BOMBAY HIGH COURT

Secretary of State

Vs

Shantaram Narayan Dabholkar

(Lallubhai Shah, Kt., C.J. Fawcett, J.)

08.07.1924

JUDGMENT

Lallubhai Shah, Ag. C.J.

1. This appeal arises out of certain references under the Land Acquisition Act. There were three references before the learned trial Judge. Apparently the Acquisition Officer had awarded compensation on the footing of the surface value of the land in question, and. it was agreed before the lower Court by the parties that the Court should be asked to give a decision on one point only, namely, whether or not the claimant had a right to the stone in the Inam land. It is not clear on this record as to how this question would be decisive of the references entirely. But it has been stated to us in the course of the argument that this particular right does not require to be valued, as the parties are agreed that one party or the other in whose favour the Court will give its decision on the point will be entitled to remove the stones, and that nothing further would remain to be decided. That was the only question which the Court was called upon to decide. The decision of the question depends upon the construction of the grant of this land. The grant is evidenced by Exhs. A and B Exh. A1 really contains a description of the lands which were intended to be the subject-matter of the grant, The grant (Exh. A 1), dated December 29, 1783, is in these terms:--

This is to certify that Vice-Admiral Sir Edward Hughes K.B. and Commander-in-Chief of His Majesty's ships and vessels in the East Indies having by letter under date March 10, 1783, pointed out the great services rendered the nation at large and the United East India Company by Manokjee Lowjee and Bomonjee Lowjee the two Master-Builders at this Presidency and having also strongly recommended to us to confer on them a certain portion of ground on this island, which will yield annually forty Mooras of Toka Batty, this is to certify that the said Manokjee Lowjee and Bomonjee Lowjee have accordingly been put in possession of certain Batty grounds in the District of Parel with their foras and perteneas of the said grounds which will yield the above quantity of Toka Batty and that they are to be kept in possession of the same without

molestation, until the pleasure of the Honourable the Court of Directors is known.

2. This grant was confirmed by the Court of Directors on April 28, 1795, in the following terms:--Observing by your advices of September 30, 1783, and February 10, 1784, that you were induced to issue the grant to the two Master-Builders and their sons at the earnest recommendation of the late Sir Edward Hughea as a reward for the essential and important services they had rendered the nation and the company in particular in refitting His Majesty's squadron and as we ourselves have borne frequent testimony of their merits we hereby ratify and confirm the said grant with a due proportion of Foras and Porteneas to their family and descendants.

3. The learned trial Judge on a construction of this grant came to the conclusion that this was an absolute and complete grant of the land, and that it conveyed the right to the mines and minerals including stones to the grantees.

4. From this decision the Secretary of State for India in Council has appealed, and it is urged in support of the appeal, first, that the grant is not of the land at all, but of the produce in the land. It is contended that the intention was really to give to the grantees the benefit of forty Moodas of Batty every year, and that the grant must be taken to be the grant of the produce of the soil and not of the soil. Secondly, it is urged that even if it be treated as a grant of the soil, it must be construed as a grant of the surface of the soil and not of the sub-soil. It is urged that unless there are express words conveying a right to mines and minerals, that right could not be said to be conveyed by the grant.

5. Several cases have been cited in the course of the argument with reference to these contentions, but ultimately the decision must depend upon the terms of this grant. Though I shall have to refer to some of the cases I shall first deal with the question of construction of these documents,

6. As regards the first question whether this is a grant of the land or merely of the produce, it seems to me to be clear from the words used both in Exh. A, as also in the Despatch Exh. B confirming the grant, that it was a grant of the land, and not merely of the produce of the land. In connection with this point we have to remember that this land is situated in the city of Bombay, and that it is not subject to the limitations, to which, for instance, the occupancy holdings outside the city of Bombay would be subject under the provisions of the Bombay Land Revenue Code. The provisions of Act II of 1876 are applicable to the city of Bombay, and it is important to note that there is no kind of statutory limitation upon the use to which such land, which has been referred to in the grant, could be put.

