

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1917.
Septem-
ber 26.

MAHMADBHAI DOSUBHAI KATHIARA (ORIGINAL PLAINTIFF), APPELLANT v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

Land Revenue Code (Bombay Act V of 1879), section 48†—Bombay Act I of 1865, section 35††—Agricultural land—Land used for brick kilns—Fine levied under section 35 of Bombay Act I of 1865—Revision Survey—Land classed as agricultural—Subsequent erection of buildings on the land—Collector's power to levy enhanced assessment as building fine under section 48 of the Land Revenue Code.

* First Appeal No. 104 of 1915.

† The material portion of the section runs thus :—

48. The land-revenue leviable under the provisions of this Act shall be chargeable—

- (a) upon land appropriated for purpose of agriculture ;
- (b) upon land appropriated for any purpose from which any other profit or advantage than that ordinarily acquired by agriculture is derived ;
- (c) upon land appropriated for building-sites.

And the assessment fixed under the provisions of this Act upon any land appropriated for any one of the above purposes shall, when such land is appropriated for any other of the said purposes, notwithstanding that the term, if any, for which such assessment was fixed may not have expired, be liable to be altered and fixed at a different rate by such authority and subject to such rules as to the fixing and periodical revision thereof as the Governor in Council prescribes in this behalf.

†† The section runs as follows :—

35. 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 plaintiff, who held certain agricultural land, began to use it for purposes of brick-kilns in 1872. For this conversion of use, a fine of 30 times the assessment was levied from him by the Collector, under the provisions of section 35 of Bombay Act I of 1865. Some huts were erected on the land about the time. The revision survey of the land took place in 1889, when the land was assessed as agricultural land. In 1901, the plaintiff erected substantial buildings on the land, for which he was called upon by the Collector in 1912 to pay extra assessment at the rate of Rs. 85 per year. The plaintiff sued to recover back the amount of the extra assessment levied from him and for a perpetual injunction restraining the Collector from levying it in future:—

Held, that substantial buildings having been erected on the land after the revision survey of 1889, the plaintiff was liable to pay the enhanced assessment under the provisions of section 48 of the Bombay Land Revenue Code, 1879.

THIS was an appeal from the judgment of B. C. Kennedy, District Judge of Ahmedabad.

The plaintiff was the holder of a piece of agricultural lands measuring 17 gunthas, bearing survey No. 237, Pot No. 2, assessed at Rs. 2-8-0 and situate in Shehr Kotda in the Daskroi Taluka. In 1872, he converted the use of the lands to brick kilns and erected some *Chhappars* (huts) on the same; for which the Collector levied a fine of 30 times the assessment under the provisions of section 35 of Bombay Act I of 1865. At the revision survey of 1889, the lands were treated as agricultural and assessed at Rs. 3-8-0.

In 1901, the plaintiff erected substantial buildings on the lands, which occupied nearly 597 square yards and left the remaining 522 square yards for kiln purposes. For this conversion, the Collector levied an enhanced assessment at the rate of Rs. 85 a year; and recovered all the arrears on the 13th August 1912.

On the 11th January 1913, the present suit was filed for recovering back the amount of the enhanced assessment and a perpetual injunction restraining the Collect-

1917.

MAHMAD-
BHAI
DOSUBHAI
v.
THE SECRETARY OF
STATE FOR
INDIA.

1917.

MAHMAD-
BHAI
DOSUBHAI
v.
THE SECRETARY OF
STATE FOR
INDIA.

or from levying as assessment any sum in excess of Rs. 3-8-0.

The defendant contended *inter alia* that section 35 of Bombay Act I of 1865 having been repealed the case was governed by section 48 of the Bombay Land Revenue Code, 1879; that section 35 did not operate as a bar against the levy of revised assessment at a future survey settlement, and also during the period of the said future settlement if at any time during that term the land had been appropriated for a building site; that Government were entitled, under section 48 of the Bombay Land Revenue Code, to levy the enhanced assessment, as the conversion of the use of the land from brick kilns to a building site took place after the revision survey of 1889; and that in any event the plaintiff was not entitled to the permanent injunction prayed for as it would conflict with the provisions of sections 45 and 106 of the Land Revenue Code.

