courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.
Website: www.courtkutchehry.com
Printed For:
Date: 20/12/2025

(1925) 08 BOM CK 0032

Bombay High Court

Case No: First Appeal No''s. 77, 79 and 265 of 1922

Jamshedji Ardeshir Wadia		APPELLANT
	Vs	
The Secretary of State for India		RESPONDENT

Date of Decision: Aug. 24, 1925

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 80

Citation: (1926) 28 BOMLR 25

Hon'ble Judges: Norman Macleod, J; Madgavkar, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Norman Macleod, Kt., C.J.

[F. A. No. 79 of 1922]. This suit was filed by the first plaintiff, Jehangir Ardeshir Wadia, styling himself the registered holder Inamdar and Khot of the villages of Juhu and Ville Parle in the Salsette Taluka of the Thana District, and by plaintiffs Nos. 2 to 4 as the trustees of a trust settlement effected by the first holder on March 16, 1853, against the Secretary of State for India. The plaint recites that the villages were granted by a deed, dated February 9, 1848, to the late Nowroji Jamsedji Wadia, Master Builder, by the Hon''ble Court of Directors of the East India Company. In 1821 the said Nowroji had been granted lands yielding an annual revenue of Rs. 4,000 from the estate held by one Hormusji Bomanji in Kurla in Salsette. For reasons which it is not necessary to set out in detail, the said Nowroji was not put in possession of any lands but continued to receive from the Company an annual payment of Rs. 4,000 and eventually at the request of the said Nowroji the suit villages were assigned to him in perpetuity subject to an annual payment to the Company of Rs. 700.

2. That ever since the said grant the holder for the time being enjoyed all the rights and privileges of a full owner without any objection on the part of Government.

3. That in November 1916 building plots in the village of Ville Parle were surveyed by Government without the holder''s consent with a view to levy non-agricultural assessment. In spite of the holder''s protest, Government contended that under the terms of the grant Government and not the holder were entitled to levy such assessment for its own benefit. Accordingly, the plaintiffs had to file this suit after due notice had been given u/s 80 of the Civil Procedure Code.

4. They prayed:-

(a) That it might be declared that the plaintiffs were the owners of the village of Ville Parle and as such were entitled to levy the non-agricultural assessment).

(b) That if the plaintiff ware not the owners of the said village their interests under the great might be detarmined and they might be declared entitled to the non-agricultural assessment either wholly or partly as the case might be, and for accounts and injunction.

5. The defendant in his written statement pleaded in effect that no proprietary title to the land in the village of Ville Parle was granted either expressly or by implication, that the plaintiff had no right to levy or receive any non-agricultural assessment which was entirely out of the purview of the grant and remain-ed with Government.

6. The following were the main issues raised at the trial:

(1) Was the grant of February 9, 1848, an absolute grant of the soil or a mere assignment of revenue ?

(2) Was the liability of the grantee restricted to an annual payment of Rs. 700, or was the payment liable to be increased in the event of the land assessment being increased or any other modification introduced in the Revenue System by Government ?

(3) Has the holder always enjoyed all the rights and privileges of an absolute owner and has the defendant recognised him as such ?

(4) Are the plaintiffs entitled to levy the non-agricultural assessment in the suit village and if not is the defendant entitled to levy the same ?

(5) If the defendant is entitled to levy the same are the plaintiffs entitled to the same either wholly or partly.

7. The Joint Judge held-

(1) That the grant of 1818 was neither an absolute grant nor an assignment of revenue. It was an assignment of Rs. 4,000 out of the revenue subject to other terms of the grant,

(2) The liability of the grantee was liable to be inoreased in the event of the land assessment being increased or any modification being introduced in the Revenue

System by Government.

(3) The holder had not always enjoyed all the rights and privileges of an absolute owner. He had been in possession of the villages and recovered the revenue. In some oases be had exceeded the rights conceded by the grant. And Government had made certain concessions to him in ignorance of the true position of the grantee under the deed, but such concession did not affect the present claim.

(4) The plaintiffs were not entitled to levy the non-agricultural assessment. The defendant was so entitled.

