

(1935) 12 CAL CK 0034
In the Calcutta High Court

Secy. of State

APPELLANT

Vs

Krishna Prosad Roy Chaudhuri and Another

RESPONDENT

Date of Decision : 19-12-1935

Acts Referred:

Citation : AIR 1936 Cal 774

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

Bench : Full Bench

Judgement

D.N. Mitter, J.—The suit in which this appeal arises was brought by the plaintiffs, now appellants, for a declaration that the Government have no right to resume any portion of certain Ilam lands covered by pottas Nos. 3 and 9 in suit, that is to say, potta No. 24512/9 / 24505/3 present No. 1 or to settle the same after resumption with any other third person and for a further declaration that the plaintiffs have the status of "landholder" in respect of the lands of the pottas in suit within the meaning of Assam Land Revenue Regulation, Regulation 1 of 1886, as well as for confirmation of possession of the two plaintiffs of the lands of-the patta in suit and for a perpetual injunction restraining the Secy. of State from disturbing the possession of the plaintiffs. The plaintiffs also asked in the suit for a declaration that they have exclusive right to take settlement from the Government at a proper jama of all the land of the Ilam Pottas in suit and they prayed for other reliefs also. The plaintiffs also asked for restoration of possession of such portion of the lands of the pottas in suit from which they might have been dispossessed in the meantime by the action of the Government and they prayed for mesne profits. The suit was resisted by the Secretary of State who filed a written statement in which they raised several defences to which reference will be made hereafter. The Additional Subordinate Judge of Sylhet decreed the suit of the plaintiffs in a modified form. He held that the plaintiffs have the interest of land-holders within the meaning of Section 8 of the Regulation, in respect of all lands of the Ilam potta No. 1 in suit, as described in the Ilam potta of the English year 1902, but the Subordinate Judge came to the conclusion that the defendant is entitled to make khas and to select for making

khass the remainder after setting apart 1/5th out of the culturable waste land within the said property. He declared that the plaintiffs are entitled to get re-settlement of such portion of the mehal as is not included in the aforesaid resumption. The Subordinate Judge held further that the plaintiffs be confirmed in their possession of that portion of the land which the defendant is entitled to resume so long as the same is not resumed as well as of the remaining lands of the mehal. The plaintiffs have preferred an appeal against that portion of the decree which refuses to give the plaintiffs a declaration in terms of their prayer No. 1 in which they asked for a declaration that the Government have no right to resume any portion of the lands of the pottas in question. This appeal has been numbered as Appeal from Original Decree No 283 of 1931 with which we will deal first. It may be mentioned that the Secretary of State has also preferred an appeal to this Court and that is against that portion of the decree of the Subordinate Judge which affirms the plaintiff's possession in that portion of the land which the Secretary of State is held to have been entitled to resume so long as the same is not resumed. That appeal has been numbered as Appeal from Original Decree No. 277 of 1931. It has been conceded by Dr. Mukherjee who appears for the Secretary of State that if the appeal of the plaintiffs, that is Appeal from Original Decree No. 283 of 1931, succeeds it would follow that the appeal of the Secretary of State, namely, Appeal from Original Decree No. 277 of 1931, must necessarily fail.

2. Appeal No. 283 of 1931.--We now proceed to deal with the appeal of the plaintiffs, namely, Appeal from Original Decree No. 283 of 1931. The facts which give rise to the contentions in this appeal are not many and are not substantially in dispute. The question really turns on the effect of certain provisions of the Assam Land Revenue Regulation as to the status of the plaintiffs as well as on the effect of the potta No. 1 which has been marked as Ex. Y in the suit and was executed on behalf of the Secretary of State in the year 1902. See p. 54 of Vol. No. 1, part 2 of the paper-book of Appeal from Original Decree No. 277 of 1931 which for the sake of convenience we shall hereafter refer to as Vol. "D." The plaintiffs case is this: that there was a settlement of two estates which will be described for the sake of brevity as estates Nos. 3 and 9 with the plaintiffs in 1888. Estate No. 3 was granted for a period of eight years commencing from 1298 to 1302 B.S., on 23rd July 1888. See p. 144, Vol. D of the paper book. This document has been marked as Ex. M. With regard to the Estate No. 9 there was a kabuliati, Ex. N (1), which evidenced an Ilam settlement. It appears that under both these documents the land which was settled was the land which belonged to the Government and was in possession of the Government and which was not in the possession of the plaintiffs; and this was the land over which none of the plaintiffs had the right of the proprietor, land-holder or settlement holder under the Assam Regulation. This was apparently the land to which provisions of Section 12 of the Assam Regulation of 1886 apply. This may be regarded as the first stage in the relationship of landlord and tenant between the plaintiffs and the Secretary of State with reference to this tenancy. It appears that before the

