

money) I will pay off the whole amount according to the above agreement. Should I not pay the same, you are to recover the same in full from the mortgaged property." The effect of such a stipulation has been considered in *Sayad Abdul Hak v. Gulam Zilani*¹, and it has been there held that the stipulation postponing the mortgagor's right to redeem beyond the time when the mortgagee can call in his money is inoperative. The present case shows the desirability of such a rule. What advantage can it possibly be to the ladies here that they should be able to redeem ^{sl-}r fifty years and remain all that time liable to pay the mort- ^{wh-}ge-money whenever it may please the mortgagee to demand it.

As the appeal before the Subordinate Judge, First Class, A. P., was heard *ex parte*, his attention was not called to the above ruling. No reasons have been assigned before us why we should not follow it. We consider, therefore, that we are bound to do so.

We must reverse the decree of the Subordinate Judge and remand the appeal that he may take the accounts and allow ^{ake} plaintiffs to redeem on the usual terms. Costs, costs in the

Decree reversed and case remanded.

(1) I. L. R., 20 Bom, 677.

APPELLATE CIVIL.

by Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

The plaintiff **GANESH OZE (ORIGINAL PLAINTIFF), APPELLANT, v. THE**
RY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFEND-
Inverari **CONDENT.***

(plaintiff) : *ct (Bom. Act VII of 1879), Sec. 48*¹—*Revenue Jurisdiction*
 tain the suit 1876), *Sec. 4 (b)*²—*Water-rate—Incidence—Land revenue—*
 contend that—*Percolation of the water—Opinion of the canal officer—*
 canal, and su—*Jurisdiction.*

pay assessment is levied under section 48 of the Irrigation Act (Bom. Act
 the *nalla*. The question as to the jurisdiction of civil Courts in a suit for the
 it is thence

* Appeal, No. 22 of 1895.

“ surface flow of the Irrigation Act (Bom. Act VII of 1879) :—

Ráo Sáheb appear to a canal officer duly empowered to enforce the provisions
 respondent (de at any cultivated land within two hundred yards of any canal

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determination of the legality or otherwise of such levy, depends upon whether the incidence of the rate is authorized by the provisions of the section. Under it, the condition precedent to levying the rate is not the fact ascertained by evidence whether the water in dispute has percolated from the canal, by opinion of the canal officer that it has so percolated, he and not the civil court being made the judge of such percolation for the purposes of the Act.

Such water-rate falls within the denomination of land revenue.

APPEAL from decision of W. H. Crowe, District Judge of Poona.

Suit to recover Rs. 115-3-0 paid by the plaintiff under protest as water-rate levied on him for two years (1889-90, 1890-91) for an injunction restraining Government from levying such rate for the future.

The plaintiff was the owner of certain land in the Poona District, near which was a *nála*. Across this *nála* the plaintiff had built a dam in order to collect the water flowing from the hills which he conducted to his land by a channel constructed by himself and used for the purpose of irrigating his crops. The water flowed from the *nála* to the land by gravitation.

The plaintiff's land was at some distance from the main channel of the Government irrigation canal (the Mutha Right Bank Canal) and receives, by percolation or leakage from such canal, an advantage equivalent to that which would be given by a direct supply of canal water for irrigation.

It was contended that any cultivated land, wherever situate, derives by a surface supply of water into such canal, a supply of water which has percolated or leaked from any canal, and that such land is entitled to a direct supply of canal water.

It was contended that he may charge on such land a water-rate not exceeding that which has been charged for a similar direct supply to land similarly cultivated.

For the purposes of this Act, land charged under this section shall be land irrigated from a canal.

Section 4 (b) of the Revenue Jurisdiction Act (Act X of 1876) provides that the Civil Court shall have jurisdiction for the trial of suits for the recovery of the amount or incidence of any assessment of land revenue or for the mode of assessment, or to the principle on which such assessment is made.

