Privy Council Appeal No. 17 *of* 1947
Bombay Consolidated Appeals Nos. 211 *and* 216 *of* 1938

The Government of the Province of Bombay - - - *Appellant*

v.

Pestonji Ardeshir Wadia and others - - - - *Respondents*

Pestonji Ardeshir Wadia - - - - - - *Appellant*

v.

The Secretary of State for India in Council, now the Province of Bombay and another - - - - - - - *Respondents*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH JANUARY 1949

Present at the Hearing:

LORD UTHWATT
LORD OAKSEY
SIR MADHAVAN NAIR

[*Delivered by* SIR MADHAVAN NAIR]

These are consolidated appeals from a judgment and two decrees of the High Court of Judicature at Bombay dated 3rd April, 1941, confirming in the first appeal (A. No. 211 of 1938) the decree of the first class Subordinate Judge of Thana dated 30th April, 1938, in suit No. 207/36 (hereinafter called the "Vile Parle suit" from the village to which it relates) and in the second appeal (A. No. 216 of 1938) reversing the decree of the same date of the said Subordinate Judge in suit No. 115/34 (hereinafter called the "Juhu suit" from the village to which it relates).

These appeals arise out of two suits which were brought against the Secretary of State for India now represented by the Province of Bombay, hereinafter called the Government (appellant in the first and respondent in the second of these appeals—defendant), by Pestonji Ardeshir Wadia (respondent No. 1 in the first of these appeals and appellant in the second —plaintiff No. 2) and the other trustees of a trust (plaintiffs) created by one Nowroji Jamsetji Wadia with respect to two villages "Juhu" and "Vile Parle" for the recovery of non-agricultural assessment collected by the Government from certain lands in these villages.

By a grant in 1848, the Government granted to Nowroji the two villages, "Vile Parle" and "Juhu", which are situated in the island of Salsette. These have now become prosperous residential suburbs of Bombay. Shortly stated, the grant after reciting that the grantee had prayed that a Government grant of Rs.4,000 per annum which he had enjoyed might be exchanged for a grant of villages in Salsette, stated that the two named villages "are hereby assigned to you and your heirs in perpetuity". This statement was followed by a description of the boundaries of the villages with a detailed statement of the land revenue paid by the occupant

owners amounting to Rs.4,679.1.8. From this was deducted " the amount of your Inam ". It was then stated that the difference along with the value of some trees, amounting in all to Rs.700, be paid by the grantees annually. The Privy Council was called upon to construe the meaning of this grant in a litigation in 1918 between the successors of the grantee and the Government of Bombay in *Wadia* v. *Secretary of State for India* (1928 56 I.A. p. 51), to which fuller reference will be made later. The Board decided that by this grant the grantee had become the owner of the villages with the obligation of making an annual money payment to the Government.

In 1879, the Bombay legislature passed an Act (Act V of 1879) called the Bombay Land Revenue Code. Section 48 (1) of the Act declares that " the land revenue leviable on any land under the provisions of the Act, shall be assessed or shall be deemed to have been assessed as the case may be with reference to the use of the land (A) for the purpose of agriculture, (B) for the purpose of building, and (C) for a purpose other than agriculture or building." Section 48 (2) provides " where land assessed for use for any purpose is used for any other purpose, the assessment fixed *under the provisions of this Act* (the italics are by their Lordships) 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 Provincial Government may prescribe in this behalf ". Acting under this provision the Government began to levy non-agricultural assessment on all the lands in the two villages except as mentioned in the plaints.

The suits from which these appeals arise relate to the recovery of the assessment from the Government on the ground that Nowroji became the full owner of the said villages and as such is entitled to the amount recovered by the Government from those villages. The claim in the " Vile Parle suit " relates to the years from 1932-33, while the claim in the " Juhu suit " relates to the years from 1922-23. The substantial defence of the Government in the appeals is that survey settlements have not been introduced into either of these two villages under the Act, and as no such settlement was introduced, no non-agricultural assessment is properly leviable and the plaintiffs cannot claim the right to recover the non-agricultural assessment. The determination of the dispute involves the decision of the question whether, prior to the levy of the non-agricultural assessment, an agricultural assessment had been fixed under the Bombay Land Revenue Code of 1879, such being under section 48 (2) a pre-requisite for the fixing of a non-agricultural assessment. This is the main question for decision before the Board.

