attached, is cognizable by a Court of Small Causes when the property is moveable property of a value not exceeding Rs. 500. The reason for these decisions was that a suit, *by the owner*, for the recovery of attached property may properly be regarded as a suit "for personal property." But a suit *by a decree-holder*, to establish his right to attach and sell certain property as belonging to his judgment-debtor, cannot be called a suit for personal property. The distinction is clearly pointed out in *Nathu v. Kalidas*, and it is there shown how this [505] distinction explains the decisions of the Calcutta and Madras High Courts which are there quoted. None of those decisions is in favour of the proposition that a suit by a judgment-creditor to establish his debtor's title is cognizable by a Court of Small Causes, and the ruling of this Court in *Jethabhai* v. *Bai Lakha* (1) is directly adverse to it. The District Judge must be informed that this Court does not concur in the view taken by him, and, consequently, that the Subordinate Judge's order must be reversed, and the plaint received. It may, no doubt, as the District Judge observes, be somewhat anomalous that a Court of Small Causes should be able to try the suit of one claimant, but not that of the other, when the two suits arise out of the same circumstances, and involve the same issues; but the anomaly is caused by the wording of s. 6 of Act XI of 1865, and can only be removed by an amendment of that section.

NOTE—This decision was followed in the case of *Balkrishna* v. *Kisansing*, Extraordinary Application No. 153 of 1879, decided by M. Melvill and Kemball, JJ., on the 10th of August 1880.

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APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

THE COLLECTOR OF AHMEDABAD (*Original Defendant*), *Appellant v.* BALABHAI KEVALDAS (*Original Plaintiff*), *Respondent*.* [6th April, 1880.]

Bombay Acts I of 1865 *and IV of* 1868, *s.* 5, *cl.* 1, *para.* 2—*Building-sites—Exemption from payment of Government land revenue.*

On the 6th April, 1836, the Collector of Ahmedabad demised by lease a building-site in that city to the plaintiff's grandfather for a term of ninety-nine years. No rent was reserved by the lease as then presently payable, but it contained a provision that the lessee should pay, in respect of the said site, such land tax as might "fall upon all." The lessee and his heirs held the site from the date of the lease down to 1878, without paying or being required to pay any land tax or rent to Government. In 1878, however, Government levied from the plaintiff Rs. 2-11 as land revenue assessed on the site. Plaintiff thereupon sued the Collector of Ahmedabad for recovery of the amount, on the ground that the assessment and levy were illegal.

[506] *Held*, that the plaintiff's building-site was exempted from liability to assessment by Bombay Act IV of 1868, s. 5, cl. 1, para. 2 which enactment applied to the case.

Held, also, that this exemption was not to continue beyond the term for which the site had been demised by Government, but that on its expiration it would be open to Government to resume the land altogether or to re-let it on such terms as to assessment or otherwise, as might be the pleasure of Government.

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* Appeal No. 2 of 1880 from original decree.

(1) 6 B. H. C. R. 37.

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The origin of Bombay Act IV of 1868 mentioned, and the provisions contained in it, relating to exemption from the payment of assessment, referred to and discussed.

THIS was an appeal from the decision of S. H. Phillpotts, Judge of the District Court of Ahmedabad, in original suit No. 66 of 1878.

The plaintiff Balabhai brought this suit against the Collector of Ahmedabad for the recovery of Rs. 2-11, alleging that the said amount had been illegally assessed and levied by the City Survey Officer in 1878 on a certain building-site belonging to the plaintiff, and situate in the city of Ahmedabad. He also alleged that the suit had been granted, free of tax, by the Collector of Ahmedabad to his plaintiff's (grandfather, Samuldas on the 6th April, 1836, under a lease for ninety-nine years.

The Collector answered that the plaintiff was liable to pay assessment under the terms of the lease, although he and his ancestors had held the land for a period of forty-two years, previous to the date of the suit, without paying any tax or assessment to Government.

The District Judge raised the issue, whether the plaintiff was liable to pay assessment under the lease. He found this issue in the negative, on the ground that Bombay Acts I of 1865 and IV of 1868 were applied to the city of Ahmedabad in 1869 (1) ; that, therefore, the lands in that city were not liable to pay assessment under the latter Act, as they came under the exemptions provided in it. He, accordingly, allowed the plaintiff's claim with costs.

The Collector thereupon appealed to the High Court.

