
(1916) 01 CAL CK 0015
In the Calcutta High Court

Ananda Kumar Bhattacharjee

APPELLANT

Vs

The Secretary of State for India in Council

RESPONDENT

Date of Decision : 31-01-1916

Acts Referred:

Bengal Land Revenue Assessment (Resumed Lands) Regulation, 1819 — Section 21, 23
Evidence Act, 1872 — Section 65

Citation : 32 Ind. Cas. 774

Hon'ble Judges : D. Chatterjee, J;Beachcroft, J

Bench : Division Bench

Judgement

D. Chatterjee, J.—This was a suit for a declaration that the plaintiff had a revenue-free title to the property in suit and the defendant, the Secretary of State, had no right to assess revenue upon it. Both the Courts below have dismissed the suit and the plaintiff appeals mainly on the grounds (1) that there is no evidence of any resumption decree having been passed in favour of the Government in 1842, and the findings based on the existence of such a decree are bad; (2) that assuming that there was such a decree or a resumption by the Revenue Authorities, no action having been taken upon the same for more than 60 years the right of the Government is barred; (3) that the plaintiff having held the property without payment of revenue for more than 60 years, no assessment can be made by reason of Clause 4 of the proviso to Section 26 of the Assam Land and Revenue Regulation, I of 1886.

2. Before discussing these points I may shortly state the facts that are admitted or found. The disputed property which was formerly a tank and has now silted up was owned, by certain Muhammadans, who in 1806 sold it to the ancestor of the plaintiff: the deed of sale does not state that the property was lakheraj and there is no documentary evidence of a grant in lakheraj right. The defendant admits that Kasba Beniachong, the mahal in which the disputed property is situate, was excepted from the Permanent Settlement in 1793 as the then holders of, the same claimed a lakheraj right. The plaintiff admits that there was a measurement in 1839-40 with a view to resumption. The defendant says there

was a resumption suit in 1842 which was decided in favour of Government. Neither the decree nor an attested copy of the name is forthcoming, but there are recitals of a resumption case and decree in a number of papers, including a kabuliat by the father of the plaintiff but not in respect of the disputed land. These documents make out a resumption of the mahal in 1812, but it does not necessarily follow from that that the disputed land was included in the resumption. Next in point of time is the thakbust proceeding, Exhibit 3 produced and proved by the plaintiff. Under the heading "Number Touji and name of Mahal" we find the entry is "Non-settled resumed Mahal," and under the heading the Mahals which have been enclosed by boundaries or plotted," we find No. 170 the disputed property, and under the heading of "Remarks" we find that the name of the Government was originally recorded as the owner in possession but was removed on the objection of the plaintiff's ancestor, whose name was recorded instead. It is contended by the learned Advocate-General that this document being filed by the plaintiff it operates as an admission of the title of the Government in 1861. I do not see how this may be. The description of the mahal as a resumed mahal was made by the Thak Authorities, and not by the plaintiff or his ancestor. It was not the business of the Thak Authorities to decide whether a particular piece of land was resumed or not: they took the name as it was given by the Government Revenue Authorities who succeeded in getting an entry as owner in possession but that entry was expunged on objection by the plaintiff's ancestor. The enclosing by boundaries of the disputed plot also does not show that it was resumed, for lakheraj lands were as a matter of fact enclosed by boundaries during the thak. Even if the description of the mahal as resumed mahal could apply to the disputed plot, there is nothing in this to show that it was resumed under a decree of the Civil Court. This is all the evidence that we have of a resumption decree as it is called. I do not see my way to adopt this view and I think the appellant is right in contending that there is no evidence of a resumption decree in 1842 in respect of the disputed land.

3. There was, however, admittedly an attempt at resumption. The resumption chitta is clear evidence of that and we may take it there was a resumption by the Revenue Authorities, that is to say, a decision by the Revenue Board that the land was assessable to revenue. Section 21, Clause 1, Regulation II of 1819 provides that upon such a decision by the Board the duty of the Collector would be to make an assessment after notice to parties. See also Section 23, Regulation II of 1819. There is no provision in this Regulation as to the time within which this assessment was to be made. Now this Regulation was modified by Section 10 of Regulation III of 1828, which directed the assessment to be made at once and that if the owner declined to pay he must be dispossessed. In the present case there was no immediate assessment and the owner was allowed to continue in possession. It is said that this was so because the land was a tank and unfit for settlement. The learned Judge says this is clear from Exhibits V and T. I do not see how this is so. Exhibit T describes No. 2532 as a tank and gives its boundaries and Exhibit V does not mention No. 2532 at all. If Exhibit T shows

