APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade, and on reference before Mr. Justice Candy.

1899. *September 27.*

NAYAK PURSHOTUM GHELJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

Land Revenue Code (Bom. Act V of 1879), Secs. 65 and 66—Fine leviable for appropriation of land to a non-agricultural purpose—Collector's omission to acknowledge receipt of application not a good defence to the imposition of fine—Construction.

Per PARSONS and CANDY, JJ.:—Under sections 65 and 66 of the Bombay Land Revenue Code (Bom. Act V of 1879), where a person appropriates land to a non-agricultural purpose he must, in order to escape liability to the fine imposed by section 66, be able to show either (*a*) that he first obtained the permission of the Collector, or (*b*) that he waited for three months from the date of the Collector's acknowledgment of his application for permission so to appropriate it. But the three months' time does not begin to run until such acknowledgment has been received, so that where a person is charged with thus appropriating his land, it is no defence to plead that the Collector, though he received the application, neglected to furnish the applicant with a written acknowledgment of the receipt of the application.

Per RANADE, J.:—Where the Collector has received the application and omitted to send an acknowledgment, the occupant need only wait for three months from the time of his sending in the application. After the expiration of this time, if the occupant appropriates his land to a non-agricultural purpose, the Collector cannot levy the fine provided by section 66.

SECOND appeal from the decision of T. D. Fry, District Judge of Ahmedabad.

Plaintiff was the registered occupant of certain land (Survey No. 465) in the village of Asarva near Ahmedabad.

In 1887-88 he applied to the Collector, under section 65(1) of the Bombay Land Revenue Code (Bom. Act V of 1879), for permission to dig pits in his land for the purpose of making bricks.

* Second Appeal, No. 464 of 1898.

(1) Sections 65 and 66 of Bombay Act V of 1879:—

"65. An occupant of land appropriated for agriculture is entitled . . . . to erect farm buildings . . . or make any other improvements thereon for the better cultivation of the land . . . . But if any occupant wishes to appropriate his holding or any part thereof to any other purpose, the Collector's permission shall in the first place be applied for by the registered occupant. The Collector on receipt of such application

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The Collector neither acknowledged the receipt of the application nor sent any reply.

After the expiration of more than three months from the date of his application, the plaintiff dug pits in his land and used it for brick-making.

Thereupon the Collector levied a fine upon him of Rs. 500, under section 66 of Bombay Act V of 1879, for using the land for a non-agricultural purpose without his permission.

Plaintiff paid the fine under protest on 1st June, 1893.

In 1894 plaintiff filed the present suit against the Secretary of State for India in Council claiming to recover the amount of the fine, alleging that the same had been unjustly and illegally levied by the Collector.

The Assistant Judge dismissed the suit, holding that as the land had been appropriated to a non-agricultural purpose without the Collector's permission, the fine had been legally levied under section 66 of Bombay Act V of 1879.

On appeal this decree was confirmed by the District Judge, whose reasons were as follows:—

"It is urged that as the application made in 1887-88 was left without a reply, no fine is leviable. This plea, however, is unsustainable. It is true that as the appellant received no reply to his application, he was at liberty, under section 65

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shall at once furnish the applicant with a written acknowledgment of its receipt, and after inquiry may grant or refuse the same; but, if the applicant receives no answer within three months from the date of the said acknowledgment, the Collector's permission may be deemed to have been granted. . . .

When any such land is thus appropriated to any purpose unconnected with agriculture, it shall be lawful for the Collector, subject to the general orders of Government, to require the payment of a fine in addition to any new assessment which may be leviable under the provisions of section 48.

"66. If any such land be so appropriated without the permission of the Collector being first obtained, or before the expiry of three months from the date of the aforesaid acknowledgment, the occupant and any tenant or other person holding under or through him, shall be liable to be summarily evicted by the Collector from the land so appropriated, and from the entire field or survey number of which it may form a part, and the registered occupant shall also be liable to pay, in addition to the new assessment which may be leviable under the provisions of section 48 for the period during which the said land has been so appropriated, such fine as the Collector may, subject to the general orders of Government, direct.

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of the Land Revenue Code, to deem that permission had been granted. He was, therefore, freed from the enhanced fine which would have been leviable under section 66 had he excavated without permission. He is still, however, liable to pay the fine which is leviable under section 65 even when permission is granted.

"I thus find that there was nothing illegal in the levy of the fine, and that the plaintiff can obtain no relief in this Court."

Against this decision plaintiff preferred a second appeal to the High Court.

C. H. Setalvad (with *Manibhai Nanabhai*) for appellant.

Ráo Bahádur *V. J. Kirtikar*, Government Pleader, for respondent No. 1.

