ORIGINAL CIVIL.

Before Mr. Justice Scott.

SHA'PURJI JIVANJI, PLAINTIFF, *v.* THE COLLECTOR OF BOMBAY, DEFENDANT.*

1885. *April* 27, 28.

Land revenue—Assessment—Right of Government to enhance—Foras or Foras-toká land.

The plaintiff was the holder of certain land in the island of Bombay, called *foras* or *foras toká* land. He and his predecessors in title had held the said land for upwards of sixty years, and had paid a certain fixed assessment to Government. On the 31st July 1882 the Collector of Bombay, claiming to act under powers conferred by Bombay Act II of 1876 and under the order and with the sanction of Government contained in a Government Resolution dated the 14th August, 1879, gave notice to the plaintiff that the assessment payable in respect of the said lands was enhanced. He claimed the increased rent not merely for the future, but also for two previous years (1879-80 and 1880-81) subsequent to the date of the Government Resolution of the 14th August, 1879. The plaintiff paid under protest, for the said two years, the sum of Rs. 442-8-2 in excess of his previous assessment, and now sued to recover that amount from the defendant. The plaint prayed for a declaration that there was "a right on the part of the plaintiff in limitation of the right of Government, in consequence of a specific limit to assessment having been established and preserved, in respect of the said lands, to possess and hold the same at the rent or assessment hitherto paid by the plaintiff; and that the Collector of Bombay had no right to increase the plaintiff's rent or assessment beyond such specific limit; and that the defendant should be ordered to repay to the plaintiff the said sum of Rs. 442-8-2."

Held, that no grant, contract, or law emanating from Government being proved to have emanated from Government conferring on the lands in question a right to a fixed and permanent rate of assessment, the assessment on these lands was liable to enhancement.

Held, also, that the plaintiff was only liable to the enhanced rate of assessment from the time at which it was actually made by the Collector, and that he (the plaintiff) was, therefore, entitled to be repaid the sum sued for.

Strict proof must be given of any right set up in derogation of the inherent right of the Sovereign to assess the land at his discretion; and the facts, that the lands in question were waste lands reclaimed from the sea which the inhabitants were invited to cultivate, or that a very small rent has been paid for many years, do not show that the Government has forfeited its right to enhance the assessment in respect of such lands.

THE plaint set forth that the plaintiff and his predecessors in title had held certain lands situate at Parel, in the island of Bombay, for upwards of sixty years, paying, in respect

*Suit in the Court of Revenue Judge, No. 1 of 1882.

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thereof, a fixed and permanent rent to Government, which the plaintiff contended the Government had no power to enhance; that the Collector of Bombay had recently raised the said rent or assessment without giving the plaintiff an opportunity of being heard, and showing cause against the said enhancement, and had given retrospective effect to the said increase; that the plaintiff had paid the enhanced rent under protest, (*viz.*, the sum of Rs. 442-8-2 in excess of the former rent,) for the years 1879-80 and 1880-81, and now claimed in this suit to recover the said amount from the defendant. The plaint prayed for a declaration that there was "a right on the part of the plaintiff in limitation of the right of Government, in consequence of a specific limit to assessment having been established and preserved, in respect of the said lands, to possess and hold the same at the rent or assessment hitherto paid by the plaintiff; and that the Collector of Bombay had no right to increase the plaintiff's rent or assessment beyond such specific limit; and that the defendant should be ordered to repay to the plaintiff the said sum of Rs. 442-8-2."

In his written statement the defendant denied the plaintiff's right, in limitation of the right of Government, to hold the said lands at a fixed and uniform rent or assessment, and claimed that the Government had power to increase the said rent or assessment. He stated that the plaintiff was the holder of 45,782 square yards of land, of which 44,402 square yards were "*foras*" or "*foras tokâ*" land, and 1,380 square yards were pension and tax land; that the Collector of Bombay under powers conferred by Bombay Act II of 1876, and under the order and with the sanction of Government contained in Government Resolution dated 14th August, 1879, fixed the assessment payable in respect of the said *foras* or *foras tokâ* land, at one pie *per* square yard, and the assessment of the said pension and tax land at the same rate. The defendant denied that retrospective effect had been given to the said increase of assessment, and stated that the said sum of Rs. 442-8-2 was the amount in excess of the former assessment payable for periods subsequent to the said Government Resolution, namely, for the years 1879-80 and 1880-81.

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Macpherson, P. M. Methá and *Inverarity* for the plaintiff.