anything it shows that the property was a tank which would ordinarily be more valuable than waste land. Then again the learned Judge says the possession of the plaintiff was permissive, but that was never the case of the defendant who only said that no assessment was made of tanks, go-paths and waste lands as unfit for the settlement and as no one applied for them. The finding of the character of plaintiff's possession, therefore, is against the case of the defendant and is an inference which, as far as I can see, is not supported by evidence. On the other hand if the defendant, had a right to dispossess the plaintiff in 1842, and did not exercise its (sic) right, the possession of the plaintiff became adverse to the defendant from that time. That possession continued for more than 60 years and the defendant's right of recovery of possession is lost. It is said, however, that the right to assess revenue is a sovereign right and cannot be lost. Reliance is placed in support of this view on the case of *Boddupalli Jagannadham v. Secretary of State* 27 M. 16 With great respect to the learned Judges I do not feel at all pressed by the opinion expressed in that case in favour of a sovereign right of assessment, The particular Madras Regulation XXV of 1802 which was the subject-matter of discussion expressly reserved the right of Government, to continue or abolish exemptions from the payment of revenue and no question of prerogative was pertinent. The unreported case relied on by the learned Judges goes perhaps a little further, but there it was stated that "no limitation is placed on the exercise of that right by any Statute or law." That was probably so in Madras. In Bengal, however, we find that there is such a Statute. Sub-section 2 of Section 2 of Regulation II of 1805 is to the effect "that all claims on the part of Government, whether for the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption or for the recovery of arrears of the public assessment or for any other public right whatever (the judicial cognizance of which may not have been otherwise limited by some special rule or provision in force), shall be heard, tried and determined, etc., if the same be regularly and duly preferred at any time within the period of 60 years from and after the origin of the cause of action."

4. The origin of the cause of action was in 1793 at the time of the Permanent Settlement, when the predecessors-in-title of the plaintiff claimed a lakheraj title and the Government had to abstain from making a settlement. If the proceedings of 1842 declared the land liable to assessment the Collector should have proceeded to assess at once but he did not. Whether we count 60 years from 1793 or from 1842 the claim of the Government is barred. This disposes of the second question.

5. The last question argued is that the assessment is barred by Section 28 of Assam Regulation I of 1886. That section enacts that all land shall be liable to assessment except land expressly exempted and land for which a tax is levied u/s 47: "provided that nothing in this section shall authorize the assessment of any land which has been held revenue free for sixty years continuously unless it is shown that the right so to hold it has ceased to exist."

6. The land in this case has been admittedly held revenue free for more than 60 years and the Bengal Regulations under which assessments were previously made being repealed by this Regulation as to Assam and the operation of this section being excluded by the said proviso, there would be no law under which the disputed land could be assessed.

7. The learned Judge, however, thinks that to apply this section to the present case would be to give a retrospective effect to it and that 60 years have not elapsed from 1886. It is true that all legislation must be considered as prospective unless anything to the contrary is expressly or by necessary implication provided. But a Statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing: see *Reg v. St. Mary Whitechapel* (1848) 12 Q.B. 120 : 17 L.J.M.C. 172: 116 ER 811. If the proviso is considered to be an enacting part of the section, which it apparently is not, it operates on the state of things that it finds existing on its promulgation. If it finds that a particular piece of land answers to the description contained in its wording, it operates by excluding it from the operation of the enacting part.

8. But the matter may be looked at from another point of view. The proviso excepts a particular class of lands from the operation of the enacting part of the section. The enacting part, therefore, does not apply and no retrospective effect is given to any enactment.

9. In the next place, it may be said that it does not take away or affect any vested right: it declares what the legal position of these lands was at its passing. The Limitation Regulation had barred the right of assessment in such cases and it was thought proper to add this proviso just for the purpose of preventing misconception and dispute.

10. The second clause to the proviso might at first sight appear to authorise the assessment of the disputed lands as excepted from the Permanent Settlement.

11. In construing that clause, however, it must be remembered that the Regulation was originally passed for the Province of Assam, where the Permanent Settlement came very much later where it did come and in many-places it has not come even now, so that it cannot be said that the assessment of lands excepted from the Permanent Settlement in 1793 was contemplated in 1886 after more than 93. years. Clause 2 of the proviso, therefore, would authorise the assessment of lands excepted from the Permanent Settlement if they were not saved by any of the other excepting clauses of the proviso, and in the present case Clause 4 has saved them.

12. In this view of the case I would allow the appeal and decree the suit with costs in all Courts in the following manner that it be declared that the disputed land is not liable to be assessed with revenue and the Secretary of State be enjoined not to realise the sum claimed in the notice of December 1908. If the amount has been realised it will be refunded to the plaintiff.

