1902.

VASUDEV v. BALAJI.

opinion, the Act merely gives legislative expression to what was the law apart from it, so that even without the Act our conclusion would be the same.

It was argued that to hold article 148 not applicable would be to prejudice the plaintiff by an act to which he was no party; but that argument has no force here, inasmuch as the redemption was under a decree passed against both mortgagors.

What considerations would apply if the redemption were without the mortgagor's knowledge, we need not now discuss.

The result is that the decree must be confirmed with costs.

*Decree confirmed.*

## APPELLATE CIVIL.

*Before Mr. Justice Candy and Mr. Justice Fulton.*

1902.
*March* 10.

GORDHANLAL AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DARBAR SHRI SURAJMALJI (ORIGINAL PLAINTIFF), RESPONDENT.*

*Land Revenue—Local Fund Cess—Bombay Act III of 1869, section 8—Liability for Local Fund Cess—Village given by ruling Chief by way of maintenance (jiwak giras), liability to Local Fund Cess of—Superior holder—Voluntary payment of cess by ruling Chief—Claim to recover payments from actual holders of village—Contract Act (IX of 1872), sections 69 and 70—Bombay Local Boards Act (Bombay Act I of 1884)—Bombay Land Revenue Code (Bombay Act V of 1879).*

The plaintiff was the Chief of Patri and the village of Kamijala was one of the villages belonging to the estate. It was held by the defendants, having been granted to their ancestor many years ago by the ancestor of the plaintiff as 'jiwak giras,' *i.e.*, maintenance allotted to the cadets of the ruling family. From the date of the passing of the Bombay Local Funds Act (Bombay Act III of 1869) until 1884 the cess imposed upon this village under that Act was paid to Government by the plaintiff and recovered by him from the defendants. After the passing of Bombay Act I of 1884 (Bombay Local Boards Act) disputes arose as to the plaintiff's right to recover the cess from the defendants. In 1888 the Bombay Government decided that the defendants, and not the plaintiff, were the 'superior holders' of the village and as such responsible to Government for the local fund cess. This view was subsequently confirmed by the Secretary of State. Thereupon the plaintiff filed this suit for a declaration that

* Second Appeal No. 207 of 1900.

the defendants were not the superior holders of the village and had no right to pay the local fund cess direct to Government, but that he was entitled to recover the same from them and pay it over to Government. He also prayed to recover the cess which he had paid for the village from 1888 to 1895 and for an injunction restraining the defendants from paying the cess direct to Government.

*Held*, that the plaintiff was not entitled to the declaration prayed for. The plaintiff was not the 'superior holder' of the village of Kamijala and was not responsible for the local fund cess nor under any liability to pay it. The supreme holders under section 106 of the Land Revenue Code (Bombay Act V of 1879) were the defendants as Bhayats, to whom the village had been granted as 'jiwak giras.' They were primarily responsible to Government.

*Held*, also, that the plaintiff, as Chief of the State, had such an interest in the village of Kamijala as would entitle him to pay the cess to Government if there were any danger of forfeiture in consequence of non-payment by the defendants. In such a case section 69 of the Contract Act (IX of 1872) would enable him to sue for reimbursement. But in the present case it did not appear that any such emergency had arisen or was likely to arise. Section 70 of the Contract Act had no application, for it could not be said that the plaintiff had lawfully made payments for the defendants. He had no authority from them and was under no obligation to pay. The plaintiff was, therefore, not entitled to recover the cess paid from 1888 to 1895 as claimed in the plaint.

SECOND appeal from the decision of Ráo Bahádur Chunilal D. Kavishvar, Additional First Class Subordinate Judge, A. P., at Ahmedabad, amending the decree passed by Ráo Sáheb Harilal Kirparam, Subordinate Judge of Viramgám.

The plaintiff was the Chief or Desai of Patri, whose estate consisted of a group of villages which formed the táluka of Patri, part of which was situate in Káthiáwár, over which part the Desai had jurisdiction, and part in British territory which was subject to the payment of tribute and other charges imposed by law.

The defendants were Bhayats or cadets of the ruling family and held the village of Kamijala, which was part of the Patri State, but which had been granted by an ancestor of the plaintiff to their (defendants') ancestor as 'jiwak giras,' *i.e.*, maintenance allowed to the cadets of a ruling family. The village was in the Ahmedabad District.

