

## APPELLATE CIVIL.

Before Mr. Justice Chandawarkar and Mr. Justice Haycraft.

1911.

July 17.

HAJI ABDULLA HAJI SUMAR (ORIGINAL PLAINTIFF), APPELLANT, v.  
THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL  
DEFENDANT), RESPONDENT.\*

*Bombay Land Revenue Code (Bom. Act V of 1879), section 3, clause (19)(i)—  
Village of Ghatkooper—Kowl (lease) for 99 years—"Alienated" village—  
Agricultural lease—Buildings erected by occupiers on their respective  
lands—Extra assessment levied by Government—Right to levy extra assess-  
ment not parted with under the kowl.*

The *kowl* (lease) of the village of Ghatkooper in the Thana District granted by Government on the 31st December 1845 for 99 years provided *inter alia* that the grantee should pay to Government annually a fixed sum with respect to the land which had already been under cultivation and "that as to waste lands, the grantee should bring them all into cultivation within 40 years and on the expiration of that period the full assessment, according to the prevailing usage of the country should be collected annually from the grantees on such land as might be under cultivation as well as on such quantity as might remain waste out of the present waste, entered in the public accounts." The *kowl* further provided that "In respect of the abovenamed village you (grantee) are to consider yourself as a farmer thereof. You are therefore to exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827 or such as may hereafter be vested in them by any new enactment, shall also be exercised by you, and in the event of your acting contrary to the abovesaid enactments, you will be subject to such penalties as are now or may hereafter be provided for by Regulations."

Subsequently some of the occupants of the village having built upon their respective lands, Government levied extra assessment from them under the provisions of the Bombay Land Revenue Code (Bom. Act V of 1879). The grantee under the *kowl* himself claimed the right to levy extra assessment on the ground that the village was an "alienated" village within the meaning of clause (19) of section 3 of that Code and was, therefore, not liable to the provisions of the Code. He, therefore, applied to Government for a refund either wholly or in part of the extra assessment collected by them and the

\* First Appeal No. 33 of 1910.

(1) Section 3, clause (19) of the Bombay Land Revenue Code (Bom. Act V of 1879).  
3. In this Act, unless there be something repugnant in the subject or context—

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(19) "Alienated" means transferred in so far as the rights of Government to payment of the rent or land-revenue are concerned, wholly or partially, to the ownership of any person.

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Government having refused to grant his request, he brought a suit against the Secretary of State for India in Council praying (1) for a declaration that (a) the extra assessment imposed by the defendant upon lands appropriated for building sites in the village was illegal, (b) the Bombay Land Revenue Code (Bom. Act V of 1879) was not applicable to the village, and (c) the resolution of Government to the effect that the *kowl* was agricultural was erroneous, (2) that the defendant be restrained by a permanent injunction from levying the extra assessment, (3) that in the event of its being found that the Government were entitled to levy the assessment, it be declared that the plaintiff was entitled to receive the same, and (4) that the amount, if any, received by the defendant on account of such assessment be awarded to him.

The Court dismissed the suit.

*Held*, on appeal, that having regard to the terms of the *kowl*, it was a lease of the revenues of the village on certain conditions. The object of the lease was agricultural and Government never parted with their rights so far as the right to build was concerned.

The *kowl* was no more than a lease. The Government parted with their rights as lessors in favour of the grantees as lessee and imposed upon him certain conditions, none of which brought the contract within the definition of the term "alienated" village in clause (19) of section 3 of the Bombay Land Revenue Code (Bom. Act V of 1879).

The clause in the *kowl*, that the grantee was to consider himself a farmer of the village and was to "exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827 or such as may be hereafter vested in them by any new enactment shall be exercised by you and you will be subject to such penalties as are now or may hereafter be provided for by Regulations," brought the village within the operation of the provisions of the Bombay Land Revenue Code (Bom. Act V of 1879).

FIRST appeal from the decision of P. J. Taleyarkhan, Joint Judge of Thana, in Original Suit No. 15 of 1908.