4. Subject to the exceptions hereinafter appearing, no civil court shall have jurisdiction as to any of the following matters:—

(b) objections—

to the amount or incidence of any assessment of land revenue or for the mode of assessment, or to the principle on which such assessment is made, or to the mode of assessment, or to the principle on which such assessment is made.

Canal), but* was about 200 yards distant from its nearest distributing channel.

The plaintiff complained that he had been charged water-rate under section 48 of the Irrigation Act (Bom. Act VII of 1879), on the ground that the *nāla* and his land were supplied with water which percolated from the said canal. He denied that this was the case, and he alleged that the water-rate was, therefore, improperly levied upon him. He prayed that the defendant should be ordered to repay the sum (Rs. 115-3-0) for two years which he (the plaintiff) had paid under protest, and that an injunction should be granted restraining the defendant from levying it. The suit was filed on 12th September, 1893.

The defendant pleaded that as the plaintiff had paid the money on the 25th July, 1891, the suit was barred by limitation under article 16 of Schedule II of the Limitation Act (XV of 1877); that the Court had no jurisdiction to entertain the suit under section 4(3) of the Revenue Jurisdiction Act (X of 1876); that the water taken by the plaintiff from the *nāla* was water which came from the irrigation canal, which was only 200 yards from the plaintiff, and that section 48 of the Irrigation Act applied.

The District Judge of Poona dismissed the suit. He held that the Government had no jurisdiction to entertain it, but on the merits he held that section 48 of the Irrigation Act applied. As to the years 1891 and for a *nāla* was supplied by water which percolated from the canal, that section 48 of the Irrigation Act applied. As to the amount of Rs. 115-3-0, he held that it was barred by limitation. The plaintiff appealed.

The main question (with *Shivram V. Bhandarkar*) for the appellant was—The Judge held that he had no jurisdiction to entertain the suit, and he decided it against us also on the merits. We say that the *nāla* does not get water by percolation from the canal, and that, supposing that it does, still we would not be liable to pay water-rate under the Irrigation Act for taking water from the canal, when water is collected by a dam in a *nāla*, and when the water is carried by some artificial means, it ceases to be water from the canal.

The lower Court (with *Vasudev J. Kirtikar* (Government Pleader) for the appellant) held that the Government had no jurisdiction to entertain the suit, and he decided it against us also on the merits. We say that the *nāla* does not get water by percolation from the canal, and that, supposing that it does, still we would not be liable to pay water-rate under the Irrigation Act for taking water from the canal, when water is collected by a dam in a *nāla*, and when the water is carried by some artificial means, it ceases to be water from the canal.

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entertain a suit like the present under section 4 of the Revenue Jurisdiction Act (Act X of 1876). In the present case the rate was authorized by Government.

[FARRAN, C. J.:—The question is whether the rate was authorized.]

We submit that it was—*Waman v. Collector of Poona*⁽¹⁾.

At this stage of the hearing the Court framed the following issue, and sent it back to the Judge for his finding:—

“Did the water flow directly by gravitation from the dammed up *nāla* through a channel on to the plaintiff's land, or was it raised from the *nāla* by artificial means and so caused to flow by a channel on to the land of the plaintiff?”

The finding of the Judge was that the water flowed directly by gravitation from the dammed up *nāla* through a channel on to the plaintiff's land.

Branson (with *Shivram I. Bhandarkar*) for the appellant (plaintiff):—It was urged that there is percolation going on, but it is possible to say whether the percolation is from the canal or field channel. The defendant must show that the water *nāla* is the percolated water from the canal and the field and from no other source. If the *nāla* contains water from other source, then the levy of assessment from us would be. The water is first collected in the *nāla* by a dam and take it to our field by cutting a channel. Under the circumstances it is impossible to uphold the levy of water section 48 of the Irrigation Act. That section relates to surface flow of water which has leaked or percolated.

We have produced affidavits to show that the water does not percolate.

