as is suggested, that appeal is one which, notwithstanding the lapse of time, can with propriety be prosecuted, then our present confirmation of the decree of the first Court must be without prejudice to it.

Decree of the first Court restored.

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SATYABHAMABAI v. GANESH BALKRISHNA.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

KALABHAI BAPUJI CHUDASAMA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

1904. *July* 6.

Bombay Revenue Jurisdiction Act (X of 1876, as amended by Act XVI of 1877), section 4—"Any other written grant"—Land free from assessment —Treaty—Civil Courts—Jurisdiction—Specific Relief Act (I of 1877), section 42—Suit for declaration—Consequential relief—Amendment of plaint —Construction of documents.

In section 4 of the Bombay Revenue Jurisdiction Act (X of 1876), the clauses (*h*), (*i*), (*j*) and (*k*) are independent of one another: the source of title referred to in each stands apart from the rest and each clause is connected only with that portion of the proviso which precedes clause (*h*). The expression "any other written grant" in clause (*j*) therefore means any written grant other than that which falls within clauses (*h*) and (*i*) of the section.

The term "treaty" in section 4 (*a*) of the Act is not to be broadly construed but is to be confined in its interpretation to its accepted meaning, *i.e.*, an agreement between two or more independent sovereign powers or states.

Generally speaking the name given by the parties to a document is not conclusive as to its nature; but the designation given by the parties themselves to it cannot be lost sight of where the document is ambiguous and is susceptible of more than one construction as to its nature and scope.

The effect of the amendment by Act XVI of 1877 is that nothing in section 4 of the Bombay Revenue Jurisdiction Act (X of 1876) shall be held to prevent the Civil Courts in the Districts mentioned in the second schedule annexed to that Act from exercising jurisdiction over claims against Government to hold lands wholly or partially free from payment of land revenue.

The plaintiff filed a suit against the Secretary of State for India in Council for a declaration that they were entitled to hold certain lands free from assessment. The defendant objected that the suit was barred under section 42 of the Specific Relief Act (I of 1877). After the settlement of the issues in the

* Appeal No. 104 of 1903.

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case, the plaintiffs applied for leave to amend the plaint by adding thereto a prayer for injunction by way of consequential relief. The lower Court refused to grant the prayer.

Held, that the lower Court should have exercised its discretion in plaintiffs' favour although the prayer for amendment was made very late, as it was a mere matter of form which could not affect the merits of the claim or transform the nature of the suit.

APPEAL from the decision of S. L. Batchelor, District Judge of Ahmedabad.

Suit for a declaration.

The plaintiffs' case was that they were the original independent full owners of the lands in Dholera, a town in the Ahmedabad District, and had enjoyed such ownership since a date prior to the advent of the British rule. In spite of this circumstance the Secretary of State for India in Council (defendant 1) on the 24th August, 1888, declared that in respect of 2,925 acres of the said lands the plaintiffs were liable to pay assessment and on that date recovered the assessment. Again, in March, 1897, the plaintiffs were further held liable to pay the local fund cess at one anna per rupee on the aforesaid assessment. The plaintiffs, therefore, sued to obtain a declaration that they were entitled to enjoy the produce of the lands in the *sim* or boundaries of Dholera without paying summary settlement assessment, local fund cess, or any other tax or rate to the Government. In support of their claim the plaintiffs relied upon documents Exhibits 51 and 52.

The Secretary of State for India in Council (defendant 1) contended, *inter alia*, that the suit was barred by section 42 of the Specific Relief Act (I of 1877) inasmuch as plaintiffs had omitted to claim any consequential relief; and that it was barred also by clauses (*a*) and (*f*) of section 4 of the Bombay Revenue Jurisdiction Act (X of 1876) inasmuch as the suit concerned lands held under treaty and the claim was to hold land free from the payment of land revenue. In support of their contention that the lands were held under a treaty, the defendant relied upon a document Exhibit 53, which ran as under :—

Articles of agreement entered into by the Honourable Company and the Churassama Grassias Manabhoy Gorbhoy, etc., Proprietors of the village of Dholera, Port and village of Ratallow, Bhimtallow, etc., concluded with this day at Baroda, 14th December, 1806, corresponding with Margasheer Sood 4th, 1863

The Honourable Company having by the Treaty of Bassein acquired the Sovereignty of the Purgunnah of Dhunduka and being desirous of improving the natural advantages of the Port of Dholera, we do hereby consent to relinquish to the Honourable Company all the rights, titles, and interest which, as the hereditary Grassia Proprietors, we claim or possess on the villages or sites of the villages under the denomination of Dholera, Rattallow, Bhimtallow and Bhangur, together with all the ground, the Fees, Veyras, Customs, Wrecks, Collections or imports (with the exception hereafter mentioned from whatsoever source arising); further engaging to relinquish all right of control or interference in the above possessions with their management or Inhabitants. The Grassias are still to be permitted to cut as much grass as they may require for their own use but not for the purpose of sale; they are also exempted from the payment of Customs on the export of the produce of their own estate or on the imports for their own private use.