terms of the lease expired a re-settlement of the lands in the two estates were made for ten years, that is from the year 1894 to 1904 or 1300 to 1310 B.S. The two leases in respect of the two estates, estate No. 3 and estate No. 9, have been marked as Exs. E E and E E-1 respectively and printed at pp. 64 and 67 respectively in Vol. D of the paper book. These leases were for a term of ten years and as soon as these leases were executed the plaintiffs acquired according to their contention the status of land-holders within the meaning of Section 8, Clause (b) of the Regulation. It may be stated here that the Secretary of State acceded to this position claimed by the plaintiffs in the Court below. The learned Senior Government Pleader has, however, raised a new contention and he argues that the plaintiffs did not acquire the status of land-holders because in the first stage of the settlement they entered into these lands as lessees to whom provisions of Section 12 apply. We shall consider the soundness or otherwise of this contention after we have finished the narrative of the facts of this case. This is the second stage in the relationship of landlord and tenant as between the Government on the one hand and the plaintiffs on the other.

3. We come now to the third stage and we will have to refer in chronological sequence to some of the events which led to the execution of potta No. 1 in 1902 which covered a period of 20 years and was to expire on 31st March 1922. (The judgment then describes the documentary evidence and the defences and then proceeds). After considering the oral and documentary evidence the Subordinate Judge has come to the conclusion that the pottas of 1894 conferred on the plaintiffs the status of landlord with a permanent heritable and transferable right for use and occupation of the lands comprising the two estates. The real issue which the Subordinate Judge had to determine in the matter of controversy before us is issue 8. That issue is to the following effect:

Is the order of the Governor in Council passed on 1st January 1926 for enforcing Clause 7 of Potta resuming the waste and allow lands valid and binding against the plaintiffs and can the plaintiffs claim re-settlement of the lands resumed by order of Government?

4. The Subordinate Judge went into the history of the Ilam estates in great detail. It is not necessary to discuss the nature of these estates as they are stated with great fulness in the admirable introduction to the Assam Land Revenue Manual, Edn. 5, 1931, p. 93, by Sir E. Ward. The Subordinate Judge held the rules made u/s 29 cannot possibly take away substantive rights expressly granted, or arising out of the other provisions of the Regulation and not terminating with the term of a settlement. He also held that before 1902 a notification was issued inserting the resumption clause of the onefifth rule. It shows that somebody has misread that important form prescribed by the notification which was intended to apply to all sets of the settlement holders including land-holders. He held further that the Government is not entitled in the case of land-holders to impose any term it chooses at the re-settlement and that such terms as it may impose must be consistent with the status of a land-holder

conferred by--the statute. After coming to these findings which are favourable to the case of the plaintiffs the Subordinate Judge next rests his conclusion on the acceptance by the plaintiffs of this lease containing the forfeiture clause: Clause (7). He says:

It is idle to contend that the plaintiffs had not accepted this Potta but accepted only the immunity from enhancement of the revenue for 20 years which the Potta secured.

5. The real basis of his decision to quote his own words is this:

When the 1894 leases were running, and the term of either was going to end in 1903 and the peril of a revision of revenue was almost in sight the plaintiffs applied for an extension of term for 20 years, that is for an immunity from further increase of the revenue for another 20 years. The Government offered a lease granting this immunity, but containing this special term that the lessee must reclaim the lands at his peril, or there would be a resumption of a proportion of the waste lands. I do not think that there was anything to prevent the plaintiffs from entering into such a contract, so that the question to which one is reduced is whether the plaintiffs had, in fact, entered into this contract.