Besides the above question which is common to both suits, certain other questions had also to be decided by the Trial Court. These were (1) in the " Vile Parle suit "—whether the above question has become *res judicata* by reason of the decision of the Privy Council in *Wadia* v. *The Secretary of State for India in Council* (*supra*); (2) in the " Juhu suit "—(*a*) whether the Government is estopped from raising their present contention that there was no survey settlement under the Code of 1879, (*b*) whether the suit is incompetent by reason of plaintiffs' failure to serve notice on the Government (defendant) complying with the provisions of section 80 of the Civil Procedure Code, (*c*) in case the plaintiffs succeed, what is the period for which they are entitled to recover the non-agricultural assessment, i.e., whether it is three years only under Art. 62 of the Indian Limitation Act as contended for by the Government, or 12 years under Art. 131, as contended for by the plaintiffs. No question of limitation arises in the " Vile Parle suit."

The " Juhu suit " was heard first. The chief question regarding the survey settlement in the two villages being common, the evidence recorded in the " Juhu suit " was by the consent of parties agreed to be read in the " Vile Parle suit ". The Trial Court delivered a consolidated judgment in the " Juhu suit " and a formal one in the " Vile Parle suit ".

All the above questions were decided in favour of the plaintiffs and the suits were decreed by the Trial Court. The Government appealed, and the plaintiffs (trustees) filed cross objections in both suits.

In appeal A. No. 211 of 1938 the High Court confirmed the Trial Court's decision in the "Vile Parle suit" with a slight variation, and in A. No. 216 of 1938 reversed its decision in the "Juhu suit". The ground of the reversal was that the notice which had been served on the Government did not comply with the provisions of section 80 of the Civil Procedure Code. The suit being held incompetent, the other points which arose in the case were left undecided by the High Court, though opinions in favour of the Government's contentions were expressed in the judgment. In the result decrees were passed dismissing the Government's appeal in reference to "Vile Parle", giving the trustees, having regard to their cross objections, liberty to raise the question which they had raised regarding two of the items in exhibit 149 in execution, and allowing the Government's appeal in reference to Juhu.

The Government have appealed to His Majesty in Council in the "Vile Parle" case (i.e., in the first appeal before the Board) and the plaintiffs (trustees) have appealed in the "Juhu" case (i.e. in the second appeal before the Board).

All the questions enumerated above have been raised for decision before the Board, but the questions 2 (*a*) and 2 (*c*) in the "Juhu" appeal will have to be decided only if the decision of the High Court on the question of "notice" to the Government, i.e. question 2 (*b*), is set aside by the Board.

In the course of hearing of the appeals on 2nd December, 1947, their Lordships intimated to counsel that since the villagers in the two villages in the possession of non-agricultural land therein and paying non-agricultural assessment were interested in the appeals, it was desirable that some such villagers should be brought on record and appear at the hearing. Two villagers—one from "Juhu" and another from "Vile Parle"—have now been added in the respective appeals by Order in Council dated the 5th August, 1948. Through their learned counsel Mr. Subba Row they generally support the Government.

Their Lordships will first consider the appeal in the "Juhu suit" (i.e. the second appeal before the Board).

As already stated, this suit along with the other, the "Vile Parle suit," was decreed by the trial court but the decree in this suit was reversed on the ground that notice which had been served on the Government did not comply with the provisions of section 80 of the Civil Procedure Code. That section states that :

> "No suit shall be instituted against the Crown
>
> . . . . . .
>
> until the expiration of two months next after notice in writing has been delivered to or left at the office of—
>
> . . . . . .
>
> (*c*) in the case of a suit against a Provincial Government, a Secretary to the Government or the Collector of the District; and
>
> . . . . . .
>
> delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."

The notice in the suit was served on the Provincial Government in October, 1933. By that time the two villages granted to Nowroji Jamsetji Wadia, the original grantee, had become vested in two trustees of the Wadia trust created in 1853, by the trust settlement of Nowroji Wadia. The notice intimated that the trustees intended to institute a suit against the Government. One of the trustees died on 2nd December, 1933. On 25th January, 1934, the present plaintiffs 2 and 3, were appointed trustees in the place of the deceased trustee, and the suit was filed on 28th April, 1934, by these plaintiffs along with the first plaintiff whose name had been included in the notice already served on the Government. It will be observed that no notice had been served on the Government on behalf of the plaintiffs 2 and 3. Under section 80 C.P.C., the notice

must state among other things the name, place and residence of the plaintiff. The singular includes the plural. It was contended that as no such notice was served on the Government on behalf of the plaintiffs 2 and 3 the suit was not maintainable. This argument did not find favour with the Trial Court but was accepted by the High Court. In the course of his judgment Sir John Beaumont, the learned Chief Justice, with whom Macklin J. agreed, observed as follows:

> "I have no doubt whatever that where there are three plaintiffs, the names and addresses of all of them must be given. The learned trial Judge was of that opinion, but he held that the real plaintiff was the Wadia trust, and that as a notice had been given on behalf of the Wadia trust, section 80 was sufficiently complied with. But that view of the matter seems to me clearly to be wrong. The trust is not the plaintiff, and there is no power under the Code for trustees to sue in the name of their trust, as members of a firm may sue in the name of the firm. The plaintiffs were, and were bound to be, the three trustees and as no notice was given specifying their names and addresses the condition precedent to the filing of the suit was not fulfilled."

Their Lordships fully concur with the above view. The provisions of section 80 of the Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government. In the present case it is not contended that any notice on behalf of plaintiffs 2 and 3 was served on the Government before the filing of the suit. Their Lordships have not been shown any provision in the Code enabling the trustees to sue in the name of the trust. For these reasons the suit against the Government must be held to be incompetent and the appeal fails. No further question therefore arises for decision in this appeal.

Their Lordships will now take up for consideration the appeal in the "Vile Parle suit" (i.e. the first appeal before the Board).

The first point for decision in this appeal is whether the main question which their Lordships have to decide has become *res judicata* by the decision of the Board in *Wadia* v. *Secretary of State for India* (supra). It is not contended that the decision of this question has become *res judicata* in the "Juhu suit," as admittedly the decision was given in the "Vile Parle suit"; The argument is confined to this appeal.

In 1916, the Government imposed on lands in the "Vile Parle" village non-agricultural assessment under the Bombay Land Revenue Code 1879, section 48 (2). Thereupon in 1918 the trustees of the Wadia trust filed suit No. 4 of 1918 for a declaration that on the true construction of the deed of grant executed by the Government in favour of their predecessors they were the owners of the "Vile Parle" village and were entitled in whole or in part to the non-agricultural assessments levied thereon by the Government and for ancillary relief. It was decided by the Privy Council:

> (1) that the grant of 1848 was not merely an assignment of Rs.4,000 per annum out of the revenues of the villages, but was a grant of the villages subject to the conditions attached.
>
> (2) that by section 48 (2) of the Land Revenue Code, the non-agricultural assessments were merely in substitution for the former assessments, and the appellants were entitled to be credited with the amount so assessed upon the land occupied by the sutidars (occupant owners)
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> . . . . . .

It is not now disputed that the construction put upon the grant by the Board is binding on the parties to this appeal. From the judgment of the Trial court in that case it appears that the suit proceeded upon the admission "that in 1885 survey settlement was introduced in the villages under the provisions of section 216 of the Code." It is contended by the plaintiffs (trustees) that so far as "Vile Parle" is concerned the present suit should be decided against the Government on the ground of

res judicata. In the present litigation the Government first stated in their written statement paragraph 6 that "Juhu is a surveyed and settled alienated village"; afterwards the paragraph was amended and it was stated that "Juhu" and "Vile Parle" have not been surveyed and settled under the Revenue Code of 1879, this giving rise to the main point for decision in the present suits.

It is argued that "in the case of the Vile Parle suit the question whether a survey settlement had or had not been introduced was *res judicata* in that the Government with due diligence not only might, but ought to have raised the question in the suit of 1918, as being one which, if decided in their favour, would have involved the dismissal of the suit". It is clear that the question was not directly put in issue between the parties to the suit because of the admission to which their Lordships have referred. In support of the argument reliance was placed on Explanation IV of section 11 of the Code of Civil Procedure which runs as follows:

> "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It is no doubt true that this matter might have been raised and if raised a decision on it might have resulted in the dismissal of the suit against the Government but the question is, ought this matter to have been raised by the Government? Their Lordships think it is impossible to say that the Government ought to have raised it, because of the admission made in that case. It is obvious that the most important question with which the Government was concerned was the construction of the grant namely, whether it was not merely an assignment of the revenue or whether it amounted to a grant of the proprietorship of the villages to the grantee. Assuming that the Government had raised the point and succeeded in proving that no non-agricultural assessment was leviable they would not have obtained—unless the court went out of its way to pronounce on the construction of the grant—a decision as to the true construction of the grant. If the Government chose to admit certain facts for the purpose of getting a decision on an important question of law it is impossible to say that the suit involves a decision as to the facts. In the circumstances their Lordships think Explanation IV cannot be used to preclude the Government from raising the point. It may be noted that the non-agricultural assessment claimed in the present suit is subsequent to the period claimed in the suit of 1918.