The District Judge held that Government were entitled to enhance the assessment and dismissed the suit.

The plaintiff appealed to the High Court.

G. K. Parekh, for the appellant.

S. S. Patkar, Government Pleader, for the respondent.

BEAMAN, J.:—The plaintiff sues the Secretary of State to recover the levy of excess assessment being Rs. 85 a year upon a plot of 17 gunthas converted from cultivable to building site land. The learned District Judge has held that the Collector's action was justified by the provisions of the Land Revenue Code and refused the relief I have just mentioned as well as further relief by way of perpetual injunction.

The case is one of considerable difficulty. It has been very fully argued and we have given our best

attention to every point made on behalf of the appellant. The facts material to our judgment may be briefly stated thus :

The plot of land in suit was in the occupation of potters before the year 1872. In 1872 it appears that the Collector, acting under section 35 of Act I of 1865, called upon the occupant to pay thirty times the assessment as fine for conversion of land from agricultural to non-agricultural uses. Under the Act of 1865, land was classified under two heads only, agricultural and non-agricultural. The Collector, presumably regarding the uses to which he found this plot being put in 1872 as non-agricultural, exercised the powers conferred upon him by section 35 of the Act. That section prescribes that after the fine has been levied, the occupant shall enter into an agreement with the Collector undertaking to pay the assessment then leviable and any enhanced assessment which may be imposed upon a revision. We find no trace of such an agreement upon the record, although the fact that the fine was levied and duly paid, which is not disputed, is conclusive proof, we think, that everything which the law then required to be done was done. We shall assume, therefore, that the occupant duly executed the agreement required and considered what his rights were thenceforward upon that basis.

The main argument addressed to us on his behalf rests upon the contention that after the levy of fine and the execution of the agreement mentioned in section 35 of Act I of 1865, the occupant of the land thenceforward had a perfect right to use the land in any way he pleased without being exposed to any further fine or to any other enhancement than the enhancement of the assessment upon a revision survey on the footing of the land being cultivable throughout. Now we are prepared to agree with this argument up to the point

1917.

MAHMAD-
BHAI
DOSUBHAI
v.
THE SECRETARY OF
STATE FOR
INDIA.

1917.

MAHMAD-
BHAI
DOSUBHAI
v.
THE SECRETARY OF
STATE FOR
INDIA.

that so long as Act I of 1865 remained in force, the occupant might very well have built upon this land without being exposed to any further fine or penalty for thus converting it from agricultural to non-agricultural uses. The difficulties begin, however, when we have to take into consideration the effect upon this position of Bombay Act V of 1879, the present Land Revenue Code. In the first place that Act enlarges the classification of lands, so that they now fall under three heads: (1) lands appropriated to agricultural uses, (2) lands appropriated to other than agricultural uses and (3) lands appropriated to building sites. The rules of 1878 to which our attention has been drawn clearly indicate that Government viewed the uses to which potters might put lands previously appropriated to agricultural uses as a special diversion, not ordinarily taking them out of their former category. But when Act V of 1879 was passed, we feel considerable doubt whether the intention of section 48 was not in some measure at least to curtail those indulgences and bring land in the occupation of potters and for the purposes of their trade diverted to some extent from purely agricultural uses, under the second head of classification. Section 2 of Act V of 1879 saves the validity of all acts properly done under the Act of 1865. This too has been made part of the appellant's argument before us, and on that it has been contended that the proceedings of 1872 finally settled in perpetuity the relative rights of Government and the occupant of this plot of 17 gunthas, that is to say, that thereafter notwithstanding any of the provisions of Act V of 1879 or any further uses to which the occupant might afterwards put the land, he can never be liable to anything more than, upon a revision, the enhanced assessment imposed upon that land as agricultural land. We doubt very much whether this contention is sound. Doubtless it is sound up to the time when a Revision

