1908

BAI DOSSIBAI v. CRAWFORD, BROWN & Co.

*Purshotam*[1], *Staniar* v. *Evans*[2], *Luke* v. *South Kensington Hotel Company*[3], *Wiggins* v. *Peppin*[4] *In re Jones, a Solicitor*[5], *Brown* v. *Burdett*[6], *Farhall* v. *Farhall*[7], *Sayers* v. *Walond*[8].

*Kirkpatrick*, for the respondents.

JENKINS, C. J.:—We think the order under appeal is erroneous. Rule 544 of the Rules of the High Court of Bombay does not empower a Judge to make an order on an attorney's application for taxation of his bill of costs for business not transacted in Court, unless such order be by consent, and the Court has not, in our opinion, any inherent power on which the jurisdiction can be rested: *Sayers* v. *Walond*[8].

The order, moreover, cannot be supported by reference to Rule 149 of the Supreme Court Rules, for, even if it be applicable, it provides for a procedure which has not been followed. We must, therefore, reverse the order with costs throughout.

Certify for Counsel.

Attorneys for the appellants:—*Messrs. Edgelow, Gulabchand, Wadia & Co.*

Attorneys for the respondents:—*Messrs. Crawford, Brown & Co.*

B. N. L.

(1) (1907) 32 Bom. 1.
(2) (1886) 34 Ch. D. 470.
(3) (1879) 11 Ch. D. 121.
(4) (1837) 2 Beav. 403.
(5) (1887) 36 Ch. D. 105.
(6) (1888) 40 Ch. D. 244.
(7) (1871) L. R. 7 Ch 123.
(8) (1822) 1 Sim. & St. 97.

## APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.*

1908
*February 26.*

BALVANT RAMCHANDRA NATU AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

*Judgment based upon an assumption or hypothesis subsequently ascertained to be erroneous—Re-opening the portion of the case affected by the error—Grant by Government of the revenue of a village as a unit of assessment—Cultivation by grantee of uncultivated or unassessed land—Grantee can do so and profit thereby.*

The High Court on appeal delivered an interlocutory judgment remanding the case for a finding on a certain issue.

* First Appeal No. 163 of 1903.

On the case coming again before a differently constituted Bench of the High Courts for final disposal.

*Held*, that the remanding judgment was conclusive on all points therein specifically decided beyond possibility of revision, but that it was otherwise with regard to any part of the judgment which could be shown to be based on such mistake or error as it would have been the duty of that Bench to correct, if it had been brought to its notice when the judgment was delivered.

*Per* BATCHELOR, *J.*:—In so far as any part of the remand judgment is based on an assumption or hypothesis which is now ascertained to be erroneous, it is, we think, competent to us—or rather it is incumbent on us—to disregard it, and to re-open that part of the case affected by the error.

When Government grants the revenue of a village considered as a unit of assessmemt, and in course of time the grantee is able to bring under cultivation land which had previously been uncultivated or even unassessed, it is open to him under the grant to do so and to profit by the new cultivation.

APPEAL from the decision of A. Lucas, District Judge of Poona, in original Suit No. 2 of 1901.

The facts of the case are fully stated in I. L. R. 29 Bom. 480. The facts necessary for the purpose of this report were as follow :—

The British Government granted an annual cash allowance of Rs. 600 to Balaji Narayan Natu, forefather of the plaintiffs, for the expenses of a palanquin. This allowance was received by the plaintiff's forefathers till 1831, when Government resolved that in lieu of the cash allowance they should be granted inam lands which they would select. The grantees thereupon selected the whole village of Wahagaon in Khed taluka and a piece of land at Poona termed "Ganjiche Wawar," and the Government granted the same in inam to them.* Since then the grantees

* The material part of the sanad, Exhibit 34, dated the 29th August 1831, was as follows :—

To

Balaji Narayan Natu, Inamdar.

