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THE COLLECTOR OF BOMBAY

v.

NUSSERWANJI RATTANJI MISTRI & OTHERS.

[VIVIAN BOSE, JAGANNADHADAS, VENKATARAMA AYYAR and SINHA JJ.]

Land revenue—Assessment—Right of Government to levy—Foras tenure—Incidents—Foras Land Act (Bombay Act VI of 1851), s. 2—Land Acquisition, effect of—Land Acquisition Act (VI of 1857), s. 8—Crown Grants Act (XV of 1857), s. 3—Scope of—Bombay City Land Revenue Act (Bombay Act II of 1876).

In the island of Bombay certain lands were held on a tenure known as "Foras". Under s. 2 of Bombay Act VI of 1851 the occupants were entitled to hold the lands subject only to the payment of revenue then payable. Between 1864 and 1867 the Government of India acquired these lands under the provisions of the Land Acquisition Act (VI of 1857). On 22-11-1938 the Governor-General sold them to certain persons under whom the present respondents claimed. In April 1942 the appellant acting under the Bombay City Land Revenue Act (Bombay Act II of 1876) issued notices to the respondents proposing to levy assessment on the lands at the rates mentioned therein. The respondents thereupon instituted two suits disputing the right of the appellant to assess the lands to revenue. They contended that under the Foras Land Act the occupants had acquired the right to hold the lands on payment of revenue not exceeding what was then payable, that the right to levy even that asseessment was extinguished when the Government acquired the lands under the Land Acquisition Act, that the Governor-General having conveyed the lands absolutely under the sale deed dated 22-11-1938 the respondents were entitled to hold them revenue-free and that even if revenue was payable it could not exceed what was payable under the Foras Land Act.

Held, (i) that under the Foras Land Act (VI of 1851) the occupants of Foras lands acquired a specific right to hold them on payment of assessment not exceeding what was then payable.

(ii) that the right of the Government to levy assessment was not the subject-matter of the land acquisition proceedings and that the effect of those proceedings was only to extinguish the rights of the occupants in the lands and to vest them absolutely in the Government.

(iii) that where there is an absolute sale by the Crown it does not necessarily import that the land is conveyed revenue-free.

The question is one of construction of the grant. The rule is that a grantee from the Crown gets only what is granted by the

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deed and nothing passes by implication. When the grant is embodied in a deed the question ultimately reduces itself to a determination of what was granted thereunder. Section 3 of the Crown Grants Act (XV of 1895) that "all provisions, restrictions, conditions and limitations over shall take effect according to their tenor" does not apply when the question is as to the liability to pay revenue.

(iv) that the Foras tenure became extinguished when the lands were acquired under the Land Acquisition proceedings and it was incapable of coming back to life when the lands were sold on 22-11-1938 and the respondents cannot claim a right to pay assessment only at the rate at which it was payable under the Foras Land Act.

Goswamini Shri Kamala Vahooji v. *Collector of Bombay* ([1937] L.R. 64 I.A. 334), *Shapurji Jivanji* v. *The Collector of Bombay* ([1885] I.L.R. 9 Bom. 483, 488), *Naoroji Beramji* v. *Rogers* (4 Bom. H.C.R. 1), *Deputy Collector, Calicut Division* v. *Aiyavu Pillay* ([1911] 9 I.C. 341), *Dadoba* v. *Collector of Bombay* ([1901] I.L.R. 25 Bom. 714), *Thakur Jagannath Baksh Singh* v. *The United Provinces* ([1946] F.L.J. 88) and *Collector of Bombay* v. *Municipal Corporation of the City of Bombay and others* ([1952] S.C.R. 43), referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 74 of 1952.

Appeal by Special Leave from the Judgment and Decree dated the 10th November 1948 of the High Court of Judicature at Bombay in Appeal from Original Decree No. 274 of 1945 arising out of the decree dated the 17th March 1945 of the Court of Revenue Judge, Bombay in Suits Nos. 7 and 23 of 1943.

C. K. Daphtary, Solicitor-General for India (*Porus A. Mehta,* with him), for the appellant.

M. C. Setalvad, Attorney-General for India and *Jamshedji Kanga,* (*R. J. Kolah* and *Rajinder Narain,* with them), for the respondents.