The following authorities were referred to:—Aungier's Convention;, Warden on the Landed Tenures of Bombay; *Naoroji Berámji* v. *Rogers*[1]; Bombay Government Records; *Kánará Land Case (Vyakuntá Bápuji* v. *The Government of Bombay*[2]).

Latham (Advocate General) and *Lang* for the defendant, in addition to the above authorities, referred to the following:—Act VI of 1851; *Doe d. East India Company* v. *Hirábái*[3]; Regulation XVII of 1827; Regulation XIX of 1827; *Lopes* v. *Lopes*[4]; *The Collector of Thána* v. *Dadábhái Bomanji*[5]; *Bábu Rámchandra* v. *The Collector of Bombay*[6].

SCOTT, J.—This suit was by consent transferred from the Court of the Revenue Judge to the Original Side of the High Court. The main question is, whether the Government has the right to increase the assessment of a certain class of land in the island of Bombay, or whether the holders, of whom the plaintiff is one, are only bound, as a condition of their tenure, to the annual payment of a customary rent invariable in amount.

It must be borne in mind that this is not a mere question of landlord and tenant. The Government is the defendant, and the plaintiff sets up a right in derogation of the inherent right of the Sovereign to assess the land at his discretion. Strict proof of the right set up must be given, whether the change be one of absolute ownership, revenue-free, or of fixity of tenure at a customary rent; and it must be borne in mind that no presumption is admissible against the Crown from mere lapse of time. *Nullum tempus occurrit regi.* It may be, as suggested by Mr. Warden and Mr. LeMesurier in the works referred to in the argument, that the land now in question was originally waste land reclaimed from the sea, which the inhabitants were invited to cultivate. It may be that at first they paid no rent, and that subsequently they were only called upon to pay a very small rent, which has continued the same for very many years. But it does not follow from these facts that the Government has forfeited its right to enhance the assessment. The expenses incurred as well as the

(1) 4 Bom. H. C. Rep., 1, O. C. J. See note, p. 40.
(2) 12 Bom. H. C. Rep., Appx., 1.
(3) Perry's Oriental Cases, 480.
(4) 5 Bom. H. C. Rep., 172, O.C.J.
(5) I. L. R., 1 Bom., 352.
(6) Printed Judgments for 1883, p. 142.

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benefits conferred by Government increase with the progress and development of the community, and it is not only legal, but politic and just, to increase assessments in accordance with the increased value of the land, so far as that increase is caused, not by the exertions of the holders, or the improvements made by them, but by the growth of general prosperity under the influences of good administration.

This principle, on which the case depends, is enunciated in section 8 of Bombay Act II of 1876, which on this point re-enacts section 3 of Regulation XVII of 1827. It is as follows:—"When there is no right on the part of a superior holder in limitation of the right of Government to assess, the assessment shall be fixed at the discretion of the Collector, subject to the control of Government. When there is a right on the part of a superior holder in limitation of the right of Government, in consequence of a specific limit to assessment having been established and preserved, the assessment shall not exceed such specific limit."

This enactment has been explained in the following words by the late Chief Justice in what is known as the *Kanárá Land Case*[1]. "Our duty is a simple one, namely, to ascertain, whether there is a right on the part of the occupant" (the plaintiff) "in limitation of the right of Government in consequence of a *specific limit* to assessment having been established and preserved." If there be such a right, Regulation XVII of 1827, sec. iv, cl. 2, from which we have extracted the foregoing words, enacts that "the assessment shall not exceed such specific limit". The first clause of the same section enacted that "when there is no right on the part of the occupant in limitation of the right of Government to assess, the assessment shall be fixed at the discretion of the Collector, subject to the control of Government." "If there be no such specific limit to the right of Government to assess, it is perfectly clear that the Civil Courts have not any jurisdiction to interfere in the assessment which, when discretionary, is expressly placed, by the clause which we have just read, in the hands of the Collector, subject to the control of Govern-

(1) 12 Bom. H. C. Rep., Appx., pp. 221, 222.

ment; and thus, by an implication which is irresistible, excludes the interference of the Courts * * * * * *."

"Hence when a petition is presented to Government by a person deeming himself aggrieved by a decision of the Collector as to assessment, Government can deal with the matter as it may please, the discretion of the Collector being subject to that of Government; but a Civil Court can only entertain an action when the legal right or title of the plaintiff to exemption or partial exemption from payment of revenue, in consequence of a specific limit to assessment having been established and preserved, is in jeopardy."

