CALCUTTA HIGH COURT

Surja Kanta Roy Choudhury

Vs

Secretary of State

(Biswa, J.)

03.12.1937

JUDGMENT

Biswa, J.

1. The plaintiff appeals against the judgment and decree of the learned District. Judge of 2l-Parganas dated 6th June 1935. The learned Subordinate Judge by his judgment and decree dated 30th January 1935, had decreed his claim, but the learned District Judge dismissed his suit entirely. The facts are not in controversy, but the question raised is, we believe, one of first impression, and is of general interest so far as the lotdars of the Sundarbans are concerned. The question is whether a lotdar who is holding under a grant on the terms hereinbelow noted is entitled to get abatement of the amount payable by him to Government under his engagement, on account of some portion of his grant being diluviated, under the provisions of Section 52, Ben. Ten. Act.

2. In the year 1854 the Sunderbans Commissioner acting on behalf of the Government granted to one Bazlar Rahman a large block of waste land under the Waste Lands Rules of 1853. This grant is known toy the name of Abad Dwarik Jangal, being Sunderban lot no. 106 of Captain Hodge'sMap and touzi no. 1419 of the Collectorate of 24-Parganas. The area was then estimated to be 20,900 bigbas. The potta which was executed on 7th September 1860 was in the standard form printed at pp 93 and 94 of the Revenue History of the Sundarbans by Mr. Pargiter. One-fourth of the area was to be for ever free from assessment, the remaining three, fourths to remain "free of revenue" for the first 20 years, from the 21st to the 30th year assessment was to be at the rate of one half anna for every standard bigha, for the 31st to the 40th year at the rate of one anna per bigha, from the 41st to the 50th year at the rate of one anna and a half per bigha, and from the 51st to the 99th year at the full rate of two annas per bigha. Clause 3 of the potta provided that between the 20th and the 30th year either the Government or the grantee could have a survey and measurement with the view of ascertaining the exact area of the lands contained in the grant and

the revenue thereafter was to be fixed on the said measurement at the rates mentioned above. Clause 4 of the potta is in these terms:That after the 99th year, the grant shall be liable to Burvey and resettlement and to such moderate assessment as may seem proper to the Government of the day, the proprietary right in the grant, and the right of engagement with the Government remaining to the grantee, his heirs, executors or assigns under the conditions generally applicable to owners of estates not permanently settled and that revenue equal to the amount anually paid from the 51st to the 99th year shall be paid annually by the grantee, his heirs, executors or assigns until such survey and resettlement or reassessment as described above be effected.

3. The next clause made it obligatory on the grantee to clear and render fit for cultivation within stated periods certain proportions of the grant under the penalty of the grant being resumed on failure to do so. It is only necessary for us to state that one half of the area was to be cleared within the first 20 years, and three fourths of the area (i.e. the whole of the area liable to assessment) was to be cleared within 30 years from the date of the grant. Clause 6 deals with the manner of paying "the revenue", and provides that it shall be recoverable by the Government by the process that now is or hereafter may be in force for recovery of arrears of "Government revenue". An analysis of the potta establishes the following:

(1) The Government demand is fixed on the basis of area; (2) the area was, at the date of the potta, stated only by guess; it was only a rough estimate, as it must be, as the grant was then a forest area; (3) the grant was to be surveyed and measured between the 20th and the 30th year, when it was expected that the forest would be cleared substantially so as to render accurate measurement possible; (4) there was no provision for resurvey and remeasurement at any other period within the period of the grant which was to last for 99 years, but after the 99th year the grant was liable to be resurveyed and remeasured with a view to resettlement at a new rate; (5) the grant was a proprietary grant the grantee being entitled to have a resettlement under conditions applicable to owners of temporarily settled estates, and (6) the Government demand is described as revenue and made recoverable by the same process by which revenue can be recovered.

4. These characteristics, we may state at once, in our judgment militate against the view that the relationship between the Government and the grantee was that of the landlord and tenant and that the Government demand, though described as 'revenue' was really 'rent'. If the jural relationship is that of landlord and tenant and consequently the Government demand is rent, there can be no doubt, (subject however to the question about the applicability and effect of the Crown Grants Act, which we shall consider later on), the plaintiff would be entitled to get abatement and to recover the excess amount paid by him under protest; if however what is payable is revenue, the suit is a misconceived one, the relief of the plaintiff lying not in the Civil Court but in She hands

of the revenue authorities.