6. The basis of the Subordinate Judge's judgment, as we read it, is that it is open to the plaintiffs to surrender their rights as landlords and the plaintiffs did surrender such rights when they agreed to the acceptance of Clause -(7) of the form in appendix E. He accordingly gave a modified decree in the light which has already been indicated. The plaintiffs have accordingly appealed and it is contended on their behalf that the basis on which the Subordinate Judge has rested his decision is wrong. It is argued that if one examines the correspondence which passed between the Chief Commissioner of Assam and the plaintiffs, and which eventually led to the execution of the pottas, it would show that there was really no necessity for introducing Clause (7) of the potta which really takes away their rights as landholders, and it is said that as land-holder they were entitled to re-settlement on the expiry of the term of 20 years on 31st March 1922, subject to the settlement of revenue as might be determined then. It is argued in the first place that the form in appendix E of the Regulation really refers to waste lands or such lands as could not be disposed of u/s 12 of the regulation; and as the land now in question was not such land, because the plaintiffs have already been in possession of these lands as land-holders the form already inserted in the lease cannot affect the rights of the plaintiffs.

7. In the alternative it is argued that even if such form is sanctioned by the rules made by the Chief Commissioner such clause as Clause (7) was not introduced in the execution of the powers given by the statute. In other words it was said that it was ultra vires of the statute and that the plaintiffs were not bound by any new term, a term which could not be enforced under the provisions of the statute. On the question of consideration for this new lease it is said that the conveyance made by the Secretary of State with regard to the consideration was the freedom

from enhancement for the period of 20 years. It is not really borne out by the plaintiff's correspondence, for the correspondence from the two previous Commissioners makes no mention of such consideration. It is true that at the end of the term of 1904 it would have been open to the Chief Commissioner to enhance the revenue in respect of these lands. But as this was not made it must be taken for granted that the settlement was on terms which were already in force. He is really extending the terms of ten years' leases of 1894 to 31st March 1922. It becomes necessary therefore to consider some of the provisions of the Assam Regulation with reference to the several grounds taken.

8. It is first contended that under the lease of 1894 the plaintiffs have acquired the status of a land-holder having regard to the provisions of Section 8 (1) of the Regulations. The Subordinate Judge has found this contention correct and we would not have dealt with this question but for the fact that the learned Senior Government Pleader has challenged this finding of the Subordinate Judge and has contended for the first time before us that the status of the plaintiffs after they had obtained the leases of 1894 and up till 1904 was not that of a settlement-holder. The argument is based on this reasoning: It is said that it being admitted that when the plaintiffs or their predecessors entered into this land they entered as lessees to whom leases were granted u/s 12 of the Regulation, and the persons who hold such leases are exempted from the benefit of Section 15. It is said that u/s 15 it is enacted that no person shall acquire by length of possession or otherwise any right over lands disposed of or allotted u/s 12, Section 13 or Section 14 beyond that which is given by the rules made under the section, and it is contended that as the initial leases of 1888 were leases granted u/s 12 the plaintiffs could not at that time acquire the status by length of possession any rights higher than what are due u/s 12. It is impossible to accept this contention, for in our view the granting of second lease for ten years certainly entitles them to acquire the rights of the land-holders in view of what is said in Section 8, Clause (b) which runs as follows:

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 land holder in respect of the land.

9. The exception would refer to a case where the lessee was holding under a lease to which Section 12 applies. In the present case it can hardly be contended that at the time when the lease of 1902 was granted the present plaintiffs were holding lands u/s 12. We have therefore no hesitation in repelling this contention, which was for a very good reason not taken in the Court below. The learned Senior Government Pleader has also questioned the finding of the Subordinate Judge that the plaintiffs have acquired the status of a land-holder because he argues, u/s 9, a landholder shall have a permanent heritable and transferable right of use and occupancy in his land subject to the special conditions of any

engagement into which the landholder may have entered with the Government. It is further argued that in this case as the plaintiff's rights were subject to the special incident in Clause (7)--the forfeiture clause which lays down the one-fifth rule--the plaintiffs cannot be regarded as land-holders within the meaning of Section 8. We are unable to accept this contention either for Clause (8) must be read in such a way as not to destroy the right of permanency, heritability and transferability and others, but at the same time impose some restrictions in the mode of user and these rights, viz., rights of easement, etc. This argument was not taken in the Court below and it seems to us not rightly taken. We must overrule this contention.