[507] *Nanabhai Haridas* (Government Pleader), for the appellant.—The decision of the District Judge is contrary to law. Section 1 of Bombay Act IV of 1868 extended the application of Bombay Act I of 1865 to towns and cities. All lands, therefore, in the city of Ahmedabad are Government lands, and liable to assessment. Section 5 of Act IV authorizes confirmation of existing exemptions from the payment of Government land revenue. But the land in dispute does not come within the exemptions. It is liable to the payment of assessment by an express provision in the lease, when other lands have been assessed. The lease expressly stipulates that the lessee should pay assessment when all others pay it. This condition is fulfilled, as a land-tax is imposed upon other lands in the city. [WESTROPP, C. J.—The land has been held free of tax for thirty-three years before the application of Regulation XVII of 1827 and Act I of 1865 to the city of Ahmedabad. It comes, therefore, under the exemption contained in Act IV of 1868, s. 5, cl. 1, para. 2.] The words "exempt from the payment of Government land revenue" do not apply to the land in dispute. Although it remained unassessed during that period, Government might have assessed it, if it had pleased.

Manekshah Jehangirshah, for the respondent, was not called upon.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—On the 6th April 1836, the Acting Collector of Ahmedabad demised, by lease, a building-site in the city of that name to Samuldas, the grandfather of the plaintiff, for a term of ninety-nine years. No rent was reserved by that lease as then presently payable, but the lease contained a provision to the effect that it was agreed that the lessee should pay, in respect of the site demised, such land-tax as

(1) See *Gevernment Gazette* for 1869, Part 1, p 183.

might "fall upon all," whereby we understand that, in the event of a general land-tax being imposed upon building sites in the city of Ahmedabad, the lessee, in respect of this particular site, should pay such tax.

The lessee or his heirs have held the site from the 6th of April 1836 down to 1878, a period of forty-two years, without paying or being required to pay any land-tax or rent to Government in [508] respect of the site; but, in the last-mentioned year, Government levied from the plaintiff Rs. 2-11, which had been assessed as land revenue in respect of the site. The plaintiff then (1878) brought the present suit against the Collector, complaining that the assessment and levy were illegal, and seeking to recover the amount levied. Bombay Act IV of 1868, having been in force at the time of the levy, said to be wrongful, is the enactment applicable to this case.

Until shortly before the passing of Bombay Act IV of 1868, Government had not treated Regulation XVII of 1827 and Bombay Act I of 1865 as applicable to building-sites in the towns and cities of the mufassal, and, generally speaking, land revenue had not been levied by Government in respect of such building-sites. In cases, which occurred shortly before or about 1868, in which Government had attempted, under the enactments of 1827 and 1865, to levy land revenue from building-sites in such towns and cities, some decisions having been made in the mufassal Courts against the right of Government so to apply those enactments, the Bombay Legislature passed Bombay Act IV of 1868. The High Court took the same view as to the inapplicability of Bombay Reg. XVII of 1827 and Bombay Act I of 1865, s. 25, to towns and cities as had prevailed in the mufassal Courts—see *Abraham* v. *The Collector of Thana* (1), *Dadabhai Narsidas* v. *The Sub-Collector of Broach* (2), *Mahasukram Narsidas* v. *The Deputy Collector of Ahmedabad*(3). Section 51 of Bombay Act I of 1865, providing that that Act shall be read and taken as part of Reg. XVII of 1827, having, we believe, been deemed to have led to the decisions in the mufassal Courts, was repealed by Bombay Act IV of 1868, s. 20, and subsequently it was by s. 17 of Act X of 1876 enacted that so much of Bombay Reg. XVII of 1827 as was, at the passing of Bombay Act X of 1876, "in force in any part of the territories to which that Act extends, shall be deemed to be in force and to have always been in force in sites of all villages, towns and cities in such part."

[509] The first section of Bombay Act IV of 1868 expressly declared Bombay Act I of 1865 to be applicable to towns and cities. The fourth section confirmed the existing right of occupancy of all lands in towns and cities so far as the interest of Government is concerned, except in the case of encroachments provided for by s. 8. The fifth and sixth sections are those which are important in the present case, and are as follows:—

"5. *Clause I.* In towns and cities the Collector shall, on the application of the owner or occupant, confirm existing exemption from the payment of Government land revenue in the following cases, that is to say:—

"1st. In any town or city where there has been in former years a survey which Government recognise for the purposes of this section, all lands shown in the maps or other records of such survey as being held wholly or partially exempt from the payment of Government land revenue."

