora, planted with cocoanut trees and subject to an assessment fixed at Rs. 39 per annum. In 1870 the plaintiff cut down one or two cocoanut trees and built a bungalow, on the site, as he alleged in his plaint, of some chawls or huts and a bakery that formerly stood there. The defendant (the Collector), under Nos. 4 and 8 of the rules framed under Section 35 of Bombay Act I. of 1865, and issued on 1st November 1865, inflicted on the plaintiff a fine of thirty times the fixed assessment of the whole survey number, and this fine the Collector doubled under the Supplementary Rules framed under Government Resolution No. 436, dated February

8176.

THE COLLECTOR OF THA'NA' v. DA'DA BHA'I BOMANJI.

1st, 1869, in consequence of the plaintiff not having obtained the permission of the Collector before building. The total fine thus levied, therefore, amounted to sixty times the fixed assessment of the entire survey number, viz. Rs. 2,340. This sum not having been paid, the plaintiff's property was summarily attached by the Collector, under Section 48 of Bombay Act I. of 1865, and the plaintiff, accordingly, brought this suit, praying to have the attachment removed. The land being valued at five times the survey assessment, viz. Rs. 195, the plaint was stamped with a stamp of the value of Rs. 15, according to the provisions of Act VII. of 1870, Section 7, Clause V., Sub-section (*d*), Proviso (1), Schedule I., No. 1, and Schedule II.

The plaintiff alleged a title to this land dating from 1809, and claimed to be the absolute owner, subject only to the annual assessment, and not a mere occupant of Government land, contending that, even if his tenancy under Government were proved, the Survey Act of 1865 could not have retrospective effect. He also alleged that the bungalow was erected on the site of a building previously in existence on the same spot.

The Collector answered *inter alia* that the plaintiff's bungalow was unconnected with any agricultural purpose, that he had not obtained permission to build it, and had thus rendered himself liable to the fine demanded, that his allegation as to the existence of the previous buildings was incorrect, and that the plaint was improperly valued.

The Assistant Judge held the plaint properly stamped, and that the plaintiff was not liable to the fine imposed by the defendant.

On appeal by the Collector, the District Judge held that the Assistant Judge had used Act VII. of 1870, Section 7, Clause 5 (*d*) (1) as the test to ascertain the value of the land, which in his opinion was incorrect. He looked on the provisions in that section as applicable only to suits for possession, and as not being intended to furnish a test as to whether the amount for which land is attached exceeds its value.

The Judge further held—

"I am unable to see anything in the circumstances of plaintiff's tenure to exempt him as an occupant of Government land from the operation of Section 35 of Bombay Act I. of 1865.

"I find that under Section 35 of Bombay Act I. of 1865, and the Rules framed under that section, the plaintiff is liable to a fine of thirty times the fixed assessment in the land, Rs. 1,170.

"The penalty imposed is sixty times the assessment, or Rs. 2,340.

"This penalty was imposed under Rules 4 and 8 of November 1st, 1865, under Government Resolution No. 4507, and under the Rule of 1st February 1869 under Government Resolution No. 436.

"The Rules 4 and 8 of 1865 authorize a fine of thirty times the fixed assessment for appropriating land to building sites.

"The rule of 1869 authorizes a fine of double the amount if the land be appropriated without the Collector's permission.

"The provisions of this rule are *ultra vires*. Section 35 of Bombay Act I. of 1865 authorizes Government to fix the amount of fine to be paid for this appropriation of land to a purpose not connected with agriculture, but gives no power to Government to fine for failure on the part of the occupant to obtain permission from the Collector. The cause of the fine contemplated in Section 35 is the appropriation of the land, not the failure to obtain permission.

Judgment for plaintiff for the removal of the attachment to the amount of Rs. 1,170."

The special appeal was heard by MELVILL and KEMBALL, JJ.

