

(1935) 08 CAL CK 0017
In the Calcutta High Court

Secy. of State

APPELLANT

Vs

Brajendra Kishore Rai Choudhury and Others

RESPONDENT

Date of Decision : 26-08-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 95

Citation : AIR 1936 Cal 629

Hon'ble Judges : Rau, J;D.N. Mitter, J

Bench : Full Bench

Judgement

D.N. Mitter, J.—The suit in which these two appeals arise was brought by the plaintiff, now respondent, for several reliefs, viz: (ka) for declaration of plaintiffs' mourashi maliki right by settlement and by right of adverse possession for upwards of 12 years to 1/3 share of the two beels (fisheries) known as Dhola and Baruri beels described more fully in the schedule to the plaint and of the Chapras, Nalas, khals and Kuris attached thereto; (kha) for a declaration that according to the provisions of the Assam Land and Revenue Regulation of 1886 the plaintiff is entitled after the expiry of the period of the settlement of 1902 to get fresh settlement at a proper Jama of lands described in the schedule and of the two said beels from Government; (ga) for a declaration that the Government has no right to separate the lands of the beels, Baruri and Dhola, from the other lands of pattas Nos. 82 and 129 to assess any rent therefor separately in an arbitrary manner or upon the produce; (gha) for a declaration that the rent which has been demanded on behalf of the Government separately, and unjustly and illegally on account of the land in claim in the schedule is ultra vires, null and void; (cha) for a declaration that with respect to land mentioned in the schedule the settlement which had been granted by the Government in favour of defendants 2, 3 and 4 may be declared void, ultra vires and inoperative; (chha chaa) for recovery of possession if during the pendency of the suit the plaintiff be said to have been dispossessed from the two beels or any portion thereof; (ja) for mesne profits from the month of Pous 1330 B.S. to the time of recovery of possession; (jha) for such other reliefs as plaintiffs may be entitled to and (niya)

for costs and for these other reliefs embodied in prayer Una, Chha and Ja in respect of which plaintiff's claim has been dismissed and there is no controversy in the present appeal. The principal defendants to the suit were the Secretary of State for India in Council (Defendant 1) who is the appellant in Appeal No. 68 of 1929 and Hanif Mahi, (Defendant 2), and Karimdi Mahi, (Defendant 3), who are appellants in Appeal No. 56 of 1929 and Madan Mahi, defendant 4, who was party respondent to both these appeals but who has died during the pendency of the appeal. The learned Senior Government Pleader asked for an adjournment in order to bring the legal representatives of defendant 4 on the record. But as these two appeals were very old appeals having been filed in 1929, Dr. Sen Gupta appearing for the plaintiff-respondent objected to the adjournment contending that defendant 4 was not a necessary party to these appeals as the settlement in favour of defendant 4 has been cancelled and agreed that the decree against defendant 4 may be discharged.

2. The suit was instituted by Brajendra Kishore Rai Choudhury (plaintiff 1), against 47 defendants. Defendants 1 to 4 were described as the principal defendants; amongst the pro forma defendants 5 to 41 were described as the co-sharers defendants 42 to 47 were lessees under plaintiff 1 and have on their own application been transferred to the category of plaintiffs and are now plaintiffs 2 to 7. The case stated in the plaint is that the plaintiff is the owner in possession in maliki right by settlement and by right of adverse possession of 1/3 share of Baruri covered by illam patta bearing No. 117 43874/82 present No. 2 and No. 149 4387/83 present No. 3 and of the two Beels Baruri and Dhola covered by Illam Pottah bearing No. 118 43913/12 present No. I which are fully described in the boundaries in the schedule and that he has been in possession by granting settlement to tenants; that the lands covered by the Beels were waste lands unfit for reclamation and were settled originally under the waste lands rules; that the plaintiff and his predecessors with great care and at enormous cost erected embankments and have turned them into a highly valuable fishery; that the plaintiff has acquired by settlement and by adverse possession for more than 12 years the status of landholder within the meaning of the Assam Land and Revenue Regulation and that he is entitled to get fresh settlement from the Government not only of the two Beels but the entire lands described in the schedule; that after the last cadastral survey the lands in the schedule together with other lands were given by Government in Ilak settlement in 1902 for a period of 20 years and the settlement expired in March 1922; that notwithstanding the expiry of the lease the Government accepted for the years 1922-23 from plaintiff and other proprietors mentioned in the patta the entire rent for the entire lands covered by the patta as the Government was bound under the law to do; that there is a custom as to how the rate of rent per bigha is to be fixed for lands settled when patit lands are re-claimed or when the condition of the same is changed and according to the said custom Ilan lands are given in settlement; that if there is any Beel in any Ilam mahal or if any lands in Ilam mahal are converted into Beel, there is no custom that only the lands