(5) The plaintiffs were not entitled to receive any of the non-agricultural assessment except on lands in the actual possession and enjoyment of the plaintiffs as holders of the alienated village of Ville Parle and an account was directed of all past recoveries of non-agricultural or building assessment levied on such lands.

8. The plaintiffs have appealed.

9. The grant of February 9, 1848, will be found at page 41 of the printed book in the Appeal No. 77 of 1922 in Suit No. 84 of 1918 in which the plaintiffs, who were occupants of certain land in the village of Ville Parle, sought for a declaration that the Secretary of State for India had no right to recover any non-agricultural assessment in respect of their land.

10. The grant, like so many of the grants of a similar nature made by the Company in those days, was drawn without any attempt to define strictly the rights and liabilities of the parties and without any imagination as to future development.

11. It recites :-

(1) That in 1821 the Governor in Council of Bombay granted to the family of the late Jamsetjee Bomanjee lands from the estate held by the late Hor-musjee Bomanjee ab Kurla, yielding an annual rent of Rs. 4,000 by transferring to the family the revenue payable to Government.

(2) That instead of that arrangement, Rs. 4,000 were annually deducted from the rental payable by Hormusjee Bomanjee on account of his estate and paid to the family until 1841 when Hormusjee redeemed the revenue of his estate.

(3) That thereupon the grantee Nowrojee Jamsetjee applied to Governments for the grant of village in Salsette the revenue of which would be Rs. 4,000 and that until some arrangements for effecting that could be made the amount might be paid from the Treasury, which request was acceded to.

(4) That in 1844 Nowrojee solicited that the villages of Juhu and Ville Parle might be assigned in perpetuity and that Government in 1845 intimated its approval of the suggestion offered by the Collector of Thana in respects to the terms of the grant. The said villages are then assigned to Nowrojee and his heirs in perpetuity from the

year 1847-48, But these important words " The particulars of the cultivation founded on the Jamabandi of 1842-43 and the conditions of the grant aro as follows," clearly limit the absolute assignment of the villages.

12. Under Clause 1 the net revenue of the villages is stated to be Rs. 4,679-1-8, and after deducting Rs. 4,000 "the amount of your Inam" the balance of Rs. 679-1-8 is to be paid annually by the grantee to Government. Particulars are given of the various lands in the villages with the exception of Mal or Warkas lands.

13. Clause 2 deals with certain other revenue from Brab trees amounting to Rs. 20-14-4 to be paid by the grantee, making the annual payment to Government Rs. 700.

14. By Clause 4 sweet and salt waste land stated in Clause 1 of the lease, in the event of its being cultivated was to be liable to the usual rate of taxation, allowance being made for at least ten years'' exemption for arable and twenty years for non-arable waste.

15. By Clause 5 if any swampy ground then covered by the sea at spring tides, became available for cultivation or for the con-struction of salt pans it was to become liable to the payment of such revenue as might thereafter be fixed.

16. By Clause 6 kowls of Mafi Istawa lands mentioned in Clause 1 of the lease were to be respected by the grantee and the revenues when collected were to be paid to the holders of the kowls.

17. Clause 7 refers to certain land assigned free of assessment to a temple. In the event of its being subjected to assessment the revenues were to be collected and paid to Government.

18. Clause 11 directs that the grantee is not to alter the present mode of assessment or introduce any new tax but he was to collect his rents from the ryots according to the commutation rates as they might be fixed from time to time for the island of Salsette. Instalments were not to be paid earlier than those paid for Government villages though they might be postponed to a later period.

19. Clause 12 is as follows :-

In the event of the land assessment being increased or any other modification introduced in the existing land revenue system of the island of Salsette by the authority of Government the same shall have operation within the village hereby granted to you.

20. And lastly by Clause 20 it was clearly to be understood that the deed conferred no right which Government did not then possess, and only such portions of the rights of Government as might therein specifically be granted were thereby granted to him.

21. To my mind the construction to be placed on the document according to the existing circumstances in 1848 admits of no doubt.