1955. February 28. The Judgment of the Court was delivered by

VENKATARAMA AYYAR J.—The point for decision in this appeal is as to the liability of certain lands situated within the City of Bombay to be assessed to revenue under the Bombay City Land Revenue Act No. II of 1876. These lands were originally known as Foras lands, and the rights of the occupants of

those lands were settled by Bombay Act No. VI of 1851, called the Foras Act. What these rights are, is a matter in controversy between the parties, and will be presently considered. Between 1864 and 1867 the Government acquired these lands for the purpose of the B.B.C.I. Railway, under the provisions of Land Acquisition Act No. VI of 1857. On 22-11-1938 these lands, being no longer required for the purpose of the Railway, were sold by the Governor-General to Lady Pochkhanawalla and others as joint tenants under a deed, Exhibit A. On 28-3-1939 the survivor of the purchasers under Exhibit A conveyed the lands in trust under Exhibit B, and the respondents are the trustees appointed under that deed.

In April 1942 the appellant acting under the provisions of Bombay Act No. II of 1876, issued notices to the respondents proposing to levy assessment on the lands at the rates mentioned therein, and calling for their representation. In their reply, the respondents denied the right of the appellant to assess the lands to revenue, and followed it up by instituting two suits before the Revenue Judge for establishing their rights. In their plaints, they alleged that under the provisions of the Foras Act the maximum assessment leviable on the lands was 9 reas per burga, and that the Government had no right to enhance it; that the effect of the land acquisition proceedings between 1864 and 1867 was to extinguish the right of the State to levy even this assesssment, and that further, having purchased the properties absolutely from the Governor-General under Exhibit A, they were entitle to hold them without any liability to pay revenue thereon. They accordingly prayed for a declaration that the Government had no right to levy any assessment on these lands, or, in the alternative, that such assessment should not exceed what was payable under Bombay Act No. VI of 1851. The appellant contested the suit. The Revenue Judge held that as a result of the land acquisition proceedings between 1864 and 1867, the lands vested in the Government freed from any liability to pay assessment, and that when the Governor-General transferred them under

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Exhibit A without reserving the right to assess them, the purchasers had the right to hold them without any liability to pay revenue. He accordingly granted a declaration that the appellant had no right to levy assessment, and that the notices issued by him under Act No. II of 1876 were illegal. On appeal by the defendants to the High Court of Bombay, it was held by Chagla, C.J., Bhagwati, J. concurring, that Act No. VI of 1851 imposed a specific limit on the right of the Government to levy assessments on the lands in question, that, further, by reason of the land acquisition proceedings the right of the Provincial Government to levy assessment even within the limits prescribed by Act No. VI of 1851 was extinguished, and that when the lands were transferred by the Central Government to Lady Pochkhanawalla and others, they got them as revenue-free lands. In the result, the appeal was dismissed. This appeal by special leave is directed against this decision.

The statutory authority under which the appellant seeks to levy assessment on the lands is section 8 of Bombay Act No. II of 1876, and it is as follows :

"It shall be the duty of the Collector, subject to the orders of Government, to fix and to levy the assessment for land revenue.

When there is no right on the part of the superior holder in limitation of the right of Government to assess, the assessment shall be fixed at the discretion of the Collector subject to the control of Government.

When there is a right on the part of the superior holder in limitation of the right of Government, in consequence of a specific limit to assessment having been established and preserved, the assessment shall not exceed such specific limit".

It was on the footing that the respondents were 'superior holders' as defined in the Act, that the appellant issued notices to them in April 1942. In their reply notices and in the plaints, the respondents did not dispute that position, but only contended in terms of section 8 that they had a specific right in limitation of the right of the Government to assess the

land; and the entire controversy in the Courts below was whether they had established that right. No contention was raised that they were not superior holders as defined in the Act, and that, in consequence, no assessment could be imposed on the lands under section 8 of the Act.

In the argument before us, the contention was sought to be raised for the first time by the learned Attorney-General that the proceedings taken by the Collector under section 8 were incompetent, as that section would apply only to lands held by superior holders, that the definition of 'superior holder' in section 3(4) as meaning "the person having the highest title *under* the Provincial Government to any land in the City of Bombay" would take in only persons who held on a derivative tenure from the Government, that persons who acquired lands from the Government under an outright sale could not be described as 'superior holders' within section 3(4), and that the lands held by the respondents were therefore outside the operation of section 8.

On behalf of the appellant, the learned Solicitor-General objected to this question being allowed to be raised at this stage of the proceedings, as that would involve investigation of questions of fact and of law, such as whether under the tenures in the City of Bombay, owners held the lands as superior holders, whether under Indian jurisprudence what was paid by the occupier of land was rent or revenue, whether the prerogative right of the Crown to assess lands subsisted in the Presidency Towns of Calcutta, Bombay and Madras and several other questions, for the decision of which there were not sufficient materials. This objection must be upheld. In view of the fact that the respondents have, at all stages, claimed immunity from assessment on the basis of section 8, we do not consider that it would be proper to allow them now to change their front, and take up a stand wholly inconsistent with what they had taken, when that involves an investigation into facts which has not been made. We must, therefore, proceed on the footing that the respondents are 'superior holders' as defined

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in section 3(4) of Act No. II of 1876, and that their rights are to be determined in accordance with section 8 of the Act.