Shantárám Náráyán for the defendant Dádábhái Bomanji:—The District Judge was wrong in taking additional stamp duty. In a suit for removal of attachment placed on land paying assessment to Government under the thirty-years' settlement, the proper test for ascertaining the market value is that given in Act VII. of 1870, Section 7, Clause v (*d*). Clause viii of the same section shows that in no case is the stamp duty to exceed the fee leviable on a suit for possession.

The land on which the plaintiff has built his bungalow is a cocoanut oart, in which there were chawls and a bakery. The bungalow was not the first building upon it; and no one raised any objection while it was under construction. The rule under which the Collector demands the fine, purports to have been issued under the authority of Section 35 of Bombay Act I. of 1865; and

1876.

THE COLLECTOR OF THA'NA' v. DA'DA'BHA'I BOMANJI.

provides for the infliction of a fine not exceeding double the amount leviable under the rules.

In the first place the Government is not authorized to issue such a rule. See *Rámchandra Bapuji* v. *Vishnu Bápuji Tendulkar*(1).

And the rule refers to a first appropriation of the land to other than agricultural purposes; the chawls and the bakery having existed before, the present bungalow is not such an appropriation.

The Collector's demand is, therefore, unauthorized, and his attachment illegal. Section 35 of Bombay Act I. of 1865 is in the nature of a penal clause, and must be construed strictly. The penalty does not attach till permission to build is asked for, which it never was in this case. The Collector may sue for damages or for an injunction, but he cannot attach.

But the plaintiff has by his uninterrupted occupation of the land become an absolute proprietor; for he is not and never was a tenant of Government land, to which alone Section 35 applies.

Honourable Vishwanáth Náráyán Mandlik, Acting Government Pleader, for the Collector of Tháná:—The plaintiff admits that the land is garden land, and that he pays the ordinary assessment and local and other cesses. The bungalow was undoubtedly built without the Collector's permission, and is not used for any agricultural

(1) Civil referred case No. 8 of 1874, decided by Westropp, C.J., and Larpent, J., 27th July 1875. Bombay H. C. Printed Judgments 1875, p. 184, not reported. This case does not in fact establish the proposition for which it was cited. It was there decided, on the construction of a document, that the plaintiff was not entitled to be repaid by the defendant, his assignee, the amount of the fine recovered by the Collector from the plaintiff, as the immediate tenant under Government, under Sec. 35 of Bombay Act I. of 1865, in respect of a building erected for other than agricultural purposes by the defendant without the permission of the Collector, on land sold by the plaintiff to the defendant, and forming part of a survey field held by the plaintiff as occupant. The learned Judges, while pointing out that Section 35 contained no provision that the Collector might impose a fine, in the event of the occupant or any person claiming under him by assignment or otherwise rendering the land unfit for cultivation without the Collector's permission, nor any provision as to the liability of a lessee or assignee of an unrecognized share of a field to recoup the occupant, declined to express any opinion on the question whether the Collector was entitled to levy the fine from the plaintiff, or whether his proper remedy would have been by suit for an injunction against the plaintiff and defendant to restrain them from building or to remove the building.

1876.

THE COLLECTOR OF THA'NA' v. DA'DA'BHA'I BOMANJI.

purposes, but is let out on rent. Section 35 of the Survey Act applies, as also the rule made under its authority. The plaintiff is nothing more than an occupant of Government land. The history of land in Salsette as given in the early Regulations shows that the plaintiff has failed to comply with the conditions under which the Government proposed that the ryots might be made proprietors. The plaintiff is, therefore, not a proprietor but a tenant under Government; and he cannot build as he pleases. It was the plaintiff's duty to ask the defendant's permission before he commenced his buildings, and in not doing so he has clearly violated a law. His claim should, therefore, be rejected with costs.

The judgment of the Court was delivered by—

MELVILL, J. :—In this suit the plaintiff seeks to remove an attachment placed by the Collector of Thána on a cocoanut oart or garden situated in the outskirts of the town of Bandora in Salsette, which the Collector has attached in order to levy payment of a fine of Rs. 2,340, being sixty times the assessment on the oart, imposed as a penalty in consequence of the plaintiff having built a bungalow in the oart without the Collector's permission.