22. Nowroji desired something more than an annual grant of Rs. 4,000 from the Treasury, he desired to have the dignity and position of a landholder connected with the annual payment, and Government were willing to gratify his desire. Accordingly the villages were assigned to him and his heirs but the conditions under which he was to hold the villages in perpetuity were particularly defined and prescribed. He was to manage them and collect the revenues, but only such revenues as were directed by Government to be paid, and after deducting from the net revenues Rs. 4,000, the amount of his inam, the balance was to be paid to Government. I can find no warrant for the contention of the plaintiff that the annual contribution to Government was to be limited to Rs. 700, the grantee retaining any additional surplus.

23. The learned Judge has arrived at the same conclusion after a very elaborate discussion of the terms of the deed, taken in conjunction with the previous negotiations and correspondence between Government and the grantee. I doubt very much whether we can refer to the previous corresppndence for the purpose of construing the deed of 1848. If it would appear from that correspondence that the parties had certain intention, and the deed clearly did not give effect to such intention, then it cannot be construed in any other way except according to its clear meaning. In any event in this case if we can refer to the correspondence, in his letter of May 30, 1846, to the Revenue Commissioner, Mr. Collector Law writes:-"As the Inamdars will have to collect and pay over to Government the surplus revenue above the amount Rs. 4,000 many clauses have been inserted in the deed which could not otherwise have been necessary and which have been adopted from leases of villages in Salsette previously approved of by Government (Exhibit 127).

24. Government in approving the draft deed replied to the Kevenue Commissioner, that the draft deed submitted by the Collector of Thana appeared to contain all that was intended by Government to convey, and Mr. Law was to be instructed to proceed with its execution with as little delay as possible provided, on its provisions being fully explained to the grantee, he offered no objection to them (Exhibit 129).

25. It is quite clear, therefore, that at that time Government intended to make a grant of the villages to provide the grantee with an annual income of Rs. 4,000 reserving to themselves all other rights.

26. In (1919) L.R. 46 I.A. 123 (Privy Council) their lordships of the Privy Council observed (p. 128): ""Each case must therefore be considered on its own facts; and in order to ascertain the effect of the grant in the present case, resort must be had to the terms of the grant itself and to the whole circumstances so far as they can now be ascertained.

27. The appellants, however, rely on subsequent conduct of Government as throwing a light on the proper construction to be placed on the document. Though the Court is permitted to look at the surounding circumstances, that must mean, the cir-cumstances surrounding the execution of the document and subsequent conduct can only have effect, if at all, as an estoppel.

28. It may, however, be necessary to set out the circumstances on which the appellants rely. On December 24, 1850, Government wrote to the Collector of Thana as follows:-

The lease ought to have been framed on the Jamabandy of the year in which it was executed etc.... You are requested to inform him that according to the spirit of their agreement Government have no doubt as to their right to demand the additional assessment Exhibit 130.

29. The reference to Clause 4, of the deed, would make it appear that the lands brought into cultivation between 1843 and the date of the deed, were sweet or salt waste lands, the assessment of which, if brought into cultivation after the date of the deed, had to be paid to Government.

30. Moreover Exhibit 135 a letter from the Collector of September 8, 1877, shows that the decision of Government originated in a petition from Nowroji dated July 3, 1850, in which objections were raised to the assessment of certain sterile land brought into cultivation between 1843 and 1847, one of which was that under Clause 4 the cultivation of waste land was to be free of assessment for ten or twenty years as the case might be.

31. In 1853 Mr. Malet, on behalf of Government, had passed an order in which he allowed an exemption from assessment of any land cultivated beyond the area provided for in the deed, which included Mal-tep or Warkas lands, on the authority of the Government letter of December 24, 1850. The Collector in his letter, Exhibit 135, points out that this order was the result of misleading argument employed by the Mamlatdar in his report of March 2 and 16, 1853. The Collector thought that the exemption of Mal or Warkas land from the deed was the best possible evidence that the grantee was given no right over it, and the letting of the land without permission was equivalent to the enjoyment of the land without payment of revenue which under Clause 13 of the deed the proprietor was bound to protect Government against. Exhibit 136 is a resolution of Government of March 30, 1878, that the land in question should be brought under assessment, but that no steps should be taken to cecover the back rents of the land.

