

CALCUTTA HIGH COURT

Jnanendra Nath Nanda

Vs

Jadu Nath Banerji

(R.C. Mitter , J.)

20.08.1937

JUDGMENT

R.C. Mitter, J.

1. The subject matter of the suit out of which this appeal arises is a strip of land near the boundary of two adjoining lots in the Sunderban area. They are lots 114/1 and 114/2, the former being to the west of and adjoining the latter. Before 1896 the lands comprised in these lots were waste lands of the Government In that year two leases for terms of 40 years were granted by the Secretary of State for India in Council to the plaintiff's and the defendant's predecessors, the leases being executed by the Sunderban Commissioner on behalf of the Secretary of State for India in Council. The first lease was in respect of the lands described as the first portion of lob 114 and is dated 12th September 1896 and was granted to the plaintiffs' predecessor-in-interest (Ex. 1). The second lease was in respect of the lands of the second portion of lob 114 and was granted to the predecessor-in-interest of the defendants on 2nd December 1896. The eastern boundary of lob 114 (first portion) and the western boundary of lot 114 (second portion) is depicted by the same red line, as it must be, in the two maps attached to the said leases. In Ex. 1 the eastern boundary of lot 114/1 is described thus: Sunderbania Khal and a straight line bearing 228 drawn from a point on the bank of the said Sunderbania Khal to a point on the bank of the Godamathura Khal, in both the leases there is a clause (clause 12) which runs in these terms: That in the event of any boundary dispute arising between the lessee of this lot and the lessee of any adjoining lot already leased under the Waste Land Lease Rules, or which may subsequently be leased, the holders of this lease shall be bound to submit such dispute to the decision of the Commissioner of the Sunderbans, or other officer empowered by the Government to decide such disputes. The decision of the Sunderbans Commissioner, or other officer abovenamed, shall be appealable to the Board of Revenue and the decision of the Board of Revenue shall be final and binding on the lessees.

2. The office of the Sundarbans Commissioner has been abolished, but the functions of the said Commissioner are being perform-ed by the Collector of Khulna. In the last Cadastral Survey and

Settlement, the strip of land in suit was recorded as appertaining to the defendant's lot e. g. lot, 114/2 and one particular dag was recorded as a low path. The plaintiffs in this suit say that the said lands appertain to their lot 114/1 and not to the defendants' lot 114/2. They pray for a declaration on that basis that the entry in the settlement record is wrong and for an injunction on the defendants to restrain them from raising a bund on the disputed area. Although the consequential prayer is injunction, and not recovery of or confirmation of possession, I am of opinion that the dispute between the parties is a boundary dispute and comes within the terms of clause 12 of the leases. I am also of opinion that the said clause contemplated the decision of such disputes between the lotdars by the re-venue authorities and not by the Civil Court. How far the terms of the said clause can be availed of or enforced by the defendants is however a different question which I will deal with later on. One of the defences is based on this clause, which is that the Civil Court cannot decide the question of boundary dispute and consequently no such relief as is prayed for by the plaintiffs can be granted by the Civil Court till the plaintiffs obtain a decision in their favour of the boundary dispute from the revenue authorities mentioned in clause 12 of the lease. This defence has been overruled by both the Courts below, the appellate Court holding that the covenant contained in said clause is illegal and void, being hit by Section 28, Contract Act.

3. For the purpose of determining the eastern boundary line of lot 114/1, i.e. for locating the red line shown in the plans attached to the leases, a Commissioner for local investigation was appointed, He was directed to do the following things: (i) to determine the boundary line between lot 114/1 and lot 114/2, (ii) to relay the lease map on the settlement map, (iii) to report whether the disputed lands are covered by the plaintiffs' lease (Ex. 1), (iv) to draw up a map of the disputed land and (v) to note any special feature shown by the parties.

4. The Commissioner did carry out these directions. His report is that nearly the whole of the disputed land, with the exception of a very small bit in the south is covered by the plaintiffs' lease. The defendants filed objections to the said report but could not succeed in displacing the commissioner's report. The Courts below have accordingly passed a decree in favour of the plaintiffs substantially in accordance with their prayers. The defendants have accordingly preferred this appeal and Mr. Chakraburty appearing for them raises two points before me: (1) that the Civil Court had no jurisdiction to determine the boundary dispute, which is the foundation of the reliefs sought for by the plaintiffs, (2) that the Commissioner's findings are based on mere conjectures and assumption and not based on evidence, and the Courts below have moreover overlooked and has left undecided fundamental objections of his clients and has misconceived the commissioner's report and his evidence given in Court. I may at once say that I do not consider the first of the aforesaid contentions of Mr. Chakraburty to be sound, though not for the reasons given by the lower Appellate Court, but there is great force in his second contention and with great reluctance I have to send back the case to the Court of first instance for a fresh local investigation.