Construing that section, the Privy Council laid down in *Goswamini Shri Kamala Vahooji* v. *Collector of Bombay*(1) two propositions: that though the language of the section would more appropriately apply when the dispute was as to the quantum of assessment, the right to levy it not being itself controverted, it was open to the superior holder under this section to plead and prove that the State had no right to levy any assessment; and that the burden was on the person who pleaded a limitation on the right of the State to assess, to clearly and unequivocally establish it. It is, therefore, open to the respondents to plead that the lands are wholly exempt from revenue; but the onus of making it out lies heavily on them.

The learned Attorney-General has sought to establish a right in the respondents in limitation of the right of the appellant to assess the lands on three grounds: (1) the Foras Act No. VI of 1851, (2) the land acquistion proceedings under Act No. VI of 1857, and (3) the sale deed, Exhibit A. Taking first the Foras Act: For a correct appreciation of its provisions, it is necessary to refer to the history of the lands, which are dealt with therein. The Island of Bombay once formed part of the Portuguese Dominions in India. In 1661 when Princess Infante Catherine was married to King Charles II of England, it was ceded by the King of Portugal to the British Crown as dowry, and by a Royal Charter dated 27th March 1668 King Charles II granted it to the East India Company. At that time the Island consisted only of the Fort and the town, and "outside the walls of the town it was scarcely more than rock and marsh which became a group of islands every day on high tide". Vide *Shapurji Jivanji* v. *The Collector of Bombay* (2). It appears from Warden's Report on the Landed Tenures in Bombay and Le Mesurier's Report on the Foras lands, that during the 18th Century the East India Company started

(1) [1937] L.R. 64 I.A. 334. (2) [1885] I.L.R. 9 Bom. 483, 488.

reclaiming these lands, and invited the inhabitants to cultivate them, at first without payment of any assessment and subsequently on favourable rates. These payments were called "Foras". The meaning of this word is thus explained by Westropp, J. in his note at page 40 in *Naoroji Beramji* v. *Rogers*(1) :—

"'Foras' is derived from the Portuguese word 'fora', (Latine *foras,* from *foris* a door), signifying outside. It here indicates the rent or revenue derived from outlying lands. The whole island of Bombay fell under that denomination when under Portuguese rule, being then a mere outlying dependency of Bassein. Subsequently the term *foras* was, for the most part, though perhaps not quite exclusively, limited to the new salt batty ground reclaimed from the sea, or other waste ground lying outside the Fort, Native Town, and other the more ancient settled and cultivated grounds in the island, or to the quit-rent arising from that new salt batty ground and outlying ground".

Thus, the salt batty lands reclaimed from the sea came to be known as Foras lands by association with the assessments payable thereon called "Foras". The nature of the interest which the occupants had in the Foras lands was the subject of considerable debate in the beginning of the 19th Century. In 1804, the Company resumed some of the Foras lands for settling persons displaced in the Town area, and that resulted in a suit by one Sheik Abdul Ambly, wherein the right of the Company to resume the lands was challenged. The action failed, the Court upholding the claim of the Company to resume them, but at the same time, it observed that its action in dispossessing the occupants would "appear and be felt as a grievous hardship, if not an open and downright injury". Vide Warden's Report on the Landed Tenures of Bombay, pages 60 and 61. Thereafter, the Company had the matter further investigated, and there were reports on the subject by Warden in 1814 and Le Mesurier in 1843. And finally the Company decided to recognise

(1) 4 Bom. H.C.R. 1.

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the rights of the occupants, and that resulted in the enactment of Act VI of 1851.

The relevant provisions of the Act may now be noticed. The preamble to the Act states that,

"Whereas the East India Company are legally entitled to the freehold reversion of the several lands heretofore paying a render called foras, the outline whereof is delineated in a plan.....and numbered 1, subject to certain tenancies therein at will, or from year to year; whereas it is considered expedient as of grace and favour that the rights of the said East India Company in all of the lands included in the said plan,.....should be extinguished, save as hereinafter mentioned. It is enacted as follows:"

Section 2 enacts that:

"From and after the said 1st day of July, the rights of the said Company in all of the said lands mentioned in the said plan No. 1, except those mentioned in the said plan No. 2, shall be extinguished in favour of the persons who shall then hold the same respectively as the immediate rent-payers to the said Company, saving the rents now severally payable in respect of such lands, which shall continue payable and recoverable by distress, or by any means by which land revenue in Bombay is or shall be recoverable, under any Act or Regulation....."