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(1) See note (1), 4 B. 513, *infra*.
(2) 7 B.H.C.R. A.C.J. 82.
(3) See note (2), 4 B. 514, *infra*.

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"2nd. In any town or city all lands shown on summary inquiry before the Collector to have been held wholly or partially exempt from the payment of Government land revenue for a period of not less than five years before the application of Bombay Act I of 1865 or of this Act to such town or city."

"3rd. In any town or city, lands, for whatever period held, shown, on summary inquiry before the Collector, to have been held partially or wholly exempt from payment of Government land revenue under a deed of grant, or of confirmation issued by an officer whom Government recognise as having been competent to issue such deed."

"*Clause* 2. A sunnud (*sanad*) from the Collector, certifying that one or other of the conditions above stated has been fulfilled, shall be sufficient proof of a right to exemption, and such sunnud shall be produced by any occupant making application under the preceding clause."

Section 6. "In any town or city all other lands not coming within the provisions of s. 7 of this Act" (*i.e.*, revenue-free lands situate in towns or cities and used for cultivation only) "which have been held for a period less than five years [510] preceding the date of the application of Bombay Act I of 1865 or of this Act to such town or city, will be liable to be assessed to the full amount of the survey rates, and, if such lands have been held for a period less than two years preceding the said date, the holder will also be liable to pay the occupancy valuation, to be determined according to the rates prevalent in the immediate neighbourhood."

It has been stated to us by the learned Government Pleader that he obtains from making any objection as to the absence of the *sanadi* certificate, from the Collector, mentioned in cl. 2 of s. 5, and of proof of the summary inquiry by the Collector provided for by clause I of the same section, as Government is desirous of having the judgment of this Court upon the substantial question in the case—*i.e.*, whether, under the circumstances which exist here, the Collector was bound, if holding such an enquiry, to have decided that the building-site, in the possession of the plaintiff, is exempt from assessment as falling within the second subdivision of clause I of s. 5 of Bombay Act IV of 1868, *viz.*, as held "exempt from the payment of Government land revenue for a period of not less than five years before the application of Bombay Act I of 1865 or of this Act to" the city of Ahmedabad. This desire of Government for the opinion of this Court is probably due to the circumstance that in s. 128 of the new Bombay Land Revenue Code (Bombay Act V of 1879), which repeals Bombay Act IV of 1868, the provisions of the fifth section of the last-mentioned Act have been re-enacted.

It is admitted that the application of those Acts to the city of Ahmedabad was first made in A.D. 1869. The plaintiff having held the land in question unassessed from 1836 to 1878, *i.e.*, forty-two years, of which period thirty-three years had elapsed before 1869, has not paid or been required to pay any land revenue in respect of it for a time more than six fold that specified (five years) in s. 5, cl. I, sub-division 2 of Bombay Act IV of 1868. But it has been argued for the Collector that the words in that passage—"exempt from the payment of Government land revenue" —render it inapplicable to land which, though unassessed [511] during that period, might have been assessed, if such were the pleasure of Government; and that the plaintiff's land might have been assessed at any time previously to the passing of Bombay Act IV of 1868. We think it clear that, under