By Bombay Act III of 1869 (the Local Funds Act) Government was allowed to levy the local fund cess, and it was subsequently decided that the villages belonging to the Patri State situated

1902.

CORDHANLAL v. DARBAR SHRI SURAJMALJI.

within the Ahmedabad District came within the provisions of the Act.

In practice the village paid the cess to the ruling Chief and he paid it on to Government, and under the provisions of the Act (Bombay Land Revenue Code, V of 1879) the revenue authorities, as occasion required, assisted the Chief to recover the cess from the villages. The local fund cess from the village of Kamijala from 1869 to 1884 was thus paid by the defendants to Government through the Chief (the plaintiff).

In 1884, however, Bombay Act I of 1884 was passed and the defendants then refused to pay the cess through the plaintiff, but offered to pay it to Government direct. A question then arose as to whether assistance should be given to the plaintiff to recover the cess from the defendants, and in April, 1888, the Bombay Government decided that the defendants, and not the plaintiff, were the superior holders of the village of Kamijala, and as such were responsible to Government for the local cess. This decision was subsequently confirmed by the Secretary of State and was communicated to the plaintiff and led to the present suit.

The plaintiff had paid the local fund cess for the whole táluka including the village of Kamijala up to 1895.

In 1895 the plaintiff filed this suit praying (1) for a declaration that the defendants were not the superior holders of the village of Kamijala and that they had no right to pay the local fund cess direct to Government, but that he was entitled to recover it and pay it; (2) to recover the amount which he had paid as cess for Kamijala from 1888 to 1895; (3) for a perpetual injunction restraining the defendants from paying cess direct to Government.

Both the lower Courts decided in favour of the plaintiff.

The defendants appealed.

*Scott* (Advocate General) and *G. S. Rao* for the appellants (defendants):—Our first point is that the Civil Courts have no jurisdiction to hear this suit. Local fund cess is land revenue: see Bombay Revenue Jurisdiction Act (X of 1876), section 4.

The plaintiff is not a superior holder of the village of Kamijala within the meaning of section 8 of Bombay Act III of 1869.

He has only a reversionary right to the village in case of failure of heirs to the defendants. He is not a superior holder within the definition of clause 13 of section 3 of the Bombay Land Revenue Code (Bombay Act V of 1879). The definition in this later Act is narrower than in the former, Bombay Act I of 1865, section 2. The amending Act I of 1884 renders the definition of 'superior holder' and 'tenant' given in Bombay Act V of 1879 applicable to the Local Fund Cess Act (Bombay Act III of 1869).

Further, this suit, which was filed in 1895, is barred by limitation. The plaintiff's claim for a declaration became barred after six years from the denial of his right. We first denied his right in 1885: *Tukaram* v. *Vinayak*.[1]

[CANDY, J.:—Is not the right claimed a recurring right, or may it not be said that the cause of action would arise when the Secretary of State gave his decision as to the person responsible to Government for the cess?]

We submit that this cause of action arose on the first denial of the plaintiff's right: *Parvatsingji* v. *Amarsingji*[2]; *Shrinivas* v. *Hanmant*.[3] This is not a reversionary right. The question is one of status.

As to the plaintiff's claim to recover the money he has paid to Government, that claim is based on sections 69 and 70 of the Contract Act (IX of 1872). These sections, however, do not apply. The plaintiff cannot be said to be interested in the payment of the cess. He cannot recover the amount from the defendant: *Desai Himatsingji* v. *Bhavabhai*[4]; *Nawab Mir Kamaluddin* v. *Partap Mota*.[5]

*P. M. Mehta* and *Inverarity* with Ráo Bahádur *V. J. Kirtikar*, *R. W. Desai* and *L. A. Shah* for respondent (plaintiff):—Admittedly the villages which form part of the State of Patri are entered in the Government records in the name of the plaintiff as Chief. The plaintiff holds them on payment of tribute to Government. The local fund cess is not levied on the particular village, but in respect of the whole estate comprising

(1) (1890) 15 Bom. 422.
(2) (1888) P. J. p. 272.
(3) (1899) 24 Bom. 260.
(4) (1880) 4 Bom. 643.
(5) (1880) 6 Bom. 244.