appertaining to the said Beel should be separated from Ilam mahal or that the land of the Beels should be given in settlement separately, that the Government has right to grant settlement separately of only the Beel lands or to assess revenue upon the produce of the Beel in an arbitrary manner; that on receipt of a notice signed and issued by the Subdivisional Officer of Moulavi Bazar, an agent of defendant 1 on 17th June 1923, the plaintiff came to know that a proposal was made to settle the Beels Baruri and Dhola with the plaintiff at an annual rental of Rs. 500 for a period of three years from 1329 to 1331 B.S.; that on receipt of the said notice the plaintiff appeared before the Subdivisional Officer of Moulavi Bazar and filed a petition of objection on the allegations that the Government had no right to assess any rent arbitrarily and separately only for the two Beels; that the petition of objection having been dismissed by the Subdivisional Officer of Moulvi Bazar, defendants 2 and 3 and defendant 4 (Madan Mahi) on accepting the rental of Rs. 500 fixed by Government, took settlement of the said two Beels from the Government for a period of three years on 17th September 1923 and on 20th September 1923; that the Government however had already realized from the plaintiff and the other proprietors mentioned in the aforesaid two Pattas Nos. 82 and 129 the entire rental for 1329 B.S., at the previously fixed rate; hence the Government had and has no right to accept the rent of Rs. 500 again for 1329 B.S., on account of the lands of the disputed two Beels of Baruri and Dhola; that the plaintiff having refused to take settlement of the Beels Baruri and Dhola at an annual rental of Rs. 500 in accordance with the improper and unjust proposal of the Government, only the lands appertaining to the said two Beels were settled with defendants 2, 3 and 4 on behalf of defendant 1 upon which the principal defendants in collusion with each other attempted to dispossess the plaintiff and his Ijaradars, the pro forma defendants from the lands of the said two Beels in Pous 1330 B.S. Upon this state of the pleading the plaintiff has asked for the reliefs mentioned in the beginning of the judgment.

3. The defence of the Secretary of State falls under several heads: (1) That the suit is barred by the provision of the Assam Land and Revenue Regulation (2) The Civil Court has no jurisdiction to try and decide questions raised in prayers "Ga" to "Cha". (3) Rights are enjoyed subject to the power of legislation vested in the Government. From the beginning of the Land Revenue Settlement it has been an invariable rule of law that at every new settlement there must be a new classification and a new rate of assessment to be determined by the Settlement Officer under the direction of the Government and with its approval. Government is the sole judge of the propriety of the classification and the suitability of the rate, and the amount of revenue settled by the Government officer is final. This has been the law always and this is the law now. It is also not a correct propositions of law that fisheries included in a lease cannot be assessed and offered for the settlement separately from the other lands of the patta. There is nothing in the Assam Land and Revenue Regulation to prevent such splitting up. (4) It is not true that there was no rule for splitting up a patta into two or more

pattas. Even in the case of the present pattas, old patta No. 82 was split up into two new pattas, Nos. 2 and 3, and the old patta No. 129 was split up into two new pattas, Nos. 1 and 2, at the last resettlement and the plaintiff and his predecessors accepted settlement of the split up pattas without any objection, protest or murmur. It is not a correct proposition of law that Government has no power to settle the Beels separately or to assess them for their own profits. Government has not assessed them in an arbitrary" manner. (5) In course of time the Dhola and Baruri Beels falling within the 4 pattas mentioned have become one fishery and it is inconvenient, nay well nigh impossible, to fish them separately and it was this circumstance which gave the plaintiffs a footing in those portions of the fishery which fell outside the pattas out of old patta No. 82 of which he was one of the settlement holders. Though he was not entitled, as of right, to settlement of those portions of fishery falling within the two pattas out of old patta No. 129, as he was not the settlement-holder thereof and had not acquired the status of the landholder in respect of the same, yet the Settlement Officer determined in the exercise of his own discretion to offer him settlement of those portions also on the strength of his possession as the plaintiff has neither any right nor any possession of the rest of the lands of the two pattas; this necessarily involved the separation of the fishery from these lands.