32. The appellants rely very strongly on Exhibit 117, a deed dated November 3, 1857, whereby Government obtained an assignment from Nowroji of his right over certain lands at Sion, and in exchange Government agreed to accept on or before April 1 in each year the sum of Rs. 200-7-7 in full discharge of the rent reserved in respect of the villages of Juhu and Ville Parle. In that deed it was recited that these villages had

been granted to Nowrojee on Khoti tenure paying to Government annually Rs. 711-7-7 for the same.

33. Exhibit 132 is a report of the Alienation Settlement Officer dated July 17, 1872, from which it appears that the amount payable by the grantee had from various causes been reduced to Rs. 84-10-1 and that it was recommended that the revised revenue survey should be introduced into the village and the increased assessment recovered from the inamdars. Further that an inquiry should be held regarding land mentioned in Clauses 4 and 5 of the deed brought under cultivation, the assessment of which should be recovered from Government.

34. On January 14, 1873, Government passed a resolution that Col. Francis should be requested to take immediate measures for the revision of the assessment in these villages with a view to the surplus revenue after deduction of Rs. 4000 being credited to. Government. Government were not disposed to allow the inam to be converted into freehold on the payment of two annas in the rupee.

35. The revision survey was introduced in 1886 and then the question arose whether the grantee was entitled to the enhanced assessment fixed at the revision rates or to Re. 4000 only.

36. After consulting their law officers, Government resolved , that their opinions should be forwarded to the Commissioner, Nothern Division, and the Collector of Thana for information and guidance. Those opinions are not on the record but the Judge says that the grantee was thereby considered to be entitled to the surplus.

37. In 1896, the question regarding the assessment of chikhli or waste lands came under consideration. The Collector of Thana. had written that besides the land shown in the kowl as cultivated and waste there was certain land known as chikhli practically warkas which was left unnoticed when the kowl was granted. Its area in the two villages was 42 acres 34 gunthas according to rhe Survey of 1885.

38. According to the evidence of Krishnaji Mahadeo who was the plaintiff''s manager, chikhli lands included warkas lands brought under rice cultivation subsequent to the grant, and unoccupied land granted in cultivation by the inamdar on condition that the land was brought under rice cultivation. They would be neither lands included in Clauses 4 and 5 of the deed, nor mal or warkas lands.

39. Government resolved that in accordance with the opinion of the Legal Remembrancer no assessment should be levied in respeot of the chikbli lands. It is also in evidence that whenever land was acquired in these villages under the Land Acquisition Act compensation was paid as if the grantee was the proprietor, but under Clause 16 of the deed in the event of any quantity of ground being required by Government for roads or public purposes it was to be given up on the usual terms of the mere re-mission of the assessment if the land in question was cultivated. The Judge refers to a decision of the District Judge of Thana in a land

acquisition reference relating to lands in this village, in which it was held that the grantee was not the proprietor of the soil but an assignee of the royal share of the revenue, and was entitled to the whole of the revenue subject to the payment of Rs. 700, a decision in which both parties acquiesced.

40. The learned Judge is of the opinion that evidence of conduct was admissible not to vary or alter but to explain the terms of the document.

41. But the Court has to construe the document according to the language used and the surrounding circumstances, and the subsequent conduct of the parties in reference to the terms of the document can only be evidence of the construction they put upon it. It was even suggested that the deed of 1857 effected a supersession of the deed of 1848; but, as pointed out by the Judge, there is no mention of this deed of 1857 in the pleadings, and it cannot be taken as more than a piece of evidence that at that date Government considered that under the grant they were only entitled to an annual payment of Rs. 711-7-7. If then the grant of 1848 has not been superseded by a later agreement, Government is not prevented from asking the Court to construe the grant according to its terms, unless by its conduct it has induced the grantee to alter hia position, or act to his detriment on the strength of their admission with regard to their right to increased or revised assessments No attempt has been made to prove anything of the sort.

42. The plaintiffs do not dispute the right of the Government to impose non-agricultural assessment under the provisions of Sections 48, 65 and 66 of the Land Revenue Code. They claim that they are the persons to recover the assessment.