1902.

GORDHANLAL v. DARBAR SHRI SURAJMALJI.

several villages, of which the village of Kamijala is one. The whole táluka is held by the plaintiff on political tenure. The village of Kamijala is not recognised as separate by Government. It is merely a part of the táluka.

Under Bombay Act III of 1869 the plaintiff was always recognised as the superior holder, both by Government and by the defendants, down to 1884. The amending Bombay Act I of 1884 passed in that year did not alter the meaning of the words in section 8 of Bombay Act III of 1869, and does not make the definition contained in Bombay Act V of 1879 applicable to Bombay Act III of 1869. Nothing has occurred since 1884 to alter the plaintiff's position as superior holder.

The defendants are the plaintiff's Bhayats and Kamijala was merely allotted to them for their maintenance. They are given the revenue of the village, but the village remains part of the estate of which the plaintiff, as Chief, is the holder. In the event of the defendants' family failing, the revenue of the village would revert to the plaintiff.

The definition of 'superior holder' in Bombay Act I of 1865 applies to Bombay Act III of 1869, and makes it clear that the plaintiff is the superior holder and the defendants are his tenants. They are not known to Government and cannot deal with Government direct: *Surshangjee* v. *Naran*.[1]

As to the plaintiff's claim for cess paid by him, it is clear that he is entitled to recover it under sections 69 and 70 of the Contract Act. The Government demanded payment of the cess from him under the usual penalties. He was compelled to pay it and was clearly interested that the payment should be made.

As to limitation, we submit that article 131 of the Limitation Act (XV of 1877) applies: *Ramchandra* v. *Hari*.[2] The cause of action accrued in December, 1890, when the decision of the Secretary of State was communicated to the plaintiff.

As to the point of jurisdiction, section 5 of the Revenue Jurisdiction Act (X of 1876) governs the Civil Court's jurisdiction.

CANDY, J.:—Plaintiff is the Chief of Patri, whose estate is composed partly of villages in British India in the Ahmedabad

(1) (1900) P. J. p. 243. (2) (1895) P. J. p. 193, 194.

District and partly of villages outside British India in the province of Káthiáwár under the supervision of the Political Agent of Káthiáwár. Kamijala is one of the villages in the Ahmedabad District: it has been found by both the lower Courts to form a component part of the Patri State, and to have been granted many years ago by an ancestor of the plaintiff to the ancestors of the defendants as 'jiwak giras,' that is, maintenance allotted to the cadets of a ruling Chief in whose family there is the custom of primogeniture. In this case the defendants set up a plea that the village was their 'jat inami' property, that is, independent of the Patri State; but this fact was found against them by both the lower Courts, and this finding cannot now be questioned: nor is there any reason to doubt the correctness of the finding.

This, then, was the relation between the parties when Bombay Act III of 1869 was passed, empowering Government to levy from all lands the local fund cess. After some time Government decided that the villages forming part of the Patri State within the Ahmedabad District came under the provisions of the Act; and as Kamijala was one of these, and had not been surveyed and assessed on the principles laid down in (Bombay) Act I of 1865, nor had it come under the Summary Settlement Acts, being part of a State held on political tenure, the cess was fixed on the old or *kamal* rate recorded in the Collector's books (section 7, Bombay Act III of 1869).

The cess (section 8) was to be levied in the same manner and under the same provisions of law as the ordinary land revenue; and the provisions of the law relative to the assistance to be given to superior holders for the recovery of their dues from their tenants and occupants under them were to be applicable to all superior holders, whether of alienated or unalienated land, in respect of the recovery of the cess from their tenants and occupants; and were to be applicable also to occupants of land under (Bombay) Act I of 1865 for the recovery of the cess from their tenants or joint occupants. The parties and the Revenue officers for many years read these provisions as providing for the levy of the cess in the first place from the plaintiff, who, in his turn, could obtain assistance in recovering the same from defendants.

1902.

GORDHANLAL v. DARBAR SHRI SURAJMALJI.