10. A further contention was raised that the plaintiffs have not acquired the status of a land-holder because they had not completed their possession under the lease of 1894 for a period of ten years. This contention also is of no substance if we consider the language of Clause (b), Section 8. Section 8, Clause (b) runs as follows:

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 land-holder in respect of the land.

11. This provision does not make it obligatory on the lessee to occupy the land for ten years before he can acquire the status of a land-holder. All that it says is that he must hold, irrespective of the period of occupation under a lease is given for a term of not less than ten years. There is nothing in this contention also having regard to the clear language of the statute. The acquisition of the rights of a land holder is not dependent on the length of possession under the lease, but it is dependent on the lessee's holding under a lease which is given for a term of ten years. We have just dealt with the objection which was really taken for the first time by Dr. Basak appearing on behalf of the Secretary of State.

12. Now we proceed to deal with the point raised by the appellant that this Clause (7) of the patta Ex. 1 was really inserted in the lease apparently through some mistake and it is contended that the notification which added or inserted this clause to the terms of the patta really was with reference to an amendment made to the rules under Sub-section 12 and 29 of the Regulations and it is said that the rules can only apply if the case is one which is covered by Section 12, and it is said that there is no point in confirming the clause as referring to both Sub-section 12 and 29 unless it was intended that they must refer to such lands as are mentioned in Section 12. On the other hand it is contended on behalf of the Government that if one looks to Sub-section 12 and 29 of the Regulations it would appear that they refer to rules regarding the different classes of duties, for instance it is said that u/s 12 the Chief Commissioner may make rules for the disposal by way of grant of lease, or otherwise, of any land over which no person has the rights of a proprietor, land-holder or settlement-holder under the

Regulation. Whereas u/s 29 the Chief Commissioner may make rules prescribing the principles on which the land revenue is to be assessed, the term for which and the condition on which, settlements are to be made, and the manner in which the Settlement Officer is to report for sanction of his rates and method of assesment. It is said on behalf of the Government that it is a general section, and our attention has been drawn on behalf of the Government to Rule No. 88 of the Rules to be found at page 97 of the Settlement Rules Chapter I of the edition of the Assam Land Revenue Manual by Mr. Gait published in 1896 with an introduction by Sir William Erskine Ward, the then Cheif Commissioner of Assam. It is said that Rule 88 refers to a case of re-settlement and not settlement of lands of which the Government is the proprietor nor settlement of waste lands. It" appears to us, however, on examining Rule 70 to which reference was made and under which Appx. E is added to the statute, that it applies to all leases. Rule 70 runs as follows:

All annual leases shall be in the form given in Appx. D, in the form given in Appx. E.

13. This Rule, looking at the contents it would appear is put in that portion of Section 3 which deals with waste lands. Section 66 of the Rules gives the definition of waste land as used in this section. That refers to periodical leases and Section 70 deals with all annual leases. It is said and I think there is great force in what has been said on behalf of the plaintiffs that Section 70 was intended to cover only cases of such lands, that is the waste land or lands which have been held on behalf of the proprietor, Government. Section 80 expressly means the case of resettlement and it also appears to us that Section 29 was not really intended to apply to the provisions of any other case of settlement for it gives really a right of assessment of Government revenue in respect of which the Chief Commissioner framed rules. I think that this is the right view to take of the various rules under Sub-section 12 and 29 published in the form printed at Appx. E. This form is to be found at page 281 of the same book. It appears that into this form in Appx. E by a notification dated 3rd July 1901, Clause (7) which has been quoted in extenso above and which is to be found in the lease had been inserted; and it seems to us on reading the notice at the footnote to Section 70 that this was with reference to waste lands. That view is strengthened by the consideration that u/s 29 waste lands are not to be assessed. But if we are not right in the construction of rules it appears to us that Clause (7) is made applicable to the rest of the lands which are not covered by Section 29, that is re-settlement of the lands of the persons who are already in possession and occupation of the lands of the lease is ultra vires under the statute for according to Section 9 of the Regulation the present plaintiffs have acquired the status of land-holder and acquired heritable right and the right of use and occupation.