The next question is whether a survey settlement as to agricultural land was introduced into the two villages under the provisions of the Act of 1879, prior to the levy of non-agricultural assessment. The non-agricultural assessment was introduced in "Vile Parle" in 1916, and in "Juhu" in 1923.

The facts found or not disputed are briefly these. At the time of the grant there was no survey settlement in these villages. Before the survey the land assessment was recovered by converting "rice into rupees". The rate was fixed by the Government every five years. The survey settlement was first introduced by Act I of 1865, described as "an act to provide for the survey, demarcation, assessment and administration of lands held under Government, in the Districts belonging to the Bombay Presidency. . . ." The Act came into force on 21st July, 1865, and remained in operation until it was repealed by the Land Revenue Code, 1879, which came into force on 30th June, 1879. In fixing the land assessment the Government began survey operations in 1860—even before the Act of 1865 was introduced. As a result of the operations carried out by the officer appointed for the purpose, the Government by a resolution on 25th May, 1876, sanctioned the rates in the two suit villages amongst others "experimentally for one year". The details of the Land Revenue were worked out on the basis of the experimental rate but the assessment was not levied during the currency of the Act. The details were rightly worked out only by 1886. The effect of the assessment was to increase the revenue by about Rs.3,000. In 1886, after the new

Act had come into force, the Government announced to the grantees that a settlement had been introduced and since then recoveries had been made according to that settlement until the introduction of the non-agricultural assessment in these villages. It will be observed that the work of the survey settlement started under the Act of 1865 was completed in 1886 under the new Act of 1879. It is not disputed that the Government continued to levy this assessment from 1886 onwards for something like fifty years. The courts in India have rightly drawn special attention to this fact which is of considerable importance in deciding this appeal.

To appreciate the arguments advanced before the Board it is necessary to refer to certain relevant provisions of the Acts I of 1865, and V of 1879, relating to survey settlement. The provisions of Act 1 of 1865 are as follows:—

> " Section 25. It shall be lawful for an Officer in charge of a survey to assess to the land revenue, under such general and local rules as may be in force in the Survey under his charge, all lands cultivated or uncultivated, and whether hitherto assessed or not, provided that such assessment shall not be levied for more than one year, until the sanction of the Governor in Council shall have been obtained thereto . . ."
>
> " Section 28. It shall be lawful for the Governor in Council, from time to time, to lay down rules for the administration of the Survey Settlements, not at variance with any provision of this Act, and to declare existing settlements and all assessments, imposed according to Section XXV . . . fixed for any period not exceeding thirty years. The expiration of periods so guaranteed shall from time to time be published by authority of Government in the *Government Gazette.*"

Section 49, which is a special provision relating to " alienated villages " is as follows:—

> " The provisions of this Act shall not, except for the purpose of defining village boundaries, be applied to alienated villages: Provided that it shall be competent to the Governor in Council to extend by notification in the *Government Gazette* all or any of the provisions of this Act to every such village, on application made, in writing, by the holder thereof, and further, to apply the provisions of this Act to all Government lands situated in alienated villages."

" Alienated village " is defined in section 2, clause (*e*) as " a village, held and managed by private individuals, exempt from payment of land revenue, or under Act II or VII of 1863 of the Council of the Governor of Bombay, or under a grant or lease fixing the Government demand in perpetuity ".

It may be mentioned that the Trial Court treated these villages as *not* alienated villages under this definition, for reasons given by the judge which are not now material, but having regard to the conditions of this grant these seem to fall within the latter part of the definition: " or under a grant or lease fixing the Government demand in perpetuity ". However, under section 3 (19) of the Act of 1879, the villages are clearly " alienated villages " and the arguments before the Board have proceeded on that basis.

The relevant portions of Act V of 1879, are as follows:—

Section 2 saved pending proceedings commenced under the Act of 1865, and directed that thenceforth they should be conducted under the Act of 1879.