It is doubtful whether this view was a strictly accurate interpretation of the Act, which apparently contemplates the holder or proprietor of an alienated village being brought into direct connection with Government in regard to the levy of the cess. Whatever may be the reversionary or other rights of the Chief of Patri over the village of Kamijala, which is a component part of his State, it is obvious that as long as there are descendants of the cadet to whom the village was first allotted in 'jiwai,' the Chief cannot be correctly termed the holder or proprietor of the village. So, too, when we come to consider the revenue law which was in force in 1869, looking at the definition of 'alienated village' in section 2 (*e*) of Bombay Act I of 1865, it must be admitted that Kamijala was 'held and managed' by defendants' family, and not by the Chief. Possibly, the Chief might be considered to be the person having the highest right recognised by the custom of the country which intervened between the Government and the cultivator (Regulation XVII of 1827, section 3 (1)), but defendants never were, and are not, his 'tenants. There is tenure, but not tenancy. By section 2 (*k*) of Bombay Act I of 1865 the definition of 'superior holder' was somewhat changed: he was the person having the highest right under Government recognised by the custom of the country to hold land or engage with Government for the land revenue due on account of any village or estate. But though the Chief of Patri engages with Government for the *tribute* due on his estate as a whole, it cannot be said that tribute is land revenue; and though 'jiwakdars' do in one sense hold under their Chief by a right derived from him, it cannot be said that they hold 'otherwise than by ownership or inheritance.'

The fact is that when (Bombay) Acts I of 1865 and III of 1869 were passed, the Legislature probably had not in view the peculiar incidents of villages held and managed by 'jiwakdars,' whose villages form part of a State under a Chief such as the Desai of Patri. But till 1884 the local fund cess due on the lands of Kamijala was without dispute recovered from the plaintiff.

In 1884 the Bombay Local Boards Act was passed, and by section 75 of this Act an amendment was made in Bombay Act

III of 1869, the words 'Bombay Land Revenue Code, 1879,' being substituted for 'Bombay Act I of 1865' wherever they occur in the Act of 1869. Disputes then arose as to whether assistance was to be given to the plaintiff in recovering the local fund cess from the defendants, and on the 24th April, 1888, the Mámlatdár of Viramgám communicated to the plaintiff the decision of the Bombay Government that the defendants, and not the plaintiff, must be held to be the superior holders responsible to Government for the local fund cess. This view was upheld by the Secretary of State and led to the present suit, in which the plaintiff prayed (1) for a declaration (*a*) that defendants are not the superior holders, (*b*) that defendants have no right to pay the local fund cess direct to Government, (*c*) that he is entitled to recover the same and pay direct to Government; (2) to recover the cess which he had paid for the years 1888 to 1895; (3) for a perpetual injunction directing the defendants not to pay the cess direct to Government.

Both the lower Courts have found that the plaintiff is not entitled to the injunction claimed in prayer (3), and the reasons which govern that decision would seem to bar the relief by way of declaration claimed in prayer (1).

There is no dispute now as to the liability of the lands of Kamijala to the cess, which is an item of land revenue, and the main object of the suit is really to obtain a reversal of the order of the highest authority as to who should be primarily responsible to Government for the cess. It is, no doubt, a claim connected with or arising out of proceedings for the realization of land revenue (section 4 (*c*), Act X of 1876), and it is not a suit between private parties for the purpose of establishing any private right (section 5 (*b*)). No doubt it is a suit between plaintiff, who claims to be a 'superior holder,' regarding dues which he claims from defendants as his 'inferior holders or tenants' (section 5 (*c*)). And assuming for the sake of argument that these 'dues' may include items of land revenue payable to Government, and that thus there is no bar on the ground of want of jurisdiction, we come to the main question involved in this litigation: Is the plaintiff a 'superior holder,' and are the defendants his 'inferior holders or tenants'? He certainly is not an occupant either

1902.

GORDHANLAL v. DARBAR SHRI SURAJMALJI.

generally or under the Bombay Land Revenue law, for he is not in occupation of the land; and the term 'occupant' under the Bombay Land Revenue Code is only applicable to unalienated land. Nor is the plaintiff a 'superior holder' under the Bombay Land Revenue Code. This was held by the Judge in the Court of first instance (last clause of paragraph 54 of his judgment), and the Judge of the lower Appellate Court agreed with this view. In second appeal the learned counsel for the plaintiff argued that his client must be regarded as taking rent from all the villages in his estate and giving it back as 'jiwai' to defendants in the village of Kamijala. This argument is untenable. Defendants are the owners and proprietors of the village, while at the same time it is part of the Patri Táluka.