7. Then there is nothing in the words of the grant to indicate that the purpose of the grant was to give only the benefit of forty Moodas of Batty to the grantees; but it seems to me that the reference to the forty Moodas of Toka Batty is really to indicate the extent of the land intended to be given. It is clear from Exh. A1 that different lands with different names, which in all were then calculated to yield forty Moodas of Toka Batty, were given, and the due proportion of Foras and Perteneas also was to form part of the grant. Whatever the value of the presumption in the case of Inam grants by the Crown in this Presidency outside the island of Bombay, that in the absence of proof it must be taken to be a grant of the royal share of the revenue and not of the soil, may have been prior to the recent decisions of the Privy Council, it is clear now that that presumption could no longer be pressed into service. It has been laid down by their Lordships of the Privy Council in several recent cases, such as *Suryanarayana v. Patanna*[1] and Secretary of State for India in *Council v. Ldxmibai*[2] that there is no such presumption with regard to the grants, and that it is a question to be determined on the evidence in each case as to whether it is a grant of the soil or of the royal share of the revenue But it is also doubtful to my mind whether the presumption, such as it was before these decisions of the Privy Council, could have really applied to land situated in the city of Bombay. In the earlier reported cases, the Inam grants related to lands outside the city of Bombay which were regulated by considerations applicable to such grants. Taking the words of this grant, it is clear to my mind that what was intended to be granted was the land and not merely the royal share of the revenue or the produce of the land. In this view we are confirmed by the decision in Doe d. M' *Kenzic v. Pestonji*[3] In that case the learned Chief Justice, Sir Erskin Perry, had to consider the nature of this very grant. The conclusion reached in that case was that the effect of these documents was to give grantees a complete estate in fee of the lands so granted. No doubt the Government was not a party to that case. But it related to this very grant; and even taking it that it is not binding upon the parties to these proceedings, nor upon this Court of Appeal, it seems to me that the opinion expressed after a consideration of these documents, so far back as 1852, is entitled to great weight. With respect I agree with that opinion.

8. In this view it is hardly necessary to refer to exhibits upon which reliance is placed by Mr. Campbell on behalf of the respondent But I may briefly refer to hem.In Exhts. Q.R. N and U this grant is referred to as being a grant of the land In fact so late as 1809 the Government accepted the view that no claim on the part of Government should be made in respect of land held as Inam by the Lowjee family under the grant of 1783 and 1828, and in the preamble to the resolution, in Exh. U, the Collector described the grant of 1783 as being an out and out gift of the Government interest in the land On the first branch of the argument, tharefore, I am of opinion that the grant is not merely of the produce of the land, but of the land itself.

9. The next question is whether the grant conveys a right to the mines and minerals in the land. It is clear that there is no express reference to this right in the grant, and the whole question is

whether having regard to the nature of this grant and the terms used, in the absence of any express words conveying such right, whether such a right should be held to have been conveyed to the grantees or not. The learned Advocate General has relied upon the decision in Secretary of State for *India in Council v. Sriniwasa Chariar*[4] which was the case of a Shrotriyam Inam in the Madras Presidency. He has also relied upon other decisions, of which *Raghunath Roy Marwari v. Raja of Jheria*[5] may be mentioned as a type. The line of argument is that unless there are express words conveying a right to mines and minerals, the grantees could not have any right to stones in this land, and the rule laid down in several decisions by their Lordships of the Privy Council in cases of leases by the Zemindars in Bengaal in favour of their tenants is relied upon.

10. Apart from the decisions, it seems to me that looking to the terms of the grant in this case, it is a complete grant of all the interest which the Crown had at the date of the grant in these lands. That is the view which is taken by Sir Erskin Perry in 1852, to which I have already referred, and that is the view which we take of the nature of the grant in these proceedings, and if that be so, there is no rule which renders it absolutely necessary that express words referring to mines and minerals are necessary. It is quite true that in this Presidency generally outside the city of Bombay the words indicative of rights to mines and minerals, the words jala, taru, trina, pashana, nidhi, nikshepa, are used to indicate that all rights in the soil are conveyed. But even there this Court has not gone so far as to lay down that the use of these words is absolutely essential to convey such rights. There have been cases in which in the absence of such words the grant has been held to be a grant of the soil, and where the grant is held to be a grant of the soil there can be no question, in my opinion, that the right to mines and minerals would be also included in the grant. The absence of such words does not necessarily indicate that such right was reserved to the Crown. In each case it is a question to be determined according to the terms of the grant and the circumstances of the particular case, as to whether the grant was complete or not. In the present case the grant was complete. No kind of right is reserved to the Government. Under these circumstances, even in the absence of words expressly referring to the right to mines and minerals, it seems to me that all the rights that the Crown had in this land were conveyed to the grantees, and that, would include the right to mines and minerals. The statutory provisions so far as they go do not support the appellant's contention. For instance the reservation in favour of the Crown in Section 69 of the Bombay Land Revenue Code does not apply to alienated lands outside Bombay and there is no provision like that in Bombay Act II of 1876.