> " . . . And all rules prescribed, appointments made, securities furnished, powers conferred, orders issued, and notifications published under any such enactment, and all other rules (if any) now in force and relating to any of the matters hereinafter dealt with, shall (so far as they are consistent with this Act) be deemed to have been respectively prescribed, made, furnished, conferred, issued, and published hereunder.
>
> And all proceedings now pending, which have been commenced under any enactment hereby repealed, shall be deemed to have been commenced under this Act, and shall hereafter be conducted in accordance with the provisions of this Act."

" Section 3 (19), now (20), " 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.

Section 48 (1) and (2) have already been referred to.

Sections 65 and 66 provide for the fixing and levy of altered assessments under section 48, in unalienated land.

Sections 95-117 make up Chapter VIII " Of Survey Settlements and the Partition of Estates ".

Sections 100 and 101 authorised the officer in charge of the survey to fix assessments.

Section 102, (in Chapter VIII) provided :—

" The assessment fixed by the officer in charge of a survey shall not be levied without the sanction of Government. It shall be lawful for the Governor in Council to declare such assessments, with any modifications which he may deem necessary, fixed for a term of years not exceeding thirty in the case of lands used for the purpose of agriculture alone, and not exceeding ninety-nine in the case of all other lands."

Section 214 empowered the Governor in Council to make rules to carry out the purposes and objects of the Act.

Rule 89, made under the provisions of section 214, provided as follows :—

" (1) Notification of Survey Settlement.

" Rule 89. When a Survey Settlement shall have received the sanction of Government under section 102 of the Land Revenue Code, a notification shall be published in the district or portion of a district to which the settlement extends, in the form of Appendix J and the period for which the assessments have been fixed shall be notified in the Bombay Government Gazette.

When the settlement is introduced into a portion of a taluka already partially settled, the guarantee will be restricted to the unexpired portion of the period for which the assessments in the first settled portion of the taluka were fixed."

* * * * * *

Appendix J was in the following terms :—

" APPENDIX J. (Referred to in Rule 89.)

Notification determining the period of Settlement.

The Governor of Bombay in Council having sanctioned the Survey Settlement introduced by the Superintendent of Revenue Survey and Assessment, under the provisions of the Bombay Land Revenue Code, 1879, into the taluka of the district, the following notification is published for the information of the landholders and village officers in the said taluka:—

Duration of Settlement.

1. The survey rates as fixed under this Settlement will remain in force without increase for a period of years, commencing from and extending to "

Section 103 (in Chapter VIII) :—

" When in the case of lands used for the purposes of agriculture alone, Government shall have sanctioned the assessments fixed by the officer in charge of the survey, it shall be the duty of the said officer or of the Collector, or Assistant or Deputy Collector publicly to announce, or to cause to be announced, the assessment fixed on each survey number.

The said officer, or the Collector, or Assistant or Deputy Collector shall, at a reasonable time beforehand, cause public notice to be given, in such manner as he shall deem fit, of the time at or about which the assessments will be announced as aforesaid.

If the holder or other person interested in any holding do not appear in person or by agent, he shall be subject, nevertheless, to the same liabilities as if he had attended.

When the assessments have been announced in the manner provided in the first clause of this section, the survey settlement shall be held to have been introduced."

" Section 216 (Chapter XIV). Save as is otherwise provided in section 111 and hereinafter in this section, the provisions of Chapters VIII to X shall not be applied to any alienated village except for the purposes of fixing the boundaries of any such village, and of determining any disputes relating thereto.

. . . . . .

But it shall be lawful for the Governor in Council, on an application in writing being made by the holder of any such village to that effect, to authorise the extension of all or any of the provisions of the said chapters to any such village."

In support of his contention that there was no non-agricultural assessment because there was no pre-existing assessment fixed under the provisions of the Code of 1879 (i.e. any survey settlement) Mr. Pringle, learned counsel for the appellant, urged two main grounds, these being:

(1) It has not been proved that there was any application in writing by the holder of the villages, and authorisation by the Governor in Council for such extension as required by section 216;

(2) Nor has it been proved that there was any sanction of the Government to an assessment fixed under the Code as required under section 102.

The learned counsel also argued that the levy of experimental rates sanctioned in 1876 under Act 1 of 1865 cannot be considered as proceedings now " pending " within the meaning of section 2 of Act V of 1879.