In consideration of the Honourable Company extending to us their full protection and support against all acts of tyranny, violence and oppression, we do hereby engage to submit to the Laws and Regulations of the Company's Government, and to the orders of their servants in authority, and will, in the case of any injury to ourselves, our families and property, proceed and make regular complaint of the same to the regular local authority.

A certain quantity of arable ground being necessary for our subsistence or Jevai, the Company will consent to our retaining to the amount of 6,000 bighas, which ground shall be measured off and left at our disposal, either by sale, mortgage, bequest or other regular course of alienation.

In consequence of the total surrender of all our rights in the villages and dependent ports above enumerated, we are to receive from the Honourable Company one-third share of the grass produce of the place, which, placing the utmost confidence in the Justice of the Honourable Company, we do also engage shall be receivable according to their calculation, disclaiming all and every Right of Inspection in the accounts above specified as payable to us, shall be paid to ourselves individually or to our duly authorized agents, and in the proportions specified in the accompanying schedule to which our signatures are affixed.

This mode of payment to have effect from the commencement of the year Samvat 1863 (1806-07), and to continue so long as the Honourable Company shall continue their colours at the Port of Dholera.

The Grassia Proprietors of Dholera are permitted to have a Mehta to attend at the several offices of collection to take care of their private affairs, but it is to be understood that this Person is to have no control or authority.—Done this day at Baroda, 14th December, 1806, corresponding with Margasheer Sood 4th, Samvat 1863.

(*Signed*) L. R. REID,
Secretary to Government.

(True Copy.)
A. STEWART,
Assistant Collector of Customs in Gujarát.

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By consent the case was fixed for hearing on the preliminary points involving the said defences before any evidence was recorded. On the date of the hearing thus fixed, after the settlement of issues, the plaintiffs put in an application praying for leave to amend the plaint by the addition of prayers for a permanent injunction and for a recovery of the assessment and cess which had been levied on the lands during the pendency of the suit. The District Judge refused the leave prayed for.

The District Judge then dismissed the plaintiffs' suit, holding that it was barred by section 42 of the Specific Relief Act, as well as by clause (*a*) of section 4 of the Bombay Revenue Jurisdiction Act, on the ground that Exhibits 51, 52 and 53 were treaties, and by clause (*f*) of the same section. His reasons were :—

"Passing to the second issue, I am concerned, first, with section 4 (*a*) and secondly with section 4 (*f*) of the Revenue Jurisdiction Act. Of section 4 (*a*) it is the fifth or last paragraph which is relied on by the defendant. This paragraph bars the Civil Court's jurisdiction in "claims against Government relating to lands held under treaty." In my opinion this suit falls under the bar. In his argument now Mr. Someshwar endeavours to escape the prohibition by arguing that plaintiff's title depends not only on treaties with the British Government, but on Inam grant from a preceding Government. But no documentary or other foundation is suggested for this contention, and in the plaint the agreements of 1807 and 1808 are recited as the supports of plaintiff's case. Now these agreements (Exhibits 51, 52) and the other agreement of 1806 (Exhibit 53) are, I think, clearly treaties within the meaning of the section. The fundamental document, Exhibit 53, . . . cannot, in my opinion, be construed otherwise than as a treaty between the Government and the Girâssias of Dholera. Looking at these documents and at the wording of the plaint, I am driven to the conclusion that what plaintiffs complain of is that the Government has not kept faith with them in respect of the lands assigned to them by treaty. But that is a grievance, which I apprehend, this Court has no jurisdiction to investigate.

