LETTERS PATENT APPEAL.

Before Jenkins, C.J. and Mookerjee, J.

1913

June 12.

SHIBA PROSAD SAMANTA
v.
RAKHALMANI DASEE.*

Embankment—Poolbundi charges—Contract between zemindar and putnidar as to payment of poolbundi charges—Change of law after contract—How far the change affects the contractual relationship—Embankment Acts (XXXII of 1855 and Beng. Act VII of 1866)—Bengal Embankment Act (Beng. II of 1882), ss 54 to 59, 68, 74.

An agreement between the landlord and the *putnidar* entered into while the Embankment Acts (XXXII of 1855 and Beng. Act VII of 1866) were in force, that the *putnidar* was to be exempt from all charges to which the term *poolbundi* could be reasonably applied, is operative even after those Acts were superseded by the Bengal Embankment Act of 1882.

There is nothing in the Act of 1882 to render such an agreement contrary to the policy of the law or void for any other reason.

The *putnidar* is entitled to come to Court for the purpose of having his contractual rights vindicated as soon as he has reason to apprehend the breach of the contract on which he relies.

LETTERS PATENT APPEAL by Shiba Prosad Samanta and others, the plaintiffs, from the judgment of Coxe, J.

This appeal arose out of a suit for a declaration that the plaintiffs were not liable to pay the *poolbundi* cess and *dak* cess and that the orders of the Collector and Commissioner apportioning the *poolbundi* cess for their share were improper and not binding on them, and for a permanent injunction on the defendants restraining them from recovering the said cesses from the plaintiffs. The plaintiffs based their case upon the *putni patta* alleged to have been executed by the predecessors of the defendants, and upon the decision of

* Letters Patent Appeal No. 96 of 1911, in Appeal from Appellate Decree, No. 2071 of 1909.

the Civil Courts in certain previous suits between them wherein it was held that they were not liable to pay this cess to the defendants. The defendants in the meantime petitioned the Collector for apportionment of the cess. The Collector, in spite of the plaintiffs' objections, based on the grounds stated above, decided adversely to the plaintiffs. The plaintiffs, therefore, apprehended a breach of the terms of the *patta* and brought this suit. The defendants contended, *inter alia*, that the order of apportionment passed by the Collector was final under the new Embankment Act of 1882, and was not liable to be set aside by the Civil Court.

The Munsif refused to declare that the Collector's orders were improper or not legally enforceable, but declared that the plaintiffs were not at all bound to pay embankment and *dak* cesses and granted the permanent injunction prayed for.

On appeal by the defendants as regards the *poolbundi* cess, the Subordinate Judge held that the order of the Collector was final and not liable to be modified or set aside otherwise than as expressly provided by the Act of 1882; that the plaintiffs' proper remedy was, if any, to prefer an appeal against the order of the Collector to the Commissioner of the Division, to the Board of Revenue, and ultimately to the Government, and that the declaration and injunction prayed for were not competent. He, therefore, modified the declaration made by the Munsif and set aside the injunction as far as it related to the realisation of the *poolbundi* cess.

The plaintiffs appealed to the High Court; and Coxe, J., sitting singly, held that, if the Collector's order under section 68 was in conflict with a contract between the parties, the contract must be regarded as a nullity; that any decision of the High Court in a

1913

SHIBA PROSAD SAMANTA v. RAKHAL-MANI DASEE

case between the same parties before the Act of 1882 came into operation, could not act as *res judicata*, and that Civil Courts have no jurisdiction to modify or alter orders duly passed under section 68 of the Embankment Act, 1882. The appeal was dismissed.

Thereupon, the plaintiffs preferred this appeal, under section 15 of the Letters Patent.

Babu Baidyanath Dutt (with him *Babu Bhupendranath Ghose*), for the appellant. Under section 69 of the Bengal Embankment Act of 1882, the landlord is entitled to recover the charges from the *putnidar*. Section 74 gives the landlord very wide powers. In this case, the landlord tried to recover, on two previous occasions by two suits, these charges as rent. Those suits were dismissed. He then got the Collector to apportion the embankment charges under section 68. The landlord has not again brought a suit, but there has been sufficient breach of the terms of the contract to justify me to come to Court and invoke section 54 of the Specific Relief Act to vindicate my rights under the contract. The suit is, therefore, not premature.