5. With regard to the first contention Mr. Chakraborty urges that the Crown Grants Act (15 of 1895) applies to the leases and according to the provisions of Section 3 of that Act, Clause 12 of the leases is valid notwithstanding the provisions of Section 28, Contract Act. Mr. Bose appearing for the respondents urges in reply that the Crown Grants Act does not apply to the leases and that even if the said Act applies, the scope of the Act is to make inapplicable the provisions of the Transfer of Property Act only to a Crown grant. These contentions of the respective parties have to be considered first.

6. It is first necessary to observe that the waste lands of the Sunderbans were not the property of any subject. The area was in the days of East India Company a vast impenetrable forest and was the property of the said Company. By Section 39 of 21 and 22 Viet., C. 106, the Statute by which the Government of India was transferred from the East India Company to Her Most Gracious Majesty Queen Victoria, all lands and hereditaments and other real and personal estate of the East India Company vested in the Crown. By Section 40, the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council was authorized to sell and dispose of the properties which so vested in the Crown. There was some practical difficulty in the working of this section, for, conveyances and contracts executed in Presidency Towns which required a seal according to previous practice could not be executed in India on behalf of the Secretary of State, as the seal was in England. During the days of the East India Company, there was no difficulty, for although the real seal of the East India Company was in England copies were kept in Calcutta, Madras and Bombay (Ilbert on Government of India, p. 195, Edn. 3). To obviate this difficulty, a statute was passed the very next year (22 and 23 Vict. C. 41). By Section 1 of the said Act, the Governor-General of India in Council, the Governors in Council of Bombay and Madras and the Lieutenant-Governor of the North-Western Provinces, which then included Bengal, or any officer for the time being entrusted with the ' government, charge or care of any Presidency, Province or District in India' were empowered "to sell or dispose of any real or personal estate whatsoever in India so vested in Her Majesty under 21 and 22 Vict. C. 106". Although the officer in charge of a district in India was one of the officers so empowered, it was held that the officer in charge of a district within a province or presidency was not meant by the term, as for instance a Collector of a district of Bengal was not meant to be included, apparently on the ground that he is not entrusted with government. This section as is stated by Sir Courtney Ilbert was interpreted to mean that only the Governor General of India in Council, the Governors of the Presidencies in Council and the Lieutenant Governors and Chief Commissioners of Provinces only were so empowered. In Madras however the scope of the section was misunderstood and the Inam Commissioner made some grants of Crown lands. That led to the passing of a Statute by Parliament (33 and 34 Vict., C. 59). Section 1 of the said statute validated the grants executed by the Inam Commissioner but a general section (Section 2) was also enacted. That section empowered the Governor-General by resolution in Council, to select and empower officers who are to execute in India instruments of grant, etc., of Crown lands on behalf of the Secretary of State for India in Council and the mode in which they were to be executed. A resolution of the Government of India in the Home Department was issued under this section on

28th March 1895. (Ilbert on Government of India, p. 195, Edn. 3.) The history of legislation which I have traced above leads me to no other conclusion than that grants or leases of Sunderbans lands, which are lands vested in the Crown by Section 39 of 21 and 22 Vict., C 106, executed by the Sundarbans Commissioner on behalf of the Secretary of State for India in Council are Crown grants and to these grants the Crown Grants Act (15 of 1895) applies.

7. The next question is what is the scope of the Crown Grants Act. Does it affect only the provisions of the Transfer of Property Act or does it affect also any other law, statutory or otherwise, which may be inconsistent with terms and conditions made in the grant. Mr. Bose contends for the acceptance of the first proposition. Section 3 is in the widest possible form, but Mr. Bose contends that there is an ambiguity in that section; the ambiguity, according to him is caused by the use of the words "such grant" occurring therein. He says that in such circumstances it is legitimate to refer to the Preamble of the Act to find out the scope of the Act for the purpose of clearing the ambiguity. He further says that the Preamble indicates that the object of the Act was to make inapplicable only the provisions of the Transfer of Property Act to Crown grants. It is no doubt a principle of construction that the Preamble of an Act can be invoked for removing an ambiguity in an Act, but it is equally a well settled principle that the Preamble cannot be invoked for creating an ambiguity in the Act. It is therefore necessary to see firstly if there is any ambiguity in Section 3 and secondly what is the meaning of the Preamble.