4. The defence of defendants 2 and 3 is substantially the same as that of the Secretary of State, but special defence was pleaded with reference to the claim of the plaintiff to 1/3rd share of Dhola Beel by virtue of adverse possession. These defendants maintained that the plaintiff has not acquired any title to Dhola Beel as they have not been in adverse possession of the same for more than 12 years. A further defence was taken that the plaintiffs obtained an unjust and illegal order for temporary injunction in the present suit by various devices and the High Court set aside the same on appeal. These defendants claimed compensation u/s 95, Civil P. C. On this state of the pleadings as many as 25 issues were framed: see pp. 110 to 112, Book A. The principal controversy, however, centred round issues 16, 17 (a) (b) (c), 18 and 19. The Subordinate Judge of Sylhet, after taking oral and documentary evidence which are voluminous, has come to the conclusion that plaintiffs are entitled to all the reliefs prayed for except the relief in the prayer clauses "Una" "Chha" and "Ja". He also held that plaintiffs are entitled to mesne profits against all the defendants jointly up to 31st March 1925, but held that the Secretary of State was not liable for mesne profits after that period. As against defendants 2 and 3 it has been held that they are liable up to the period of their last fishing before delivery of possession.

5. It is against this decree of the Subordinate Judge that two appeals have been preferred: one by the Secretary of State and the other by defendants 2 and 3. Some of the grounds of the two appeals are common and we will deal with them first. It is contended for the appellants in both the appeals that the Subordinate Judge has done wrong in holding that separate settlement of the two Beels without assessment of the rest of the lands of the estate was illegal and ultra

vires, and that the joint settlement of the two Beels was illegal. It is argued that there is no provision of the Assam Regulations which prohibits a Revenue Officer from assessing revenue on a part of the estate and making a settlement thereof with the original holders at a particular revenue and settling the rest of the estate later at a particular revenue. It is also argued that so far as Dhola Beel is concerned the plaintiff 1 cannot be regarded as a land-holder within the meaning of the Regulation because no settlement of Dhola Beel was made with him or his predecessor-in-interest, and it cannot be said that the right which the plaintiff acquired by adverse possession in one-third share of the said Beel was a right legally derived from a previous landholder within the meaning of Section 6 (b) of the Assam Land and Revenue Regulation, 1886. It was further contended that the civil Court has no jurisdiction to question the validity of the assessment and that therefore the decree of the Subordinate Judge must be varied if the other contentions fail by deleting from prayer "Kha" the words "at a proper Jama" in line 4 of the said prayer as also by deleting from prayer "Ga" the words "or upon the produce" in line 5 of the said prayer.

6. In order to understand the contentions raised on behalf of the appellants the following facts require to be stated. The lands mentioned in the schedule to the plaint along with the Beels belonged to Government as waste lands locally known as Ilam lands. The history of Ilam lands is given in the admirable introduction to the Assam Land Revenue Manual at pp. 93 to 103. There is one passage in the introduction which may be quoted below:

Certain principles were laid down by the Bengal Government in 1869 which among other things declared the proprietary right in Ilam lands to belong to Government and that Government was at liberty to dispose of them as it thought proper.

7. These lands of Baruri held under an Ilam Pattah No. 4882/82 referred to later in this judgment as Pattah 82, belonged to (1) Bama Sundari, (2) Rajendra Das, (3) Rajendra K. Roy Chowdhury, father of plaintiff, (4) Bissessari Debya, mother of plaintiff, and (5) Akhoy Nath Roy. The interest of (1), (2) and (5) is 2/3rd passed by private treaty to Alim Mahi, father of defendant 2, and Golamdi Mahi, father of defendant 3, and 1/3rd devolved on plaintiff 1. In 1902 patta 82 was split up into two pattas, pattas Nos. 2 and 3 and was settled with plaintiff 1 and father of defendant 2 and defendant 3 for 20 years ending with 31st March 1922. With reference to Dhola Beel it may be stated that the original patta was 43913/129 referred to as patta 129 throughout this judgment. It was originally held by some persons whose interest was sold in 1877 for arrears of revenue, and went into khas possession of Government. Under Ilam patta dated 23rd August 1872 it was settled along with other properties by Government with Madhab Kar for 17 years from 1285 B.S. to 1301 B.S. corresponding to 1878-79 to 1894-95. After expiry of this settlement in 1895 settlement operations were taken up by Government. In 1902 this patta 129 was resettled with Madhab Kar for 20 years from 1902 ending on 31st March 1922. This patta was split up into