Section 4 provides:

"Nothing herein contained shall exempt such lands from being liable to any further general taxes on land in Bombay....."

According to the appellant, the effect of these provisions was to grant the lands to the occupants on a permanent tenure, heritable and alienable, but not further to grant them on a permanent assessment. Reliance was also placed on the decision in *Shapurji Jivanji* v. *The Collector of Bombay*(1), where it was held generally that the Government had the right under section 8 of the Act to enhance the assessments on Foras lands. There is some support for this contention in the provisions of the Act. The preamble

(1) [1885] I.L.R. 9 Bom. 483, 488.

expressly recites that the occupants were tenants at will or from year to year, and that the reversion was with the East India Company. One consequence of that was that the Company had the right to eject the occupants. Now, what the Company did under the Act was to give up that right as a matter of grace, because, as already mentioned, it would appear to have invited them to settle on the lands and cultivate them, and it did that by extinguishing its reversion as landlord. In other words, it agreed to confer on the tenants the status of owners of lands. If that was all the scope of Act No. VI of 1851, it could not be doubted that the rights of the State to enhance the assessments would not be affected, because ownership of land does not *per se* carry with it an immunity from enhancement of assessment in exercise of sovereign rights, and occupants of Foras lands cannot claim to be in a better position by reason of the Act than owners of lands in ryotwari tracts, the assessments on which are liable to periodic revision. But what is against the appellant is that section 2 does not stop with merely extinguishing the reversionary rights of the Company. It goes further, and saves expressly "the rents *now* severally payable in respect of such lands", rent being used here in the sense of assessment, and adds "which shall continue to be payable". Now, the contention of the respondents is that those words conferred on the Government a right to recover only the assessment which was then payable, and that there was thus a limitation on its right to enhance it. It is common ground that the assessment payable on these lands at that time was 9 reas per burga, and Exhibit N shows that it was at that rate that the assessment was collected from 1858 until the lands were acquired by the Government in land acquisition proceedings. It is accordingly contended for the respondents that under the Act, the Government could not claim anything more than 9 reas per burga as assessment on the lands.

It is urged for the appellant that the words "now severally payable" could not be construed as impos-

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ing a limitation on the right of the Government to enhance the assessment, as they occur in a saving clause, the scope of which was to reserve the rights of the Company and not to confer on the occupants rights in addition to what the body of the section had granted to them. It is true that the setting in which these words occur is more appropriate for reserving rights in favour of the Company than for declaring any in favour of the occupants. But to adopt the construction contended for by the appellant would be to render the words "*now* severally payable" and "which shall *continue* to be payable" wholly meaningless. Notwithstanding that the drafting is inartistic, the true import of the clause unmistakably is that while, on the one hand, the right of the Government to recover the assessment is saved, it is, on the other hand, limited to the amount then payable by the occupants. The contention of the respondents that under the Foras Act they acquired a specific right to hold the lands on payment of assessment not exceeding what was then payable, must, therefore, be accepted.

We have next to decide what effect the proceedings taken by the Government under the Land Acquisition Act No. VI of 1857 during the years 1864 to 1867 have on the rights of the parties. Section VIII of the Act is as follows :

"When the Collector or other officer has made an award or directed a reference to arbitration, he may take immediate possession of the land which shall thenceforward be vested absolutely in the Government, free from all other estates, rights, titles and interests".

The contention of the respondents which has found favour with the Courts below is that under that section the effect of the vesting of the lands in the Government was to extinguish whatever interests were previously held over them, that the right of the Government to levy assessment was such an interest, and that it was also extinguished. It is argued that when lands are acquired under the Act, the valuation that is made is of all the interests subsisting thereon, including the

rights of the Crown to assess the lands, as well as the interests of the claimants therein, that what is paid to the owners is not the full value of the lands but the value of their interests therein, deduction being made of the value of the right of the Government to assess from out of the full value, and that, in effect, there was an award of compensation for the right to assess, and that, therefore, that right equally with the rights of the claimants over the lands would be extinguished. One of the awards has been marked as Exhibit P, and the respondents rely on the recitals therein that the compensation to the claimants was "for their interest in the said lands". The award, it must be mentioned, directs the Government to pay the claimants the amounts specified therein, but contains no provision for payment of any sum as compensation to the Government for its right to assess the lands; nor does it even value that right. But the respondents contended that the Government being the authority to pay must be deemed to have paid itself, and that, in any event, if they were entitled to compensation, their failure to claim it could not affect the result, which was that the right to levy assessment would be extinguished.