The facts of the case are as follows:—

The plaintiff holds two plots of land at Parel, until recently numbered 15 and 61 in the Collector's books. It was proved that down to 1879 assessment was paid for many years on No. 15 at the rate of Rs. 4-2-2, and on No. 61 at the rate of Rs. 12-2-65. No bills were produced of an earlier date than 1832, but the earliest date of payment is probably much anterior.

On the 31st of July, 1882, notice was given by the Collector of Bombay of an increased rate of assessment. This increased rate was claimed, not only for the future, but also for the two previous years. The authority of the notice was derived from a Government Resolution of the 14th of August, 1879, which did not itself order any new rate, but only sanctioned the scheme for the re-assessment submitted by the Collector of Bombay.

In the deed of conveyance of the 12th of December, 1833, this land is described as "that parcel of land and plantation of trees, with the messuage or bungalow and out-houses built and standing thereon, together with a batty field adjoining thereto, situate at Parel, subject to the payment of *foras* to the East India Company." In the earliest rent rolls put in, (*e.g.*, 1816 to 1836), the land is also described as *foras*. But after the passing of the Foras Land Act, 1851, the description changes. Thus in the bill for 1868 and 1869 it is described as *toká foras*, and in that for 1879 it is described as *toká* only. No evidence was given of the meaning of this word *toká*. It was not, however, contended that its addition at all strengthened the plaintiff's case.

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I will now trace briefly the history of this '*foras*' tenure in the island of Bombay. We received the island from the Portuguese, as the dowry of the Infanta Catarina, in 1661, and before the Portuguese rule there is no evidence of any settled occupation. Outside the walls of the town it was scarcely more than rock and marsh, which became a group of islets every day at high tide. Even after we took over the island the whole land revenue was hardly more than £2,000 a year, to which Máhím, Parel and Sion combined, only contributed £800 (see Deputy Governor Gayer's Report to the Secretary of State, 1667, and Anderson's English in Western India, p. 66).

Any analogy drawn from the historical land tenures of India proper would be unsafe, and the land tenures of Bombay must be treated on a separate footing.

The first use of the term '*foras*' occurs in the treaty made by Humphrey Cooke with the Portuguese authorities, in which it was provided that the inhabitants and landholders of Bombay should not be obliged to pay to England a higher *foras* than they used to pay to Portugal. That treaty, however, was entirely repudiated by England, and not even ratified by Portugal, and the terms of the surrender of the island are to be found in the 11th Article of the Treaty of the 23rd of June, 1661, by which absolute dominion and sovereignty of the port and island was given, with no reservations as regards rent or revenue.

The phrase *foras* is next used in Governor Aungier's Convention (12th of November, 1672), when security of tenure and perhaps fixity of assessment were apparently intended to be given to the possessors of lands in consideration of payment of 20,000 xeraphins *per annum*, which was to cover the quit-rent or *foras* they then paid. Here the meaning of *foras* is evidently rent or revenue. But, as Westropp, C. J., points out in *Naoroji Beramji* v. *Rogers*[1], "the quit-rent in Governor Aungier's Convention, called *foras*, also bore the still older name of pension, (pensão, pension), and since that convention has been chiefly known by the name of pension. It was payable in respect of the ancient settled and cultivated ground only." Westropp, C. J., also

(1) 4 Bom. H. C. Rep., p. 40, O. C. J., note h.

says on the same page: "Subsequently the term *foras* was, for the most part, though perhaps not quite exclusively, limited to the new salt batty ground reclaimed from the sea, or other waste ground lying outside the fort * * * * * * * or to the quit-rent arising from that new salt batty ground and outlying ground."

Now, even as regards pension lands, which under Governor Aungier's Convention were apparently made free of enhancement, the assessment has been increased on three distinct occasions—1718, 1731, 1758, (see Warden's Land Tenures of Bombay, p. 108). But as regards the *foras* lands, in the sense of salt batty land, there is no contention that they were included in the Aungier Convention, as they were not then in existence. In Mr. LeMesurier's report upon them he says (p. 13): "The *foras* or salt batty lands were once covered by the sea. They were reclaimed in the early part of the last century, and at the expense of the Company"; and as regards the Aungier Convention he says (p. 16): "This agreement refers to lands which are known under the designation of *fazendari* lands paying pension and tax, and not to *foras* or salt batty lands."