L. A. Shah, for respondent No. 2.

The case came on for hearing before a Division Bench (Parsons and Ranade, JJ.), who passed the following interlocutory judgment :—

The appellant (original plaintiff) brought this suit to recover a fine levied from him by the Collector for the appropriation of his land for other than agricultural purposes. The order of the Collector is not on the record, but the fine was evidently imposed under section 66 of the Bombay Land Revenue Code, since that was the only section relied on by the Collector in his written statement as justifying his action. The fifth issue in the first Court raised this point,—*viz.*, whether the plaintiff appropriated the land to a non-agricultural purpose and whether he obtained permission to do so,—but, curiously enough, no finding was recorded thereon.

On appeal the District Judge raised the very insufficient issue "whether the plaintiff subsequently to the revenue year 1886-87 excavated land in his field and thus appropriated it to non-agricultural purposes." He decided it in the affirmative. There was never any dispute about it. In his judgment, however, he says that the plaintiff applied for permission, and, as he received no reply to his application, he was at liberty, under section 65 of the Land Revenue Code, to deem that permission had been granted. He was, therefore, "freed from the enhanced fine which would have been leviable under section 66 had he excavated without

permission. He is still, however, liable to pay the fine which is leviable under section 65 even when permission is granted."

The Judge thus made an entirely new case for the defence and one which is not based upon any evidence on the record to which we have been referred. Had there been evidence to support the finding that the Collector's action was not justified by section 66, we should have been obliged to decide in the plaintiff's favour. As it is, we must have a fresh enquiry confined to the points properly at issue in this suit. We cannot allow the introduction of section 65 into the case, for the fine was not imposed under that section, and it is impossible for any Court to say what fine, or if indeed any fine at all, would have been imposed by the Collector had he known that the plaintiff had obtained permission to use his land in the way he did. Under the rules of Government the imposition of a fine seems to be optional, but the fine imposable under section 66 is five times as much as that imposable under section 65.

We frame these issues :—

1. Did the plaintiff apply to the Collector for permission, under section 65 of the Land Revenue Code, to use his land for a non-agricultural purpose, and was he furnished with a written acknowledgment of its receipt ?

2. Did he receive no answer within three months from the date of such acknowledgment ?

3. Did he use his land before or after the expiration of three months from such date ?

The parties are at liberty to adduce evidence, and the findings and evidence should be certified to this Court within two months.

On the first issue the Joint Judge found that the plaintiff had applied to the Collector for permission, under section 65 of the Land Revenue Code, to use his land for a non-agricultural purpose, but that he had not been furnished with a written acknowledgment of receipt.

The Joint Judge recorded no findings on the second and third issues.

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After the return of the above finding, the case came on for final hearing before Parsons and Ranade, JJ.

C. H. Setalvad (with him *Manubhai Nanabhai*) for appellant.

R. V. Desai for Government Pleader, for respondent No. 1.

PARSONS, J.:—The Joint Judge has found "on the first issue that the plaintiff applied to the Collector for permission under section 65, Land Revenue Code, to use his land for a non-agricultural purpose, but that he was not furnished with a written acknowledgment of receipt." No findings are recorded on the second and third issues. It was argued for the appellant that the default of the Collector to obey the provisions of the law and send an acknowledgment ought not to prejudice the appellant, and that, he having waited three months from the date of his application, was entitled to appropriate his land. On the other hand it was contended that the appellant was bound to wait until he got an acknowledgment and three months' time from that date before he appropriated his land, and that, not having done so, he was properly fined under section 66 of the Land Revenue Code. In my opinion the contention is good.

The law as contained in section 66 has expressly made the appropriation of land conditional on the permission of the Collector being first obtained or on the expiry of three months from the date of acknowledgment of receipt of the application for permission to appropriate. The appellant's counsel cited the case of *Thompson* v. *Harvey*[1], in which it was said that "it is a rule of construction that matters shall not be deemed to be conditions precedent unless they are declared to be so. That is a sound rule to apply to statutes, and unless the Legislature has in plain words said that a certain thing shall be a condition precedent, we must not so construe it" (p. 262). That is the converse of the present case, for here the Legislature has said plainly that there shall be a condition precedent, *viz.*, the expiry of three months' time from the date of the acknowledgment. This acknowledgment the appellant never obtained, and time, therefore, never began to run. I think that it is not within the power of a Civil Court to substitute any other time for the time provided by

(1) (1859) 4 H. and N., 254.

statute however equitable such a substitution may appear to be, and that it is no defence against the subsequent action of the Collector to say that the application was made, but that the Collector wrongfully omitted to furnish a written acknowledgment of its receipt. The appellant might have sent in another application, or he might have availed himself of his remedy by way of petition, or appeal to higher authority against that omission, but in my opinion he had no right to take the law in his own hand and appropriate his land before the time allowed by the law had expired. I see, therefore, no necessity for any findings to be recorded on the other issues, and I would confirm the decree. At the same time, considering the facts of the case, I would order each party to bear his own costs.