A preliminary question arises regarding the sufficiency of the stamp upon the plaint. We agree with the Assistant Judge that the stamp is sufficient, and, therefore, the additional amount which the District Judge has levied from the plaintiff must be refunded. Clause viii., Section 7 of Act VII. of 1870, prescribes that in suits to set aside an attachment of land, or of an interest in land or revenue, the fee shall be according to the amount for which the land or interest was attached: provided that, where such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest. The word "value" in the last clause must be construed in the same way as in the previous clauses of the same section, and, therefore, in the case of land held on settlement for a period not exceeding thirty years, and paying the full assessment to Government (which is the present case), the value must be deemed to be a sum equal to five times the survey assessment. The meaning of Clause viii. evidently is that a person suing to set aside an attachment on land shall in no case be

1876.

THE COLLECTOR OF THA'NA' v. DA'DA'BHA'I BOMANJI.

called upon to pay a higher fee than he would have to pay if he were suing for possession of the land.

We proceed now to consider the merits of the case. The plaintiff holds the land which has been attached under a title which has been proved to extend back, at all events, to the year 1815. In 1869 he commenced to build a bungalow upon it, which was completed in 1871 : and towards the close of that year he received a notice that his land was attached and would be sold in satisfaction of a fine of Rs. 2,340, to which he had rendered himself liable by building without having previously obtained the Collector's permission. The authority relied on in support of this proceeding is Section 35 of Bombay Act I. of 1865, and certain rules purporting to have been made under that section by the Government of Bombay. Section 35 of Bombay Act I. of 1865 is as follows :—

"It is hereby declared that an occupant of any Government land is entitled, in virtue of his occupancy, to erect farm buildings, construct wells or tanks, or make any other improvements thereon for the better cultivation of the land. But if an occupant wishes to appropriate the land in his occupancy to any purpose unconnected with agriculture so as to destroy or injure it for cultivation, he shall first obtain the Collector's permission, which shall be given on payment of a fine fixed according to such rules as may from time to time be prescribed under the orders of the Governor in Council, and on entering into a written agreement to pay, in addition to such fine, the annual assessment which may have been fixed on such land at the settlement then current, and which shall remain liable to revision at any future settlement of the district."

The rules prescribed by the Government of Bombay under this section will be found at pages 123 and 124 of Mr. Nairne's Revenue Hand-book. They are dated 1st November 1865, and fix the fine to be paid under Section 35 at a certain rate per acre, or at thirty times the fixed assessment, whichever of the two may be the greater. Subsequently on the 1st February 1869 the Government promulgated another rule, which is as follows :—

"In cases where the occupant has diverted his land to other than agricultural purposes without having obtained the permission required by the rules, he is liable to a fine not exceeding double the amount leviable under the rules."

It is under this last rule that the Collector has made the plaintiff liable to a fine of sixty times the assessment. We agree with the District Judge that it was not within the power of the Government of Bombay to make such a rule. Section 35 of the Act declares that a person wishing to apply his land to certain purposes must first obtain the Collector's permission and must pay a fine; but it is silent as to any penalty for making such an application of the land without having obtained permission. This may have been an oversight on the part of the Legislature: though it is difficult to think that the omission was accidental, seeing that in a preceding and a subsequent section (Sections 33 and 39) care has been taken to provide an express penalty for the unauthorized appropriation of certain lands. More probably, it was considered that the Collector would have an adequate remedy in an injunction of the Civil Court against any one who might commence building without permission, or in a suit for the removal of the building; or for damages. However this may be, it is certain that no penalty has been prescribed by Section 35 of the Act, and that the Governor in Council has not been authorized to make a rule on the subject.

It follows that the attachment placed by the Collector was in pursuance of an unauthorized demand, and we might on that account at once order it to be set aside, leaving the Collector to pursue any other remedies which he may have against the plaintiff.