The Aungier Convention, therefore, whatever may be its binding force on the Government, does not include the lands which are the subject of the present suit. Indeed, the right of resumption, by the State, of these batty fields outside the fort received judicial recognition from the Recorder, Sir J. Mackintosh, in 1806 (see Warden, para. 16); and, again, the Revenue Judge on 16th May, 1843, affirmed the right of re-assessment as regards lands at Colába.

Even if the equitable claim of long possession is recognized, this recognition does not deprive the Sovereign of his right to enhance the assessment when the land has permanently increased in value.

What I have really to consider is, whether any grant, contract, or law has emanated from Government conferring on these lands the right to a fixed and permanent rate of assessment. I have shown that the Aungier Convention does not cover this case.

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It was next contended that such a right was given in 1851 by what is known as the Foras Land Act. Let me examine that contention. In the first place, that Act was really a compromise between Government and certain landholders. (It is so described by Westropp, C.J., in *Naoroji Berámji* v. *Rogers*[1].) It did not lay down any principles by which any class of land was exempted from further increase of assessment. In its preamble it clearly asserted the right of the Government to the freeholds of the lands specifically in question, and only as a matter of "grace and favour" waived its rights in the lands included in the plan annexed. In the second place, it only applies to the lands contained in a map or plan annexed to the Act. The lands in question in the present suit were not included in that plan. It is doubtful whether even they are lands of the kind intended by the Act. They are described as *foras toká* or *toká* in the later bills, and the description given in the conveyance of 1833 seems to show they are not salt batty lands. They were not, at any rate, included expressly in the Foras Land Act. Nor do I think they are included by implication. The Act merely waives certain rights of Government in respect of certain specified lands and it cannot, in my opinion, be legally held to apply to any other lands even of the same character. To hold otherwise would be an infringement of the prerogative of the Crown, and the violation of the rule, laid down by Lord Stowell, "that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant beyond what such grant by necessary and unavoidable construction can take away." (The Rebekah, 1 C. Rob., 227, 230.) No other proof of special grant was offered, and I think, therefore, the following principle, laid down in the *Kánará Case*[2], applies:—"If there be no specific limit, either by grant, contract, or law, to the right of Government to assess land for the purpose of land revenue, the Civil Courts have no jurisdiction, under Bombay Regulation XVII of 1827, secs. 4 and 7, to entertain a suit to rectify the assessment made by the Collector or other competent revenue authority."

(1) 4 Bom. H. C. Rep., p. 60, O. C. J. (2) 12 Bom. H. C. Rep., Appx. 1.

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I now come to the subordinate question, whether the plaintiff is liable to pay a new assessment before the Collector had fixed what it should be. In 1879 he was, no doubt, authorized to impose a new rate, but nothing was said as to the time from which it should date, and there was nothing in the authorization to give retrospective operation to the new assessment. Indeed, all that was done was to sanction a scheme for re-assessment. I think the Government sanction must be taken as prospective only, and as only sanctioning the new assessment from the time that it was actually made by the Collector. There is nothing in the language of the Government Resolution inconsistent with that interpretation, or to show any intention to give a retrospective effect to the new assessment. I think, therefore, the plaintiff is entitled to the return he claims.

As neither party is completely successful, each must pay his own costs.

Attorneys for the plaintiff.—Messrs. *Jefferson, Bhái shankar and Dinshá.*

Attorney for the defendant.—Mr. *F. A. Little,* Government Solicitor.

ORIGINAL CIVIL.

Before Mr. Justice Bayley.

JAIRA'M N'ARRONJI, PLAINTIFF, *v.* KUVERBA'I AND OTHERS, DEFENDANTS.*

1885. *January* 29.

Will—Construction—Vested or contingent estate—Fund set apart by will for payment of monthly allowances proving insufficient—Right to supply deficiency from the general estate—Interest chargeable on property of a testator deposited with a firm.

C., a separated Hindu, died in 1874 possessed of a half share in two dwelling-houses, one situated in Bombay and the other in Káthiáwár. He was also possessed of considerable moveable property. He left, him surviving, two widows, Kuverbái and Kessarbái, and one daughter named Jivá. By clause 2 of his will dated 4th July, 1874, he directed, as to his share in the houses, that his wives should have a right to reside therein as long as they might live, and, in the event of their decease, that his nephew, Vullubdás, the son of his brother, Visrám, should be the owner; and should the decease of Vullubdás take place, then who-

* Suit No. 258 of 1883.