8. In my judgment there is no ambiguity in Section 3, the words "such grants" clearly mean grants made on behalf of the Crown. The Preamble mentions two objects, namely (1) to remove doubts about the operation of the Transfer of Property Act on Crown grants, and (2) to remove doubts on the power of the Crown to impose limitations and restriction upon grants and other transfers of land made by the Crown. The two following sections of the Act carry out these two objects. Section 2 deals with the Transfer of Property Act and Section 3 declares the unfettered discretion of the Crown to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be. If Mr. Bose's contention had been right, Section 3 would be redundant. There is high authority also that the Crown Grants Act does not contemplate only the Transfer of Property Act. In *Sheo Singh v. Raghubans Kunwar* (1905) 27 All 634 Sir Arthur Wilson held that under the Crown Grants Act, the Crown in a Crown grant can modify the Hindu law of inheritance.

9. The ease cited by Mr. Bose, *Secy. of State v. Lal Mohan*, has no application because the grant in that case was not a Crown grant, but a grant of Khas Mehal lands where the Secretary of State for India in Council occupied the position of a mere landlord. I accordingly hold that by reason of Section 3, Crown Grants Act, clause 12 of the leases is not affected by Section 28, Contract Act, The benefit of that covenant contained in clause 12 of Ex. 1 however cannot be availed of by the defendant. Clause 12 of the lease (Ex 1) rests on contract and contract only. That is a contract between the Secretary of State and the plaintiff's predecessor, and the defendant, although a lessee of an adjoining lot cannot have the benefit of the said clause on the principle

that his predecessor-in-interest was not a party to the contract entered into between the Secretary of State in Council and the plaintiff's predecessor. I accordingly hold on this reason that the Civil Court had jurisdiction to decide the boundary dispute.

10. Regarding the second contention raised by Mr. Chakravarty, it appears from the Commissioner's report, which is made clearer by the Commissioner's evidence in Court, that he made no attempt to fix any of the two points on the Sunderbania of "Godamathura Khals from which and to which the red boundary line between the two lots was to be drawn. If he had fixed on the locality the two points or only one of them and had drawn the line with the bearing given in the leases after correcting the magnetic variation the result could have been satisfactory, but he -did neither. He proceeded upon the assumption that the khals had remained exactly in the same position throughout and he has said in his report that that was the admission of both the parties. On examining however the proceedings of the Commissioner of 16th March 1934,¹ find that the defendant's pleader contended that the two khals "are always variable". The said pleader insisted on locating on the spot the two points at the extremities of the red boundary line on the banks of the two khals. Later on, the Commissioner examined one witness produced on behalf of the plaintiffs and one produced on behalf of the defendants. The defendants' witness did not admit that the khals had not changed a bit but remained all along in exactly the same position. He only said that their position was "almost" the "same". The comparative map, which the Commissioner has prepared, shows the position of the relevant portions of the two khals according to his own relaying, according to the lease and according to the relaying by the settlement authorities. In the comparative map their positions do not tally. That shows either his relaying is wrong or that there is no foundation for the assumption on which he proceeded in his report, namely that the khals have remained in exactly the same position since 1896 and that there has been no change in their bends and contours. If any of the terminal points of the boundary line be placed not exactly on the points of the banks of the khal as indicated in the lease map, the boundary line would shift in a parallel way. In their objection to the Commissioner's report, the defendants expressly mention that the said two points on the banks of the khals have not been located correctly by the Commissioner and that he was wrong in assuming that the channels of the two khals have all along remained constant "though in fact they are always variable" (grounds Nos. 4 and 5 of the objections). These grounds which are vital ones have not been considered by any of the Courts below. The Commissioner's evidence would show that what he did was only guesswork. I accordingly hold that in accepting the Commissioner's report, the Courts below have not only left undetermined two very relevant objections of the defendants to the Commissioner's report but have accepted his re-port on a misconception of evidence, e. g. of his report and deposition.

11. I accordingly set aside the judgments and decrees of the Courts below and direct the case to be reheard on the question of boundary dispute after a fresh local investigation. The report of the Commissioner is discarded. The local investigation is to be made by a different Commissioner. The appeal is allowed and the case is remanded to the Court of first instance. Costs to abide the result.