Beachcroft, J.

13. As regards the first point argued on behalf of the appellant, I am not prepared to say that there is no evidence that the land was resumed in 1842. There is no doubt that there was evidence before the learned Judge that resumption proceedings were taken in respect of the whole of the Baniachong, in which area was included the subject-matter of dispute, and that this particular piece of land, then a tank, figured in the resumption chitta. Then the learned Judge says: "the rubakari (Exhibit V) shows besides that plaintiff or his father preferred no objection with regard to the disputed tank." It has not been suggested that this is an incorrect statement of the contents of the exhibit, nor has it been taken as a ground of appeal that the learned Judge has in the passage misstated the evidence. An extract from the exhibit has been printed. It mentions that objections were made in respect of some lands. But the whole exhibit has not been placed before us, and though in the portion printed there is no mention of this particular plot there is no reason to suppose that the portions not printed, to some passage in which the learned Judge presumably refers, did not bear out his statement of their contents.

14. It was urged that as u/s 65 of the Indian Evidence Act, the only secondary evidence admissible of the contents of a public document is a certified copy, there was no evidence of the contents of the resumption decree. But the rule is obviously subject to the rule that when the original has been destroyed or lost any secondary evidence may be given.

15. The appeal must, however, in my opinion, succeed on the ground that the assessment complained of is barred by Section 28 of the Assam Land and Revenue Regulation, 1886. It is argued for the respondent that the right of the Government to assess land revenue, which, as is pointed out in the preambles to Regulations XIX and XXXVII of 1793, is based on the ancient law of the Country, can never be barred. As to the proposition stated in those general terms it is not necessary to express an opinion. For it is clear that Government can divest itself of the right to assess revenue and can make such Regulations for the guidance of its officers as will have the same practical result as renunciation of the right to assess revenue. Now the Assam Land and Revenue Regulation has repealed the Bengal Regulations so far as they apply to territories to which the Regulation has been extended so the only provisions for assessment of the land revenue as extant in Sylhet are those to be found in the Regulation itself. Section 28 provides that all land shall be deemed liable to be assessed to revenue, subject to exceptions in two classes of land, and subject also to certain provisos. Exemption is claimed under the 4th proviso which declares that nothing in the section shall "authorise the assessment of any land which has been held revenue free for sixty years continuously unless it is shown that the right so to hold has ceased to exist." The learned Advocate-General argued that the words "held revenue free" meant so held "as of right", but he was not prepared to argue that they could, not mean merely "held without payment of revenue" apart from any

question of the right so to hold the land. I think that if the former meaning had been intended it would have been expressed in definite terms and that the meaning to be attached to the words is the alternative one suggested. The proviso then would seem intended to reproduce the rule of 60 years' limitation provided by Section 2 of Regulation II of 1805. It is also definitely enacted that the proviso is made inapplicable if it be shown in the case of land so held that the right so to hold it has ceased to exist. The qualification is probably intended to save the land revenue in cases where at some time the land has been rightly held without payment of revenue within the sixty years. The effect of the proviso appears to be to save the land from assessment if the owner can prove 60 years' possession without payment of revenue, unless Government can prove that at some time within the 60 years there was a cessation of the assessee's right to so hold it. If it were sufficient for Government to show that at any time, even before the 60 years, the owner had no right to hold the land revenue free or had lost the right, the practical effect of the proviso would be merely to raise a presumption in favour of freedom from assessment after 60 years' holding without payment of revenue. If that had been the intention, I think, it would have been expressed in simpler language. It seems to be a case of an exception within an exception. So that if in fact there has never been a right to hold the land revenue free, the second exception will not apply and the holding of the land without payment of revenue for 60 years will bar the assessment.

16. I must confess that I express this opinion as to the meaning of the 4th proviso with considerable diffidence in view of the fact that the 2nd proviso contemplates cases of assessment of land which was not included in the assets of an estate at the time of the Permanent Settlement, but I do not see what other construction can be placed upon it.

17. The learned District Judge favoured the view that the proviso to Section 28 could not have retrospective effect, in other words, that it could not come into operation till the year 1946. This view was only faintly supported in this Court and does not commend itself to me. There does not appear to be any parallel between this case and the case relied on by the learned Judge.

18. In the present case the appellant has held the land for more than 60 years without payment of rent: it is not shown that he lost the right within the 60 years preceding the suit, in fact it is not shown that he ever had the right to hold revenue free. The result is that the Regulation does not authorise assessment in his case.

19. I, therefore, agree in allowing the appeal and decreeing the plaintiff's suit.