Ráo Sáheb *Vasudev J. Kirtikar* (Government Pleader respondent (defendant)).

FARRAN, C. J.:—This is an appeal from the District Judge of Poona. The circumstances under which it was brought are these. The plaintiff is the owner of Survey No. 24 in the village of Loni Kalbhar. At the time of the assessment whether the levy

(1) P. J., 1892, p. 21.

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hills lying to the south of Loni passes close to the field. The plaintiff has constructed a dam across this *nála* behind which water collects. Thence it is led by means of a channel constructed by the plaintiff to the field in question where it is used by him for the purpose of irrigating his sugarcane crops. The water flows by gravitation only without being raised for the purpose from the dammed *nála* to the field. In respect of the water thus reaching the plaintiff's field the canal officer empowered to enforce the provisions of section 48 of "The Bombay Irrigation Act, 1879" has charged the plaintiff under that section with a "water-rate not exceeding that which would ordinarily have been charged for a similar direct supply" (from a canal) "to land similarly cultivated." The land of the plaintiff though at a considerable distance from the main branch of the Mutha Right Bank Canal is within 200 yards of its nearest distributing channel. The distributing channel is, however, included by the force of section 3 of the Act within the term "canal." The plaintiff's land is thus brought within 200 yards upon the canal.

The plaintiff filed the present suit on the 12th September, 1893, against the canal officer. The sum of Rs. 115-3-0 paid by him, under protest, to the canal officer on the 25th July, 1891, as water-rate levied for the year 1890-91 and 1891-92 in respect of his above survey number 1000 is the subject-matter of the present suit. The plaintiff's declaration that Government is not entitled to demand Rs. 57-9-6 per annum on that account and for an injunction to restrain Government from levying it in future.

The plaintiff's defences raised on behalf of the defendant were (1) that the suit was barred by limitation; (2) that the Court has no jurisdiction to entertain the suit under section 4 of Act X of 1879; (3) that the *nála* dammed by the plaintiff derived its water from the field water-courses and not from the canal, the plaintiff's land being within 200 yards of the canal; and that the case fell within the provisions of section 48 of the Act.

Now in this case the Court has found that the plaintiff's claim to recover the sum of Rs. 115-3-0 paid under protest is barred under article 16 of the Limitation Act, but that the claim for a declaration that the plaintiff is entitled to water from the canal is not barred.

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declaration and injunction is not time-barred. There has been no appeal upon that part of the case, which we do not, therefore, further consider.

The question whether the Court has jurisdiction to entertain the claim depends upon the construction and effect of section 4 of Act X of 1876, which enacts that "subject to the exceptions hereinafter appearing no civil Court shall exercise jurisdiction as to * * * (b) objections to the amount or incidence of any assessment of land revenue authorized by Government or to the mode of assessment or to the principle upon which such assessment is fixed, &c." It is not contended before us that the water-rate in question is not land revenue, and in *Wade v. Collector of Poona*⁽¹⁾ it has been ruled that it falls within denomination, and so it appears to us that it does. The contention of the plaintiff on this point is that, even assuming water in the *nāla* behind the dam to be derived by leuka percolation from the Government canal, the canal office not authorized to levy a water-rate upon his land, as the not one which falls under the provisions of Bombay Act 1879, section 48, which is the only law under which such can be levied from him. It is not suggested that independent of the Act, Government has authorized or could authorize levy of this water-rate from the plaintiff, nor has Government directed that the water-rate should have this particular character unless it falls within the scope of the section 48.

Assuming, then, that the rate being authorized by the Act is a rate authorized by Government (as it certainly is), the question of jurisdiction appears to us upon whether the incidence of the rate upon the plaintiff is authorized by Government, or, in other words, by the provisions of section 48. If it can fall within those provisions within the authorization by Government, the jurisdiction of the civil Courts is, it appears to us, ousted. If it is not within that authorization, or within those provisions, the rate is illegal, and the jurisdiction of the civil Courts is preserved. We proceed, therefore, to consider wh

(1) P. J., 1892, p. 21.

of this rate from the plaintiff is authorized by the provisions of section 48 of the Bombay Irrigation Act of 1879.