But we think that, if the plaintiff is liable to the payment of any sum of money on account of the building of his bungalow, it is not desirable that we should raise the attachment, without insisting that such sum of money should be first paid. Such a proceeding would be beneficial to neither party. If Section 35 of Act I. of 1865 be applicable to the case, then the plaintiff was certainly bound to pay the fine therein prescribed before he commenced building:—and though it may be doubtful whether; if the Act be construed very strictly, such a fine, not having been paid, is a charge leviable under the Act (within the meaning of Section 48) by a summary attachment, yet it is certain that the Collector could recover it, together with costs, in a suit for damages, and could then attach the plaintiff's land and house in the ordinary course of civil procedure. Under these circumstances it is better

1876.

THE COLLECTOR OF THA'NA' v. DA'DA'BHA'I BOMANJI.

for both parties that we should decide that which is the substantial question at issue between them, viz., whether the plaintiff is liable to any, and what, fine under the provisions of Section 35 of Bombay Act I. of 1865.

That section is in terms applicable only to occupants of Government land; and the first question which arises is, what is meant by "Government land." It is hardly to be supposed that the word "Government" is mere surplusage, and that the expression "any Government land" is equivalent to "any land." It is rather to be inferred that the term applies to a particular description of land, to the exclusion of land of a different description. This supposition is borne out by a reference to Section 11 of the Act, which authorizes Survey Officers to enter "any lands, whether belonging to Government or to private individuals, and whether assessed to the public revenue or partially or wholly exempt from assessment." The "Government land" spoken of in Section 35 is, we think, the same thing as "land belonging to Government" spoken of in Section 11, and must be understood as used in the same sense of contra-distinction to land "belonging to private individuals." And it is also clear from the words quoted from Section 11 that the distinction between Government land and land belonging to private individuals is not to be sought in the payment or non-payment of assessment. The distinction, therefore, which is intended, must, we think, have reference to the proprietary rights in the soil: and the expressions "land belonging to Government" and "Government land" can only mean land of which Government is the proprietor, and do not apply to land in which the proprietary right in the soil vests in a private individual, whether or not it be subject to the payment of assessment to Government. This appears to us to be the only method of construing the Act consistently with itself; and it is, moreover, a very reasonable construction of Section 35, taken by itself: for it can hardly be supposed that the Legislature intended to restrict the full enjoyment of his own land by an absolute proprietor of the soil.

It is not necessary for us to discuss the much-vexed question, whether from an historical point of view the land in India is to be regarded as originally the property of the State or of indivi-

duals, and whether the State dues are a rent or a tax. That question is not now of much practical importance, seeing that every occupant of a field has his right of conditional occupancy guaranteed to him by the Survey Act as a transferable and heritable property. No doubt the preamble of Regulation III. of 1814 declared that "the ruling power of the provinces now subject to the Government of Bombay has, in conformity to the ancient usages of the country, reserved to itself, and has exercised the actual proprietary right of lands of every description." The correctness of this statement is very questionable. The reports of Elphinstone, Chaplin, Grant Duff, Robertson, and others, indicate very clearly that a large portion of the ryots, and especially the mirasdars, are, according to the ancient usage of the country, proprietors of their estates, subject to the payment of a fixed land-tax to Government. The subject will be found discussed at considerable length in *Sooryabhan* v. *Bukajee and another* (1). But, at any rate, the statement in the preamble of Regulation III. of 1814 is consistent with the alienation of its proprietary rights by Government, or with its recognition of the existence of proprietary rights in individuals, in particular instances, whether before or subsequently to the Regulation. It is also consistent with the capacity of private individuals to acquire proprietary rights by possession adverse to the Government, as prescribed in the subsequent Regulation V. of 1827, or any other law of prescription or limitation. It is, therefore, open to us to consider whether the plaintiff has, either by alienation, recognition, or prescription, acquired a proprietary right in his land.

The early history of the revenue administration of Salsette is given in great detail in Regulation I. of 1808. From this it appears (Section 20) that in the year 1788 it was proposed by Mr. Farmer, the officer locally in charge, "to encourage persons to pursue the cultivation and general improvement of the Company's villages, by ensuring to them and their heirs for ever the fruits of their labour and expense, and at the same time securing to the Company, as lords of the soil, a fair participation in these improvements, so as, in his idea, to convert the system of needy adventurers and temporary farmers into one of permanent zemindars." Some discussion on the part of the Government of

(1) 2 Morris. Rep. 189.