On the 31st December 1845, J. S. Lamb, who was then the Acting Collector of Thana, granted to one Ruttonji Edalji Parsee a *kowl* (lease) of the village of Ghatkooper in the Thana District for the period of 99 years. Under the *kowl* that grantee was to pay to Government annually Rs. 1,135-14-7, and it provided *inter alia* as follows :—

2. The waste land of the village, including Jungligurk, Nallagurk and Nowsad, etc., is hereby granted to you in *masl* for 40 years from 1844-45. You are to make the necessary outlay and bring it under tillage, out of the sweet waste land, one-fourth within the term of ten years from the date hereof; and

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you should, in the same manner, continue to do so every ten years, so as to bring the whole of it under tillage within that period, in failure whereof, the produce of the hay amounting to Rs. 27 herein deducted, will be collected from you from the first to the last year of the exemption. You are to prepare the salt land for cultivation within five years from 1844-45, but if you fail to do so, a fine of five hundred rupees (Rs. 500) will be imposed on you, and after the expiration of 40 years, the full assessment according to the prevailing usage of the country will be collected annually from you on such land as may be under cultivation as well as on such quantity as may remain waste out of the present waste entered in the public accounts.

6. The rights of the present proprietors of land and other privileges of any description whatever, remain unaffected by this lease. It is clearly to be understood that this lease confers no right which Government does not now possess, and only such portion of the rights of Government as may be herein specifically granted is hereby granted to you.

8. Should a survey be made and a new assessment be introduced in the district, the same will also be done in your village; the land, etc., which has been granted to you free from assessment will, however, remain uninterfered with till the period of exemption has expired, when the rates will be levied.

10. You are to pay all Devasthans and Dharmadaya allowances to those who have hitherto enjoyed them, and also to continue all emoluments, rights, etc., hitherto held by the Patels and village officers according to established usage. Should any complaint be made to Government on the subject, you are to act according to its order. If on any account the payment to the parties of any of the above allowances should be stopped the amount should be paid by you to Government.

12. In respect to the abovenamed village, you are considered farmer thereof; you are therefore to exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827, or such as may hereafter be vested in them by any new enactment shall also be exercised by you, and in the event of your acting contrary to the abovesaid enactments, you will be subject to such penalties as are now or may hereafter be provided for by Regulations.

16. For breach of any of the conditions of this lease for which a specific penalty has not been laid down, Government is at liberty to inflict such punishment as may be provided by Regulations, and to cancel the lease and resume the village without reimbursing you for any expense you may have incurred. No claim for losses will be attended to.

18. Should you wish to sell or transfer the said village in any way whatever to any other person, you are to apply to Government for permission to do so, and if the person to whom you may wish to transfer the above village shall be approved of by Government, it will grant you such permission, and you are then at liberty to transfer it to him. The farm of the village in question is to be held by one individual as an undivided property, and is, in cases of succes-

sion, to be considered, as concerns Government, the property of the head of the family.

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Subsequently the grantee sold his rights under the *kowl* to Hariprasad Santukji, Narayanji Shamji and Jannadas Bapuji. These persons conveyed their rights to the plaintiff's father Haji Sumar Haji Karim in December 1880, and by the order of the Collector the village was transferred to the vendee's name on the 30th September 1881. Owing to the prevalence of the plague in Bombay and its suburbs, several occupants of the land in the village having erected residential quarters on their holdings, the Government of Bombay in the year 1906 imposed enhanced assessment on lands which were converted into building sites under the provisions of the Bombay Land Revenue Code (Bom. Act V of 1879). The grantee under the *kowl* himself claimed the right to recover the enhanced assessment or at least a portion of it on the ground that the village was "alienated" and exempt from the provisions of the Land Revenue Code. The Government, thereupon, issued a Resolution, No. 1127, dated the 1st February 1907, to the effect that the grantee had no right to participate in the enhanced assessment with respect to the building sites. The grantee, the plaintiff, therefore brought the present suit in the District Court at Thana against the Secretary of State for India in Council praying,

(1) It be declared that—

(a) the extra assessment imposed by the defendant upon the land appropriated for building sites in the village of Ghatkooper was illegal ;

(b) the Land Revenue Code was not applicable to the said village ;

(c) the Resolution of Government to the effect that the *kowl* was agricultural was erroneous.

(2) The defendant be restrained by a permanent injunction from levying the aforesaid assessment.

(3) The amount, if any, recovered by the defendant on account of such assessment be awarded to the plaintiff.