We are unable to accept this contention. When the Government acquires lands under the provisions of the Land Acquisition Act, it must be for a public purpose, and with a view to put them to that purpose, the Government acquires the sum total of all private interests subsisting in them. If the Government has itself an interest in the land, it has only to acquire the other interests outstanding therein, so that it might be in a position to pass it on absolutely for public user. In *In the Matter of the Land Acquisition Act: The Government of Bombay*. v. *Esupali Salebhai*(1) Batchelor, J. observed :

"In other words Government, as it seems to me, are not debarred from acquiring and paying for the only outstanding interests merely because the Act, which primarily contemplates all interests as held outside Government, directs that the entire compen-

(1) [1909] I.L.R. 34 Bom. 618, 636.

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sation based upon the market value of the whole land, must be distributed among the claimants".

There, the Government claimed ownership of the land on which there stood buildings belonging to the claimants, and it was held that the Government was bound to acquire and pay only for the superstructure, as it was already the owner of the site. Similarly in *Deputy Collector, Calicut Division* v. *Aiyavu Pillay*(1), Wallis, J. (as he then was) observed:

"It is, in my opinion, clear that the Act does not contemplate or provide for the acquisition of any interest which already belongs to Government in land which is being acquired under the Act, but only for the acquisition of such interests in the land as do not already belong to the Government".

With these observations, we are in entire agreement. When Government possesses an interest in land which is the subject of acquisition under the Act, that interest is itself outside such acquisition, because there can be no question of Government acquiring what is its own. An investigation into the nature and value of that interest will no doubt be necessary for determining the compensation payable for the interest outstanding in the claimants, but that would not make it the subject of acquisition. The language of section VIII of Act No. VI of 1857 also supports this construction. Under that section, the lands vest in the Government "free from all *other* estates, rights, titles and interests", which must clearly mean other than those possessed by the Government. It is on this understanding of the section that the award, Exhibit P, is framed. The scheme of it is that the interests of the occupants are ascertained and valued, and the Government is directed to pay the compensation fixed for them. There is no valuation of the right of the Government to levy assessment on the lands, and there is no award of compensation therefor.

We have so far assumed with the respondents that the right of the Government to levy assessment is an interest in land within the meaning of section VIII

(1) [1911] 9 I. C. 341.

of Act VI of 1857. But is this assumption well-founded? We think not. In its normal acceptation, "interest" means one or more of those rights which go to make up "ownership". It will include for example, mortgage, lease, charge, easement and the like, but the right to impose a tax on land is a prerogative right of the Crown, paramount to the ownership over the land and outside it. Under the scheme of the Land Acquisition Act, what is acquired is only the ownership over the lands, or the inferior rights comprised therein. Section 3(b) of the Land Acquisition Act No. I of 1894 defines a "person interested" as including "all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act, and a person shall be deemed to be interested in land if he is interested in an easement affecting the land". Section 9 requires that notices should be given to all persons who are interested in the land. Under section 11, the Collector has to value the land, and apportion the compensation among the claimants according to their interest in the land. Under section 16, when the Collector make an award "he may take possession of the land which shall thereupon vest absolutely in the Government free from all encumbrance". The word "encumbrance" in this section can only mean interests in respect of which a compensation was made under section 11, or could have been claimed. It cannot include the right of the Government to levy assessment on the lands. The Government is not a "person interested" within the definition in section 3(b), and, as already stated, the Act does not contemplate its interest being valued or compensation being awarded therefor.

It is true that there is in Act No. VI of 1957 nothing corresponding to section 3(b) of Act No. I of 1894, but an examination of the provisions Act No. VI of 1857 clearly shows that the subject-matter of acquisition under that Act was only ownership over the lands or its constituent rights and not the right of the Government to levy assessment. The provisions relating to the issue of notices to persons interested

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and the apportionment of compensation among them are substantially the same. Moreover, under section VIII the Government is to take the lands free from all other "estates, rights, title and interest", and "interest" must, in the context, be construed *ejusdem generis* with "estates" etc., as meaning right over lands, of the character of, but not amounting to an estate, and cannot include the prerogative right to assess the lands. It must accordingly be held that the effect of the land acquisition proceedings was only to extinguish the rights of the occupants in the lands and to vest them absolutely in the Government, that the right of the latter to levy assessment was not the subject-matter of those proceedings, and that if after the award the lands were not assessed to revenue, it was because there could be no question of the Government levying assessment on its own lands.

