

PRIVY COUNCIL

Bomanji Ardeshir Wadia

Vs.

Secretary of State

Privy Council Appeal No.97 of 1927

(Viscount Dunedin, Lords Shaw, J. Blanesburgh and Sir John Wallis JJ.)

27.11.1928

JUDGMENT

VISCOUNT DUNEDIN J.

1. Early in the last century an ancestor of the leading plaintiff for services rendered to the Government received a grant of Rs. 4,000 per annum. In 1844 his successor prayed that the grant might be changed into a grant of villages in Salsette, an island near Bombay. This after some negotiations was done in 1847 and the grant which falls to be construed in this action was given. This grant, after a preamble narrating the original grant of Rs. 4,000 to the family and the request that it might be exchanged for a grant of villages, goes on as follows :

"The aforesaid villages of Juhu and Vile Parla in the island of Salsette are hereby assigned to you and your heirs in perpetuity from the year A. D. 1847-8. The particulars of the cultivation, etc., founded on the jamabandi of 1842-3 and the conditions of the grant are as follows :"

2. Then follows a long and minute description of the villages, the boundaries and the various lands from which revenue was levied, calculated partly on the lands and partly on the produce of brab trees which are tapped for toddy. All the particulars referred to lands as held by various ryots or sutidars as to whose position explanation will be shortly given. The list ends with a summation of the revenue at the sum of Rs. 4,679-1-8. From this is deducted "the amount of your inam Rs. 4,000." It is added that there are 97 undrawn brab trees for which "the grantee is to pay Rs. 20-14-4," making the whole sum payable by him as the surplus over the Rs. 4,000, Rs. 700. Subsequently, on condition of the surrender of certain other lands not included in this grant, the Rs. 700 was reduced to Rs. 200. The deed then goes on with various conditions which will

be examined hereafter.

3. It is now expedient to explain the position of the ryots or sutidars. By legislation in 1808, the sutidars in Salsette were declared to be permanent proprietors of their lands so long as they paid the amount of their assessment, and this assessment was fixed at a sum equivalent to a certain share of the produce and could be revised every five years.

4. The effect of the deed is in their Lordships' view quite clear. It is a grant of the villages. The villages consist partly of land occupied by sutidars and partly of land not so occupied. So far as the land occupied by the sutidars is concerned the grant becomes in effect a grant of the revenue payable by them. So far as the other land is concerned, though the grant is to the grantee, yet if he brings it under cultivation he is bound, in virtue of a condition which will be hereafter quoted, to pay the assessment just as a new sutidar would have to pay had he been settled there by the Government.

5. The grantee entered into possession under the grant and his heirs succeeded. They annually paid the Rs. 200 and have drawn regularly the revenue from the sutidars as that revenue was from time fixed; in particular there was an increase in 1885 and they recovered the increased sum. The appellants represent the original grantee. They were in actual possession of certain portions of the land not held by sutidars, but they do not appear to have brought additional land into cultivation. In 1879 the Bombay Government passed an Act called the Bombay Revenue Act. By this Act, Section 48(2) :

"Where land assessed for use for any purpose is used for any other purpose, the assessment fixed under the provisions of this Act upon such land shall, notwithstanding that the term for which such assessment may have been fixed has not expired, be liable to be altered and fixed at a different rate by such authority and subject to such rules as the Governor-in-Council may prescribe in this behalf."

6. and by Section 214 the Governor-in-Council was authorised to make rules regulating the assessment of land to the land revenue and the alteration and revision of such assessment and the recovery of land revenue. Rules under that section were published in 1907. R. 1 provided that when land assessed for purposes of agriculture only is subsequently appropriated to any purpose unconnected with agriculture, the assessment upon the land so appropriated shall, unless otherwise directed by the Governor, be altered and fixed and revised by the Collector. After providing in subsequent rules that when an application for a permission to appropriate the land to

other purposes than agriculture is received by the Collector, he should forward it to the holder of the alienated village who should then state whether the application should be granted or refused, it goes on to say that after that the Collector shall direct the village officers to levy any altered assessment so ordered and such altered assessment shall be levied in the same manner as other land revenue and shall be credited wholly to the holder or holders of the alienated village where such holder or holders are entitled to the whole land revenue of the village or proportionately to the share of such holder or holders when such holder or holders are entitled to a proportion only of the land revenue in accordance with the conditions under which such holder or holders hold the alienated village.