43. It must be noted, though no importance seems to have been attached to the point in the Court below, that Government concede in the written statement that the plaintiffs are entitled to manage the villages and collect the revenue. It seems, however, that the plaintiffs have taken no objection to the rules framed by Government with regard to the fixing and collection of non-agricultural assessment in alienated villages. Under Rule 5 the recoveries are to be effected by the village officers through the Mamlatdars, and are to be credited wholly to the holder of the alienated village, when such holder is entitled to the whole land revenue of the village, or proportionately to the share of the bolder when entitled only to a proportion of the land revenue.

44. Under Clause 6 lands in the actual possession and enjoyment of the holder of an alienated village are exempt from the payment of altered assessment.

45. The Judge, therefore, directed that an account should be taken of all non-agricultural or building assessment recovered by the defendant on lands in the village of Ville Parle in the actual possession and enjoyment of the plaintiffs. With regard to such assessment on lands not in actual possession or enjoyment of the plaintiffs the Judge held that the defendant was entitled to retain it.

46. In my opinion he was right. I can find nothing in the deed which constitutes a grant by Government of such assessment on land which has passed out of the possession and enjoyment of the grantee. But for Rule 6 (supra) Government would be entitled also to the assessment on land in his possession.

47. Government has appealed against the final decree disallowing the assessment on survey number 152, falni 6 and survey number 191, on the ground that the words ''actual possession'' include the possession of the plaintiffs through their tenants. If the tenants had been permanent tenants., it might be said that the lands had ceased to be in the actual possession of the plaintiffs, but it does not appear that the tenants of those survey numbers are anything more than annual tenants. We agree then with the construction placed on Rule 6 by the Judge.

48. The result will be that both appeals are dismissed with costs.

49. [F. A. No. 77 of 1922]. The plaintiffs sued for a declaration that the defendant had no right to recover any non-agricul-tural assessment in respect of the plaint bunglow and for a refund of the amount already recovered.

50. The Joint Judge of Thana dismissed the plaintiffs'' suit.

51. The preliminary objection raised by the defendant that the suit was barred by Section 4 (b) of the Bombay Revenue Jurisdiction Act was decided in favour of the plaintiffs and is now at rest.

52. On the issue whether the defendant had the right to levy and recover from the plaintiffs non-agricultural assessment with local fund and survey charges the Judge decided against the plaintiffs. The title of the plaintiffs was not disputed. The land situated in the village of Ville Parle was purchased by Sir Ratan Tata in 1004. The suggestion that the land was chikhli land was dismissed by the Judge, and it seems evident that it was mal-tep or warkas land which had pasted out of the possession of the grantee under the deed of 1848. This suit had something in common with suit No. 4 of 1918, and reference may be made to the appeal judgment in that case with regard to that deed since the Joint Judge attached to his judgment in the case a copy of his judgment in that suit.

53. The plaintiffs first contended that as they held the land by virtue of successive transfers which must have originated in a transfer from the inamdar, they were entitled to the same exemption from non-agricultural assessment as if the (sic) were still in his actual possession. The contention is so obviously bad that it requires no argument to refute it.

54. The plaintiffs then contended that under the grant the land could not be assessed, but that is contrary even to the argument of the grantee in the other suit, and we havepheld that Govern-ment''s right to assess lands not assessed at the time of the grant was reserved.

55. The last point urged for the plaintiffs was that Government was estopped from claiming non-agricultural assessment, as their conduct in the past was a representation that they would not claim any altered assessment from the holders of land in the event of its conversion to building sites. At the most it could be said that Government was precluded from objecting to the grantee obtaining the benefit of the enhanced assessment. It was not suggested as between the grantee and Government that Government by its conduct had represented that no non-agricultural assessment should be levied on warkas lands.

56. I entirely agree with the remark of the learned Judge on this point, and it seems to me there is no necessity to amplify them.

57. The plea of limitation is equally bad. The plaintiffs were offered a reduced assessment of Rs. 33 if they were willing to pass the usual Salsette agreement but they refused to do that.

58. We cannot, therefore, compel the defendant to repeat this offer when the plaintiffs have failed in their suit. That is a matter for negotiation between the plaintiffs and the defendant.