Then there remains the question whether the sale deed, Exhibit A, imposes any limitation on the right of the Crown to assess the lands. The deed conveys the lands to the puchasers absolutely "with all rights, easements and appurtenances whatsoever" to be held "for ever". It does not, however recite that they are to be held revenue-free. But it is argued for the respondents that where there is an absolute sale by the Crown as here, that necessarily imports that the land is conveyed revenue-free; and section 3 of the Crown Grants Act No. XV of 1895 and certain observations in *Dadoba* v. *Collector of Bombay*(1) were relied on as supporting this contention. Section 3 of Act No. XV of 1895 is as follows:

"All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take affect according to their tenor any rule of law, statute or enactment of the Legislature to the contrary notwithstanding". The contention is that as the grant is of a freehold estate without any reservation it must, to take effect according to its tenor, be construed as granting exemption from assessment to revenue. But that will be extending the bounds of section 3 beyond its con-

(1) [1901] I. L. R. 25 Bom. 714.

tents. The object of the Act as declared in the preamble is to remove certain doubts "as to the extent and operation of the Transfer of Property Act, 1882, and, as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority". Section 2 enacts that the provisions of the Transfer of Property Act do not apply to Crown grants. Then follows section 3 with a positive declaration that "all provisions, restrictions, conditions and limitations over" shall take effect according to their tenor. Reading the enactment as a whole, the scope of section 3 is that it saves "provisions, restrictions, conditions and limitations over" which would be bad under the provisions of the Transfer of Property Act, such as conditions in restraint of alienations or enjoyment repugnant to the nature of the estate, limitations offending the rule against perpetuities and the like. But no question arises here as to the validity of any provision, restriction, condition, or limitation over, contained in Exhibit A on the ground that it is in contravention of any of the provisions of the Transfer of Property Act, and there is accordingly nothing on which section 3 could take effect.

It is argued by the learned Attorney-General that this limitation on the scope of the Act applies in terms only to section 2, and that section 3 goes much further, and is general and unqualified in its operation. The scope of section 3 came up for consideration before the Privy Council in *Thakur Jagannath Baksh Singh* v. *The United Provinces* (1). After setting out that section, Lord Wright observed:

"These general words cannot be read in their apparent generality. The whole Act was intended to settle doubts which had arisen as to the effect of the Transfer of Property Act, 1882, and must be read with reference to the general context....."

In this view, section 3 must also be construed in the light of the preamble, and so construed, it cannot, for the reasons already given, have any bearing on

(1) 1946 F. L. J. 88.

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the rights of the parties. Moreover, that section only enacts that "all provisions, restrictions, conditions and limitations over" shall take effect according to their tenor, and what is relied on is not any provision, restriction, condition or limitation over, in Exhibit A which according to its tenor entitles the respondents to hold the lands rent-free, but the absolute character of the interest conveyed under Exhibit A. Therefore, section 3 does not in terms apply.

The respondents also relied on certain observations in *Dadoba* v. *Collector of Bombay* (1) as supporting their contention. There, the facts were that the Government had granted one parcel of land to the Free Church Mission of Scotland revenue-free under a deed dated 1-10-1884. By another deed dated 20-12-1887 they released their right of reversion on two other parcels of land held by the Mission as tenants but "subject to the payment of taxes, rates, charges, assessments leviable or chargeable in respect of the said premises or anything for the time being thereon". On 16-1-1888 the Mission sold all the three parcels to one Janardan Gopal, and the Secretary of State joined in the conveyance for effectually releasing the reversion of the Government. Before Janardan Gopal purchased the lands, there had been correspondence between his solicitors and the Government as to the assessment payable on the lands, and the Government had intimated that it would be 9 pies per square yard per annum. Subsequent to the purchase, the Collector raised the assessment payable on the lands, and the point for decision was whether he could lawfully do so. In deciding that he could not, Sir Lawrence Jenkins stated that the purchaser had paid full value for the lands in the belief induced by the Government that the assessment of 9 pies per sq. yard would be permanent, and that on the facts, the case fell within section 115 of the Evidence Act, and that the Government was estopped from enhancing the assessment. He was also prepared to hold that the correspondence between the purchaser and the Government prior to

(1) [1901] I. L. R. 25 Bom. 714.

the sale amounted to a collateral contract not to raise the assessment. Chandavarkar, J., concurred in the decision, and in the course of his judgment observed :

"....when we have regard to the nature of the transaction, *viz.*, that Government was selling the property out-and-out as any private proprietor—when we look to the whole of the language used....the intention of the parties must be taken to have been that the purchaser was to be liable to pay the amount of 9 pies per square yard per annum then levied as assessment and no more".