Further I think the suit is also barred under section 4 (*f*) of the same Act, which, subject to certain exceptions, prohibits the entertainment of "claims against Government to hold land wholly or partially free from payment of land revenue." I can only refer to the plaint itself in proof that this is such a claim. What plaintiffs seek is "a declaration that we, the plaintiffs, are entitled to enjoy the produce of the lands in the *sim* (limits) of Dholera without paying the summary settlement, the local fund cess, or any kind of assessment to Government." . . . It is sufficient for me, in this suit, that the plaintiffs make against the Government a claim to hold the lands in suit free from payment of land revenue, and such a suit cannot be tried in this Court. It is sought to

save the suit by pleading clause (*j*) of section 4, which enables the Courts to entertain claims to hold land rent-free when the claim is based upon "any other written grant by the British Government expressly creating or confirming such exemption." The words "such exemption" must refer back to clause (*h*), which provides for the entertainment of claims to hold land rent-free when the claims are based upon any enactment for the time being in force expressly creating an exemption not before existing in favour of an individual or of any class of persons, or expressly confirming such an exemption on the ground of its being shown in a public record, or of its having existed for a specified term of years. It is suggested that Exhibits 51, 52 and 53 are such "written grants by the British Government," as are contemplated in clause (*j*). But the suggestion appears to me untenable. For these documents are, as I have said, treaties of the character referred to in clause (*a*); certainly they are not grants, creating or confirming an exemption which has been created or confirmed by an enactment. Admittedly there is no enactment which has any bearing upon the question of plaintiffs' claim to hold the lands in suit free from the payment of land revenue. I find, therefore, that the suit is barred also under section 4 (*f*) of this Act."

The plaintiffs appealed to the High Court.

Sir Pherozeshah M. Mehta (with him *Lallubhai A. Shah*), for the appellants (plaintiffs) :—The lower Court is wrong in holding that the suit is barred by section 4, clause (*a*), of the Bombay Revenue Jurisdiction Act (X of 1876) as it relates to lands held under treaty. But a treaty can only be between two independent states signed by or on behalf of their sovereign authorities (Encyclopædia of the Laws of England, Vol. XII, p. 270). The lands in question were held by the plaintiffs who were Girássias of Dholera; and the paramount power in the beginning of the last century was the Peishwa. Now the Peishwa as a paramount power can cede only their own territories: they cannot cede any territory belonging to a Chief under their protection. The sovereign power over the lands in suit rested with the Peishwa till 1802, when it passed to the British Government under the Treaty of Bassein. The plaintiffs were simply Girássia proprietors. Hence the agreements evidenced by Exhibits 51, 52, 53, which were come to between the Girássia proprietors and the British Government cannot in strict parlance be called treaties. Exhibit 53 should not have been admitted in evidence as it is not a duly authenticated copy of the original. But apart from that objection, the said Exhibit is simply in the nature of a *bandobast*.

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These articles of agreement (Exhibit 53) do not find a place in Aitchison's Collection of Treaties, Sanads, &c., which contains a complete collection of all treaties and engagements. This fact shows that the Government did not regard Exhibit 53 as a treaty. Further the conduct of Government shows that they could not have regarded it as a treaty. The lands in dispute were, as a matter of fact, brought under summary settlement; which they would not have done had they regarded the lands as treaty lands. See the Bombay Summary Settlement Act (Bombay Act VII of 1863), section 2, clause 4. Exhibits 51 and 52, we submit, are not treaties in any sense of the term.

Then as to clause (*f*) of section 4 of the Bombay Revenue Jurisdiction Act (X of 1876), we submit that the lower Court has gone wrong. We rely upon the exception mentioned in clause (*j*) of section 4 of the Act. The lower Court is wrong in connecting the said clause (*j*) with clause (*h*) which, we submit, is quite independent of it. Besides the effect of clause (*f*) is completely nullified by the amending Act XVI of 1877, which restores the jurisdiction of the Civil Courts taken away by the principal Act X of 1876. Having regard to the history of this legislation as also to the case of *Government of Bombay* v. *Haribhai Monbhai*[1], it is quite clear that the Legislature has removed the bar created by the principal Act to the jurisdiction of the Civil Courts to the extent mentioned in the amending Act. This amending Act does not seem to have been brought to the notice of the lower Court. We submit that this is a suit for a declaration that the lands in dispute are wholly exempt from the payment of land revenue, and as such within the jurisdiction of the Civil Courts.

Lastly the lower Court is wrong in holding that the claim is barred by section 42 of the Specific Relief Act (I of 1877). In the plaint we have not asked for arrears and the Judge therefore thinks that we have failed to seek further relief open to us. We are not bound to ask for arrears and no consequential relief appears to be necessary. See *Kunj Bihari* v. *Keshavlal*[2]. The lower Court should not have dismissed our suit; but, in any event, it ought to have allowed us to amend our plaint. The

(1) (1875) 12 Bom. H. C. R. 225 (Appx.).
(2) (1904) 28 Bom. 567 : 6 Bom. L. R. 475.

date on which we applied for amendment was the day on which the case was fixed for the first time by consent. The amendment prayed for is only formal and does not in any way change the character of the suit. There was no desire to save any Court-fees and the lower Court has been erroneously influenced by that consideration in refusing leave to amend.