* * * * * * * * * *

A Government order dated the 13th of the month of December in the Christian year 1830 was received to the effect that a land of six hundred rupees which you may select should be given to you for the Palkhi (Palanquin) expense. Thereupon Mouje Wahagaon, Tarf Wada, Pargane Khed, and 'Ganjiche Wawar' near the City of Poona were selected and a communication was sent (to that effect) and on the 11th of the month of

1908

BALVANT RAMCHANDRA v. SECRETARY OF STATE.

remained in enjoyment of the said land and the village from generation to generation, and the Government granted the land and the village to the family of the plaintiffs on the same tenure as other hereditary inams granted to them. The plaintiffs alleged that they and their forefathers had been in the enjoyment of the aforesaid piece of land and village as owners with all the proprietary rights appertaining thereto. They were also enjoying all forest produce, such as rab, grass, etc.

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April in the Christian year 1831 a Government order was received to the effect that both (*viz.*) the village and the Ganjiche Wawar should be given to you as Inam for the Palkhi expenses.

(I) having seen the Government order to the above effect, have been pleased to give you as Inam Mouje Wahagaon * * and the Ganjiche Wawar at the City (these two) in all. The particulars in respect thereof are as given below:—

The amount given in respect of Mouje Wahagaon * * exclusive of Inamdars Hakdars and village expenditure and officers.

| | | |
|---|---|---|
| The average for 10 years— | | |
| Including remission ... ... ... | 743-3-95 | |
| Excluding remission ... ... ... | 627-2-91 | |
| According to the survey measurement— | | |
| The amount of assessment of Khalsa lands together with the waste lands in the Fasli year 1240, including therein 'Mohotarfa' (*i.e.*, kind of taxes imposed on certain professions) and including the expenses ... ... | 744-2-49½ | |
| Assessment was taken agreeably to the survey for two years— | | |
| The average thereof, including the remission | 484-3-56¾ | |
| | | 575-1-99 |

Having in this manner seen the four amounts and having deducted the revenue of Ganjiche Wawar according to he survey measurement (and) as there is an order for six hundred rupees the amount that remains is fixed and given.

| | |
|---|---|
| Ganjich Wawar in the Peth Shukravar in the City of Poona ... ... ... ... ... | 24-2-1 |
| | €00-0-0 |

Altogether two places are given to you as Inam by the order of the Government. You will therefore together with your sons, grandsons, etc., from generation to generation enjoy the village and the Ganjiche Wawar and live in peace. A communication has been sent to England. Whether to to confirm this sanad or not depends upon the will of the Court of Directors.

1908

BALVANT RAMCHANDRA v. SECRETARY OF STATE.

On the 29th July 1897 the Government of Bombay published in the *Bombay Government Gazette* a notification that Survey No. 125, measuring 648 acres, situated in Wahagaon village was to form part of the reserved forest from the 1st October 1897.

The plaintiffs thereupon filed the present suit against the Secretary of State for India in Council to obtain (1) a declaration that "they have a proprietary right over Survey No. 125" situated in the Wahagaon village and for possession of the same; (2) for an injunction restraining the defendant from obstructing plaintiffs from the enjoyment of the land as proprietors and from cutting rab, etc.; and (3) for other incidental relief.

The defendant by his written statement contended *inter alia* that the proprietary rights in the land in suit belonged to Government and not to plaintiffs, who were merely grantees of land revenue; that the plaintiffs having been entitled only to revenue and not to the soil of the village, could not by long user or enjoyment become the proprietors of the soil and of timber or forest rights, and that the action of Government in constituting the land a reserved forest and placing it under restrictions attaching to such forest was, under the Forest Act (VII of 1871), one that might legally be done by Government, and the Civil Court had no power to interfere with the exercise by the Government of its discretion in the discharge of its functions.

