

(1928) 08 CAL CK 0046
In the Calcutta High Court

Harendra Kumar Rai Choudhuri and Others

APPELLANT

Vs

Secy. of State and Others

RESPONDENT

Date of Decision : 14-08-1928

Acts Referred:

Public Demands Recovery Act — Section 9

Citation : AIR 1928 Cal 808

Hon'ble Judges : Page, J; Mallik, J

Bench : Full Bench

Judgement

Page, J.—The plaintiffs are 7 annas and odd cosharers in a zemindari, and 16 annas putnidars under the zemindars. Certain lands have accreted to the Zemindari, and diarah proceedings were taken by the Government for the purpose of the resumption and settlement of the accreted lands, and the assessment thereof with revenue under Regulation 7 of 1822 and 1 of 1825, Act 31 of 1858, Act 9 of 1847, and Ch. 10, Ben. Ten. Act. The zemindars refused to take settlement of the accreted lands, and were granted malikana in respect thereof. The Government then took khas possession of the accretions, and in the Record-of-Eights the plaintiffs are recorded as the tenants of the separate diarah mahals Nos. 13618, 13116, which had been formed out of the accreted lands. Thereafter five certificates under the Public Demands Recovery Act (3 of 1913) were issued and notices were served upon the plaintiffs for the recovery of arrears of rent and cesses alleged to be due from them as tenants of these diarah mahals under the Government. The plaintiffs under protest paid the amounts demanded under the certificates on 28th October, 1920, 26th March 1922 and 31st January 1924. On 21st July 1924 the plaintiffs brought the present suits for a declaration that they are not liable for the rent and cesses in respect of these two diarah mahals, and that the certificates were issued ultra vires and were null and void. The plaintiffs also sought to recover by way of refund the sums paid thereunder to the Government.

2. Three defences were raised by the Secretary of State for India:

(1) That the plaintiffs had failed to bring the present suit within six months of their petition denying liability u/s 9, Public Demands Recovery Act, and, therefore, under Sections 34, 35 and 37 of the Act the suits were barred by limitation.

(2) That as the plaintiffs had failed to bring a suit within the time limited by Section 104H, Ben. Ten. Act the plaintiffs in the present suits were precluded u/s 104J and Section 111A from challenging the correctness of the entries in the Record-of-Rights to the effect that they were tenants of the diarah mahals under the Government and were liable to pay the rent, therein stated to be settled.

(3) That on the refusal of the zemindars to take settlement of the lands that had accreted to their zemindari the Government was entitled to treat the plaintiffs as tenants under Government of the new estates that had been created out of the accretions, and to recover rent and cesses in respect of the same from the plaintiffs.

3. The first contention on behalf of the defendant raised the question whether the only mode in which the validity of a certificate issued under the Public Demands Recovery Act, and the liability of the certificate debtor to pay the public demand thereunder can be challenged is by resorting to the machinery provided in the Act.

4. The general rule is

that an affirmative statute giving a new right does not of itself and of necessity destroy a previously existing right. But it has that effect if the apparent intention of the legislature is that the two rights should not exist together : per Lord Granworth, L.C., in *O'Flaherty v. Mc. Dowell* [1857] 6 H.L.C. 142

Whether the new remedy is exclusive or cumulative in each case will depend upon the true construction of the statute under consideration.

5. Now it is to be observed that in Section 37 the legislature, when limiting the common law right of the subject to seek relief in a Court of law, refers to "a certificate duly filed under this Act," and in my opinion, it is a condition precedent to the issue of a valid certificate that the "public demand" should be due and payable by the certificate debtor, and if at the time when the certificate is signed by the certificate officer there is no "public demand" due from the certificate debtor the certificate is ultra vires, and all the proceedings founded upon it are null and void. The ruling of the Judicial Committee in *Balikssen Das v. Simpson* [1898] 25 Cal. 833 relating to the cognate provisions of the Bengal Land Revenue Sales Act (11 of 1859) is applicable to the Public Demands Recovery Act : see *Janakdhari Lal v. Gossain Lal* [1909] 37 Cal. 107, *Nandan Missir v. Harak Narain* 14 C.W.N. 607, *Pratap Chandra Jana Vs. The Secretary of State for India in Council*, . *Dhirendra Krishna v. Mohendra* AIR 1923 Cal. 428. In *Balkissan Das v. Simpson* [1898] 25 Cal. 833 Lord Watson, in delivering the judgment of the Board, observed that