the lease of 1836, Government had the right, up to the passing of Bombay Act IV of 1868, to have assessed the plaintiff's land, if Government were making a general (we don't say absolutely universal) assessment of such building-sites in the city of Ahmedabad as were liable to assessment. But Government did not, during that period, exercise that right, so that not only was there no land revenue paid by the plaintiff during that time or up to 1869, but there was none payable by him, and the plaintiff did, as a matter of fact, hold his building site "exempt from the payment of Government land revenue" during the thirty-three years previous to 1869 and thirty-two years before the passing of the Act. It may be, that, if the land had been lawfully assessed and that the plaintiff had nevertheless allowed the land revenue so imposed to fall into arrear, for five years or more previous to 1869, the land could not be regarded as exempt from payment of Government land revenue; but that not being the present case, there is not any necessity for us to give, and we don't give, any opinion upon that question. There was neither a general assessment of building-sites in the city of Ahmedabad, during the period named, which would, pursuant to the lease of 1836, have afforded the opportunity, to Government, of making an assessment of the plaintiff's building-site, nor a particular assessment of that site. The circumstances under which that site could have been assessed conformably to the lease of 1836 never, previously to 1869, arose;—in other words, there was not any general assessment made, *i.e.*, any land-tax imposed, which "fell upon all" holders of such sites in the city. Three cases are specified in s. 5, cl. 1, of the Act in which the Collector is, by it, required to confirm "existing exemption,"—a phrase in itself of great importance as of far wider scope than would be "existing title to exemption." They may be more conveniently and logically stated in the following order than in the sequence adopted in the Act; *ex. gr.*—1. Where the exemption is testified by "a deed of grant or of confirmation" issued by a competent Government officer (case 3 in the Act). [512] 2. Where the exemption is testified by "maps or other records of a survey" recognized by Government for the purposes of s. 5 (case 1 in the Act). 3. Where there has been actual exemption "from the payment of Government land revenue for a period of not less than five years before the application of Bombay Act I of 1865, or Bombay Act IV of 1868, "to the town or city where the land is situate" (case 2 in the Act). The two of these cases, which we have placed before that last mentioned, depend upon proof of the title. The last appears to us to depend, not on proof of title, but on proof of a fact. We think that where the site-holder was unable to give proof of title as required in the two former cases, the intention of the Legislature was that by proof of a fact he should be relieved of liability to pay the land-tax imposable on building-sites in towns or cities. That fact appears to us to be actual exemption for a given period independently of, and uncomplicated by, any question of title, and may be either non-assessment (as distinguished from non-assessability, which does involve title) or non-payment. Which of these two the Legislature intended, it is (as already mentioned) unnecessary for us now to decide; for both of these facts exist in the present case. In our opinion the Legislature, at the very least, intended that non-assessment during five years should entitle the site-holder to exemption at the hands of the Collector. If we were to hold that proof of the requisite period of actual exemption must, in order to secure future exemption be accompanied by strict proof of title, we think that we should defeat the intention of the Legislature, which seems to us to have been

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to rest the case, which we have placed third in order, on prescription alone, and, moreover, to have been very liberal in fixing so short a period of prescription as five years.

The sixth section, in declaring what lands in towns or cities shall be assessable under the Act, does not in anywise conflict with the view which we have taken of the fifth section, which declares what lands shall be free from assessment under the Act; for the sixth section provides that all *other* lands (*i.e.*, other than those exempted by s. 5) not coming within the provisions of s. 7 of the Act (*i.e.*, not used for cultivation only), which have been held for a period less than five years [513] preceding the date of the application of Bombay Act I of 1865 or of this Act to a town or city, will be liable to be assessed to the full amount of the survey rates, and if held for a period of less than two years preceding that date will also be liable to pay the occupancy valuation to be determined according to the rates prevalent in the immediate neighbourhood.

In deciding, as we do, that the plaintiff's building-site, the subject of this suit, is by the operation of Bombay Act IV of 1868 exempted from liability to assessment, we must not be understood as holding that such exemption can endure beyond the term of ninety-nine years for which that site has been demised to his ancestor by Government. On the expiration of that term it will be open to Government either to resume that land from the plaintiff, his heirs, or assigns, altogether, or to re-let it to him on such terms as to assessment or otherwise as may be the pleasure of Government. This, we think, is the proper inference from the fourth section of that Act, which confirmed the then existing right of occupancy. That right in the present case was a right to occupy for ninety-nine years only.

For the reasons above given, and with the limitation last mentioned, we affirm the decree of the District Judge with costs.

Decree affirmed.

4 B. 513-N.

NOTE 1.—*Abraham* v. *The Collector of Thana* (S. A. No. 179 of 1870), above referred to, was a suit, by the plaintiff Abraham against the Collector of Thana and the Mamlatdar of Salsette, to set aside an order issued by the defendants to the plaintiff. He alleged that he had built walls round a plot of land belonging to him and situate in the village of Nowpada, in the town of Bandra; that the defendants holding the said land to be Government property, issued an order to the plaintiff to pay Rs. 177 as rent and fee. The suit was filed in the District Court of Thana on the 18th January 1869. The defence was that the land did not belong to the plaintiff, that he occupied it wrongfully, and that the order for the payment of rent was legal under Bombay Act I of 1865. The Assistant Judge (Mr. M. B. Baker), who tried the suit, raised the issues :—(1) whether the land belonged to the plaintiff or Government, and was liable to pay the rent claimed by the defendants; (2) whether the order issued by the defendants was legal.