7. In November, 1916 without any intimation to the plaintiffs, a surveyor began to survey various building plots in the village of Ville Parla, with a view to fixing a building assessment thereon. On this coming to their knowledge the plaintiffs wrote asking for an answer as to whether the Collector considered that the building or non-agricultural assessment should be paid to them. To this they received a reply that the Government's view of the grant was that the grantees had no right to a non-agricultural assessment, which belonged to the Government. After some ineffectual appeals to Revenue Officers the plaintiffs raised the present suit to determine the question. The leading demand is that a declaration should be made that a non-agricultural assessment levied under a statute of rules should be paid to them as in place of the agricultural assessment which they previously received. They also asked for repayment of a building assessment which had been levied on lands in their own actual possession.

8. The suit depended before the Joint Judge of the Thana District. He held that the plaintiffs were entitled to recovery of such assessment as had been made on lands in their actual possession, but as regards the main claim he dismissed the action. Appeal was taken to the High Court of Judicature at Bombay which affirmed the judgment and from that judgment the plaintiffs appeal to His Majesty in Council.

9. The learned trial Judge examined with great care the correspondence which took place between the parties before the deed of 1847 was granted, and he came to his opinion on the true meaning of the deed, as he puts it himself, "after a careful consideration of the deed in the light of the correspondence." Their Lordships must say at once that this way of approaching the true construction of the deed is quite illegitimate. The learned Judge in another passage says that because the correspondence is referred to in the deed that makes it part and parcel of it. The only

reference to the correspondence is in the narrative in the preamble of the deed that there had been such a correspondence, but it is a vital mistake to suppose that introduces the correspondence as a part of the deed. Nothing is better settled than that when parties have entered into a formal contract that contract must be construed according to its own terms and not be explained or interpreted by the antecedent communings which led up to it. This is especially true of a conveyance. There even, if there has been a formal antecedent contract, that contract cannot be looked at to control the terms of the conveyance; much less can mere communings which could only show what parties meant to do but cannot show what they did. It would be otiose to set forth at length the authorities, but reference may be made to *Shore v. Wilson* 9 Cl. and F. 555, dictum by Baron Parke, *Smith v. Doe, d. Jersey 2 Broad and Bing.* 473; *Prison Commissioners v. Clerk of the Peace for Middlesex* 9 Q. B. D. 506, per Sir G. Jessel, at p. 511; and *Lee v. Alexander* [1883] 8 A. C. 853 (868) where, although the case is a Scotch case where the law is the same, Lord Selborne states the proposition as a general one.

10. While their Lordships have thought it expedient to make it quite clear that this method of approaching the question used by the trial Judge was illegitimate, they note that no such criticism can be directed to the judgment of the High Court. Those learned Judges although only expressing their opinion as a doubt as to the admissibility of what the trial Judge had done, yet clearly make up their minds on the construction of the deed, but the result at which they arrived is the same as that arrived at by the trial Judge. Their view is tersely expressed by the first finding of the trial Judge:

"The grant is neither an absolute grant of the soil nor a mere assignment of the revenues. It is merely an assignment of Rs. 4,000 out of the revenue of the village subject to the conditions of the grant."

11. From that view they deduce the further consideration, that what they called conditional or enhanced assessment belongs to the Government.

12. In their Lordships' view this is a complete inversion of the scheme of the deed, prompted rather by a view as to what in the circumstances the Government ought to have done rather than by a strict observation of what they did do. No doubt it was clear that the Government intended and thought that what they were giving was worth Rs. 4,000; but they were not giving Rs. 4,000. On the contrary they were giving something instead of Rs. 4,000 which at that time they were paying in cash. Now whenever one person gives another something instead of what he has got, both parties

take the risk of whether the thing that is given will keep, or lose, or enhance its value. Even an obligation to pay in currency is liable to that risk. The fluctuations in quite recent years in European rates of exchange have brought home that lesson to many an unfortunate grantee. Now what did the Government grant by the deed? Indubitably they granted not money but villages. These are the only words of conveyance. The something they were giving, i. e., villages, were on accurate calculation worth more than Rs. 4,000 yearly, which was the sum of which in cash the Government were being relieved. They calculated to a rupee what the gift was worth, and then say "deduct your inam," i. e., your old free grant, and you will find you get Rs. 600 odd too much. There is a little extra for some brab trees, and, therefore, you will become bound to pay us R. 700 a year, and that is to be an ordinary debt recoverable like any debt by process. How fantastic is the idea to turn this into what the learned Judge of the trial Court called an "annuity" of Rs. 4,000.