These observations have been relied on as supporting the contention that when there is an absolute sale by the Government, it amounts to an agreement not to levy more assessment than was payable at that time. But the remarks of the learned Judge have reference to the recitals in the deed dated 20-12-1887 and the negotiations between the purchaser and the Government which are referred to in the passage, and not to the character of the transfer as an absolute sale; and the decision is based on a finding of estoppel or collateral contract deducible from the correspondence between the purchaser and the Government. Neither section 3 of the Crown Grants Act, nor the observations in *Dadoba* v. *Collector of Bombay*(1) lend any support to the contention that an absolute sale of lands by the Government *ipso facto* confers on the purchasers a right to hold the lands free of revenue.

The question then is whether on the terms of Exhibit A such a right could be held to have been granted. There was some discussion at the Bar as to the correct rule of construction applicable to the deed, Exhibit A. It was argued by the learned Solicitor-General for the appellant that being a Crown grant, Exhibit A should be construed in favour of the Crown and against the grantee. On the other hand, it was argued by the learned Attorney-General that it should make no difference in the construction of the grant, whether the grantor was the Crown or a subject, as

(1) [1901] I.L.R. 25 Bom. 714.

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the question in either case was what had been granted; and that must be determined on the language of the deed. When closely examined, it will be seen that there is no real conflict between the two propositions. The former is in the nature of a rule of substantive law; and its scope is that whereas the transferee from a subject acquires, unless the contrary appears, all the rights which the transferor has in the property as enacted in section 8 of the Transfer of Property Act, as grantee from the Crown gets only what is granted by the deed, and nothing passes by implication. But when the grant is embodied in a deed, the question ultimately reduces itself to a determination of what was granted thereunder. What the Court has to do is to ascertain the intention of the grantor from the words of the document, and as the same words cannot be susceptible of two different meanings, it makes no difference whether they occur in a grant by the Crown or by the subject. If the words used in a grant by a subject would be effective to pass an interest, then those words must equally be effective to pass the same interest when they occur in a Crown grant. Dealing with this question, Sir John Coleridge observed in *Lord* v. *Sydney*(1) :

"But it is unnecessary for their Lordships to say more on this point, because they are clearly of opinion, that upon the true construction of this grant, the creek where it bounds the land is *ad medium filum,* included within it. In so holding they do not intend to differ from old authorities in respect to Crown grants; but upon a question of the meaning of the words, the same rules of common sense and justice must apply, whether the subject-matter of construction be a grant from the Crown, or from a subject; it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances".

Exhibit A has to be construed in the light of these principles. As already stated, there is no recital in the deed that the purchasers are entitled to hold the lands free of assessment. On the other hand, it

(1) [1859] 12 Moore P.C. 473, 496, 497; 14 E.R. 991, 1000.

expressly provides that the properties will be subject "to the payment of all cesses, taxes, rates, assessments, dues and duties whatsoever now or hereafter to become payable in respect thereof", which words would in their natural and ordinary sense cover the present assessment. In *Dadoba* v. *Collector of Bombay*(1), the Court had to consider a clause similar to the above contained in a deed executed by the Government in favour of the Mission on 20-12-1887. Discussing the effect of this clause on the rights of the plaintiff to hold the property permanently on an assessment of 9 pies per sq. yard, Chandavarkar, J. observed :

"When that deed says that the property was sold 'subject to the payment of all taxes, rates, charges, assessments leviable or chargeable', it leaves the *question open* as to what the taxes etc., are which are 'leviable or chargeable'. Extrinsic evidence of that is admissible, for it neither contradicts nor varies the terms of the deed, but explains the sense in which the parties understood the words of the deed, which, taken by themselves, are capable of explanation : see *Bank of New Zealand* v. *Simpson*(2)".

In that case, the dispute was not as to the liability to pay any assessment but to the quantum of assessment payable, and it was a possible view to take that the clause in question was not decisive on that question, and that it was left open. But here, the question is whether a right was granted to the purchaser to hold the lands free from liability to be assessed, and the clause in Exhibit A clearly negatives such a right. Even if we are to regard the question as left open, as observed in *Dadoba* v. *Collector of Bombay*(1) , it will not assist the respondents, as they have not established *aliunde* any right to hold the lands free from assessment. It must, therefore, be held that far from exempting the lands from liability to be assessed to revenue, Exhibit A expressly subjects them to it.

It was finally contended that even if the land acquisition proceedings between 1864 and 1867 had not the

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(2) 1900 A.C. 182.