The defendant denied that Ghatkooper was an "alienated" village or that the provisions of the Land Revenue Code (Bom.

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Act V of 1879) were not applicable to it, and contended that the plaintiff was no more than a farmer of land revenue existing at the date of the *kowl* in accordance with section 20 of Bombay Regulation XVII of 1827 and Government did not otherwise transfer their rights to the payment of the land revenue, that the lease was granted not only without any stipulation against increasing the assessment but on the contrary with an express stipulation reserving the defendant's right to do so, that the object of the lease being clearly to promote cultivation in the village, it was obviously agricultural in its character and Government had full authority to levy non-agricultural assessment under sections 65 and 66 read with section 48 of the Land Revenue Code in cases the lands were diverted from their originally contemplated user during the currency of lease, and that the rights and benefits granted to the lessee were those specifically granted to him under the terms of the lease and the benefit of receiving enhanced assessment not being so granted, the plaintiff was not entitled to lay claim to any share in it whatever.

The Joint Judge dismissed the suit holding that Ghatkooper was not an alienated village and the provisions of Bombay Land Revenue Code (Bom. Act V of 1879) were applicable to it, that the terms of the lease did not disentitle the defendant from enhancing the assessment on building sites during the currency of the lease, that the plaintiff was not entitled to the said enhanced assessment and that he could not get any relief.

The plaintiff appealed.

*D. A. Khare, G. B. Rele and J. G. Rele*, for the appellant (plaintiff).

*L. A. Shah* (Acting Government Pleader), for the respondent (defendant).

CHANDAVARKAR, J.:—The question whether the decree of the lower Court is right depends upon the main question argued in this case, whether the village in dispute is not an alienated village within the meaning of clause (19) of section 3 of the Bombay Land Revenue Code (Bom. Act V of 1879).

The word "alienated" is defined in that Code to mean "transfer, in so far as the rights of Government to payment of the rent or land revenue are concerned, wholly or partially, to the ownership of any person."

The question is whether this village has been transferred to the ownership of the present appellant, so far as the rights of Government to the land revenue are concerned. That is a question which must be decided upon the proper construction of the *kowl* (Exhibit 24) granted to the appellant's predecessor-in-title in the year 1844-45.

The terms of the *kowl* leave no matter whatever for ambiguity. In dealing with the terms of that document it is necessary to bear in mind that in order to bring a village within the term "alienated," a transfer of the rights of Government must be a transfer of a particular kind, namely, of the ownership of Government with reference to its rights to land revenue, not all rights of ownership.

Now, the word "owner" does not require any definition, because its meaning is quite plain. But if it is necessary to find out the meaning attached to it by the Legislature, we may usefully refer to the sections of the Transfer of Property Act, where 'transfer' is pointed out as being either by way of ownership, in which case the transaction amounts to a sale, an out and out assignment, or by way of gift, in which case also it may be by way of ownership. But there are transfers of a more limited character such as transfer by way of mortgage, or lease, or charge. In the present case it is impossible to hold that the rights of Government have been transferred by way of ownership, having regard to the terms of the *kowl*.

At the outset the preamble of the *kowl* shows that the village was leased to the grantee for a period of 99 years. It is a lease of the revenues of the village on certain conditions. One of those is "that on the land which had already been under cultivation the grantee should pay Rs. 1,135-14-7; and that as to the waste lands, the grantee should bring them all into cultivation within 40 years, and on the expiration of that period the full assessment, according to the prevailing usage of the country,

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should be collected annually from the grantee on such land as might be under cultivation, as well as on such quantity as might remain waste out of the present waste, entered in the public accounts." It is clear that the object of the lease was agricultural; that Government never parted with its rights, so far as the right to build was concerned. That conclusion is strengthened by the subsequent conditions in the lease. All these conditions refer to agricultural operations and objects. Then the 6th condition is: "It is clearly to be understood that this lease confers no right which Government does not now possess and only such portion of the rights of Government as may be herein specifically granted to the grantee, is hereby granted to you." In other words, wherever the lease is silent about any right, that right must be regarded as not having been granted. Now, the rights as to building are omitted altogether from the lease. There is not a word said about them. The necessary inference from that is that Government reserved to itself those rights.

