APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Pratt.

1907.
April 10.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), APPELLANT, *v.* WASUDEO SAKHARAM AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Khots—Khots of the whole village—Alluvions—Right of the Khot to the alluvion—Land Revenue Code (Bombay Act V of 1879), section 37.†

The Khots of the village of Bele Budruk in the Ratnágiri District asserted a claim to occupy and cultivate lands left dry in the river bed as far as the middle of the bed opposite their khoti village. The lands in question were treated for nearly a hundred years as part of the village,

Held, that plaintiffs were entitled to the right claimed and that section 37 of the Land Revenue Code (Bombay Act V of 1879) presented no bar to the same.

The construction to be placed on the words "are hereby declared" in a statute discussed.

APPEAL from the decision of M. P. Khareghat, District Judge of Ratnágiri.

Suit for declaration and injunction.

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* First Appeal No. 31 of 1906.

† The Bombay Land Revenue Code (Bombay Act V of 1879), section 37, runs as follows:—

All public roads, lanes and paths, the bridges, ditches, dikes and fences, on, or beside, the same, the bed of the sea and of harbours and creeks below high-water mark, and of rivers, streams, nalas, lakes and tanks, and all canals, and water courses, and all standing and flowing water, and all lands, wherever situated, which are not the property of individuals or of aggregates of persons legally capable of holding property, and except in so far as any rights of such persons may be established in or over the same, and except as may be otherwise provided in any law for the time being in force, are and are hereby declared to be, with all rights in or over the same, or appertaining thereto, the property of Government; and it shall be lawful for the Collector, subject to the orders of the Commissioner, to dispose of them in such manner as he may deem fit, or as may be authorized by general rules sanctioned by Government, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting.

Explanation.—In this section "high-water mark" means the highest point reached by ordinary spring tides at any season of the year.

The plaintiffs were the Khots of the village of Bele Budruk in the Ratnágiri Táluka. Close by the village there was a river in which some lands were left dry in its bed. These lands up to the middle part of the river were treated as part of the village for nearly a hundred years. And the Khots were in enjoyment thereof, in the same way as the other lands of the village.

The Collector of Ratnágiri, treating the lands formed in the bed of the river as belonging to Government, tried to let the same to other tenants.

The plaintiffs thereupon filed a suit for a declaration that they were entitled to occupy and cultivate the lands and for an injunction restraining the Collector from letting it out to other tenants.

The District Judge of Ratnágiri dismissed the plaintiffs' suit on the preliminary ground that it was barred by section 42 of the Specific Relief Act (I of 1877).

The plaintiffs appealed to the High Court, where Jenkins, C. J., and Batty, J., reversed the decree passed by the District Judge and remanded the case to his Court for determination on merits.

On remand the District Judge raised the following issues on merits :—

(1) Are the plaintiffs entitled to occupy and levy rent for the lands in the river bed left dry, and if so, to what extent? Is the river navigable and tidal?

(2) Is the suit as regards the declaration barred by Article 120, Schedule II of the Limitation Act?

(3) Are the plaintiffs entitled to damages from defendant, and if so, what?

(4) To what relief, if any, are the plaintiffs entitled?

The findings on those issues were as follows :—(1) The plaintiffs were entitled to occupy and levy rent for the lands left dry in the river bed as far as the middle of the bed opposite their khoti village of Bele Budruk, the river being neither tidal nor navigable at that place; (2) the suit was not barred by Article 120 of the Limitation Act; (3) the plaintiffs were entitled to recover Rs. 22-3-7 as damages; (4) the plaintiffs were entitled

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to occupy or let for occupation and receive the rent of the lands mentioned in paragraph 3 of the plaint and similar lands left dry in the river bed up to the middle of the bed, and to an injunction restraining the defendant from obstructing him in the enjoyment of his right.

The defendant appealed to the High Court.

Scott (Advocate General), with *H. C. Coyaji*, for the appellant:—The plaintiffs are mere Khots of the village and are therefore merely farmers of land revenue. The lower Court has erred in applying to them the presumption that a riparian owner is entitled to the lands formed in the bed of the river which is neither tidal nor navigable up to the middle part of the river. And under section 37 of the Land Revenue Code (Bombay Act V of 1879), the bed of rivers is the property of Government.

G. K. Dandekar (with *M. B. Chaubal*), for the respondents:—The Khots in this case are not mere farmers of land revenue. They are, as laid down in section 5 of the Khoti Settlement Act (Bombay Act I of 1880), the occupants of their villages. They are in a sense proprietors of their villages. In this view of their position, the presumption applicable to owners of lands as to alluvion is rightly applied to them.

CHANDAVARKAR, J.—The only question raised in this appeal is whether the respondents as Khots of the village of Bele Budruk in the district of Ratnágiri are entitled to occupy and cultivate lands left dry in the river-bed as far as the middle of the bed opposite their *khoti* village. The District Judge, who tried the suit brought by the respondents against the appellant (the Secretary of State for India in Council), has found upon that question in the affirmative.

But his finding is assailed before us upon the ground that, the river in question, being admittedly neither tidal nor navigable, is, under section 37 of the Land Revenue Code, the property of Government, and that the respondents cannot claim any right to the lands left dry as far as the middle of the bed, because they are not *owners* of any land adjoining the bank of the river, but are, as Khots, mere farmers of the land revenue of the village.