59. The suit was a hopeless one from the commencement and the appeal will be dismissed with costs.

Madgavkar, J.
The defendant-respondent, the Secretary of State, in the two appeals Noa 77 and 79, was sued in civil suit No. 4 by the heirs of the grantee in 1848 of Ville Parle and Juhu villages, and i" suit No. 84 by the owners of a portion of survey number 134 in Ville Parle and a bunglow standing thereon. The question common to both the suits was the right of the respondent Government to impose non-agricultural assessment. The right was denied in toto by the plaintiffs in suit No. 84. The plaintiffs in the other suit claimed that it could not be imposed, if at all, without their consent, and that in any case the plaintiffs were entitled to retain it themselves. Incidentally, and in relation to this question, certain other issues as to the construction of the grant of 1848 were raised and reliefs sought, such as a declaration that the heirs of the grantee were owners of the villages.

2. The suits were tried as companion suits, and the judgment in suit No, 84 incorporated in the judgment in the other suit. In the result the lower Court held that Government had the eight to impose and to retain the non-agricultural assessment in all lands, the only exception being lands in the actual occupation and enjoyment of the heirs of the grantee. Suit No, 84 was, therefore, dismissed with costs, and suit No. 4 also with the exception just stated. Appeal No. 77 is by the plaintiffs in suit No. 84, and appeals Nos. 79 and 265 by the plaintiffs and the defendant respectively in suit No. 4. The question in the suit No. 84 is more fundamental, though in substance the decision of both depends on a construction of the grant of 1848 to the ancestor of the plaintiffs in suit No. 4. The three

questions in these appeals are, firstly, whether and on what lands Government has the right to impose non-agricultural assesment in these two villages. Secondly, whether the consent of the grantee plaintiffs in suit No. 4 is necessary to such imposition, and thirdly, whether Government or the heirs of the grantee are entitled to retain the proceeds of such non-agricultural assessment.

3. The history of the grant under construction is shortly as follows: In recognition of the faithful services of Wadia, their late master builder in Bombay, the East India Company agreed to give his family a pension in perpetuity of Rs. 4,000 a year Wadia''s son, however, preferred a grant of lands with this income to a cash pension and was allowed to choose the two villages in suit, their jamabandhi or total annual revenue then amounting to Rs. 4,675-1-8, or adding for some trees, Rs. 4,700. And a grant Exhibit 87 was drawn up on February 9, 1848, in favour of the ancestor of the Wadia plaintiffs, under which he was to pay Rs. 700 yearly into the treasury and retain the remaining Rs. 4,000.

4. In the lower Court, Government, and in this Court, the opposite parties, seek to rely on the previous and the subsequent correspondence and acts in support of their respective construction of the grant that it was a grant of the revenue only or of the soil. The grantee, it is true, directly raised this question and this issue, and sought a declaration in this suit that they, and not Government, were the owners of the soil. But, however relevant, if at all, to the issues raised of estoppel and limitation against Government, the main question at issue must be answered upon the grant itself, read as a whole, and in its particular clauses, and not upon a stray word ''Inamdar'' or a stray phrase ''your villages'' even in the deed itself, much less upon letters, previous or subsequent or stray phrases therein, more particularly when there is no allegation of addition to or substraction from the grant but at the most of incidental questions and their answers by Collectors or Legal Remembrancers in the orders passed by Government in any particular case. Above all, non-agricultural assessment was never the subject of this correspondence or these acts.

5. The first issue in suit No. 4 "Is the grant dated February 9, 1818, an absolute grant of the soil or a mere assignment of revenue" appears to be based on an assumption, not uncommon, that these two categories combined, of revenue or of soil, are exhaustive of all grants. The assumption, however, is not, in any sense absolutely correct either in fact or in law. These two kinds together comprise perhaps the largest class of grants, made by Governments in India prior to the British; and they are so, not because even before the British Government, revenue was confined to a single head;-it was not, as is shown by various ancient haqs and babs-but because the ruler either contented himself with merely assigning the revenue or a portion and making him a haqdar, or went to the other extreme, and reserving to himself a certain amount and subject to this payment by the grantee for military service, divested himself of all jurisdiction in the village and invested the

grantee with it making him a Taluqdar or Inamdar, as the case might be. But these were after all the two extremes. Various grants at different times and in different parts had each their own phrases in habitual use to designate each extreme, as for instance, (sic) for the latter extreme with Maratha Governments. Nevertheless, various intermediate grants are conceivable, even with the old rulers, and much more so, in the case of the East India Company, particularly where it was a case, not of a re-grant of an anoient grant, but of a grant such as the present, not in any set form, but embodying a concession in lieu of a monetary pension.