The Judge found *inter alia* that the plaintiffs were only grantees of land revenue and were not proprietors of the land; that they were not entitled as owners to cut rab and enjoy the land as full proprietors, and that the action of Government in constituting the plaint land a reserved forest and placing it under restrictions attaching to such forest was legal under the Forest Act. He therefore held that the plaintiffs were not entitled to the relief sought and dismissed the suit.

The plaintiffs appealed against this decision to the High Court and the defendant also filed cross-objections.

*Branson* with *K. H. Kelkar* for the appellants (plaintiffs).

*Raikes* (Acting Advocate-General) with *Rao Bahadur V. J. Kirtikar* (Government Pleader) for the respondent.

1908

BALVANT RAMCHANDRA v. SECRETARY OF STATE.

The appeal was heard by a Division Bench composed of Russell and Batty, JJ., who sent down the following issue for trial: *see* I. L. R. 29 Bom. 513:—

"Whether the land in dispute is comprised within the area to which the grant extends or formed part of the unassessed waste excluded from its operation."

The finding of the Judge (C. A. Kincaid) on the said issue was that the land in dispute was included in the grant to the Inamdar.

The respondent (defendant) preferred cross-objections.

*K. H. Kelkar* for the appellants (plaintiffs).

*Raikes* (Acting Advocate-General) with *M. B. Chaubal* (Government Pleader) for the respondent (defendant).

BATCHELOR, J.:—The course of this litigation is described in *Balvant Ramchandra* v. *Secretary of State*[1]. The case then came on appeal before a Division Bench, consisting of Russell and Batty, JJ., who after a long judgment dealing with various points sent down for trial the issue whether the land in dispute was comprised within the area to which the grant extended or formed part of the unassessed waste excluded from the grant.

The District Court has returned a finding that the land in dispute was included in the grant to the Inamdar.

The case again came before the same Bench, when it was directed to stand over for one month to afford the defendant an opportunity of producing evidence, if he so desired, in rebuttal of that which had already been adduced by the plaintiffs on the subject of possession.

The defendant did not avail himself of this opportunity, and so the appeal now comes for final disposal before the present Bench. The only question before us is whether, having regard to the grant, the Government of Bombay are entitled to declare the land in dispute a reserved forest under section 5 of the Forest Act: all other points have been decided by Russell and Batty, JJ., and they have not been discussed before us.

In our opinion the question lying at the threshold of our inquiry turns upon the effect to be given to the remanding judgment of

(1) (1905) 29 Bom. 480.

the Bench in *Balvant Ramchandra* v. *Secretary of State*[1]. That judgment is, no doubt, binding upon us *quoad* all points which are therein specifically decided beyond possibility of revision. But it would, we think, be otherwise in regard to any part of the judgment which can be shown to be grounded on such mistake or error as it would have been the duty of that Bench to correct, if it had been brought to notice when the judgment was delivered. In so far as any part of the judgment is based upon an assumption or hypothesis which is now ascertained to be erroneous, it is, we think, competent to us—or rather, it is incumbent on us—to disregard it, and to reopen that portion of the case affected by the error. Now upon the best consideration that we can give to the matter, and after carefully weighing all that has been urged by Mr. Raikes, we must adhere to the opinion, which we formed at an early stage of the hearing, that that part of the former judgment which led to the issue whether the land in suit was unassessed waste at the time of the grant, is grounded upon a mistaken hypothesis which should now be discarded. The point is dealt with in the concluding pages of the reported judgment, where the learned Judge speaks of certain land as being excluded, not only *from* the grant, but *in* the grant. This land is variously described as waste, or uncultivable waste, or unassessed waste, as if these terms were interchangeable, which we venture to think they are not; but having regard to the reasoning as a whole and to the form of the issue sent down, we apprehend that the exact distinction upon which the learned Judge decided to insist was the distinction between land which was unassessed waste at the time of the grant and land which was not. This view is accepted by Counsel for the Secretary of State, and is borne out by Counsel's notes of the arguments before the Division Bench. From what source, then, did the learned Judge obtain the distinction in question? There can be no doubt that he was under the impression that it was derivable from the terms of the grant itself; that is the origin to which he ascribes it. No reference is made to the general law in support of the distinction, nor, indeed, was any such support available, for since Melville, J.'s judgment in 1882, the law in this Presidency

(1) (1905) 29 Bom. 480.