patta Nos. 1 and 2/129 The disputed lands of Dhola Beel appertained to this patta.. On 23rd January 1903 Madhab sold portions of the lands of pattas 1 and 2 including Dhola Beel to Inus Mahi. In 1903 Alim Mahi, father of defendant 2, instituted a suit against Madhab and his vendees in the Sub-Judge's Court at Sylhet for specific performance of a contract of sale which was entered into with Madhab previous to sale. The suit was amicably settled between Alim Mahi and Inus Mahi by selling the said portion to Alim Mahi father of defendant 2 and two others on 15th February 1904. Defendant 4, Madan Mahi, also purchased other lands of patta 129 (1 and 2) from Madhab Kar and both the names of Alim and Madan were registered as settlement holders of the patta. Golamdi, father of defendant 3, also acquired a share in pattas 1 and 2 by purchase. On 31st March 1922 the period of settlement of all these pattas expired and re-settlement became due. The re-settlement was started. The Settlement Officer started proceedings under Sub-section 29 and 30 of the Regulation (Assam Regulation). The Settlement Officer submitted a general proposal of assessment and submitted the same to Government. The regularity of proceedings is in question in this suit. The Assam Government approved of the scheme of re-settlement and issued a general order directing that the re-settlement should be made for three years from 1st April 1922 pending decision of the question of the term of the next settlement and provisional patta should be issued for three years for the two Beels only. The Government decided that the Beels be formally assessed as waste lands and should form a separate class and should be assessed on a percentage of the average net income, 50 per cent of the average income. (See letter Ex. "F" Vol. B p. 82). It is contended that the Government could make the separate assessment. u/s 29 Government made a rule--Rule 61--Settlement Rules, i.e. 51 new rule, No. 70-A, i.e. 61 new rule.

8. The Settlement Officer u/s 31 ascertained the amount of revenue for the said Beels and he fixed Rs. 500 as the revenue for the two Beels. Then settlement was made by defendant 1 with defendants 2, 3 and 4: see order-sheet in Vol. F, p. 1277, Ex. E. A notice had previously been served on plaintiffs, and defendants 1, 2 and 3, to take the settlement: see Ex. 18, p. 1285, Vol. P. On the issue of the said notice objections were taken by defendants 2 and 3 (see p. 84 B. K. B.). The objection related both to separation and assessment. Defendants 2 and 3 objected to assessment, see Ex. 7, p. 84, Vol. B. The plaintiff was excluded under:Section 35, p. 1280, Vol. F. Defendants 2 and 3 and then No. 4 also got the settlement. It is argued for the Government that that was a perfectly legal procedure: p. 1290, Vol. F. It will appear from Ex. B-2, Vol. F-1292, that the order admitting defendant 4 to the settlement was set aside and the settlement was made with defendants 2 and 3 with regard to Dhola Beel. It is contended that plaintiff cannot acquire any title by adverse possession. It is contended that plaintiff did not appeal to the authorities against the settlement. The settlement with regard to the rest of the lands other than the beels was made and accepted by the plaintiff in April 1925 and the settlement was made for 15 years, 1st April 1927 to 31st March 1942: B. K. B., p. 147, Ex. 2 (c). In other words by patta

82/2 settlement was made of the Baruri Beel (147-B) and by 82/9 (not pointed) settlement was made of the rest of the lands with plaintiff and defendants 2 and 3. The Beels were separated and similar settlement of Dhola Beel by patta 129/1 and the rest of the lands by patta 129/2, on 19th December 1923. the present suit had been instituted by the plaintiff. The plaint was subsequently amended on a petition filed on 25th September 1926 (see p. 60 B. K. A.) and a prayer for mesne profits was added.