the Act does not sanction and by plain implication forbids the sale of any estate which is not at the time in arrear of Government revenue.... But the chief and substantial objection upon which the appellants' plaint is based is that at the time when their 5 annas share of the village Shahzadpur was sold there were no arrears of revenue due by them in respect of it.... The result is that the whole of the proceedings of the Collector with a view to the sale of the 5 annas share were beyond his jurisdiction, and are not entitled to the protection given by the Act in cases where the sale is authorized, although it may be attended with some irregularity or illegality : *ibid* p. 842, *Mutsaddi Mians v. Mahamed Idris* AIR 1915 P.C. 177; *Mahomed Jan v. Gunga Bishun* [1911] 38 Cal. 537.

6. The issue to be determined, therefore, is whether the arrears and cesses in suit were due from the plaintiffs at the time when the certificates were issued. The defendant's second contention is that under Sections 104(J) and 111A, Ben. Ten. Act, the plaintiffs are precluded from asserting in the present suits that they are not liable as tenants to pay the rent settled and cesses in respect of the two diarah mahals as they have failed to challenge the entries to that effect in the Record-of-Rights as provided by the Act.

7. The answer to that contention is that u/s 104(J), although the entry relating to the rent settled is conclusive, any other entry is not irrebutable but

shall be presumed to be correct until it is proved by evidence to be incorrect. Section 103B(3), *Priya Nath Basu and Others Vs. Tarachand Moral and Others*, , *Uma Charan Panda Vs. Lakshmi Narayan Panda and Others*, .

8. Now, the entries in the Record-of-Rights that the plaintiffs are tenants of the two diarah mahals and are in possession of the same through sub-tenants clearly are rebutted by the following facts found by the lower appellate Court, that:

no settlement was or could under the law be offered to them as patnidars
and that

the plaintiffs were not in possession of the diarah mahals, and refused to take settlement thereof.

9. Nevertheless, the third contention of the defendant is that, notwithstanding the refusal of the plaintiffs to become tenants under the Government, after the zemindars had declined to take settlement of the lands that had accreted to their zemindari, the Government was entitled to treat the plaintiffs as tenants under Government and to claim rents and cesses from the plaintiffs in respect of the two diarah mahals. In my opinion this contention is ill founded. No doubt, in the circumstances the plaintiffs under the law were entitled to claim these accreted lands as appertaining to their patni tenure, but to contend that the Government could compel them to take settlement of the accreted lands even against their will is to advance a proposition opposed to good sense and justice, and for which, I apprehend, there is no justification in law. In the present case it is not pretended that the plaintiffs have taken possession of the lands in suit, or that

they have entered into any agreement to take statement of the lands from Government, and, in my opinion, at the time when the certificates were issued there was no "public demand" due from the plaintiffs; the certificates were ultra vires the certificate officer, and all the proceedings founded upon the certificates were null and void.

10. I am of opinion that the plaintiffs are entitled to the declarations for which they pray and as the claim for a refund of the arrears and cesses that were paid under protest is in substance one for money had and received by the Secretary of State to their use Article 62, Schedule 1, Lim. Act (9 of 1908) is applicable, and the plaintiffs are entitled to recover the sums paid under protest, except the amount of the payment on 28th October 1920, which was not made within three years of the filing of the suit. The decrees of the lower appellate Court will beset aside, and a decree in the above sense passed in favour of the plaintiffs-with costs in all the Courts.

Mallik, J.

11. I agree.