Mr. Baker held that the land belonged to the plaintiff; that it had been in the possession and occupation of the plaintiff, and those under whom he claimed, for more than thirty years; that it was the *gavthan* or within the [514] precincts of the village of Nowpada, in the town Bandra; that it was not liable to pay any rent; that Act I of 1865 did not apply to lands in a town or village before the passing of Bombay Act IV of 1868; that the plaintiff's cause of action arose before Act I of 1865 was made applicable to towns and cities by Act IV of 1868, and that, therefore, the order issued by the defendants was illegal. He, accordingly, made a decree in favour of the plaintiff. The Collector thereupon appealed to the District Judge (Mr. A. Bosanquet), who held that the land belonged to Government, and was subject to the payment of assessment; that the order made by the defendants was legal. He, accordingly, reversed the decree of the Assistant Judge, and dismissed the

plaintiff's claim with costs. The plaintiff specially appealed to the High Court. The appeal was heard by Gibbs and Melvill, JJ. The principal point urged in the High Court was that the land was situated within the boundaries of a town, and, therefore, not liable to assessment. The Court sent an issue to the lower Court for a finding on that point, and on the receipt of it, gave the following judgment (8th December, 1870):—

PER CURIAM.

The Court referred the following issue to the District Judge :—

"Is the land in dispute a portion of *gavthan* of the village of Bandra, or its hamlet Nowpada?" And the District Judge has found that the land is a portion of the *gavthan* of the village. Under these circumstances the Court is of opinion that, previous to the passing of Bombay Act IV of 1868, the Collector had no power to assess such lands, and therefore, the District Judge was in error in holding the land liable to assessment. The Court, therefore, reverses the decree of the District Judge, and confirms that of the Assistant Judge, with costs (8th December 1870). [This Case is also referred to in 4 B. 505 (508).]

4 B. 514-N.

NOTE 2.—*Mahasukram Narsidas* v. *The Deputy Collector of Ahmedabad* (S. A. No. 334 of 1871), above referred to, was a suit, by the plaintiff Mahasukram against the Collector and Deputy Collector of Ahmedabad, to establish his right to a piece of ground situate in the city of Ahmedabad, and to recover Rs. 8 which the plaintiff alleged had been illegally levied by defendant No. 2 as rent on the said land. The plaint was filed on the 12th February 1867. The defence was that the ground was a portion of the public road; that the plaintiff had encroached upon it; that the rent levied was legal, under Bombay Act I of 1865. The Assistant Judge (Mr. S. M. Tagore), who tried the suit, raised two issues, *viz*: (1) whether the plaintiff was owner of the ground, and (2) whether the defendants had a right to levey rent on it. He held that the ground did not belong to the plaintiff, but that the rent levied by the Deputy Collector was illegal, as he had not been invested with any power to do so under Act I of 1865, s. 6. He raised the question, but did not determine it, whether that Act I was applicable to lands like that in dispute in the city of Ahmedabad, as he decided the case on the ground that the levy of the rent was illegal, and that the plaintiff was entitled to recover it. He, accordingly, made a decree [515] in favour of the plaintiff on the 24th July, 1868. The Collector thereupon appealed to the District Judge (F. D. Melvill), who reversed the decree of the Assistant Judge, on the ground that the levy of the rent was legal. He, accordingly, threw out the plaintiff's claim on the 16th December 1870. The plaintiff thereupon specially appealed to the High Court on the 28th March 1871. The appeal was heard by Westropp, C.J., and Lloyd, J., on the 4th March 1872. The following is their judgment :—

WESTROPP, C.J.—The Court reverses the decree of the Acting Judge (dated the 16th December 1870) and restores that of the Assistant Judge (dated the 24th July 1867), this Court holding that the opinion expressed in the case of *Dadabhai Narsidas* v. *The Sub-Collector of Broach* (1), that Bombay Act I of 1865 was not applicable to building sites in towns and cities until expressly made so by Bombay Act IV of 1868, is correct. A decision to the same effect seems to have been made, on the 8th December 1870, by Gibbs and Melvill, JJ., in an unreported case, *Abraham* v. *The Collector of Thana* (S. A. No. 177 of 1870), with reference to a building-site at Bandra, in the island of Salsette. In the present case the assessment was made in January 1867, and, as the Deputy Collector expressly states, under Act I of 1865.

In holding that the defendant must refund the rent then levied, the Court is not to be understood as deciding either upon the question of title or that of encroachment. The defendant must, besides paying the costs of this suit as ordered by the Assistant Judge, also pay the costs of both appeals. [This case is also referred to in 4 B. 505.]

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(1) 7 B.H.C.R. A.C.J. 82.