1908

BALVANT RAMCHANDRA v. SECRETARY OF STATE.

has always been that a grantee of the revenue is entitled to make such profit as he can out of unoccupied lands: see *Ramchandra* v. *Venkatrao*[1] followed in *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat*[2] and *Rajya* v. *Balkrishna Gangadhar*[3]. But if we turn to the grant itself, Exhibit 34, we find no countenance for the distinction in question: what is there given is "the village," that is, we take it, the entire village, and in the description following the grant "waste lands" are expressly included. Indeed upon a careful reading of the material part of Batty, J.'s judgment at page 513 of the report it is clear that he was throughout confusing the grant, Exhibit 34, with Exhibit 35, the revenue account of the village for the year 1828-29 when it first fell under the operation of Pringle's survey. It was a mere oversight occurring at the end of a long and exhaustive judgment; and we must, we think, begin our decision of the appeal by removing this misconception and its consequences. This course is facilitated by the remark made by the same Bench in their interlocutory judgment on the second remand, the remark, namely, that in the former judgment "it was not intended to suggest that the parties could either of them claim to have obtained a decision in any measure disposing of questions which they respectively have to meet."

It follows, then, that we must consider the construction of the grant as *res integra* upon the point now under discussion, and, that being so, we cannot entertain any doubt as to what our decision should be. That the grant is merely a grant of revenue has been decided, and that decision is binding upon us; but with that exception, we can see no reason for imposing any restriction on its operation. The "village" is given to the grantee; no limits or boundaries are stated; and, as we have said, waste lands are expressly included. The only rights excluded are apparently those of Inamdars, Hakdars and village officers, and these are expressed to be excluded. The statement of average revenue following the grant should, we think, be read as mere description, and cannot be taken to limit the universality of the grant to lands then actually assessed. What the

(1) (1882) 6 Bom. 598 at p. 608.

(2) (1885) 10 Bom. 112. (3) (1905) 29 Bom. 415.

Government granted was, we think, the revenue of the village considered as a unit of assessment, and if, in the course of time, the grantee was able to bring under cultivation land which had previously been uncultivated or even unassessed, it was open to him under the grant to do so and to profit by the new cultivation. This view receives support from the contemporary correspondence between the officers of the Government, and we may point to Mr. Giborne's letter of 13th March 1831 to the Secretary to the Government of Bombay as plainly contemplating the expansion of the cultivated area. And, as we have noticed, this construction involves no new doctrine, but is consistent with what has been the law of this Presidency since 1882.

For these reasons we are of opinion that the land in suit cannot be excluded from the grant upon the only ground on which it is sought to exclude it, namely, as having been unassessed waste at the time of the grant and that the right to the revenue arising from it must be held to have passed to the grantee under the grant.

This being so, it is not disputed that the Government was not entitled to take up the land in suit for reserved forest, and therefore we accept this proposition as a consequence which needs no further discussion.

Though this is enough to dispose of the case, we may add that in our opinion the appeal ought to be allowed even apart from the terms of the grant. The Government has sought to support the decree upon the ground that the land in suit is identifiable as the 3¼ *khandies* ½ *maund* of *gairan dungar* (that is pasture, hill land) of which the mention occurs in the village records between 1822 and 1829. The argument is that as that land was unassessed waste, it should be held to have been excluded from the grant under the judgment of Russell and Batty, JJ. Thus the position depends upon identifying the land in suit with the 3¼ *khandies* ½ *maund* of the records. Mr. Kincaid, the District Judge, to whom on the remand this argument was addressed, has found that the attempted identification failed; and we are of the same opinion. It is unnecessary to elaborate this part of the case, but we will state very succinctly some of the reasons