6. If by construction is meant the intention of the parties, as expressed in the deed, there is not, I think, much doubt. The grantor wished as far as possib''e to meet the desire of the grantee to combine (sic) of a landholder with the pecuniary advantage (sic) of Rs. 4,00; and the deed so designed was ordered and framed by the Collector of Thana and approved. It begins with a recital of the circumstances above leading to the grant. Then follow the detailed boundaries and assessment of the total amount of Rs. 4,679-1-8. "Deduct the amount of your Inam Rs. 4,000. Difference payable by you annually Rs. 679-1-8," increased by the 2nd para for 97 brab trees to Rs. 700, which amount (Clause 3) the grantee is to pay annually to the treasury. Clause 4 relates to the cultivation of sweet and salt waste land. The grantee is to get ten or twenty years'' exemption from assessment, that is, he is liable for the full assessment thereafter. By Clause 5, swampy lands, if brought under cultivation, are to be liable for assessment at rates to be fixed afterwards Clauses 6-10 bind the grantee to the statu quo in respect of various rights of the ryots : and so does Clause 11 in regard to the mode and amount of assessment and taxes.

7. Clause 12 runs as follows :-

In the event of the land assessment being increased or any other modification introduced in the existing revenue system of the Island of Salsette by the authority of the Government, the same shall have operation within the Tillages heroby grunted to you.

8. And Clause 13 :-

You are to bring to the notice of Government any instance in which any land &c. in your villages belonging to Government may have been fraudulently concealed or enjoyed without payment of revenue, when the necessary steps will be taken to assess them, but you have no power to do so.

9. Of the remaining clauses, Clause 16 empowers Government to take up land for roads or public purposes on the usual terms of the mere remission of the assessment. Clause 19 forbids all exercise of magisterial or judicial authority by the grantee. And before the last clause of reversion to Government in default of heirs comes the penultimate Clause 20 as follows :-

It is clearly to be understood that this deed confers no right which Government does not now possess and only such portion of the rights of Government as may be herein specifically granted is hereby granted to you.

10. There is no evidence that non-agricultural assessment was levied in these village or in the Island of Salsette in 1848. The land on which the plaintiff in suit No. 84 has built is maltep or warkas land, which was not cultivated in 1848 and which does not fall under Clauses 4 to 7 of the grant. Non-agricultural assessment on it was first imposed in these villages and on the land in suit No. 84 in 1917.

11. In the case of unalienated lands, the right to Government to impose enhanced assessment on land appropriated for non-agricultural purposes, such as building, arises in virtue of Section 61 and the rules framed u/s 214 of the Land Revenue Code, Bombay Act V of 1879. It is not contended that these Sections are ultra vires. The survey settlement was introduced in the two alienated villages in suit in 1885 u/s 216 of the Land Revenue Code on the application and with the consent of the heirs of the grantee, with the consequence under a 217 that the occupants were affected by the same responsibilities as .the occupants in unalienated village. A contention was raised in arguments that Rule 5 of the rules made under p. 214 is ultra vires by reason of Rule 6, with which it is inconsistent. I see no inconsistency between these two rules, framed u/s 214 oE the Land Revenue Code, and sametioned in Government Resolution No. 5641, dated June 5 1907, nor between Rules 13 and 81. The lands in these villages are not aliennted lands apart from the alienation of the villages, and the only lands exempt from non-agricultural assessment are lands in the actual possession and enjoyment of the holder or holders of the alienated village. These words do not and cannot include lands such as the land in suit No. 84, of which the grantee has given up possession to other persons, reserving no rights in himself.