Scott (Advocate General) with the Government Pleader, for respondent No. 1 (defendant No. 1):—There is no doubt that the plaintiffs sued only for a declaration: they could have also sued for the arrears which were illegally exacted from them and could have asked for an injunction. Without a prayer for some consequential relief no declaration can be granted. The case of *Kunj Bihari* v. *Keshavlal*[1] has no application here. If no declaration can be made in the absence of consequential relief, the effect is that the suit must fall to the ground. As regards the amendment, the application for amendment was made in March, 1903, though the issues were settled in October, 1902; and the case came before the Court for various purposes several times before the date of the application. The Court had the power to deal with the application and has rejected it in the exercise of its discretion.

Then as regards the question whether Exhibit 53 is a treaty, it should be remembered that the plaintiffs base their claim to hold the lands exempt from land revenue under Exhibits 51 and 52. The principal document however is Exhibit 53. The definition of treaty as laid down in the Encyclopædia of the Laws of England has no application here. There might have been many *bandobusts* in the earlier part of the last century in India, and though they might not have been entered into by independent sovereign powers they may yet be treaties for the purpose of Indian Legislature. If the test laid down in the Encyclopædia of the Laws of England were strictly applied, then many of the treaties in Aitchison's Collection would disappear. The position of the *Girássias* was not simply that of private proprietors but they were in a sense in the position of the Sovereign of the villages held by them, while the Peishwa had only a shadowy suzerainty over them. See the Ahmedabad Gazetteer, page 143

(1) (1904) 28 Bom. 567: 6 Bom. L. R. 475.

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Forbe's Rás Málá, Chapter VII, page 414; Colonel Walker's Report on the Province of Gujarát, Government Selections, Volume XXXIX, section 50. The arrangement evidenced by Exhibit 53, therefore, clearly falls within the purview of section 4, clause (*a*), of the Bombay Revenue Jurisdiction Act (X of 1876); and the lands in dispute are either held under treaty or under political tenure.

As regards clause (*f*) of section 4 of the Act and the effect of the amending Act (XVI of 1877), the arguments on the other side appear to be correct.

Sir Pherozeshah M. Mehta, in reply:—The word "treaty" should be strictly construed since it appears in an Act which restricts the jurisdiction of the Civil Courts.

The Peishwa had not a shadowy suzerainty, but real sovereignty with power to cede territory over the territories including the Dholera territory. See the valuation of the territory as given in the Treaty of Bassein.

CHANDAVARKAR, J.:—The District Judge has dismissed the suit, out of which this appeal has arisen, on several grounds, one of which is that the suit is barred under section 4, clause (*f*), of the Bombay Revenue Jurisdiction Act. Subject to certain exceptions that section ousts the jurisdiction of Civil Courts as to claims against Government to hold lands wholly or partially free from payment of land revenue. The exceptions are enumerated in the proviso to the section, and one of those exceptions which was relied upon by the plaintiffs before the District Judge is contained in clause (*j*). It relates to "any other written grant by the British Government expressly creating or confirming such exemption," *i.e.*, any written grant other than that which falls within clauses (*h*) and (*i*). But the District Judge construes clause (*j*) as referring to such exemption as is mentioned in clause (*h*).

We think the District Judge is wrong, because clauses (*h*), (*i*), (*j*) and (*k*) are independent of one another; the source of title referred to in each stands apart from the rest and each clause is connected only with that portion of the proviso which precedes clause (*h*). The words "such exemption" in clause (*j*) obviously refer to the exemption mentioned in that portion. As the learned Advocate

General has conceded this point in favour of the plaintiffs (appellants) it is not necessary to pursue it further.