1908

BALVANT RAMCHANDRA v. SECRETARY OF STATE.

which have led us to this opinion. In the first place, the words "*gairan dungar*" are not words descriptive of a certain parcel of land, but are words of enumeration, corresponding to the English expression "pasture land, hill land," the phrases being separated by a comma. Then $3\frac{1}{4}$ *khandies* $\frac{1}{2}$ *maund* cannot by any possibility be reckoned as the equivalent of 648 acres, the admitted area of the land in suit, but amount only to about one half of this area. Moreover, statements in the earlier records from 1822 onwards are of no real assistance; what must be looked to is the state of the land at the time of the grant. At that time the village was subject to Pringle's survey of 1828-29 and in Exhibit 35 we have the statement of revenue for that year. There we find that the $3\frac{1}{4}$ *khandies* $\frac{1}{2}$ *maund* of the earlier records has disappeared, and the only uncultivable land is entered as 202 acres and a fraction. Deducting various strips of waste appertaining to different survey numbers, the total area assigned to "pastures, rocky plains, etc.," is only 28 acres odd, and it is out of the question that this should represent the land in suit. To escape this difficulty Counsel for the Secretary of State is driven to suggest that the whole of the 648 acres in suit was somehow omitted from Pringle's survey, but that is a somewhat violent assumption and in our opinion ought not to be made. It is not as if Pringle had omitted to reckon pastures and rocky lands; he *has* surveyed them, and the result is his figure of 28 acres, and this figure leaves no room for the 648 acres in suit. Thus it seems clear from the survey that at the time this grant was made, the land in suit was not unassessed waste; it would, therefore, pass to the grantee even under the terms of Batty, J.'s judgment. It may be added that both Mr. Silcock, the Collector, and Mr. Shuttleworth, the Conservator of Forests, also formed the opinion that the land was assessed at the time of the grant; and it seems to us that the District Judge, Mr. Kincaid, was fully justified in animadverting upon the various and different positions which the defendant elected to adopt at one time or another in the course of this litigation. But this part of the case need not be pursued further: for the above reasons we are of opinion that the appeal would succeed even on the footing of the judgment of the Division Bench.

1908

BALVANT RAMCHANDRA v. SECRETARY OF STATE.

The result is that the decree under appeal must be reversed, and we give the plaintiffs a declaration that though they have no proprietary rights as owners over the land in suit, the defendant had no authority to issue the order including this property in the Government reserved forest, and the plaintiffs are entitled to continue to enjoy the land in the same way as before the order to afforest.

It is not necessary to consider the question of granting the injunctions asked for by the plaintiffs against the Secretary of State as the Government through its pleader has given an undertaking not to obstruct the plaintiffs' enjoyment of the land in question so long as this decree remains unreversed or unmodified and so long as the land is not acquired.

Under the provisions of section 429, Civil Procedure Code, we give the defendant a period of three months within which to satisfy the decree.

The undertaking of the Government will not bar it from the the exercise of any other power vested in it for the control of such land under the Indian Forest Act, 1878, or otherwise.

The appellant will have ¾ths of his costs throughout from the respondent.

*Decree reversed.*

G. B. R.

## APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Beaman.*

1908
*March 11.*

KHASHABA BIN MANSING (ORIGINAL DEFENDANT), APPELLANT, *v.* CHANDRABHAGABAI, WIFE OF BALVANTRAV KHASHABA (ORIGINAL PLAINTIFF), RESPONDENT.*

*Transfer of property Act (IV of 1882), sections 122 and 123—Gift of immoveable property—Acceptence of the gift—Registration of the deed subsequent to accaptance—Remand—Examination of witness on commission—Practice.*

A gift of immoveable property duly made and accepted is not invalid merely because the registration of the deed of gift took place after the death of the donor.

* Second Appeal No. 277 of 1905.