The mere fact of the Collector making an apportionment cannot impose on me any liability overriding the express terms of the contract. The charge in question is one for construction of embankments. The older Acts, XXXII of 1855, and Beng. Act VII of 1866, which were in force when the lease was executed, meant exactly the same thing by embankment charges as the Act of 1882. The repeal of the Acts of 1855 and 1866 does not, therefore, alter the state of things, and cannot affect the contract.

The Collector's order may be final on the question of apportionment, but there is nothing in the statute to preclude the operation of a contract like this. Such a contract is not opposed to public policy.

[MOOKERJEE, J. A similar question arose in connection with cesses in *Ashutosh Dhar* v. *Amir Mollah* (1)].

The matter, moreover, is *res judicata* between the parties. It was once before held by this Court, on the construction of this very lease, that the *putnidars* were not liable to pay embankment charges.

Babu Nandalal Banerji, for the respondent. The word *poolbundi* does not, on the construction of the lease in question, include the present charge, which is levied under the Act of 1882, which introduces a different state of things from what prevailed at the date of the lease. The present charges on the *putnidars* were created for the first time by Bengal Act VI of 1873, which was repealed by the Act of 1882. Under the Acts of 1855 and 1866, *putnidars* had not to bear any share of the burden in respect of *poolbundi* charges. The landlords had to bear the burden alone. Under the law then in force, there could be no apportionment legally. The state of things has changed and the contract is of no force.

Under section 86 of Act II of 1882, the Collector's order is final, and any contract which is contrary to the statute cannot prevail. The Collector can realise only from the landlord and he is entitled to recover from the tenure-holder. I intend to enforce the Collector's orders soon.

JENKINS, C.J. This is a suit whereby the plaintiffs seek to vindicate a right which they claim under a *putni* lease in their favour executed in 1870. By that document it was provided on the part of the zemindar as follows: "We (that is the zemindars) shall pay the Government revenue, *poolbundi* and *dak* cesses, you having nothing to do with the same." The

(1) (1900) 3 C.L.J. 387.

1913

SHIBA PROSAD SAMANTA v. RAKHALMANI DASEE.

JENKINS C. J.

Embankment Acts in force at that time were XXXII of 1855 (Government of India) and Act VII of 1866 (Government of Bengal), and for the purposes of this argument it has been assumed that the obligation in respect of embankment charges was on the zemindars at that time. Whether that was so under Act VII of 1866 in all cases we need not now determine, but we will assume, for the purpose of this case, the correctness of the view that the stipulation which I have read gave practical effect to the state of the law as it then stood. These two Acts have been repealed, and that now in force is Act II of 1882 of the Bengal Legislature. There are provisions in that Act under which there can be an apportionment of embankment charges as between the zemindar and his tenure-holders. There has been that which purports to be an apportionment under the Act, and by it a certain burden in respect of *poolbundi* charges has been cast on the tenant. At the time of the proceedings before the revenue authority a protest was entered against this view, on the strength of the stipulation in the *putni* lease of 1870. But the argument failed, and it was held that this made no difference for the purposes of the Collector's decision. It may be that the Collector merely had to apportion without regard to the contractual rights between the parties; but of this I am confident that he had no power to take away from the plaintiff the benefit of any contractual right which he had against the zemindar, and that the plaintiff is entitled to come to this Court for the purpose of having his contractual rights vindicated.