The courts in India dealt with the above points in different ways.

The Trial court held that since the villages were *not* " alienated villages " within the meaning of Act 1 of 1865, the survey settlement proceedings could be made under section 49, without an application from the holder; that the proceedings under Act 1 of 1865 were pending at the time of the introduction of the Code in 1879; that under section 2 of the Code such proceedings which had been commenced under the repealed act should have been deemed to have been commenced under the Code; that thereafter all that remained to be done under the Code was to announce the assessment under section 103 of the Code; that this announcement of the settlement made in 1886 (which will be referred to presently) was obviously made under section 103 of the Code; that the provision that application in writing should be made by the holder under section 216 of the Code to make a survey in an " alienated village " would not apply when proceedings had commenced under Act 1 of 1865 on the assumption that the villages were unalienated and that assuming that such a course was necessary it cannot be presumed that the proper procedure was not followed.

The learned Chief Justice after stating that the suggested survey settlement was made in 1886 under the later Act of 1879, examined the provisions of the Act, the various rules and the definite references to an assessment having been made in 1886, and stated " The question seems to me to turn primarily on what inferences the Court ought to draw from the facts which I have mentioned ". Then he drew attention to the fact that the Government continued to levy the assessment from 1886 onwards for something like fifty years, and never suggested that agricultural assessment had not been properly introduced into these villages, and that he must draw all proper inferences against the Government.

So far as the application in writing required under section 216 from the grantees is concerned, he stated that:

" We must presume that such an application was made, and has been either lost or destroyed. The original, of course, would be in

> Government custody but nobody suggests that Government is suppressing anything. The evidence is that Government has in fact not got any such application at the present time and the grantees admit that they have not got any copy of it. But a letter may easily be lost or destroyed in the course of fifty years."

Dealing with the question of " sanction " he expressed the following opinion :

> " So far as Government sanction is concerned, as I read Rule 89 and section 102, it is not necessary that Government's sanction for introduction of survey settlement should be notified in the *Gazette*, unless the sanction goes on to fix an assessment for a specified number of years. But the mere sanction, without fixing any number of years, could, I think, be published by displaying a notice in the form given in the rules in a prominent place in the locality, e.g. the Collector's Office, and it seems to me that at this distance of time we must presume that this was done."

The learned Chief Justice also expressed his opinion " we must presume further that all the necessary steps were taken under section 103 to announce the settlement ". It cannot be disputed that announcement of the settlement was made to the grantees.

Their Lordships will now consider the arguments advanced by the appellant's learned counsel. The survey settlement was actually made in 1886. From the provisions of Act V of 1879, it will be seen that an " alienated village " can be brought within the provisions of the Act if there is an application in writing by the holder to extend the provisions to his village, and an authorisation of such extension by the Governor in Council. If there is such an application and authorisation then the Government could direct a survey and empower the officer in charge of the survey to fix an assessment ; but under section 102 no assessment can be levied without the sanction of the Governor in Council. Under Rule 89 such sanction has to be notified. The Governor in Council besides sanctioning the levy of the assessment can declare that it shall be lawful for a term of years. In this connection it will be remembered that the assessments in these cases are unfixed assessments, the levies being " experimental " rates for one year only. Under section 103 of the Act, when the assessments have been announced in the manner prescribed in the first clause of the section, the survey settlement shall be held to have been introduced. Whether the announcement of the settlement made to the grantees in 1886 can be said to fall properly within these provisions is the broad question for consideration in the present appeals.

On the evidence, the courts in India have found that an announcement of the survey settlement was openly made to the grantees in 1886. This must obviously be taken to be the announcement required under section 103 of the Act. Whatever doubt there may be as to whether an application under section 216 of the Act was made, or whether " sanction " was granted under section 102 of the Act and notified according to the rules, there cannot be any doubt whatever that an announcement was made to the grantees that a survey settlement was made in the suit villages, or that the Government continued to levy the rates for something like fifty years without themselves suggesting any legal difficulty in the way.