11. The decision in Secretary of State for India in Council v. Srinivasa Chariar (1920) L.R. 48 I.A. 56, which has been relied upon, turned upon its own facts. In that case a village was granted as a Shrotriyam Inam. The purpose of the grant was that the grantee having appropriated to his own use the produce of the seasons each year, might pray for the prosperity of the Empire, and it was provided that he should pay a. fixed yearly sum to the Sirkar. When the old grant in that case

was settled by the Madras Government, the effect was to convert the tenure into a permanent freehold upon payment of a quit rent. On the terms of the grant in that case, the nature of which I have just referred to, their Lordships came to the conclusion that the grant did not include the right to mines and minerals. It is pointed out in that case that it must depend upon the language of the instrument and the circumstances of each case as to whether such a right can be deemed to have been conveyed or not, and a reference is made to the different opinions which the Government of Madras held with reference to the right to mines and minerals in the case of grants of the nature such as their Lordships had to deal with in that case. But briefly speaking, in my opinion, that case turned upon the construction of the grant in that particular case, which cannot be compared in any essential particular with the grant in the present case. Here we have a grant in favour of the two ship-builders by the Company in city of Bombay, and the object of the grant, so far as we can gather from the terms of the grant, was to benefit the grantees to as fall an extent as possible without any kind of reservation. No kind of quit rent was reserved, and in fact no other right can be said to have been reserved under the grant. It is clear to my mind that the decision in this case cannot help the appellant.

12. As regards the other cases relied upon, I shall refer to the case of *Raghunath Roy Marwari v. Raja of Jheria*[6] So far as I can see the basic principle of this decision and other like decisions, it is that a Zemindar being the owner of the soil and also owner of the mines and minerals, when he gives a lease of any portion of the Zemindari, he creates a new estate and reserves the reversion to himself, and that in such a case in the absence of express words the right to mines and minerals cannot be held to have passed to the lessee. In fact in all those cases the reversion is reserved to the Zemindar, and the ratio decidendi of the cases is that where that is the case, in the absence of any express words conveying the right to mines and minerals, such a right cannot be held to have been conveyed. A reference was made to the case of *Giridhari Singh v. Megh LaL Pandey*[7] in which the expression used was "mai hak hakuk" and the learned Advocate General has pointed out that even where such an expression was used the right to mines and minerals was held not to have been conveyed. In that case their Lordships have dealt with the point as to the meaning of the expression used. As I have said, the underlying reasoning of those cases is that as between the Zemindar and the holder, in whose favour the Zemindar has created a lease, there is a certain right reserved, and in the Case of such reservation, unless there are words actually conveying rights to mines and minerals, those rights could not be said to be conveyed to the holder, but are reserved to the original grantor. In the case of Raghunath Roy Marwari v. Raja of Jheria their Lordships have quoted with approval a passage from the judgment of Jenkins J. pointing out the difference between a conveyance and a lease. The principle of these cases might apply if the grant here were in the nature of a lease. In the present case we have to deal with the case of a grant from the Crown to ship-builders, and to consider whether this can be put upon the

same footing as a lease by a Zemindar of a part of his Zemindari. The grant here is not in the nature of a lease at all, and therefore, so far as I can see, the cases upon which reliance has been placed would not apply to the present case. After all we have to determine in this case on the terms of the grant as to what the nature of the grant was, and whether in the absence of the words actually conveying the rights to mines and minerals, all the rights of the Crown were conveyed or not In my opinion all the rights of the Crown were conveyed by this grant to the grantees.

13. I would, therefore, affirm the decree appealed from, and dismiss the appeal with costs.

Fawcett, J.

14. I agree that the appeal should be dismissed with costs. Taking the grant as it stands, and the circumstances surrounding it, I think that it shows an intention to confer on the grantees the actual lands that had been selected by the Collector, yielding annually forty Moodas of Batty. That was a common way of specifying the extent of lands to be granted in those days. Several instances of the same kind will be found in the Bombay Gazetteer, Vol. XXVI, being part III of the Historical Materials for the Gazetter of the Town and Island of Bombay, collected by the late Sir James Campbell. At p. 450 there is an instance in which the Board directed the Collector to mark off such of the rice lands belonging to the Honourable Company situated near Mancalla tank as might produce three Moodas and nineteen Pharas of rice, in order to give them as compensation to a cultivator who had converted waste lands into Batty grounds and whose lands had been taken for a certain ditch.