12. The ordinary right of Government to impose non-agricultural assessment in these two villages, as in the rest of the Island of Salsette, with corresponding liability of occupancy tenants to pay, by virtue of these Sections of the Land Revenue Code, is, therefore, clear. No portion of the grant is opposed to it. On the contrary Clause 12 of the grant quoted above, expressly applies, and is broad enough to include modification and increase of land assessment, Much as the non-agricultural assessment now in question. On the main issue in the suit No. 84 and appeal No. 77, the plaintiff-appellant fails.

13. No representation by Government to him is sat up; and he built his house in 1905. The issues of estoppel and limitation raised on his behalf, appear to be equally without substance. The other points raised in his behalf are sufficiently dealt with in the judgment of the Court below. Omission by Government to impose or by any officer to collect, of itself neither estops nor bars.

14. Passing on to the contentions raised in suit No. 4 by the heirs of the grantee : as regards imposition of the non agricultural assessment, his consent u/s 216 of the Land Revenue Code to the introduction of the survey settlement, and Clause 12 of the grant, are clear that no further express consent on his part is necessary to render its imposition in these two villages legal; and Clause 13 denying him all power to assess even persons in fraudulent occupation is in the same sense.

15. As to whether Government or the grantee is entitled to retain the amount of the non-agricultural assessment, it is argued for the grantee that the amount payable is expressly limited to Rs. 700, and that the grant is a grant of the two villages, soil and all. Confining myself to the question of non-agricultural assesament, there can be no doubt that its possible imposition in the future did not occur to Government, and therefore, no express provision was made in its regard, similar to the extension of cultivation as in Clauses 4 and 5. But as against the fact that the payment by the grantee to Government on the then assessment is limited to Rs. 700, is the penultimate Clause 20 recited above. No law, revenue or other, of 1848, is quoted or evidence led to show that Government had then the right to impose or collect non agricultural assessment. This right, therefore, was created by the legislature and arose sub sequently. Government did not possess it and did not grant it in 1848 but must be taken to have reserved it in themselves, along with other future rights, under Clause 20, and subsequently by Rule 5 of the rules made u/s 214 of the Land Revenue Code.

16. The subsequent correspondence and consent do not refer to non-agricultural assessment, and do not, therefore, affect this conclusion. In so far as they are relevant, they are sufficiently dealt with in the judgment appealed against.

17. In this view of the case, it is not necessary, and I do not propose to consider, the question raised in the lower Court in the first issue in suit No. 4, whether the grant was an absolute grant of the soil or a mere assignment of the revenue, The only distinction known to law is between villages which are alienated, as defined by Clause (20) of Section 3 of the Land Revenue Code, and villages which are not. These two villages are admittedly alienated. Further questions often arise in the case of any particular alienated village as to the right to trees above or minerals or quarries below or as to accretions from streams or sea, and may require in the Courts a decision as to whether the alienation is confined to the revenue or a portion thereof or whether it comprises the particular right or rights in question in that suit; and in the latter case, the usual form of the issue has no doubt been the form in this suit. But no such particular question other than the question of non-agricul tural assessment is raised in this suit. And unlike the Jerm ''occupancy tenant,'' the term ''owners'' in the declaration sought by the grantee is again a term not known to the Revenue Code, and not to be found in the grant; and the grantee or his heirs are no more entitled to such a declaration than the Government would be to a declaration that they were Khots''.

18. But that lands in the actual occupation and enjoyment of the holders of the alienated villages, such as the plaintiffs in suit No. 4, are exempt by reason of Rule 5 from non-agricultural assessment, admits of no doubt. Which lands are in such aotual occupation and enjoyment is a question of fact in each case. It would be too narrow an interpretation to exclude any and all occupation and enjoyment through tenants, as it would be too wide to include alienations by the grantee by permanent leases. The finding of the lower Court on the report of the Commissioner is, I think, on the whole correct. And more particularly in regard to survey numbers 152A and 191, which are the subject of appeal by Government., there is no sufficient evidence to show that the sheds erected are such permanent structures as to affect the occupation and enjoyment of the plaintiffs.

19. In the result I agree with the conclusions on these three questions formulated by the lower Court. I concur, therefore, with the judgments of my lord the Chief Justice. All three appeals fail aud must be dismissed with costs.