5. The interest of Bazlar Rahman devolved upon the Agra Bank Ltd. from whom it has passed to the plaintiff. On 9th September 1884, the Agra Bank applied for survey and measurement of the lot in terms of Clause 3 of the potta. That prayer was allowed and the lot was measured. The area was found to be 11,882 bighas. A revised potta and kabuliyat -were recommended and sanctioned by the Board of Revenue on 10th May 1886, and they were executed on 1st September 1887. The terms of the potta were the same as of the original potta of 7th September I860, with the exception that clause 3, the clause that gave the right to the grantee and the Government to survey and measure, was, as was apposite in the circumstances, dropped out. The Government demand on the progressive scale in accordance with the terms of the original potta was calculated on the ascertained area of 21,882 bighas and embodied in a dowl was axecuted by the Bank and attached to the kabuliyat. At the Cadastral Survey under Chap. 10, Ben. Ten. Act in the year 1924-25, the area of the lot was found to be less than 11,882 bighas by 358 bighas 9 cottas 13 chitaks. The plaintiff claims abatement for this deficit area at the rate of as. 2 per bigha.

6. As we have stated above. if the relationship between the Government and the plaintiff be that of landlord and tenant, She plaintiff is entitled to succeed, for the Government demand would be "rent". If however it is "revenue" the claim is not sustainable in a Civil Court. Mr. Roy Choudhury for the plaintiff appellant con-Sends that as the grant was conferred by a potta for a fixed term or period, the word revenue used in it must be taken to have been used in a loose sense only. The consideration on which be most strongly relies is that the Secretary of State for India is (the proprietor of the Sunderban area and a grant by him to a person must as a matter of law confer only tenant right on the grantee. He supports his contention by reference to that part of Clause (1) of Section 13 of Regn 3 of 1828 which states that "the uninhabited tract known by the name of Sunderbans has ever been and is hereby declared still to be property of the State", and to the following passage at page 51 of Mr. Sarada Charan Mitter's Tagore Law Lectures of 1895 (Edn. l):The settlement of land revenue in temporarily settled estates and khas mahals takes place periodically. The Government is a landlord within the meaning of the word as used in the Bengal Tenancy Act, and though the amount directly payable to the Government in khas mahals is rent, the paramount title of the state carrying with it the right to receive revenue and the proprietary right to receive rent uniting in the Government, the proprietary right merges in the paramount title, and rent in such oases is called revenue.

7. It has further been broadly contended for by Mr. Roy Choudhury that only the settlement holders under the Government under the Permanent Settlement Regulation (l of 1793) are, or have been made "proprietors", and that consequently their relationship with the Government is not of landlord and tenant, but that all other settlement holders holding directly under the

Government are "tenants", i.e. tenure, holders or ryots. He finally refers to the decision of the Judicial Committee in Khetramoni Dasi v Jiban Krishna (1921) 8 AIR PC 33 and says that, that decision establishes that a Sunderban lotdar holding under the Government on terms exactly similar to the terms of the potta we have before us, is a tenure-holder. It is necessary to examine these contentions a little more in detail.

8. In the middle of the 18th century, the Moghul Sovereign at Delhi was only a titular one. The East India Company were the virtual Sovereigns of Bengal. On 12th August 1765, the Company obtained from Shah Alam, the titular Emperor of Delhi, the Dewani of Bengal, Behar and Orissa on an agreement to pay to the latter 26 lacs of rupees as revenue, for the said provinces. Having obtained the Dewani from the Muhomedan ruler, they thought it prudent to follow the Mahomedan system. From the Mahomedan financial system, they claimed the inheritance of a right to seize upon an unduly large portion of the gross produce as khiraj or land revenue, and coupled the same with their own doctrine of the proprietary right of the Sovereign by reason of conquest. The seven years which followed the grant of the Dewani were years of chaos, resulting from double Government-the Dewani of the English and the Nizamat of the Nawab of Murshidabad, though at this period attempts were made to gather information and to establish a machinery for collecting revenue and making settlements (Tagore Law Lectures of 1895, pp. 29 and 30; Field's Landholding and Eolation of Land, lord and Tenant in various countries of the World, Ch. 20.) In 1772 the Company made settlements of the land revenue with the zemindars of Bengal for a period of five years, and the assessment was adjusted yearly, year after year, till the Decennial Settlement of 1790, which was made permanent in 1798. The Decennial Settlements (confining ourselves to Jessore, 24-Parganas and Bakerganj) were made with the zamindars of what may be roughly said to be the culturable area in the said districts or of such areas as though not under cultivation at the moment, were in the nature of patit and could be made culturablc easily and with little labour and capital, the impenetrable forest bordering on the sea on the Gangetic delta known as the Sunderbans being excluded from these settlements. Just before the Permanent Settlement, a controversy was carried on with great keenness between Lord Cornwallis and Mr. Shore as to whether the zamindars with whom the Decennial Settlements were to be concluded by the Government were to be considered as fit for the responsible rights of property and whether permanent settlements were to be made with them. The Permanent Settlement Regulation however was passed in spite of Mr. Shore's strong protest, and though in form it recognized the zamindars as proprietors of the soil, it really made the zamindars, who were formerly farmers, revenue proprietors. In other words, in effect the Government purported to divest itself of the proprietary right in the soil in favour of the persons with whom the Permanent Settlements were concluded. The Decennial Settlements were made permanent with some degree of haste with the result that the boundary lines on the forest side of the permanently