1876.

THE COLLECTOR OF THA'NA' v. DA'DA'BHA'I BOMANJI.

Bombay and the Court of Directors followed this proposal: and in 1791 the Government General directed further inquiry to be made, as to whether the property in the soil was vested in the Company or in the occupants, subject only to their payment to Government of the *toka*, or moiety of the crop. The inquiry was made, and certain temporary changes were introduced in the revenue system; but the result not being satisfactory, Mr. Rivett Carnac (who had succeeded Mr. Farmer) recommended in 1796 that the Government share in the crop should be reduced from one-half to one-third (Section 23), and, as a further and necessary incentive to the projected improvement, Mr. Rivett Carnac suggested that "the Coorumbees" (Koonbees) "should be admitted to a defined and certain interest in the land they respectively cultivate, their occupancy having hitherto been understood to be founded rather on prescriptive than positive right; for removing all doubts respecting which, it should be publicly signified to the ryots that the perpetual possession of the property held by their forefathers would be secured to them by written deeds as long as they continued to pay the rent to be settled for their respective local extent of cultivation" (Section 24). These proposals met with the entire approbation of the Supreme Government, as expressed in their letter of the 27th January 1797, which included likewise their recommendation "that the privilege of selling or transferring their lands should be conferred on the Coorumbees as the hereditary proprietors of their respective occupancies, under such rules and restrictions as the Government of Bombay might judge proper to prescribe for the security of the public revenue: the principle of which was, to continue to rate the fixed demp-jara part of the rental in grain instead of money, for the purpose of guarding against the gradual diminution in value of the precious metals" (Section 31). The Court of Directors were pleased to signify, under date the 20th March 1799, their concurrence in these proposals, as having for objects "an increase of the revenues, a decrease in the expense, and an amelioration in the condition of the inhabitants." The result was that the new system was introduced in 1798: that system being that, as regards the rice lands, which constituted almost the whole of the cultivated land in Salsette, the cultivators were to pay a fixed assessment computed in grain at one-third of the average crop; a wise precau-

tion being introduced (which has unfortunately been abandoned in later settlements), that if the grain assessment should be commuted for cash payments, there should be decennial valuations for the purpose of guarding against the gradual diminution in the value of silver. On the 1st May 1801 the Government of Bombay again signified its acquiescence in the principle of this arrangement, and declared that the cultivators were henceforward to be the full proprietors of their respective tenures (Section 41), and shortly afterwards the Governor in Council issued a proclamation (Section 43) in which he made known "for the particular information of the inhabitants of Salsette that, in pursuance of his determination, communicated to them on the 12th June last, to ameliorate their situations, by rendering them perpetual proprietors of the soil they now occupy, under a very moderate and fixed rent payable to the Government, formal grants of the property in question will be issued through the Collector, under the seal of the Company and signature of the Secretary to Government, to such present occupants of the soil in Salsette as may be desirous, and shall, in consequence, make application to the Collector on the spot, or to the Government of Bombay, to obtain them." From Section 45, Clause 3, it appears that only four persons actually availed themselves of the deeds offered to them, the reasons being thus stated—"How favourable so ever these deeds of property were esteemed in prospect, yet, from several causes, only four have been actually taken out, the Natives being under the less inducement to apply for them, or to pay the fee of five rupees, which had, since the 30th of September 1806, been established on each, that *they have continued undisturbedly in possession of all the advantages derivable from them*: whilst, on the other hand, they have had in object to obtain a modification of them, by rendering the present decennial valuation of perpetual batty-rental as permanent as is become that revenue in kind; * * * * * * added to all which not a few of the Coorumbees remain attached to the antient practice of their forefathers, and are apprehensive of binding themselves to a specific revenue by positive engagements, where, from circumstances of season joined to their own limited means, they might prove unable to withstand such casual disadvantages."