The next point on which the District Judge has dismissed the suit is that in his opinion the plaintiffs' claim relates to "lands held under treaty," and is, therefore, barred under the fifth paragraph of section 4 of the Bombay Revenue Jurisdiction Act. The determination of this point depends upon the question whether the plaintiffs' muniments of title (Exhibits 51 and 52 produced by the plaintiffs and Exhibit 53 produced by the defendant) can be regarded as treaties. Of these three documents the District Judge has held Exhibit 53 to be the most important as being "the fundamental document." And to it the learned Advocate General has mainly confined his argument in support of the District Judge's view. That argument is that though before the execution of Exhibits 51, 52 and 53 the British Government had concluded the Treaty of Bassein with the Peshwa with reference to territories under the latter's sovereignty, including the villages now in dispute, yet the Peshwa's suzereinty was of a shadowy character, the real sovereignty being vested in a body of persons called the Girássias, now represented by the plaintiffs. The agreement, therefore, between the British Government and the Girássias is, according to the argument, a treaty. It must be remembered at the outset that we are dealing with the question of the Civil Courts' jurisdiction and we must interpret section 4 (*a*) strictly, taking care not to lean to a construction shutting out a party from his right to resort to the Civil Courts, unless the section clearly ousts the Court's jurisdiction. We cannot accept the broad interpretation which we are asked to put on the word treaty, when that word is not defined in the Act itself and when the accepted meaning of it is an agreement between two or more independent sovereign powers or states. It may be that the Peshwa's sovereignty was of a shadowy character over the territories which included the villages now concerned, but the question is—do the documents themselves show that the parties dealt with each other as independent sovereign powers and were entering into a treaty or treaties? Exhibit 53 recites the fact of the Treaty of Bassein. That is a circumstance which shows that the parties knew what a treaty meant, that in fact they were aware of its distinctive meaning, they having

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before them the Treaty of Bassein entered into between the Honourable East India Company and the Peshwa. Had they intended this document (Exhibit 53) also to be a treaty, *i.e.*, had the British Government been dealing and intended to deal with the Girássias as a body regarded as an independent sovereign power, they would have taken care to describe the document as a treaty instead of terming it "articles of agreement" which is the designation given to it at the very commencement. It is true that, generally speaking, the name given by parties to a document is not conclusive as to its nature, but the designation given by the parties themselves to it cannot be lost sight of where the document is ambiguous and is susceptible of more than one construction as to its nature and scope. When we find that the word "treaty" is used in Exhibit 53 with reference to another document, whereas Exhibit 53 itself is termed an agreement, it is a legitimate inference to draw that the latter designation was adopted deliberately to mark the difference between *a treaty* and this particular document. Further the document goes on to recite that the sovereignty of these villages had already passed into the hands of the Honourable East India Company from the Peshwa by the Treaty of Bassein. That has no other meaning than that the East India Company had acquired the sovereign power and were dealing with the Girássias as a body of persons brought within their subjection. We think, therefore, that there is no substance in the argument that these documents, Exhibits 51, 52 and 53, are treaties between the East India Company and the Girássias.

But apart from that, it does not appear that Act XVI of 1877, amending the Bombay Revenue Jurisdiction Act X of 1876, was brought to the notice of the District Judge. According to that amendment nothing in section 4 shall be held to prevent the Civil Courts in the districts mentioned in the second schedule annexed to that Act from exercising jurisdiction over claims against Government to hold land wholly or partially free from payment of land revenue. Ahmedabad (of which the villages in dispute form a part) is one of the districts mentioned in the schedule. Even assuming, then, that Exhibits 51, 52 and 53 are treaties, under the Amending Act of 1886, section 4 of the original Act does not apply to them and bar the jurisdiction of a Civil Court.

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The last point on which the District Judge dismissed the claim is that the suit being merely for a declaration could not lie. The plaintiffs seek for a declaration that they are entitled to enjoy the lands without paying the summary settlement, the local fund cess or any kind of assessment to Government; they have not asked for any consequential relief by way of injunction which they could have claimed. We agree with the District Judge that the suit in the form in which it was brought was bad, but we think that when the plaintiffs asked to be allowed to claim relief by way of injunction also, the District Judge should have exercised his discretion in their favour although the prayer for amendment was made very late. It was a mere matter of form which could not affect the merits of the claim or transform the nature of the suit. The plaintiffs were no doubt responsible for asking for the amendment at a late stage, but for that they should have been made to bear the costs up to the date of the application.

The amendment asked for should be allowed, the plaintiffs paying the costs up to the date when they made the application for amendment to the lower Court.

We reverse the decree of the lower Court and remand the suit for a decision on the merits.

Costs, except those mentioned in the judgment with reference to the amendment, to be costs in the cause.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

LAKSHMISHANKAR DEVSHANKAR (ORIGINAL SURETY), APPELLANT, *v.* RAGHUMAL GIRDHARILAL (ORIGINAL PLAINTIFF), RESPONDENT.*

1904. *July* 12.

Civil Procedure Code (Act XIV of 1882), section 253—Decree—Execution—Surety—Notice to the surety—Court executing the decree can give the notice.

The intention of section 253 of the Civil Procedure Code (Act XIV of 1882) is that when a person has made himself liable as a surety for the performance

* Second Appeal No. 758 of 1903.