settled estates bordering on the Sunderbans were not fixed or defined with any degree of certainty. In fact in many permanently settled estates in Jessore no boundaries were given at all, and only at a later period the zamindars were asked to supply boundaries, which they did by filing with the Collector papers called huddabandi papers. These documents were mostly unreliable and inaccurate, larger areas than those actually settled with them being in almost all oases included within the boundaries, as the zamindars had by that time extended cultivation by encroaching upon the forest area lying on the borders of their estates. As cultivation extended, some of the huddabandi papers were even tampered with in the Collector's office in collusion with his amlas.

9. From about the year 1770 attempts were made to encourage reclamation of some portion of the forest area within the 24-Parganas. From 1770 to 1773, Mr. Claude Russell, the Collector General, granted leases of land to individuals on certain terms. These grants were known as Patitabadi taluks, but a larger scheme to bring under cultivation the Sundarban forest was embarked upon by Mr. Henakell (in 1783-1788). His object was of a two fold nature, to increase the Government revenue, and to break up the lurches of dacoits and robbers in the forest area Mr. Henckell made between 1784 to 1788, 144 grants known by the name of Henckell's taluks, but most of those grantees could not make much out of the grants, because the zamindars obstructed them and dispossessed them of areas reclaimed by them, on the claim that the grounds cleared were parts of their permanently settled estates in which they had proprietary rights. The result was that most of the grants made by Mr. Henckell were surrendered and a. few only of Henckell's taluks survived. The undefined boundaries of the permanently settled estates bordering on the Sunderbans created great difficulties in the way of the Government in making settlements of the Sunderban forest, no part of which had in fact been included in estates-permanently settled.

10. To overcome these difficulties, it was necessary to determine what was exactly included in permanently settled estates and to prevent the zamindars from enlarging their claim, as cultivation extended in the forest area. It was also essential to maintain the grantees from the Government of the forest area in possession of what they had reclaimed. The Sunderban Commission was established in 1816 for fiscal management of the Sunderbans, and from 1817 regulations were passed for facilitating grants of the Sunderbans area. Regn. 23 of 1817 was the first regulation. In its Preamble the Mogul theory that the State was entitled to the khirij, (certain proportion of the produce of every bigha land) was asserted, and it was further asserted that the Sunderbans area had not been included in any permanently settled estate. This Regulation was repealed and Regulation 2 of 1819 was passed. In 1825 by Regn. 9 of 1825 the settlement rules of Regn. 7 of 1822 were extended to the Sunderban area. These regulations were insufficient to meet the claims of the zamindars, and the defects and difficulties up to 1828 will be found

summarized in Ch. 4, Section 60, p. 22 of Mr. Pargiter's "Revenue History of the Sunderbans from 1765 to 1870". To put a stop to the claims of zamindars to portions of the forest area which may later on be cleared by future grantees from Government, Section 13 of Regn. 3 of 1828 was enacted. The material part of the Pre-amble of that regulation declares that: Commissioners have from time to time been appointed under orders of Government to maintain and enforce the public rights in different districts, in which extensive tracts of country unowned and unoccupied at the time of the perpetul settlement are now liable to assessment, or being still waste belong to the state.