RANADE, J.:—There has apparently been some confusion on the part of the lower appellate Court in determining the chief point or points really at issue in this case. The original suit was brought to recover a fine levied by the Collector of Ahmedabad under section 66 of the Land Revenue Code, which the appellant-plaintiff claimed was unjustly levied from him. The fine was levied on the ground that the appellant had appropriated his land for non-agricultural purposes without obtaining the permission of the Collector. The appellant's case as set forth in the plaint was that the use made by him of the land, in the way of digging pits for making bricks, did not spoil the land, but improved the same. The Assistant Judge held that the question of improvement or injury was immaterial, but that the fine was properly levied, as it was proved that the land was appropriated to non-agricultural purposes without first obtaining the Collector's permission.

The District Judge on appeal held that the appellant had applied for permission under section 65 of the Land Revenue Code, and as no reply was received from the Collector, the appellant was freed from the enhanced fine leviable under section 66. The District Judge, however, thought that a fine was still leviable under section 65, and on this latter ground he confirmed the decree of the Assistant Judge.

In second appeal we held that as the fine was actually levied under section 66, it was not open to the lower appellate Court

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to make out a new case that the fine was leviable under section 65. We accordingly sent down three issues for determination by the lower Court of appeal, *viz.* :—

(1) Did the plaintiff apply to the Collector for permission, under section 65 of the Land Revenue Code, to use his land for a non-agricultural purpose, and was he furnished with a written acknowledgment of its receipt ?

(2) Did he receive no answer within three months from the date of such acknowledgment ?

(3) Did he use his land before or after the expiration of three months from such date ?

The District Judge on remand held on the first issue that the plaintiff did apply to the Collector for permission under section 65 to use his land for a non-agricultural purpose, but that he was not furnished with a written acknowledgment of its receipt. The District Judge recorded no findings on the second and third points.

The Government Pleader filed objections, the chief among them being that no petition under section 65 was made, as held by the lower appellate Court, and secondly, that the District Judge ought to have recorded findings on the second and third issues sent down.

The first of these contentions relates to a matter of fact, and the District Judge has recorded his view definitely in appellant's favour in the first inquiry, as also in the remand inquiry. Witness Balgovind, examined after remand, Exhibit 12, distinctly stated that there was such a petition made for permission to dig in the year 1887-88, as shown by the Barnishi, Exhibit 65. This objection of the Government Pleader must accordingly be overruled.

His other objection, however, appears to me to be well founded. If the appellant-plaintiff had applied for permission under section 65, the Collector was bound to send him an acknowledgment under the provisions of the section, and he was also bound, within three months from the date of the acknowledgment, to send a reply either granting the request, or refusing the same.

The section further provides that, if no such reply is sent, the Collector's permission may be deemed to have been granted. In his first judgment the District Judge apparently assumed, from the fact that an application had been made, and no reply was received thereto, that the applicant was freed from all liability to the enhanced fine under section 66, though he might be liable to the smaller fine leviable under section 65. This last liability we have not now to consider. The liability under section 66, however, attaches (1) when there has been no application, (2) when though application is made, the occupant enters upon the use of the land before the three months' term fixed for a reply has expired. It was with reference to this latter alternative that we framed the second and third issues in the order of remand. The necessity of an inquiry on the second issue cannot be dispensed with merely because no acknowledgment was sent by the Collector. The third issue, moreover, had also to be decided anyhow, for appellant would render himself liable to the fine under section 66 if he appropriated the land before the three months' term was over. His application under section 65 would not protect the occupant from this liability. It was on this account that the respondent's pleader obviously laid so much stress on the contention that the District Judge should have recorded his findings on the remaining issues. The extent of the liability turned entirely upon the question whether the appropriation was made before or after three months from the date of the acknowledgment of the application. If it was made after three months without reply, section 65 would protect the occupant. If it was used before the three months' term, section 66 would be applicable, and the fine would be leviable even though an application had been made under section 65.