9. At the outset we desire to observe that the Subordinate Judge should not have allowed two letters, Exs. 9 and 9-a, pp. 112 and 104, Book B which passed between the Government and the Commissioner, Surma Valley and the Superintendent and the Remem brances of Legal Affairs of Assam and Surma Valley respectively to go into evidence seeing that these letters were written in view of a compromise between the Government and Brajendra after notice of the suit had been served by the plaintiff, for these letters must be taken to be without prejudice to the rights of the parties. We can state at once that although the Subordinate Judge was considerably influenced in his decision regarding the ultra vires nature of the settlement which is impugned in this suit we have kept our mind free from anything which has been said in these letters and we propose to deal with the legal questions raised by these appeals on a construction of the provisions of the Assam Regulations. This leads us to consider the main question in controversy in these appeals, as to whether the settlement of a part of the estates, covered by the pattas 82 and 129 was ultra vires of the statute or not. The question turns on the construction of some of the relevant sections of the Assam Land and Revenue Regulation (Regulation 1 of 1886 as amended by Regulation 2 of 1889 and Regulation 2 of 1905). u/s 3, Clause (b) an estate includes Bipradas Pal v. Kamini Kuar 1922 P C 48 any land subject either immediately or prospectively to the payment of land revenue for the discharge of which a separate engagement has been entered into. u/s 3, Clause (g) "landholder" means any person deemed to have acquired the status of a landholder u/s 8. The status of a landholder is acquired in the following manner u/s 8 which runs as follows:

(a) Any person who has before the commencement of this Regulation held immediately under the Government for ten years continuously any land not included either in a permanently settled estate or in a revenue free estate, and who has during that period paid to the Government the revenue due thereon, or held the same under an express exemption from revenue; and (b) except as provided by Section 15, any person who has whether before or after the commencement of this Regulation acquired any such land under a lease granted by or on behalf of the Government, the term of which is not less than ten years, shall be deemed to have acquired the status of a landholder in respect of the land.

10. With regard to lands covered by patta No. 82 there can be no question from the facts narrated above that plaintiff 1 has acquired the status of a landholder

and this has not been disputed. With regard to Patta No. 129 regarding Dhola Beel, it has been strenuously contended on behalf of the appellants that the plaintiff has not acquired the status of a landholder. On the evidence which we shall discuss later, when dealing with the special defence of defendants 2 and 3, we have no doubt that the plaintiff has acquired as against the said defendants a right to one-third share of the Dholla Beel by adverse possession for more than the statutory period of 12 years, and as such shall be deemed to have acquired a right over lands of Patta No. 129 in respect of which a separate engagement was admittedly entered between the predecessors-in-interest of defendants 2 and 3 as also defendants 2 and 3, u/s 6, Clause (b) of the Regulation. It has been strenuously contended by the Senior Government pleader that right acquired by adverse possession is not a right legally derived from any right mentioned in Clause (a) of the said section which includes the rights of landholders. We are unable to accept this contention. The law does recognise a right founded on adverse possession for more than the statutory period to be a legally derived right. Just as property can be acquired from another by sale, by gift, lease or mortgage, so property of another can be acquired by the adverse possessor where he holds the property for more than 12 years dispossessing the rightful owner. In *Bipradas Pal v. Kamini Kuar* 1922 P C 48 at p. 507 the Judicial Committee observed that an interest not directly created by the talugdar but allowed to grow up by his sufferance and negligence is an encumbrance within the definition of Section 161, Ben. Ten. Act, and that there was a current of decisions in India to that effect. In *Mohim Chandra v. Peary Lal Das* 1917 Cal 213 it was held by Sanderson, C.J., as he then was, and A.T. Mukherjee, J. that a person in adverse possession of an entire estate held under the Regulations might by lapse of time acquire a proprietary interest in that estate and would be liable for payment of Government revenue. There can be no question of these authorities that a right acquired by prescription is a legally derived right within the meaning of Section 6, Clause (b) of the Regulation. The Indian law, like the English law, practically transmutes long possession of real property into ownership by bringing to an end the right of the owner. Section 28, Lim. Act, Statute 3 & 4 Will IV, e. 27, Section 34.