11. Section 13 enacts the following provisions which are of importance to us.

(i) The uninhabited tract known by the name of the Sunderbans had ever been and then declared still to be the property of the State, the same not having been alienated or assigned to zamindars at the perpetual settlement. (ii) The Governor-1 General in Council was therefore competent as heretofore to make grants, assignments and leases of any part of the said Sunderbans; (iii) all parties to whom such grants, assignments or leases of any tract of Sunderban jungle had been made or were to be made shall be entitled to hold or to take possession without any question or opposition and all public officers shall aid and assist the same; (iv) the zamindars were given the right to contest the validity of the title or the right of possession of any grantee or lessee, but if it be proved that at the time of the grant, assignment or lease the area so granted was within the limits of the unoccupied jungle their suits were to be dismissed. Such being the history behind this piece of Legislature, and such being the object of the Regulation, viz. to maintain and enforce public rights in the area which was dense forest at the time of the Permanent Settlement, it follows that the right of property in the Sunderbans claimed and declared to be vested in the State by Section 13 is not of the same category as the right of property vested in a private person which may in a sense be regarded as a derivative right. In our opinion the right of property so asserted in the State in the said section is the right of property in the Sovereign by reason of conquest, which was asserted, as we have noticed above, just after the grant of the Dewani. Such proprietary right in the Government was not of the same class as its property right in what are technically known as Khas Mahals, where its position is that of a private proprietor. By the force of Section 13 of Regn. 3 of 1828 alone, the State does not therefore become a "landlord" as defined in the Bengal Tenancy Act, when it grants to a person a tract of the Sunderban forest. If the terms of the actual grant or assignment make it a landlord, that is another matter, for the State can also grant leases of its property in such a capacity. The grant in question in the present suit has been included in Register A maintained under the Land Registration Act as touzi no. 1419. It is accordingly an "estate" as defined in Section 3, Sub-section 4, Ben. Ten. Act, and the plaintiff is its proprietor as defined in Sub-section 11 of the said section. This is in accord with the terms

of the potta which has in terms conferred a "proprietary right in the grant" on the grantee, his heirs, executors, and assigns, and the right to engage with Government on conditions applicable to owners of temporarily settled estates. The passage cited' by Mr. Boy Choudhury from p. 51 of the Tagore Law Lectures of 1895 is quite correct with regard to Khas Mehals, but we disagree if it is intended to mean that the Government is the landlord as defined in the Bengal Tenancy Act in respect of all temporarily settled estates, the lots in the Sunderbans granted under the Waste Land Rules of 1853 being undoubtedly temporarily settled estates. We accordingly overrule the main contentions of Mr. Boy Choudhury.

12. The case cited by Mr. Roy Choudhury, *Khetramoni Dasi v Jiban Krishna*[1], is no authority for the pro. position contended for. The case does not decide that a Sunderban lotdar holding land under the Waste Land Rules of 1853 is a tenure-holder under the Government. In that case the appellant had a grant of a Sunderban lot from the Government. He had granted a permanent mnkurari tenure to the respondent in 1890, the terms of which precluded the respondent from claiming abatement of rent for diluvion. A portion of the lands of this tenancy diluviated, and the respondent claimed reduction of rent under Section 52 (2), Ben. Ten. Act. The appellant maintained that the respondent was bound by his contract in view of Section 179, Ben. Ten. Act. The only question that was decided was whether the land of the tenancy which the respondent held under the appellant was within "a permanently settled area". This Court on review, and the Judicial Committee of the Privy Council held that the lands being in the Sunder bans were not in a permanently settled area, and so the con. tract between the parties did not affect the right of the respondent to have abatement of rent under Section 52 (2), Ben. Ten. Act. No doubt the appellant admitted in Ms written statement that he was a permanent tenure-holder under the Government but the question as to whether he was a tenure-holder or a proprietor was neither raised in issue nor decided nor at all relevant to the case. The Judicial Committee held that the terms of the grant made to the appellant were so inconsistent with the terms of the Permanent Settlement of 1793 that the lands could not be said to be in a permanently settled area. That case therefore has no material bearing.

13. The learned District Judge has also held that even if it be assumed that the plaintiff is a tenure-holder, the Crown Grants Act precludes the plaintiff from getting abatement. In the view we have taken of the [status of the plaintiff, it is not necessary to decide the point. The Crown Grants Act applies to grants by Government of Sunderban lands. The scope of the Act is not limited to affecting the provisions of the Transfer of Property Act only. The Crown has unfettered discretion to impose any condition, limitation, or restriction in its grants and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law. These matters have been

discussed in detail in Jnanendra Nath Nanda v. Jadunath Banerjee . The grant, assuming it to be a lease, is for a term of 99 years. It gives the grantee the right to have the lands measured once and only once, between 20th and 30th year of the grant, and the adjustment of the Government demand on the results of the said measurement was to be the only adjustment during the currency of the term of 99 years. This view of the terms of the lease (assuming it to be a lease) militates against the right conferred by Section 52 (2), Ben. Ten. Act, which section must consequently give way in view of the provisions of the Crown Grants Act. We accordingly dismiss the appeal with costs.

Cases Referred.

1(1921) 8 AIR PC 33