

**(1921) 08 CAL CK 0023**  
**In the Calcutta High Court**

Bhuban Mohan Sardar and Others

APPELLANT

Vs

Dhangopal Ghose and Others

RESPONDENT

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**Date of Decision :** 19-08-1921

**Acts Referred:**

Bengal Embankment Act, 1882 — Section 87

**Citation :** AIR 1921 Cal 761 : 84 Ind. Cas. 22

**Hon'ble Judges :** Panton, J;Asutosh Mookerje, J

**Bench :** Division Bench

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## Judgement

1. This is an appeal under Clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in an Appeal from Appellate Decree arising out of a suit for confirmation of possession of land upon establishment of title. The subject matter of the litigation is the site of an old embankment on the west bank of the river Hugli which was entered as No. 73 in Schedule. D to the Bengal Embankment Act, 1873. The embankment was abandoned, and on the 21st February 1912, the Collector conveyed the site to the predecessor of the plaintiffs. The defendants are the proprietors of estate No. 302, and the disputed land is admittedly included within the ambit of their estate. The plaintiffs based their claim on the conveyance executed by the Collector. The defendants disputed the validity of the transfer as made in contravention of Section 87 of the Bengal Embankment Act, 1882. The Trial Court held that the plaintiffs had failed to establish a valid title and dismissed the suit. Upon appeal, the District Judge reversed that decision and decreed the claim. On second appeal to this Court, the decree of the District Judge has been confirmed by Mr. Justice Walmsley. This decree has been assailed on the present appeal on two grounds, namely, first, that on a true construction of the provisions of Act II of 1882, the District Judge should have held that Section 87 was not controlled by Section 4 and, secondly, that u/s 87, the Collector was not competent to transfer the land to the predecessor of the plaintiffs without opportunity afforded to the defendants to secure restoration of the land.

2. As regards the first ground, great weight must be attached to the opinion expressed by Mr. Justice Walmsley that the view taken by the District Judge is not justified by the generality of the language used by the Legislature in Section 87. The phraseology of that section is manifestly 1 comprehensive enough to make the rule enunciated therein for the disposal of lands no longer required for embankments, applicable to all public embankments. The District Judge took the view that the effect of Section 4 is to restrict the comprehensive scope of Section 87 and to make the rule inapplicable to the embankments mentioned in Schedule D to Act VI of I 1873. The history of these embankments, as set out in the judgment of Field, J., in *Nuffer Chunder Bhutto v. Jotindro Mohun Tagore* 17 C. 505 : 4 Sho L.R. 158 : 8 C.L.R. 553 : 3 Ind. Dec. (N.S.) 874, affords no indication that the embankments so scheduled were intended to be excluded from the operation of Section 63 of Act VI of 1873 which corresponds to Section 87 of Act II of 1882. We are not much impressed by the variance in punctuation between Section 34 of Act VI of 1873 and Section 4 of Act II of 1882, which is emphasised by the District Judge. There are two-weighty objections to the adoption of the view taken by him. In the first place, if the Legislature had intended that Section 87 should not be applicable to the embankments enumerated in Schedule D, the section might have been appropriately expressed, and the words "other than embankments mentioned in Schedule D" might have been inserted after the words "public embankment." Besides this, the provisions of Section 4 are not contradictory to those of Section 87, and the two may be reconciled so as not to render inevitable the inference that the embankments mentioned in Schedule D are by implication excluded from Section 87. In the second place, the Local Government has authority u/s 43 of Act II of 1882 to direct that any embankment not mentioned in Schedule D be included therein. It is improbable that such a power would be reserved, if the effect of its exercise was to deprive the subject at any moment of the valuable right conferred on him by Section 87. We are, on the whole, inclined to agree with Mr. Justice Walmsley that Section 87 applies to all public embankments inclusive of the embankments enumerated in Schedule D.

3. As regards the second ground, its validity must be tested with reference to the language of Section 87 of Act II of 1882, which, for this purpose, is not identical with the language of Section 63 of Act VI of 1873. Section 87 of Act II of 1882 provides as follows: "Whenever the maintenance of any public embankment, or the retention of any land appropriated to the purposes thereof, may no longer be required, and the permanent relinquishment of the same may be deemed expedient, such land shall be restored by the Collector to the estate or tenure from which such land was originally taken on repayment of the compensation, if any, which was paid for such land when the same was taken for the purpose of the embankment. If persons who are entitled to the restoration of any land under this section, or any of them, refuse or neglect to pay such price within a reasonable time after demand, the same shall be sold by the Collector as a revenue free holding for such price as he can obtain, for the same."

4. Section 63 of Act VI of 1873 was in the following terms: "Whenever the maintenance of any public embankment, or the retention of any land appropriated to the purposes thereof, may no longer be required, and the permanent relinquishment of the same may be deemed expedient, such land shall be conveyed by the Collector to the proprietor of the land, within the limits of which it may be situated, on payment of the compensation, if any, which was paid for such land when the same was taken for the purpose of the embankment. If the proprietor of such lands refuse or neglect to pay such price within a reasonable time after demand, the same shall be sold by the Collector for such price as he can obtain for the same.

5. It will be observed that whereas under Act VI of 1873 the relinquished embankment is to be conveyed to the proprietor of the land within the limits of which it may be situated, under Act IT of 1882, the land is to be restored to the estate or tenure from which such land was originally taken. Under the law as it now stands the burden thus lies upon the person who claims the abandoned embankment to establish that the site was originally taken from his estate or tenure. If the embankment was erected after the Permanent Settlement, it may be possible to raise a presumption in favour of the claimant that the site was taken out of his estate. But where, as here, nothing is known as to the time of erection of the embankment, no presumption arises that the embankment stands on a site which was included within the estate of the defendants at the time of the Permanent Settlement. If the embankment was in existence at the date of the Decennial Settlement, or the Permanent Settlement, it is improbable in the highest degree that the site should have been included in an estate settled with a private individual. It is not enough for the defendant to show that the site lies within the limits of their estate; they have to establish that the land was originally, that is, at the time of the first erection of the embankment, taken from their estate. This burden has not been discharged by the appellants; in other words, they have not established their right to invoke the aid of Section 87. The title created by the Collector in favour of the predecessor of the plaintiffs consequently remains unimpeached.

6. The result is that the decree made by Mr. Justice Walmsley is affirmed and this appeal dismissed with costs.