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effect of extinguishing the right of the Government to levy assessment, and that even if Exhibit A conferred on the purchasers no right to hold the land revenue-free, the assessment which the Government was entitled to levy under section 8 of Act No. II of 1876 was limited to what was payable under the Foras Act No. VI of 1851, and that the appellant had no right to levy assessment at a rate exceeding the same. The argument in support of the contention was that it was an incident of the Foras tenure under which the lands were held, that the occupants were bound to pay only a fixed assessment, that the incident was annexed to the lands, and was inseparable therefrom, that between the dates when the lands were acquired under the Land Acquisition Act No. VI of 1857 and 22-11-1938 when they were sold under Exhibit A they continued to retain their character as Foras lands, that if no assessment was paid on the lands during that period, it was because the hand to pay and the hand to receive were the same, that when they came to the respondents under Exhibit A, they became impressed with the Foras tenure, and that, in consequence, they were liable to be assessed only at the rate payable under Act No. VI of 1851.

This contention is, in our judgment, wholly untenable. When the lands were acquired under the Land Acquisition Act No. VI of 1857, the entire "estate, right, title and interest" subsisting thereon became extinguished, and the lands vested in the Government absolutely freed from Foras tenure, and when they were sold by the Government under Exhibit A the purchasers obtained them as freehold and not as Foras lands. As the tenure under which the lands were originally held had become extinguished as a result of the land acquisition proceedings, it was incapable of coming back to life, when the lands were sold under Exhibit A.

In support of the contention that the incidents of the Foras tenure continued to attach to the lands in the hands of the respondents, the learned Attorney-General relied on the following observations of

Das, J. in *Collector of Bombay* v. *Municipal Corporation of the City of Bombay and others* (1):—

"The immunity from the liability to pay rent is just as much an integral part or an inseverable incident of the title so acquired as is the obligation to hold the land for the purposes of a market and for no other purpose".

But the point for decision there was whether the Municipal Corporation of Bombay could acquire by prescription a right to hold the lands rent-free, they having entered into possession under a resolution of the Government that no rent would be charged. And the passage quoted above merely laid down that when title to the land was acquired by the Municipal Corporation by prescription, one of the rights acquired as part of the prescriptive title was the right to hold the lands revenue-free. But the question here is whether the right to hold the lands under a fixed assessment survived after the acquisition by the Government under the land acquisition proceedings, and that depends on the effect of section VIII of Act VI of 1857. If, as observed in the above passage, the liability to pay assessment was "an integral part or an inseverable incident of the title", then surely it was also extinguished along with the title of the occupants under section VIII of Act No. VI of 1857.

There is another difficulty in the way of accepting the contention of the respondents. The Foras Act was repealed in 1870 by Act No. XIV of 1870 long prior to the date of Exhibit A, and therefore, even if we hold that the Foras tenure revived in the hands of the purchasers under Exhibit A, the rights under the Foras Act were no longer available in respect of the lands. Section 1 of Act No. XIV of 1870 saves rights "already acquired or accrued", and it is argued that the rights now claimed are within the saving clause. But as the lands had all been acquired under Act No. VI of 1857 between 1864 and 1867 there were no rights in respect of the lands which could subsist at the date of the repeal, and the rights now claimed

(1) 1952 S.C.R. 43, 52.

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by the respondents are not within the saving clause. In the result, it must be held that the right of the appellant to levy assessment under section 8 of Act No. II of 1876 is not limited by any right in the respondents.

We accordingly allow the appeal, set aside the judgments of the Courts below, and dismiss both the suits instituted by the respondents with costs throughout.

Appeal allowed.

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March 1

SURAJ PAL

v.

THE STATE OF UTTAR PRADESH.

[VIVIAN BOSE, JAGANNADHADAS and B. P. SINHA JJ.]

Indian Penal Code (Act XLV of 1860), ss. 302, 307—Charges and conviction by trial court under s. 302 read with s. 149 and under s. 307 read with s. 149 of the Code—Conviction by the appellate court under ss. 302 and 307 of the Code—Legality—Code of Criminal Procedure (Act V of 1898), ss. 236, 237—Applicability—Retrial.

Where a person has been charged along with others under ss. 302 and 307 of the Indian Penal Code each, only as read with section 149 of the Code, his convictions and sentences for the substantial offences under ss. 302 and 307 of the Code are erroneous. The absence of specific charges in this behalf is a serious lacuna in the proceedings, inasmuch as the framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence is the foundation for a conviction and sentence therefor. The conviction in these circumstances under ss. 302 and 307 of the Code and sentences of death and transportation for life cannot be maintained unless the Court is satisfied, on the facts of the case, that the accused has not been prejudiced in his trial. Whether or not in such a situation the questioning of the accused during the course of his examination under s. 342 of the Code of Criminal Procedure in relation to the offences under sections 302 and 307 of the Indian Penal Code can be relied upon as obviating the likelihood of prejudice has to be determined with reference to the facts and ircumstances of each case.

All the circumstances of the case and the evidence and materials on the record should be looked into on the question arising in such a situation as to whether a retrial should be ordered or not.

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