There only remains, then, the argument set out in the 54th paragraph of the judgment of the Subordinate Judge, Viramgám, and in the 15th paragraph of the lower Appellate Court's judgment. It is briefly that the words 'superior holders' in section 8 of Bombay Act III of 1869 mean superior holders in the wide sense of the term, including a superior lord such as the Chief of Patri, and are not confined to superior holders under the narrow and restricted sense of the term under the Revenue Code. The flaw in this argument is that if paragraphs 1 and 2 of section 8 are dissociated, confusion must arise as to who is liable for the cess. It is to be levied in the same manner and under the same provisions of law as the ordinary land revenue. For that purpose we must look at the ordinary land revenue law, which provides (section 136) that the superior holder (as defined in the Land Revenue Code) shall be primarily responsible to Government for the land revenue of alienated land. But the Subordinate Judge has declared that plaintiff as superior holder, *not* under the Land Revenue Code, but by custom and under Acts prior to and repealed by the Land Revenue Code, is primarily responsible to Government for the payment of this item of land revenue. The 'law' referred to in the second paragraph of section 8 must be the law referred to in the first paragraph: and if this law does not recognise the plaintiff as a superior holder primarily responsible to Government for the cess, it cannot recognise him as entitled to assistance as a superior

holder under section 80 of the Land Revenue Code. The Subordinate Judge was right in holding that the words at the end of the second paragraph of section 8 of Act III of 1869 do not control the preceding portion of the paragraph; but he was wrong in thinking that the word '*all*' before 'superior holders' extends the meaning of the latter term.

For these reasons I am of opinion that the plaintiff is not entitled to the declarations which the lower Courts gave him. He is in no way damnified by this result. His position as Chief of Patri is in no way injured. The land of Kamijala is no more and no less liable for the cess. The fact that in the neighbouring province of Káthiáwár an analogous cess, levied on villages owned by his cadets as 'jiwai,' is taken direct from him and not from the 'jiwakdars,' can have no bearing on the procedure to be adopted by Revenue officers in regard to similar villages in British India.

It only remains to consider prayer (2) of the plaint, the claim to recover the cess which plaintiff has paid for certain years. This to a plaintiff in the Desai's position is a minor consideration, its only importance being in connection with the principle which he has sought to establish in the other prayers of the plaint. It is not explained how the Mámlatdár came to give the notice dated 27th January, 1895 (Exhibit 259). It is apparently admitted that the item of Rs. 1,553-4-0 for local fund in that notice includes the local fund cess due on Kamijala. But it is also admitted that since 1885 Government had ruled that plaintiff was not primarily responsible for the cess and that defendants were always anxious to pay the same. That would have been a complete answer by plaintiff to the Mámlatdár, without prejudice (he might have added) to any right which he might establish in a Court of law to be considered the 'superior holder.' The case is not exactly on all fours with *Desai Himatsingji Jorawarsingji* v. *Bhavabhai*,[1] in which the present plaintiff's brother and predecessor as Desai of Patri claimed, under a notice from the Revenue authorities, to have lawfully paid local fund cess on certain *wanta* lands in a village belonging to his estate. For in that case it would seem that the Revenue authorities had no

(1) (1880) 4 Bom. 643.

1902.

GORDHANLAL v. DARBAR SHRI SURAJMALJI.

knowledge that the Desai was not the 'superior holder' in respect of the *wanta* lands. The present case is even stronger. The notice of the Mámlatdár was obviously given under some mistake. It threatened, in case of default, to take steps to enforce payment according to law; and it was open to plaintiff to reply that, according to the view of the law taken by the Mámlatdár's superiors, payment for Kamijala could not be enforced against the plaintiff. Sections 69, 70 of the Contract Act do not, therefore, apply.

I would reverse the decree of the lower Court; but as defendants' pleas have in a great measure added to the bulk of this case, I would order the parties to bear their own costs in both the lower Courts, and plaintiff to bear all costs in second appeal.