11. u/s 9 of the Regulation a landholder shall have a permanent heritable and transferable right of use and occupancy in these lands subject to certain conditions mentioned in Clauses (a), (b), and (c) of the said section. u/s 32 Clause (I) the Settlement Officer shall offer the settlement to such persons (if any) as he finds to be in possession of the estate and to have a permanent heritable and transferable right of use and occupancy in the same or to be in possession as mortgagees of person having such a right. The word "estate" is important. Under this section after the expiry of the term of two pattahs 82 and 129 on 31st March 1922 the Settlement Officer should have offered the re-settlement of the entire estate and not of portions of the two estates. The Regulation does not contemplate the partition of an estate except in the manner provided for in the provisions regarding partition as embodied in Ch. (6) of the

Regulation. The partition could be done by consent which is not the present case. In making the temporary settlement of a part of the estate, namely the Beels, the Settlement Officer has clearly contravened the provisions of the Regulation. The question is whether this contravention makes the action of the Settlement Officer ultra vires of the statutes. In our opinion it has that effect. It is one of the essentials of the offer of re-settlement that the re-settlement would be of the whole estate; if such offer has been made and the revenue had been increased considerably the plaintiff could not have questioned the re-settlement in favour of defendants 2 and 3 on his refusal to accept the settlement. Section 154 would have prevented him from questioning the assessment in the civil Court. That section lays down:

Except when otherwise expressly provided in this Regulation or in rules issued under this Regulation no civil Court shall exercise jurisdiction in any of the following matters: (a) questions as to the validity or effect of any settlement or as to whether the conditions of any settlement are still in force.

12. The offer of an estate for re-settlement after partitioning the same was in excess of the authority of a Settlement Officer. Section 154, Clause (1) (a) refers to cases where an act of the Settlement Officer is in conformity with the essential provisions of the Regulation which gives him jurisdiction to act, but there has been irregularities in the mode of carrying out the act. As for instance where the re-settlement had been offered of the whole estate but the assessment of revenue has been based on a new basis which might have increased the assessment considerably. To such a case 154 (1) (a) might apply. The following authority which was cited at the Bar gives the true limit of the jurisdiction of tribunals whose powers are limited by the Statutes: see *The Colonial Bank of Australasia v. William* (1874) 5 P C 417 at p. 442:

Their Lordships understand the final judgment of that Court to state, as the grounds upon which the order ought to be quashed, that the Judge of the Court of Mines who made it had acted without jurisdiction and that he had been misled into doing so by the fraud of the petitioning creditors. The question upon this appeal is whether the materials before the Court justified either conclusion. And as these two points, want of jurisdiction in the Judge, and fraud in the party procuring the order, are essentially distinct, it will be well to consider them separately. In order to determine the first it is necessary to have a clear apprehension of what is meant by the term "want of jurisdiction." There must of course be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But these conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts of a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes.

13. If as we hold for the reasons above given, that the offer of re-settlement to

the plaintiff and defendants 2 and 3 was not in accordance with the statutes, it follows that the re-settlement of the two Beels in favour of defendants 2 and 3 was ultra vires of the statute, and on the basis of that re-settlement it was not permissible to defendants 2 and 3 to dispossess the plaintiff for u/s 34 of the Regulation in so far as it is material:

when a settlement has been accepted the revenue fixed thereby and no more shall be payable from such date, and for such term, as the Chief Commissioner may fix in this behalf; or, if at the expiry of that term no new settlement has been made, until a new settlement has been made.

14. The plaintiff was therefore entitled to hold on after the expiry of the term ending with 31st March 1922 on the previous revenue. We now proceed to consider the grounds taken on behalf of the Government with reference to the decree granted to the plaintiff by the Subordinate Judge in respect of prayers Kha and Ga of the plaint. It is contended that the decree should be varied by striking out the words "at a proper jama" from prayer Kha and the words "or upon the produce" in prayer "Ga." We think that this contention is well founded for u/s 154 (1) (a) of the Regulation it is not open to the plaintiff to question the validity of the assessment. The declarations with regard to prayers (Kha) and (Ga) must therefore be varied by striking out the words in the two prayers mentioned above respectively. It remains now to consider the question as to whether with reference to Dholla Beel the plaintiff has acquired a title to one-third share by adverse possession for more than the statutory period. This is a defence peculiar to defendants 2 and 3's appeal, namely Appeal No. 56 of 1929. It appears that in a previous litigation between the plaintiff and defendants 2 and 3 it was decided by the Munsif, the District Judge and eventually by the High Court that plaintiff 1 had acquired a title by adverse possession in the Dhola Beel to the extent of his share against Madhab Kar or his successors, and that the plaintiffs in that suit claiming through Madhab Kar had no subsisting right in the one-third share held by the defendants who were the present plaintiff and others: see judgment of the High Court BK. "B", p. 106, Ex. 10 (g), The decree of the High Court, although it cannot operate as *res judicata* against defendants 2 and 3, because the suit in which the appeal to the High Court arose, was tried by a Munsif who had no jurisdiction to try the present suit, still the "finding on the question of adverse possession was the finding of a Court which was dealing with facts nearer to their kin than the facts are to the High Court now and it certainly creates a paramount duty on the appellants in this appeal to displace that finding: see *Midnapore Zemindary Co. v. Nares Narayan Roy* 1922 P C 241 at p. 55. It remains to consider whether the appellants have been able to discharge the burden which lay on them of showing that the finding was wrong. Very strong reliance has been placed on the evidence of Nazabdi, plaintiff's witness, who is one of added plaintiffs in the suit where he states: "My father paid rents to Madhab Kar when I was young: Vol. A, p. 89," but the same witness in re-examination said that "Madhab Kar had no possession of Dhola or Baruri Beels." So this admission of payment of rent to Madhab Kar cannot help the