14. That cannot be taken away by the insertion of the forfeiture clause which would really mean surrender at the end of the term of the lease ofvaluable rights which had been acquired by reason of the plaintiffs being the land-holders within

the meaning of Section 8. The Subordinate Judge has also taken that view, and we think, rightly. In this view the question next arises which is the more difficult point in the case with which we have to disagree with the Subordinate Judge as to what is the effect of the acceptance of the lease. Some argument has been advanced on behalf of the appellants that there has not been acceptance of the potta Ex. I as is contemplated by the Regulation. We do not think that we need be troubled by these technicalities as to whether there has been acceptance in conformity with these regulations. The fact remains that as the lease patta Ex. I was in the possession of the plaintiffs it must be presumed that they had full knowledge of the contents of the potta including Clause (7). It is true that they did not execute a corresponding kabuliati and that becomes a question of no materiality, seeing what we have to determine is whether the plaintiffs have surrendered the rights which they have already acquired as land-holder by the execution by Government of the potta Ex. Y which they accepted and which they treated as the foundation of their title. It has been argued on behalf of the plaintiffs that in order to effect such a surrender of their rights a registered document is necessary. This point was not taken in the Court below but it is said that this is a pure question of law which should be allowed to be raised for the first time in appeal to this Court. It is true that this argument suffers from infirmity which attaches to the belated plea taken for the first time in appeal, but at the same time as it is a pure question of law which is not dependent on any disputed facts we might allow this point to be taken. We think that in order to show that a party has contracted himself out of his rights and surrendered what he had already acquired with reference to the property the value of which exceeds Rs. 100 the transaction must be evidenced by a registered document having regard to the provisions of Section 17, Registration Act of 1877, which was the Registration Act prevailing at the time. But apart from the question of registration before one can hold that the party has contracted himself out of his rights some express declaration on the part of the party abandoning his rights must be forthcoming. In order to establish the fact that there was abandonment of their rights by the pottah there must be something to show in the most explicit terms that the parties understood when accepting the potta that they were giving up a very valuable right by reason of their being land-holders within the meaning of Sub-section 8 and 9 of the Regulation. Besides it seems to us that this agreement, in so far as it incorporates Clause 7, the forfeiture clause or the one-fifth rule being ultra vires of the statute to that extent is irregular, and as there can be no estoppel against the statute it is permissible for a party to say that they are not bound by a term which is in contravention of the statute. This term of the pottah is separable from the rest. It is well established that if a deed is void in part only and the rest be severable estoppels may arise from the part which is good. This is an exception to the general rule that where a deed had been executed in contravention of a statute the law of estoppel does not apply. We think therefore that the Subordinate Judge is not right in the view which he has taken that the acceptance of the potta which includes Clause 7 is tantamount to surrendering their rights as "land-holders."

15. It remains to consider the other points on which the Subordinate Judge rests his decision, namely, that there has been consideration for the potta, Ex. Y. It is said that it would appear from the passage which has been already quoted that the consideration for the Pottah was that they got immunity from further increase of revenue for 20 years and that in view of this Consideration they accepted the clause about the resumption of a portion of waste land as will appear from the correspondence with the revenue authorities. There is nothing in that correspondence which would show that any such concession was given to the present plaintiffs which would induce them to surrender their very valuable rights. We think, therefore, that the decree of the Subordinate Judge must be modified and the plaintiffs must be declared entitled to a decree in terms of their plaint.

16. Appeal No. 277 of 1931.--As has already been stated that the learned Junior Government Pleader concedes that as a result of Appeal No. 283 of 1931 being allowed Appeal No. 277 of 1931 must be dismissed. In the circumstances of the present case we think that each party must bear its own costs throughout and this order as to costs must govern both the appeals.

Patterson J.

17. I agree.