FULTON, J.:—The principal question in this appeal is whether the Desai of Patri or the defendants in respect of their shares are primarily liable to pay the local fund cess for the village of Kamijala. This village is one of a group which together constitute the Táluka of Patri and form the estate of the Desai. Part of the Táluka is situate in Káthiáwár where the Desai has jurisdiction, and part is in British territory where, subject to the payment of tribute and other charges imposed by law, the Desai has full proprietary rights exclusive of such rights as are vested in feudatories or other holders. The defendants are Bhayats or cadets of the ruling family who along with other sharers hold the village of Kamijala by way of 'jiwak giras.' The incidents of this tenure are regulated by custom, and, while not entailing any payment of revenue to the Darbar or involving any service, in all likelihood preserve to the Desai a reversionary interest in case of the termination of the tenure on the failure of heirs qualified according to custom to succeed to the holding.

I should have preferred if this case had come before another Bench, as when the hearing of Mr. Mehta's argument for the respondents was nearly over I discovered that in all probability I must, as officiating Legal Remembrancer to Government, have given an opinion on this dispute in the early months of 1888. Of the details of that opinion I have no recollection, and on my mentioning the matter the counsel on either side elected to go

on with the argument. It would have been more satisfactory if the case had come before another Bench, but as the question now at issue is simply one of the application of certain sections of the law, I think I can give an opinion quite independent of any I may have formed fourteen years ago.

It now seems to me that the matter, so far as concerns the question of the general right of the Desai to pay the local fund cess to Government and recover the amount from the Bhayats, depends on the proper interpretation of section 8 of Bombay Act III of 1869. The section is as follows :

> The cess described in sections 6 and 7 shall be levied in the same manner, and under the same provisions of law, as the ordinary land revenue and through the agency of such officers as shall from time to time be appointed for the purpose by the Collector acting under the general control of Government or of the Commissioner of the division or other officer from time to time duly empowered on that behalf by Government.
>
> The provisions of the law relative to the assistance to be given to superior holders for the recovery of their dues from their tenants and occupants shall be applicable to all superior holders ..... in respect of the recovery of this cess from their tenants and occupants and shall be applicable also to occupants of land under the "Bombay Land Revenue Code, 1879," for the recovery of this cess from their tenants or joint occupants.

The words in inverted commas have been substituted for "Bombay Act I of 1865" by section 75 of Bombay Act I of 1884, which, while declaring in section 3 that any word or expression which is defined in the Bombay Land Revenue Code, 1879, and is not hereinbefore defined shall in this Act be deemed to have the meaning given to it by that Code, does not purport to affect the meaning of words used in Bombay Act III of 1869, which consequently bear the same meaning now as they did when the Act of 1869 was passed.

But granting that the words 'superior holder' and the word 'tenant' in section 8 of the Act of 1869 still bear the meaning assigned to them by Bombay Act I of 1865, inasmuch as it is reasonable to hold that the phraseology of the Act of 1869 was intended to be the same as that of the Act of 1865, and assuming that in these circumstances the terms 'superior holder' and 'tenant' in section 8 are applicable respectively to the Desai of Patri and the Bhayats of Kamijala (an assumption by no means

1902.

GORDHANLAL v. DARBAR SHRI SURAJMALJI.

free from doubt), it does not follow that the Desai can recover from the Bhayats the local fund cess which he may have paid on account of this village. The second clause of section 8 of Act III of 1869 appears to me merely to prescribe a procedure whereby a superior holder can recover from his tenants cess leviable from and paid by the superior holder. In order to ascertain whether the cess is leviable from the Desai we must turn to the first sentence of section 8: "The cess described in sections 6 and 7 shall be paid in the same manner *and under the same provisions of law as the ordinary land revenue.*" The words which I have italicised are the only indication of the person liable to pay the cess to Government, and import into the matter section 136 of the Land Revenue Code which declares by whom the land revenue is payable. The first clause of this section provides that "the registered occupant shall be primarily responsible to Government for the land revenue of unalienated land and the superior holder shall be primarily responsible to Government for the land revenue of alienated land." The second clause enables Government, on failure of the person primarily responsible, to recover from co-sharers, inferior holders, or persons in actual occupation of the land. But in section 136 the term 'superior holder' bears the meaning assigned to it by section 3 of the Land Revenue Code and is applicable to the Desai of Patri, who is not entitled to receive rent or land revenue from the Bhayats of Kamijala on account of lands held by them. Consequently it seems impossible to hold that under the existing law the Desai is responsible for the local fund cess. He was, therefore, in my opinion, under no legal liability to pay it. The superior holders within the meaning of section 136 are the Bhayats to whom the village has been granted for 'jiwak giras.' They, therefore, were primarily responsible to Government. The decision in *The Secretary of State for India* v. *Balvant Ramchandra* [1] in reference to the position of an Inamdar has no bearing on the present case.