The plaintiff contends that the water in the *nála* behind the dam is not derived by percolation or leakage from the Government "canal," but comes from another source. The District Judge has raised an issue upon that contention, which he has found against the plaintiff and in favour of Government. Counsel for the appellant before us was anxious to be allowed to refute that finding and asked leave to put in affidavits or to adduce evidence before this Court to the effect that the result of the sinking of certain trial pits showed clearly, if not conclusively, that the opinion formed by the canal authorities as to the source of the water in the *nála* was erroneous and that it was really filled from sources independent of the canal water. We have not ourselves formed an opinion upon this question, nor have we allowed the affidavits to be put in, because it appears to us that the authority to levy the rate does not depend upon whether the

The land is, in the judgment of the civil Court founded upon evidence before it, irrigated with canal water, but upon the opinion formed on that question by the canal

The words of the section are:—"If it shall appear to a Magistrate that any cultivated land within any canal receives by percolation or leakage from the canal an advantage, &c., or that any cultivated land receives by a surface flow a supply of water

percolated or leaked from such canal * * * on such land a water-rate not exceeding that which is ordinarily charged for a similar direct

Rule XVI of the Act similarly cultivated." The condition precedent in Resolution No. 10 of 1879 is not the fact ascertained by evidence

that water in dispute has percolated from the canal, but that the canal officer that it has so percolated. He

Provided that no Court is made the judge of such percolation for the purpose of the Act.

All rules when so far as they relate to the case it has, we consider, appeared to the canal authorities, have the effect of the Act.

(2) Rule 16:—The *nála* in question is supplied with water in the manner in which it is supplied, and whether it has wholly or almost wholly leaked or percolated from the canal, and the question only remains whether that

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brings the case within the provisions of section 48 of the Act. We think that it does. The first part of the section hardly, we think, applies to the case. The plaintiff's land cannot well be said to receive by percolation or leakage from the canal an advantage equivalent to that which would be given by a direct supply of canal water for irrigation, but the second part of the section, in our opinion, applies. The *nāla ex concessis* in the opinion of the canal officer has been filled with a supply of water which has percolated or leaked from the canal. The plaintiff's cultivated land derives by a surface flow a supply of the water which has so percolated or leaked, and the conditions of the section are thus, we think, fulfilled. It does not seem to us to be material whether the reservoir which collects the percolation from the canal is a natural reservoir or one artificially formed so long as the water flows from it by a surface flow on to the plaintiff's land. If the plaintiff can show that the opinion formed by the canal officer is erroneous, and that the *nāla* is kept supplied by sources independent of the canal water, his remedy is to call the canal authorities of that fact and not by suit in Court. We must confirm the decree appealed from with

Decree *c*

APPELLATE CIVIL.

Before Mr. Justice Ranale and Mr. Justice Hoshin

VASUDEVACHARYA AND OTHERS (ORIGINAL PLAINTIFFS)
v. THE MUNICIPALITY OF SHOLAPUR (ORIGINAL
RESPONDENTS.*

*Municipality—District Municipal Act (Bom. Act XXVI
District Municipal Act (Bom. Act VI of 1873), Sec. 14(1
under—Rule 16(2)—Rule not mandatory but only perm
Act (IX of 1872), Sec. 265—Suit for damages and injun
municipality from stopping water-supply—Right to sue in a*

The plaintiffs having sued the Municipality of Sholapur for an injunction restraining the municipality from stopping t to their house, the first Court allowed the claim, but the J

* Second Appeal, No. 216 of 1896.

(1) Section 14 of the District Municipal Act (Bom. Act VI of 14. *Clause L.*—It shall be the duty of every municipality constitution as conveniently may be, to prepare rules, and a