The first question then that we have to determine is whether this suit can be entertained. At one time I felt some doubt as to whether the suit was not somewhat premature, and whether the proper method of meeting any claim advanced by the zemindar

would not have been by defence to a suit. But any doubt on that score has been dissipated by a consideration of the provision contained in section 74, which vests in the zemindar wide powers of recovery of the amount to which he is entitled under an apportionment order. He could possibly realize his claim without going to a Court, and therefore it will be right for us to give protection to the plaintiff now, if he is entitled to it. More than that, it has been very properly conceded before us that in this case the defendant does intend to take action, notwithstanding the terms of the agreement, so that the plaintiff is within the provisions of the law which require that it should be shown that there is reason to apprehend the breach of the contract on which he relies. Therefore, I think the suit is properly conceived. The only question then is whether the plaintiff has the contractual rights which he claims. The clause in the *putni* lease to which I have already referred is in wide terms; and is in effect an indemnity against *poolbundi* charges. The first point, therefore, we have to consider is whether that in respect of which the zemindar now intends to advance a claim is a *poolbundi* charge. Admittedly it is.

The next point for consideration is whether by reason of its being a *poolbundi* charge arising under an Act subsequent to the date of the *putni* it was outside the intention of the parties, so that, though covered by the words, it would not be fair to extend the agreement to this particular charge. There again, I think, there can be no doubt that the *poolbundi* charge with which we are concerned in this case is so similar to that in existence at the date of the *putni* lease that it is clear it was within the intention of the parties to include such a *poolbundi* as that with which we are now concerned. Indeed, the basis of the contract

1913

SHIBA PROSAD SAMANTA v. RAKHAL-MANI DASEE.

JENKINS, C.J.

between them must have been that the *putnidar* was to be exempt from all charges to which the term *poolbundi* could reasonably be applied. Therefore, I think, this second point is established in the plaintiffs' favour, and that the agreement extends to the present *poolbundi* charges, though they arise under the Act of 1882. This view is, I think, supported by the decision of the High Court in Appeal from Appellate Decree No. 920 of 1880, for it was there held that the agreement was operative, though prior to that suit Act VI of 1873 had come into operation and had superseded the previous Embankment Acts.

The final point is whether it is contrary to the policy of the law that we should enforce the agreement to which the parties came. I fail to see the fine distinction which embarrassed the learned Judge in reference to this point. The Government is in no way prejudiced by this contract between the zemindar and the *putnidar*. It is merely a contract that the zemindar will bear, as between him and the *putnidar*, certain charges. If the Government have any right against the property of the *putnidar*, this agreement would not prejudice in any way the assertion by the Government of its claim. I cannot see any difficulty in the zemindar undertaking to discharge a burden in the place of the *putnidar* or indemnifying the *putnidar* against this burden. Therefore, the final point, as it appears to me, is also in the plaintiffs' favour, that is to say, there is nothing in the Act of 1882 that renders this agreement contrary to the policy of the law or void for any other reason.

To sum up: in my opinion, the decree of the lower Appellate Court was erroneous, as was the judgment of Mr. Justice Coxe by which it was affirmed. The Munsif took a correct view.

We, therefore, restore the decree of the Munsif, with this variation, that we only grant an injunction restraining the defendants from realizing *poolbundi* and *dak* charges from the plaintiffs in respect of the *putni*.

The plaintiffs must receive from the defendants their costs in all Courts.

MOOKERJEE J. I agree.

S. M. *Appeal allowed in part.*

LETTERS PATENT APPEAL.

Before Jenkins C.J., and Mookerjee J.

DEBNARAYAN DUTT

v.

CHUNILAL GHOSE.*

1913

June 16.

Debtor and Creditor—Acknowledgment of debtor's liability by another and acceptance of same by creditor—Rights of creditor—Novation—"Consideration"—Administration of justice in Courts in India on general principles of equity and justice—Contract Act (IX of 1872), ss. 2(d) and 62.

Where the transferee of a debtor's liability has acknowledged his obligation to the creditor for the debt to be paid by him, under the provisions of the registered instrument conveying to him all the moveable and immoveable properties of the original debtor, and the acknowledgment was communicated to the creditor and accepted by him.

Held, first, that the arrangement between the creditor and the transferee did not amount to a *novation* within the meaning of s. 62 of the Contract Act; *secondly*, that the obligation undertaken by the transferee was for, and intended to be for, the benefit of the creditor; and, *lastly*, that the creditor is entitled to sue the transferee on the registered instrument.

---

*Letters Patent Appeal, No. 68 of 1911, in Appeal from Appellate Decree, No. 1778 of 1909.