The 8th condition is also important. That condition runs thus: "Should a survey be made and a new assessment be introduced in the district, the same will also be done in your village; the land, etc., which has been granted to you free from assessment will, however, remain uninterfered with till the period of exemption has expired, when the rates will be levied." Now, that condition makes it quite clear, even if there had been any ambiguity in the conditions that had gone before, that this village cannot be included in alienated villages, because according to the provisions of the Bombay Land Revenue Code, in the case of an alienated village, Government cannot make a survey or fix an assessment unless it is invited to do so by the alienee; whereas, according to this 8th condition, Government has reserved to itself the right of making a survey and introducing a new assessment in this village, upon its own initiative, without any invitation from the grantee.

And in the 10th condition it is also distinctly stipulated that "if a complaint be made to Government in respect of payments to all Devasthanans and Dharmadaya allowances, then the grantee is to act according to the orders of Government."

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Then the 12th condition is also significant. "In respect of the abovenamed village," that condition says, "you are to consider yourself as a farmer thereof"; in other words, as a "lessee." It further says: "you are therefore to exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827 or such as may be hereafter vested in them by any new enactment, shall also be exercised by you, and in the event of your acting contrary to the abovesaid enactments" *i. e.* not only Regulation XVII of 1827 but any other which may subsequently be passed, "you will be subject to such penalties as are now or may hereafter be provided for by Regulations." That is sufficient to bring the village within the operation of the provisions of the Land Revenue Code.

Then the 16th clause provides that "for breach of any of the conditions of this lease for which a specific penalty has not been laid down, Government is at liberty to inflict such punishment as may be provided for."

The 18th clause must also be read as having a bearing upon the question which we have to determine. The grantee is prohibited by that condition from either selling or transferring the village in any way whatever, which would mean by way of gift or sale, or lease or mortgage, to any other person without the consent of Government. This condition is usual in the kind of transfers known as leases, in which the lessor makes it a term that there shall not be any assignment by the lessee without his consent, either in writing or otherwise.

Therefore, there cannot be any the slightest doubt that this *hool* is no more than a lease; that Government parted with its rights as lessor in favour of the grantee as a lessee, and imposed upon him certain conditions. None of those conditions brings the contract within the definition of the term "alienated" village, in clause 19 of section 3 of the Bombay Land Revenue Code.

For these reasons we are of opinion that the District Judge is right in holding that the plaintiff's claim must fail.

In confirming his decree, however, we wish to make it quite clear that our decision is confined only to the buildings which have been erected, and to the extra assessment which Govern-

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ment has imposed in respect of those buildings, under the provisions of the Land Revenue Code. This decision does not in any way affect or prejudice such right as the plaintiff or Government may have in respect of the assessment on agricultural land. We express no opinion whatever as to the latter. The plaintiff's claim, as made in his plaint, and in his pleadings, was entirely confined to the extra assessment levied by Government in virtue of its right, under the provisions of the Land Revenue Code, to impose that assessment on occupants, who have built upon their respective lands. Our decision, therefore, is confined only to that extra assessment. For these reasons the decree must be confirmed with costs.

*Decree confirmed.*

G. B. R.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Hayward.*

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*July 20.*

THE COLLECTOR OF POONA (ORIGINAL PLAINTIFF), APPELLANT, v.  
BAI CHANCHALBAI (ORIGINAL DEFENDANT NO. 1), RESPONDENT.\*

*Civil Procedure Code (Act XIV of 1882), section 539—Suit relating to public religious property—Ejection of trespasser—Party of suit—Joinder of parties—Practice and procedure.*

Where a breach of trust is complained of and where the alienee of trust property denies that the property is the subject of a public trust for religious purposes, he is a proper and necessary party to a suit brought under the provisions of section 539 of the Civil Procedure Code of 1882, though no relief can be given as against him by way of a decree in ejection.

APPEAL from the decision of C. Roper, District Judge of Poona, confirming the decree passed by K. Barlee, Assistant Judge of Poona.

This was a suit filed under the provisions of section 539 of the Civil Procedure Code of 1882. It was brought by the Collector of Poona to formulate a scheme of management with respect to the village of Navli, which had been dedicated to the mosque known as the Shamanshasur Pir Dargah at Supa.

\* Second Appeal No. 997 of 1910.