13. Doubtless, however, the villages are granted under conditions. Their Lordships will now analyze the conditions. Conditions 1, 2 and 3 have been already dealt with, for they embody the calculation of how much is the worth of the lands and the brab trees and how much they exceed Rs. 4,000 and they provide for the payment of Rs. 700 as excess, which excess is to be paid as an ordinary debt payable on a day certain and recoverable by process. The fourth and fifth conditions explain that if the grantee brings into cultivation any land not then cultivated and consequently not assessed, he will after a certain moratorium be liable to assessment for that, just as the ryots are for their land. Then come the fasciculus of conditions 6, 7, 10 and 14, which secure the provision to outsiders of quasi easement rights hitherto enjoyed. Then the position of the grantee to the ryots or sutidars is specially dealt with, and those articles had better be quoted in full :

" 8. You are to continue the ryots in the free enjoyment of their sootee lands, brab and other tress of which they are the owners as well as such other privileges as they may be entitled to in the same manner as they have enjoyed them before.

" 11. You are not to alter the present mode of assessment nor to introduce any new tax but to collect your rents from the ryots according to the commutation taxes as they may be fixed from time to time in the Island of Salsette. You are not to fix your instalments earlier than those fixed for the Government villages, though you may postpone them to a later period should you wish it.

"12. In the event of land assessment being increased or any other modification

introduced in the existing revenue system of the Island of Salsette by the authority of the Government, the same shall have operation within the villages hereby granted to you."

14. The remaining conditions have to do with miscellaneous matters in which the grantee is warned against trying to exercise any magisterial authority, etc. Then there is one condition on which the learned counsel for the respondent laid great stress namely, condition 20:

"20. It is clearly to be understood that this deed confers no right which the Government does not now possess and only such portion of the rights of Government as may be herein specifically granted is granted to you."

15. and in conclusion, section 21 provides that the grant is only to be to the grantee and not to disponees and that on failure of heirs the grant is to revert to the Government.

16. It will be observed that these conditions leave the matter of the grant exactly as it was, i. e., that the only grant is the grant of the villages. The learned Judges having settled as mentioned that the deed is the grant of an annuity then proceed to consider what is to be the fate of the building assessment which is imposed on such ryots as have decided to divert the land from agricultural to building purposes and come to the conclusion that this extra assessment, as they call it, belongs to the Government. Here there is another misconception. The Act of 1879 by Section 48 does not provide for an additional assessment; it only provides for an altered assessment to be imposed according to rules. Once the building assessment is imposed the old agricultural assessment has gone forever. This if it is thought out is quite logical. The root idea of British rule in India is that he who has the soil must pay, not in kind like a proper title, but in money, a certain proportion of what he gets from cultivation, and this money payment can be raised from time to time so as to maintain the proportion to the fruits of cultivation which have increased. If therefore, the cultivation for agricultural purposes is given up and the land is used for building, the building assessment carries out the same idea, as being the equivalent for a certain proportion of what the cultivation of lands under these new conditions might bring. Therefore, inasmuch as the ryots agricultural assessment in virtue of the grant of the village went to the grantee, so does the altered or building assessment unless under the rules which the Government have power to make its destination is in some way altered, but the rules absolutely recognize the same right.

17. Section, 5, already quoted, says that the altered assessment shall be levied in the

same manner, i. e., as the agricultural assessment, is levied, and shall be credited to the holder or holders of the alienated village or a holder in part. Now, by Section 3, Land Revenue Act, the interpretation section, it is settled what is an alienated village. "Alienated," says that section, Sub-Section 20

" 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 parson."

18. Before the grant the Government were the holders of the village as a whole entity, the sutidars being proprietors of their own respective plots, but in no sense owners, of the village. Then by the deed of 1847 the village was alienated as alienated is defined in the section just quoted and so alienated to the appellants. They were then the owners of the village. They are not, however, the proprietors of the whole village, because there is still land on which assessment may be allowed when the land comes into cultivation, and that amount of assessment by the terms of the deed goes to the Government. This ownership, however, is not an ownership in esse but is an ownership in posse. Now it would be pure speculation to fix the proportion which the ryots assessment enjoyed by the appellants bears to the possible amount which the Government will enjoy if other land is brought into cultivation. The simple plan therefore seems to be to fix that when a building assessment comes into being that assessment should come to the person to whom the agricultural amount which it displaces should go.

19. Condition 20, which the respondent's counsel so strongly pressed, has no application. The building assessment is not a grant now of the Government of something which they did not possess in 1847 but do possess now. It is not a grant at all. The old agricultural assessment was granted. Then comes legislation which binds the Government just as much as the grantees and turns that agricultural assessment into an altered building assessment; but it is still the same assessment on the same lands.

20. Their Lordships are therefore of opinion that the judgment must be reversed in so far as it denies the appellants all right to building assessment, and that a declaration should be made to the effect just Stated. The rest of the judgment will stand. The appellants must have the costs before this Board and in the Courts below. Their Lordships will humbly advise His Majesty accordingly.

Decree varied accordingly.