In support of the District Judge's view, it might be suggested that as no acknowledgment was sent by the Collector to his application for permission, the occupant could not use the power conferred by section 65 when no answer was sent within three months from the date of the acknowledgment. As there was no acknowledgment, the application failed, and it must be treated as if there had been no application. This seems to me to be ascribing an unnecessary importance to the provision about

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"acknowledgment," and defeating the main purpose of the statutory provision which empowers an occupant to use his land as he deems most desirable. The occupant could not insist upon the Collector acknowledging the application sent to him, and if the Collector simply neglects to send an acknowledgment, he may, if this view be true, defeat the provision without taking any action on the application made to him. The necessity of acknowledgment is obviously intended only to furnish the occupant with evidence of the fact that he presented his application. This acknowledgment fulfils the purpose of the notice provided for under section 33 of Bombay Act VI of 1873, and the notice under sections 342 and 345 of Bombay Act III of 1888. In both these cases, notice has to be given before any building work is undertaken, and the law provides that, if the Municipal authorities send no reply within one month from the date of the notice, the building work may be commenced as proposed without waiting for sanction. The acknowledgment obviously is intended to be a convenient proof of the receipt of notice or application made to the Collector. The Collector's failure to make an acknowledgment cannot take away the occupant's power to use his land. To hold otherwise would be tantamount to permitting the Collector to make the occupant responsible for his own failure to comply with the law.

The District Judge has in this case been of opinion, on the merits, that the appellant has been harshly treated in the matter of the levy of the fine. This circumstance, however, cannot dispense with the necessity of inquiring into the question whether the appropriation of the land was made before or after the three months' term fixed by law. If it is shown that the occupant-appellant waited for three months and then dug the pits, &c., he would be protected under section 65. If he did not wait for three months, he would be liable to the penalty under section 66. Issues 2 and 3 thus stand good with the slight change suggested below by the fact that no acknowledgment was sent. A reasonable interval over and above the date of the application may be allowed. I would accordingly remand the case for the decision of these amended issues.

Their Lordships thus differing in opinion referred the case to a third Judge under section 575 of the Civil Procedure Code (Act XIV of 1882).

The reference was in the following terms :—

It will be seen from the above judgments that the Court differs in opinion upon a question of law, namely, upon the construction to be placed upon section 66 of the Bombay Land Revenue Code, 1879. Parsons, J., thinks that before a person can appropriate his land to a non-agricultural purpose without incurring the penalty of the fine provided for therein, he must wait for three months from the date of the acknowledgment of the application required to be given by the Collector by section 65 of the same Code, and that it is no defence to plead that the Collector, though he received the application, omitted to send an acknowledgment. Ranade, J., thinks that in a case where the Collector has received the application and omitted to send the acknowledgment, the occupant need only wait three months' time from the date of his sending in his application, and that the Collector could not levy the fine in a case where he has omitted to send an acknowledgment and the occupant has appropriated his land within a reasonable time after the expiry of three months from the date of his applying for permission to so appropriate his land. If the view of Parsons, J., be correct, it will be decisive of the appeal and no further issues need be tried. As we differ on this point, we, under the provisions of section 575 of the Civil Procedure Code, refer the appeal to the learned Chief Justice of this Court.

The case was thereupon referred to Candy, J., who delivered the following judgment :—

CANDY, J. :—I agree with Mr. Justice Parsons that under sections 65 and 66 of the Land Revenue Code, before a person can appropriate his land to a non-agricultural purpose without incurring the penalty of the increased fine described in section 66, he must show that he first obtained the permission of the Collector, or that he waited for three months from the date of the Collector's acknowledgment of his application, the prayer of which has been neither granted nor refused : it is no defence to plead that the Collector, though he received the application, neglected to perform the statutory obligation imposed upon him, *viz.*, to furnish the applicant with a written acknowledgment of the receipt of the application. The law may possibly work harshly; but we sit here to administer the law as it is, not to spell out an enactment which is not on the statute

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book. The acknowledgment (as Mr. Justice Ranade says) is obviously intended by the Legislature to be a convenient proof of the receipt of the application made to the Collector. To prevent disputes as to whether an alleged application was really made or not, the Legislature provides that the applicant cannot take the Collector's silence to mean that the prayer of the application has been granted, unless he obtains the Collector's acknowledgment in writing of the receipt of the application. Such an interpretation is not making the Act absurd by introducing a matter which could never have been within the calculation or consideration of the Legislature. On the contrary, taking the words of the section in their plain ordinary sense, it is, I think, clear that it was within the calculation and consideration of the Legislature that the applicant should be forced to obtain an acknowledgment of the receipt of his application. The Collector could always be made to perform his duty by petition to the Revenue Commissioner or Government.

As to the case of *Thompson* v. *Harvey* [1] cited by the learned counsel for plaintiff, it is only necessary to read the whole judgment of Baron Martin (and not an isolated sentence) to see that the decision in that case in no way conflicts with my interpretation of sections 65 and 66 of the Land Revenue Code.

I would confirm the decree of the lower appellate Court, but under the special circumstances of the case each party should bear his own costs throughout.

(1) (1859) 4 H. and N., p. 254.