Under section 48 (2) of the Act of 1879 it is only when an assessment has been fixed " *under the provisions of this Act* " (Act V of 1879) that the provincial Government can introduce non-agricultural assessment i.e. " altered " assessment under the Act. The burden of proving that a survey settlement under the Act has been made lies on the plaintiffs ; that is to say, they have to prove that an application in writing under section 216 of the Act to extend the provisions of chapter VIII to their villages was made to the Government, and that the Governor in Council authorised such extension ; and that sanction under section 102 of the Act was granted and was notified as required by the rules. These the plaintiffs have failed to prove by direct evidence. It is true that the Government have shown by examining the *Gazettes*

from 1871 to 1917 that there is no record of any sanction and that they have not got with them any application made by the grantees; but the circumstances of the case are so strong that their Lordships think that they are justified in inferring from them that they have discharged their burden, these circumstances being, as already mentioned, the fact that these assessments have now continued for about fifty years and—what is more important—that an announcement of the introduction of the survey settlement was made to the grantees in 1886.

As regards the application which will presumably contain on it after acceptance an endorsement by the Governor in Council authorising the survey settlement of villages, their Lordships hold, agreeing with the High Court, that it may have been lost or destroyed in the course of fifty years. Mr. Pringle's objection is not so much to the presumption that is drawn that the application should be held to have been made—indeed he concedes (for arguments' sake) it might be reasonable—as to the absence of record to show authorisation by the Governor in Council. It is true that an actual form has been provided by the rules in which the authorisation by the Governor in Council is given but it is to be noticed that there is no requirement that the authorisation should be notified in the Gazette. The authorisation may well have been endorsed on the application made by the party to initiate proceedings. Passing orders by endorsing them on the applications made to them is not an unfamiliar method of disposal by Government. It was further argued that the learned Chief Justice has overlooked the required authorisation, but that he must have had it in his mind is clear because referring to "the application in writing by the grantee *Khot*" in the course of his judgment he says "if there is such an application Government can accept it . . ." The acceptance by government would include the required authorisation by the Government.

As regards the sanction, their Lordships think that Rule 89 read with section 102 of the Act would require notification of the sanction in the Gazette only in cases where the assessment has been fixed for a term of years. In cases like the present where rates have been sanctioned without fixing a term their Lordships think, as held by the High Court, that a sanction is published "by displaying a notice in the form given in the rules in a prominent place in the locality e.g. in the Collector's office" and this fact also can well be presumed to have taken place at this distance of time. Further—from the undisputed evidence which shows conclusively that the grantees were formally told that a settlement had been made—which must obviously be held to have been done under section 103 of the Act—it may well be held that all the necessary preliminary steps required to make a valid settlement have been taken by the Government. Section 114 of the Indian Evidence Act entitles a court to presume :

> "the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

Illustration (e) says "The Court may presume"—

> "that judicial and official acts have been regularly performed".

While section 114 of the Indian Evidence Act states the general maxim that all acts are presumed to have been rightly and regularly done, illustration (*e*) draws attention to a special application of the maxim with particular reference to judicial and *official acts*. It is impossible to think that the officers of the government would be likely to levy an assessment unless instructed to do so by the government. The fact that plaintiffs have not been able *at this distance of time* to prove by direct evidence that their predecessors-in-title made an application under section 216 of the Act or that the government granted "sanction" is not enough to displace the presumption that all official acts should be considered to have been regularly performed. Their Lordships cannot think that the government would have neglected to take the necessary steps to make a valid assessment.

From the above circumstances their Lordships conclude that a survey settlement was introduced in the suit villages under the provisions of the Act of 1879, and that the levy of the non-agricultural assessments by the Government was legal. It is not disputed that if the villages in question have come under the survey settlement the plaintiffs (trustees) are entitled to the non-agricultural assessment recovered by the Government.

In the view that their Lordships hold that the imposition of the non-agricultural assessment under the provisions of Act V of 1879, in the manner indicated above, is valid, no need arises for considering the further question whether the view of the Trial court that the proceedings were validly commenced under Act I of 1865, and under section 2 of the Act of 1879, were carried over as " Pending " to be completed under the Code (as they were completed by assessments in 1886) is right.

For the reasons given above their Lordships will humbly advise His Majesty that these appeals should be dismissed. There will be no order as to the costs of these appeals but the costs as between solicitor and client of the villagers who were added as respondents will, in accordance with the terms of the Order in Council, be paid by the Government.

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In the Privy Council

THE GOVERNMENT OF THE PROVINCE OF BOMBAY

v.

PESTONJI ARDESHIR WADIA AND OTHERS

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v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, NOW THE PROVINCE OF BOMBAY AND ANOTHER

DELIVERED BY SIR MADHAVAN NAIR

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