15. The circumstances, in my opinion, show that the Bombay representatives of the Company intended to show special favour to the grantee, and to give him all they could in regard to these lands. This is supported, in my opinion, by Exh. Q, under which the Governor in Council directs the Collector to give immediate and full possession of the lands to the grantees. Some stress can, I think, be rightly laid upon the words "full possession," as indicating a complete, as opposed to a partial, grant. The lands in question, at any rate the batty lands, would probably be occupied by cultivators or Kunbis, as they were then called, and the Parel lands of which these lands were a part, used to be leased to various farmers who dealt with the cultivators, as mentioned in the same Volume of the Bombay Gazetteer at pp. 447, 448. The cultivators, however, were in those days treated by the Company as mere tenants-at-will, as is sufficiently shown by the proclamation of 1789 which is quoted in Vaidya's Bombay City Land Revenue Act, Introduction, pp. 17 and 18, and also in the Gazetteer of Bombay City and Island, Vol II, pp, 352-53. There is an illustration of the little rights they were considered to have in these lands, which is of some interest in connection with this question about quarries, given in Vol. XXVI part III of the Bombay Gazetteer already referred to. At p. 429 we have an extract from the diary of the Company in Bombay as follows:--At a Consultation of June 10, 1772, the Board record the

following letter of the same date from Gaspar Pagon: Having the honour to farm the villages from Parel to Sion, the Kunbis have represented to me the losses they suffer by large pits in their batty fields dug for limestones and left open, it is extremely hard the Kunbis should suffer thereby and be obliged not only to fill them up at their own expense but to lose the cultivation of the ground by which they are unable to pay the Honourable Company's toka

16. Then after quoting the substance of this letter the extract says:--Ordered that the Collector inquire into the custom heretofore practised in digging chunam stone and report the same.

17. That further report is not cited in this Volume. But that goes to show that the right to quarry was reserved to the Government or owner of the lands; and as there is no reservation of any kind in this grant, and the circumstances point to a full grant being intended, I think it should be taken as transferring the sub-soil rights.

18. The argument that it was contemplated at the time that the grantees would continue the cultivation and thus obtain a revenue is no doubt true to a certain extent, but that is simply because at that particular time the land was so utilised. It could not, in my opinion, be contended that the grantees had threfore no right to use even the waste land appurtenant to these batty grounds for building purposes, and Government have, so far as I am aware, never laid any claim that the grant was restricted in that respect. The quarry rights would, as I have already shown, be in the possible contemplation of the Company at that time; and although the document is of a very informal nature, and not drafted in conveyancing language, yet it would have been perfectly competent for the drafters to have inserted a reservation of the quarry rights, if that was intended The grant should no doubt be construed strictly in favour of the Crown, that rule superseding the ordinary rule about construing a grant in favour of the grantee. But for the reasons I have given I do not think that the rule can overcome the considerations I have mentioned. It is no doubt true that in construing the terms of a deed the question is not so much what the parties may have intended, as what is the meaning of the words which they use: see Maharaja Manindra Chandra Nandi v. Raja Sri Sri Durga Prashad Singh But the words used are, in my opinion, sufficient to convey a complete grant in fee, as was held by Perry C.J. in *Doe d. M'Kenzie v. Pestonji*[8]. That decision is, I think, one to which great importance must be attached in the present case, on the general principle that great importance is to be attached to old authorities on the strength of which many transactions may have been adjusted and rights determined, as said by Lord Loreburn in *West Ham Union v. Edmonton Union*[9] which was cited in *Chandra Binode Kundu v. Ala Bux Dewan*[10]. Here titles have probably passed and been valued on the strength of this decision of Chief Justice Perry, and in view of that I think this Court should lean in favour of the construction that we put upon it. The document does not of itself indicate, at any rate clearly, that it was merely intended that the grantees should have the benefit of a certain amount of produce,

as was indicated by certain expressions used in the grants considered in Secretary of State for India in *Council v. Srinivasa Chariar*[11] and Raghunath Roy *Marwari v. Raja of Jheria*[12] I, therefore, concur in the order proposed by the learned Chief Justice

Cases Referred.

1(1918) L.R. 45 I.A. 209
2(1922) L.R. 50 I.A. 49; s.c. 25 Bom. L.R. 527
3(1852) Perry O.C. 531
4(1920) L.R. 48 I.A. 56
5(1919) L.R. 46 I.A. 158 s.c. 21 Bom. L.R. 895
6(1919) L.R. 46 I.A. 158, s.c. 21 Bom. L.R. 895
7(1917) L.R. 44 I.A. 246
8(1852) Perry O.C. 531
9[1908] A.C. 1, 4
10(1920) I.L.R. 48 Cal. 184
11(1920) L.R. 48 I.A. 56, s.c. I.L.R. 44 Mad. 421
12(1919) L.R. 46 I.A. 158, s.c. 21 Bom. L.R. 895