The result is that although, as pointed out in *Ranga* v. *Suba Hegde* [2] and *Ram Tukoji* v. *Gopal Dhondi*, [3] the second clause

(1) (1892) 17 Bom. 422.

(2) (1880) 4 Bom. 473.

(3) (1892) 17 Bom. 54.

of section 8 of Bombay Act III of 1869 indicates the intention of the Legislature to make tenants and occupants ultimately liable for the cess, as expressed more clearly (as pointed out by Mr. Justice Jardine[1]) in reference to other cesses by section 50 of the Land Revenue Code, it would be unreasonable to hold that it conferred on 'superior holders' the right of recovery except in cases in which they were legally bound to pay and had paid. Consequently I think that section 8 imposes no liability on the Bhayats to reimburse the Desai on account of payments which he may voluntarily have made.

It is unfortunate that in consequence of a change in the law a practice should have been altered which appears to have been accepted without objection by the parties from 1869 till the passing of Bombay Act I of 1884. But it is to be hoped that both the Darbar and the Bhayats will understand that no question of dignity is involved. The local fund cess, though for convenience collected by officers of Government, is payable not to Government but to a local body for local purposes, like a municipal rate which is usually leviable in the first instance from the occupant. It is in no sense indicative of the relation which the person paying it bears to the Government of the Crown. It will, of course, be remembered that no question of custom arises. The position of the Bhayats to the Darbar is one of feudatory subordination, but like all other subjects of the Empire they are liable to pay such local cesses as may from time to time be imposed by law. It has not been shown that before 1869 it was customary for the Bhayats to contribute to any payments which the Darbar made to Government by way of tribute or otherwise. It is impossible, therefore, to appeal to custom for the determination of a question which can only be decided according to the terms of the Act. The cess is a new one and is leviable in accordance with the provisions of the law by which it was imposed and not otherwise. For the future I think it would be most satisfactory, unless the Bhayats should voluntarily consent to pay their cess through the Darbar, if the Revenue officers were to arrange to collect it from the Bhayats and should merely give notice to the

(1) (1892) 17 Bom. at p. 55.

1902.

GORDHANLAL v. DARBAR SHRI SURAJMALJI.

Darbar in case at any time owing to payment being withheld the tenure of the village was imperilled.

The only question now remaining for consideration is whether the Darbar having actually made payment under notice in respect of the years in suit can recover under the provisions of section 69 or section 70 of the Indian Contract Act.

I have no doubt that the Desai has such an interest in the village of Kamijala as would entitle him to make payment if there were any danger of forfeiture in consequence of non-payment by the Bhayats. In such circumstances section 69 would enable him to sue for reimbursement. But in the present case it does not appear that any such emergency had arisen or was likely to arise. The mere service of a notice on the Darbar did not create it. Apparently the Bhayats were anxious to pay. Consequently it cannot, I think, be said that circumstances had arisen which gave the Darbar an interest in the payment of the money. Such interest would only come into existence when a reasonable probability existed of injury to the Patri State if payment were not made by the Darbar. Such probability is not proved in the present case and is clearly absent, as the Bhayats were always willing to pay. Consequently, much as I regret that we cannot decree repayment to the Darbar, there seems no means of doing so. Section 70 has, I think, no application, for it cannot be said that the Darbar lawfully made payment for the Bhayats. It had no authority from them and was under no legal obligation to pay.

I think, therefore, we must reverse the decrees of the Courts below and dismiss the claim. I concur in the order as to costs proposed by my learned colleague.

*Decree reversed.*