defendants, for he has made the position clear in re-examination. Besides, the Subordinate Judge observed that Nazabdi's admission of payment of rent to Madhab Kar cannot help the defendants as his lease comprised many other Beels, also of Patta No. 129 regarding which there is no dispute: p. 123, Book A. The plaintiff has by the production of documentary evidence, i.e., Touzis Exs. 1 to 1 (Z) 21 and Jama Kharach, Exs. 2 to 2-L from 1281 B.S. up to 1329 B.S. established that he was in possession through a fisherman who executed kabuliats in his favour and that he was dispossessed in Pous 1330 B.S. by the defendants under the settlement which is impugned in this suit. The Touzis and the Jama Kharach papers support the kabuliyats Exs. 3, 3j, 3c and 3h. Far from displacing the finding arrived at by the Munsif, the District Judge and the High Court in the judgments Exs. 10e, 10f and 10g that Madhab Kar never possessed Dolla Beel and that plaintiff 1 and his co-sharer in Patta No. 82 possessed them all along with Baruri Beel, a duty which was cast on defendants 2 and 3, the plaintiffs have by producing abundant documentary and oral evidence shown that the said findings were right. This defence of defendants 2 and 3 must therefore fail.

15. It remains now to consider the question of mesne profits. The Subordinate Judge has made defendant 1 (Secretary of State) liable jointly with defendants 2 and 3 for mesne profits up to 31st March 1925. It has been argued by Dr. Basak that Government was not all liable for mesne profits seeing that they made the offer of temporary settlement to plaintiff 1 and he refused settlement because it was not profitable. The liability of Government for mesne profits is now established by the most recent decision of their Lordships of the Judicial Committee in Secy. of State v. Saroj Kumar 1935 P C 49. In that case it was held in circumstances mentioned below that the Government was liable in the same way as a trespasser, for mesne profits:

In 1890 the Government obtained possession under Bengal Act 4 of 1868, Section 3, of an island char which had emerged from the river Padma, and settled and assessed the land according to the rules in force. In 1902 the respondents brought a suit claiming a fourth share of part of the char lands, with mesne profits, on the ground that the land in suit was a re-formation in situ of land of which there were co-proprietors. They ultimately obtained possession under a judgment of the Privy Council delivered in 1917;

and in the appeal before the Privy Council, in Secy. of State v. Saroj Kumar 1935 P C 49 the question related to mesne profits only. We have no doubt that as the Settlement by the Government was ultra vires possession of persons claiming under the Government was wrongful possession and the Government was liable for mesne profits. The next point taken is that in any event Government's liability should be limited to the revenue which the Government obtained for the one-third share of plaintiff 1. The Government was receiving Rs. 500 per year from defendants 2 and 3 and that may be taken to be the minimum profit which was available from the two Beels or fisheries, and plaintiff could have obtained

one-third of Rs. 500 in his share, if he had obtained settlement. The relief of mesne profits as against defendant 1 will be varied in this way. The plaintiffs are entitled to get their one-third share of Rs. 250 for 1330 B.S. as the defendants are liable according to the finding of the Judge for half the fish of that year. As regards 1331 B.S. defendant 1 will be liable to pay one-third of Rs. 500.