Survey was made, that is to say, the year 1889. In our opinion, prior to that survey, the occupant might have built over this land without being exposed under the provisions of section 48 of Act V of 1879 to any fine or penalty for conversion from one use to another. But when we look at the terms of the agreement which must have been entered into in 1872 in conformity with the provisions of section 35 of the Act then in force, one of those terms is that the occupant will undertake to pay any enhanced assessment leviable upon the land when a Revision Survey shall be made, and we do not think that that necessarily implies that in making that Revision Survey the land must be assessed as agricultural land although in fact it might be covered with substantial buildings. In point of fact—and this is rather curious—when the Revision Survey was introduced in 1889, this land has been assessed as cultivable or agricultural land! I think it is clear that this is due to the spirit of the rules of 1878 and the fact that prior to 1889 the land had not been converted into building sites although it had been put to uses of the kind contemplated in clause (b) of section 48. The evidence is that at first there were brick kilns and *Chhappars* upon the land and before 1889 there is evidence that there were also structures described as *Imarats*. The word *Imarat* may mean any kind of building from the flimsiest to the most substantial, but it certainly does connote a building of some kind. *Chhappars* may be huts of the most temporary character and such a word would hardly ever be used to describe a substantial and permanent building. I conjecture then that at the time of the Revision Survey of 1889 the Survey Officer found kilns and inconsiderable structures upon this land and regarded them as accessories to the trade of a potter within the policy of the rules of 1878. That is very likely the reason why the land was assessed in 1889 as

1917. •

MAHMAD-
BHAI
DOSUBHAI
v.
THE SECRETARY OF
STATE FOR
INDIA.

1917.

MAHMAD-
BHAI
DOSUBHAI
v.
THE SECRETARY OF
STATE FOR
INDIA.

cultivable or agricultural land. Now suppose that during the period between 1872 and 1889 the occupant had built Chawls or mills over the whole of this land. Although he might have been allowed to do so without the Collector feeling himself empowered to levy a fine on that account for conversion from agricultural to non-agricultural uses, it is I think incredible that the Revision Survey Settlement Officer should in 1889 have classed lands so covered with permanent buildings as cultivable or agricultural. As he did not do so, the result would be in my opinion that in 1889 this land fulfilled all the requirements of clause (b) of section 48 of the new Land Revenue Code and was assessed virtually, though not explicitly, upon that basis with special regard to indulgences formerly granted to potters. If, however, on the supposition I have made, viz., that prior to 1889 the land had been covered with substantial buildings, it would have been assessed on the introduction of the Revision Settlement as building site land, I can see no reason why, because it escaped that imposition at that time, if later during the currency of the Revision Survey it was deliberately converted from land within clause (b) of section 48 to land within clause (c) of that section, it should be continually exempt until the period of the settlement of 1889 had expired. It appears to me that section 48 was framed with the express purpose of dealing with cases of this kind. Now the evidence is that in 1901 for the first time the plaintiff began to put up permanent structures covering some two-thirds of this plot of 17 gunthas. No notice of this was taken until the year 1912 when it was brought to the notice of the Collector and he, in the exercise of the powers he conceived to be conferred upon him by section 48 of the Act, levied assessment as upon the conversion of this land from class (a) to class (c). It is a curious point which was brought out in argument that no rules appear to have