The Assistant Judge, referring to the proclamation and to the form of deed given in Section 44 of the Regulation, observes that

1876.

THE COLLECTOR OF THA'NA' v. DA'DA'BHA'I BOMANJI.

there is nothing in the present case to show that the plaintiff ever accepted the conditions offered, and that his tenure is different to that of any other occupant of Government land, nor that he possesses any grant entitling him to any privilege or exemption. In this view the District Judge appears to have concurred.

Now it appears to us that both the Assistant Judge and the District Judge have fallen into an error in holding that the plaintiff is prejudiced by the non-acceptance of a title-deed. Whether, if a deed had been offered to him and refused, such a result would have followed, as the Courts below suppose, it is not necessary for us to determine; though we may remark that the words italicised in the passage quoted above from Section 45 of the Regulation, and other portions of the same Regulation, show clearly enough that the non-acceptance of the deeds was not at the time considered either by the cultivators or by the Government as in any way working a forfeiture of the rights and privileges which had been bestowed or offered. But, in fact, there is nothing to show that title-deeds were ever offered to persons in the position of the plaintiff. It is true that the Government's proclamation purported in the first paragraph to be addressed generally to "the inhabitants of Salsette;" but it is clear from paragraph 3 of the proclamation, and from the form of the title-deed given in Section 44 of the Regulation, that the title-deeds were intended to be given only to the cultivators of *batty* or rice land. If there be any doubt on this subject, it is at once removed by Section 42, which informs us that, "under date the 18th of July 1801, the Collector reported his having given the most public notice of the rates fixed for the receipt in money of the batty revenues for ten years, transmitting at the same time drafts of the deeds of property to be interchanged with all possessors of batty ground paying revenue or quit-rent, and a list of those occupants of the soil to whom these deeds should be applicable, to the number altogether of ten thousand four hundred and sixty-nine, of whom thirty-six were distinguished as immediately desirous of availing themselves of the grants in question." The form of these deeds having been approved by the Government, they were returned to the Collector, with copies of the proclamation, to be disseminated for the general information of the inhabitants (Section 43). It

appears, therefore, that the title-deeds were intended for a specified number of possessors of batty ground, and there is nothing in the Regulation to show, or even to suggest the idea, that similar title-deeds were offered to the occupants of cocoanut oarts. These oarts had always been, and continued to be, dealt with on a different system from that applied to batty ground. This system is described in Section 40, from which it appears that the Marathas had observed the pratice of taxing the oarts at seventeen and fifteen rupees per bega, from which they deducted twenty-five per cent. for the ground occupied by wells, tanks, houses, and unproductive spots. Mr. Rivett Carnac proposed, under date the 23rd of April 1800, to reduce the rate to twelve rupeees per bega, "a modification which, leaving the rental still higher than *the proprietors* could afford to pay as a net permanent assessment," the following rules were, under date the 2nd of January 1807, prescribed to the Collector for his guidance in respect to the oart assessment :—

"Those that were rated by the Maratha Government at the gross amount of seventeen rupees per bega, to be now assessed at the rate of ten rupees per bega, without further plea or deduction in the whole measured extent, *however occupied.*"

"Those that were rated by the Maratha Government at the gross amount of fifteen rupees, to be now assessed at the rate of eight rupees and a half per bega on the whole measured extent, *however occupied.*"

The section goes on to say that these rates had been extended over the Island: and that some oarts having devolved to the Company, as well as certain baghat or gardens, these descriptions of tenure were, on the 1st of May 1801, ordered to be sold, subject to a fixed quit-rent in perpetuity, as accordingly took place on the 15th of July following, the rent on the gardens being fixed at two and a half rupees, and on the oarts at twelve rupees per bega, which rate was afterwards altered to those specified in the rules above quoted.

From the statements contained in the above section it appears that the terms granted to the possessors of cocoanut oarts were in every respect to their advantage. The cultivators of batty ground had, as we have seen, been deterred from accepting title-

1876.