16. We now proceed to consider the objection of defendants 2 and 3 to the amount of mesne profits for which they were made liable. The Subordinate Judge has held that Rs. 2,600 per year would be the net profits from the fisheries in question. He has referred to certain evidence which we have examined. It seems to us that the claim for mesne profits is exaggerated, and the witnesses also have placed before the Court figures which do not represent the actual profits. It seems to us that it would be right to proceed on the basis of the findings of the Settlement Officer who has held an inquiry with regard to mesne profits during the cadastral survey proceedings, which were held in the presence of all the parties, and on that basis the mesne profits should come to about Rs. 1,000 per year. On this basis the Subordinate Judge's decree must be varied in this way. The plaintiffs are therefore entitled to get their one-third share of Rs. 250 for 1330 B.S. and of Rs. 500 for 1331 B.S. as also for the period after 1331 B.S. up to the period of the last fishing before delivery of possession. With regard to the objection of defendants 2 and 3 that they are entitled to compensation for improper injunction u/s 95, Civil P. C., we think there is no substance in it, seeing that the same has been taken into account by the Subordinate Judge in the assessment of mesne profits.

17. Both the appeals are allowed in part and the judgment of the Subordinate Judge must be varied in accordance with the observations mentioned in the previous part of the judgment. The costs of these appeals will be in the following proportion: The respondents will get two-thirds of the costs, that is, two-ninths from the Secretary of State and four-ninths from defendants 2 and 3. Defendants 1, 2 and 3 will get one third of their costs from the plaintiff. The order of the lower Court as to costs will stand. It has been brought to our notice that notices to the minor substituted respondents 10/5 to 10/8 and 10/9/3 have been duly served, but their proposed guardians ad litem have not entered appearance. It is also reported by the serving peon that respondent 10/12 is dead. This will not affect our decision seeing that these persons were all heirs of defendant 4 who, as has been pointed out before us, had no interest in the suit and as such his heirs are not necessary parties to this appeal. As a matter of fact Dr. Sen Gupta agrees that the decree as against them should be discharged.

18. There is a clerical error in the decree of the first Court which needs to be corrected. In place of the words "Dag 81" in the said decree the words "Dag 431" should be substituted. This amendment is obviously necessitated by the clerical mistake occurring in the decree as will appear from the plaint printed at p. 44 of the first of the paper book of appeal from Original Decree No. 56 of 1929, i.e., Book A. A table has been annexed to this judgment at the end showing

references to the different volumes by the figures of the alphabet for facility of Court purposes. There are also cross-objections on behalf of the plaintiff-respondent which are not pressed and are dismissed. No order as to costs is made in the cross-objections.

Rau, J.

19. I agree in the order proposed by my learned brother, but would like to add a few observations. The settlement of the two beels for the three years from 1st April 1922 to 31st March 1925 was in reality more than a settlement. These two beels had previously formed part of two different estates; what the Settlement Officer did, in effect, was to partition the two estates into three new ones and then re-settle one of the three. The partition was effected without any application from the land-holders concerned and was not authorized by any provision of the Assam Land and Revenue Regulation. We are therefore concerned here not with the validity of a mere settlement, such as is referred to in Section 154 (1) (a) of the Regulation, but with the validity of a composite proceeding which was partly a settlement and partly a partition entirely foreign to the Regulation. Section 154 of the Regulation is no bar to the civil Court pronouncing such a proceeding to be ultra vires.

20. This is not to say that all the issues framed and decided by the learned Subordinate Judge were within the competence of the civil Court. I refer in particular to issues 16 and 17 (c) set out in his judgment. Issue 16 runs thus: "Have plaintiff 1 or other settlement-holders converted the lands into fisheries or have they effected any improvement in the fisheries in dispute? If so, is this a legal bar to the Government enhancing the revenue of the fisheries settled as estate on part of the estate?"; and issue 17 (c) thus: "Is the assessment of the fisheries at other than bigha rate illegal as beyond the power of Government?" Both these issues were decided in plaintiff's favour, but it is clear that u/s 154 (1) (b) of the Assam Land and Revenue Regulation the civil Court has no jurisdiction to decide either, since they are questions as to the amount of revenue to be assessed or as to the mode of principle of assessment. I may also point out that in the decision of these issues, the learned Subordinate Judge appears to have treated certain executive instructions in the Assam Land Revenue Manual regarding enhancement of revenue as if they were statutory rules not to be broken on pain of illegality.