been framed for assessing land converted from class (a) to class (b). But taking the section as a whole and assuming that it was not thought worthwhile to lay down definite rules for the guidance of Collectors in dealing with this intermediate land, I cannot see that the absence of such rules creates any difficulty in the case before us. I am assuming that at the time of the Survey of 1889 this land really fell within the classification of clause (b) of section 48. What assessment ought to be levied on such land appears to be left to the discretion of the Collector. But there are rules prescribing the rate of assessment to be levied upon land converted from class (a) into class (c) and presumably lands falling under the classification of clause (b) would occupy an intermediate place, that is to say, the assessment upon them, assuming it had been enhanced proportionately to assessment upon agricultural lands, would be something lower than the assessment leviable upon lands appropriated to building uses. Therefore, wherever lands, which at the time of the introduction of the revised settlement of 1889, might have been liable to assessment as falling within clause (b), although they were in fact assessed as falling within clause (a) have afterwards, during the currency of that settlement, been converted to the uses of clause (c) there can be no difficulty whatever in imposing the full assessment prescribed by the rules upon the land so converted from either clause (a) or clause (b) to the uses of clause (c). That is what the Collector has in fact done and upon a review of the Legislation to which our attention has been drawn it appears to me that, what the Collector did was within the contemplation of the later Act and entirely consonant with its policy. There is no question here of invalidating anything which was done under Act I of 1865. I assume that what was done there exposed the occupant to enhanced assessment upon the introduction of a

1917.

MAHMAD-
BHAI
DOSUBHAI
v.
THE SECRETARY OF
STATE FOR
INDIA.

1917.

MAHMAD-
BHAI
DOSUBHAI
v.
THE SECRETARY OF
STATE FOR
INDIA.

revised settlement, and I have endeavoured to show that when such a Revision Settlement was introduced under the new Act of 1879, the occupant might, had he made the full use of his privileges under his agreement of 1872, and covered his land with buildings, have been assessed for it as building site land. If I am right so far, it follows necessarily that he can complain of no hardship, because this assessment was not taken from him until the year 1901 when he in fact did convert the land from the intermediate non-agricultural uses to which it had before been put to land appropriated exclusively to building site. I have only to add that the building sites do not cover the entire area of the land and it is only upon so much of it as is proved to have thus been converted to uses within the meaning of clause (c) of section 48 that the enhanced assessment can be levied.

I, therefore, am of opinion that this appeal fails except in respect of so much land as has not been covered by the buildings. That is shown to be 522 square yards and there must be a proportionate deduction of the assessment which can be worked out in framing the decree. The substantial claim, however, has entirely failed so far as it is founded upon the principles contended for by the appellant.

We shall, therefore, modify the decree of the Court below in the manner set forth in this judgment and dismiss the rest of the appeal, ordering parties to bear their costs proportionately in the Court below and in this Court.

HEATON, J.:—I have not very much to say in this case, because I agree that the decree proposed is the decree which must after a consideration of the evidence and the arguments in the case be made. I am satisfied on the evidence that the land in suit was not in fact appropriated for use as a building site until some time between 1897 and 1901. In 1889 when the Revision

Settlement was introduced, the land undoubtedly, as I read the evidence, was in use by potters for the purpose of their calling and was then assessed as cultivable land and when thereafter this land or the greater part of it was appropriated as a building site, it came under the operation of section 48 of the Land Revenue Code, and the matter was correctly dealt with by the revenue authorities under those rules which empowered them to levy a special rate on land assessed as cultivable land which is converted into a building site.

The only argument that I wish to say anything about is the argument that in virtue of Act I of 1865 the appellant had acquired vested rights which could not be interfered with. But to me it is quite plain that he had not acquired any vested rights which could not be interfered with by Legislation and Legislation did in fact interfere with his rights, because section 48 of the Land Revenue Code which became law in 1879 enacted that particular rates of assessment might be levied on land which was appropriated from other uses to building sites. It is perfectly true that this enactment, in virtue of section 2 of the Act, would not interfere with the rights which the appellant had acquired by an agreement with Government and some rights no doubt he did acquire by such an agreement. As my learned brother has pointed out, the agreement is not on the record. But we assume that the agreement was entered into and that it fulfilled the conditions set out in section 35 of Act I of 1865. That being so, it would hold good until there was a Revision Survey, i. e., until 1889. But thereafter the appellant would be absolutely subject to the law as enacted in section 48 of the Land Revenue Code.

That is all I wish to say in this case.

Decree modified.

R. R.

1917.

MAHMAD-
BHAI
DOSUBHAI
v.
THE SECRETARY OF
STATE FOR
INDIA.