The District Judge has not found, nor has it been argued before us by the respondents' pleaders that they are Khots having a proprietary interest in the soil of the village. They must, therefore, be regarded as Khots of the description mentioned by Sargent, C.J., in his judgment in *The Collector of Ratnágiri* v. *Antaji Lakshman* (1). They are mere farmers of the land revenue having "only an hereditary right of farming the village." Now, as regards such *khots* it was held by this Court in the case of *Tajubai* v. *The Sub-Collector of Kulaba* (2) that the *khot* settles with Government for "assessment of the village as a whole" and that "he may let out for cultivation, or himself cultivate, without making any additional payment to Government on that account, any waste or uncultivated land of the village." And it was held in that case:—"The right to cultivate such waste or other lands as may be at the Khot's disposal, or to give them out in cultivation under such terms as may be most to his advantage, must consequently be viewed as the recognised mode of his remuneration for the services rendered." This view of a Khot's rights was concurred in by Couch, C. J., and Melvill, J., in *Ramchandra N. Mahajan* v. *The Collector of Ratnágiri* (3) where they said:—"His occupation of the land without making any additional payment is really part of the fruits of the Khotship, and is only provisional upon its continuance."

If, then, the respondents are hereditary farmers of the land revenue of the whole village of Bele Budruk, with a right to let out for cultivation, or themselves cultivate, any waste or uncultivated land of the village, they would have a right to occupy and cultivate the lands which are now in dispute, provided these form part of the village lands and fall within the description of waste or uncultivated lands. It is not disputed that the bed of the stream in question to the middle of it is part of the village, of which the respondents are Khots. The lands under it left dry have been so treated for nearly a 100 years; and it is unquestionable that when the bed of the stream is left dry, the land formed by alluvion would be waste or uncultivated land. All this has not been disputed before us by the learned Advocate-General, nor does it appear to have been disputed in the Court below.

(1) (1888) 12 Bom. 534.
(2) (1866) 3 Bom. H. C. R. (A. C. J.) 132.
(3) (1870) 7 Bom. H. C. R. (A. C. J.) 41 at p. 45.

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But it was said that section 37 of the Land Revenue Code was a bar to the right claimed by the respondents. That section, however, has been held by this Court in *Hanmantrav* v. *The Secretary of State for India*(1) and in *Surannanna* v. *Secretary of State for India*(2) not to take away rights which existed when it became law. No doubt the words in the section are "are and are hereby declared to be ..... the property of Government;" and there are authorities, according to which, in the case of a law which is in its nature declaratory, "the argument that it must not be construed so as to take away previous rights is not applicable." See the judgment of Pollock, C. B. in *Attorney-General* v. *Theobald*(3) citing *Attorney-General* v. *Hertford*(4). But in *Harding* v. *Commissioners of Stamp for Queensland*(5) the Judicial Committee of the Privy Council, in dealing with the argument that the expression "it is declared" in an enactment is *primâ facie* retrospective, observed that "the use of the expression 'it is declared' to introduce new rules of law is not incorrect, and is far from uncommon. The nature of the Act must be determined from its provisions." Section 37 itself provides that the ownership of Government, thereby declared, is subject "to the rights of individuals legally existing." Before the Land Revenue Code came into force, the law relating to the ownership of such lands was presumably the common law, according to which, "where the soil is covered by the water forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land; and there is no case or book of authority to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake." (Per Lord Blackburn in *Bristow* v. *Cormican*(6)). Accordingly, upon the theory prevailing in British India that, generally speaking, the State is the owner of all land, and that its holders were *occupants* even before the Land Revenue Code, Government was entitled as owner to all land formed by alluvion in the bed of a river in which the tide does not flow. But even upon that theory, there

(1) (1900) 25 Bom. 287 at p. 299.
(2) (1900) 24 Bom. 435.
(3) (1890) 24 Q. B. D. 557 at p. 559.
(4) (1849) 3 Ex. 670.
(5) [1898] A. C. 769 at p. 775.
(6) (1878) 3 App. Cas. 641 at p. 666.

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was nothing to prevent Government from appropriating such land to any person and creating private rights derogating from their ownership or right as the State landlord. As was said by Wightman, J., in *Marshall* v. *The Ulleswater Steam Navigation Co.*(1) "whether the soil of lakes, like that of fresh water rivers, *primâ facie* belongs to the owners of the land or of the manors on either side *ad medium filum aquæ*, or whether it belongs *primâ facie* to the King, in right of his prerogative, (Com. Dig. Prerogative, D. 50; *Hale de jure maris*, c. I), it is not in this case necessary to determine; for it is clear upon the authorities that the soil of land covered with water may, together with the water and the right of fishery therein, be specially appropriated to a third person, whether he have land or not on the borders thereof or adjacent thereto." Such appropriation to the Khots of the soil must be held to have been made when they were constituted hereditary farmers of *the whole village*, with the right to bring into cultivation all waste or uncultivated land in the village. Section 37 of the Land Revenue Code declares that Government are *the owners* of such lands. So they had been before that section became law, and so they are now. But that is not decisive of the right now claimed by Government so as to deprive the respondent Khots of the right acquired by them in virtue of the khotship to cultivate the lands. The evidence in the case shows that from 1801 to 1899 the Khots exercised that right without let or hindrance on the part of Government. That evidence has been believed by the District Judge and before us the learned Advocate-General, who appeared for the Government in support of this appeal, has not discussed it or questioned the District Judge's appreciation of it. This long and uninterrupted user supports the right claimed by the Khots and would of itself be sufficient to raise the presumption, in their favour and against Government, of *their limited title*—that is, their title, not indeed as owners or landlords, but as *Khots* of the whole village.

On these grounds we must confirm the decree with costs.

Decree confirmed.

R. R.

(1) (1863) 3 B. & S. 732 at p. 742.