THE COLLECTOR OF THA'NA' v. DA'DA'BHA'I BOMANJI.

deeds, some of them because they desired a fixed money assessment, and others because they dreaded any kind of fixed assessment. These deterrent causes could have had no operation in the case of the holders of the oarts. These oarts had always been rated at a fixed money assessment: and the only effect of the changes introduced in 1800 and 1807 was to reduce that money assessment, and to increase the security of the tenure. If then title-deeds had been offered to the holders of oarts, there can be little doubt that they would all have accepted them gladly. That they did accept the favourable terms offered to them, there can be no doubt. The plaintiff's position, therefore, is quite unaffected by any prejudice arising from a supposed omission on the part of those through whom he claims to avail themselves of the terms offered to them by the Government.

What, then, is that position? From Section 40 of the Regulation it appears that from 1800 until 1808 (the date of the Regulation) the occupants of oarts were treated as "proprietors," and that in 1807 the assessment was fixed on the whole extent of the oarts "however occupied." It is clear from the whole tenor of the Regulation, that the word "proprietors" in Section 40 is used advisedly and in its strict sense. It has been stated in the course of the argument, and not contradicted, that no change whatever was made in the relations between the Government and the holders of the oarts, nor in their assessment, between the years 1808 and 1861, when the new survey was introduced. It is certain from Captain Francis' Report, No. 74 of 13th February 1861,[1] that the assessment of two and a half rupees on gardens (the rate mentioned in Section 40 of the Regulation) had remained unchanged during the whole of that period: and there is no reason to suppose that it was otherwise in regard to the assessment on the oarts. But this is of little consequence. The assessment on land may be varied, without any disturbance of proprietary rights. What is of importance is that the plaintiff and those through whom he claims have held as proprietors and without dispute from 1815 till 1869, or for more than 50 years. It is not necessary to say that the rules set out in Regulation I. of 1808 created such an indefeasible proprietary title that the Government could not subsequently have

(1) Bom. Govt. Records, No. XCVI. N. S. p. 312.

disputed it. It may be that Government could have done so; but in fact it never did. For a period very much exceeding thirty years it continued to recognize the validity of those rules. It had by its Regulation told the holders of the oarts that they were proprietors. It never asserted that they had ceased to be proprietors. They continued to regard themselves and to be regarded as proprietors. Consequently, in the words of Section 1, Regulation V. of 1827 (which was in force when this suit was brought), they held their lands as proprietors, and such possession for a longer period than thirty years must, according to the provisions of that section, be received as proof of a sufficient right of property.

For these reasons we are of opinion that the plaintiff has, under Section 1 of Regulation V. of 1827, acquired a right of property in his oart, subject only to the payment of assessment to the Government; that the land is not Government land, within the meaning of Section 35 of Bombay Act I. of 1865; that the plaintiff is not liable to pay any fine or penalty for building in the said oart without the Collector's permission; and that, consequently, the attachment of the oart by the Collector is illegal, and must be set aside.

We reverse the decree of the Court below, and restore that of the Assistant Judge, placing all costs on the Collector throughout.

PRIVY COUNCIL.

July 13, 15, 20, 1875.

February 16, *March* 28, 1876.

PRESENT:

The Lord CHANCELLOR (Lord CAIRNS).	Sir BARNES PEACOCK.
Lord SELBORNE.	Sir MONTAGUE E. SMITH.
Sir JAMES W. COLVILE.	Sir ROBERT P. COLLIER.

IN APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

DA'MODAR GORDHAN, DEFENDANT, *v.* DEORAM KANJI*

(DECEASED, BY HIS SONS AND HEIRS), PLAINTIFF.

British territory in India, Power to cede—Proof of cession—Transfer of jurisdiction—Re-arrangement of jurisdiction within British territory—Statutes 3 & 4 *Will.*

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*On account of the very great importance and interest of the point of Constitutional Law discussed in this case, and the circumstance that it is not the point on which the judgment turns, it has been thought more instructive to give a very full report of the arguments of Counsel and interpellations of the Committee.