APPELLATE CIVIL.

Newbould and Graham JJ.

MAHABUNNESSA BIBI

v.

SECRETARY OF STATE FOR INDIA.*

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May 20.

Resumption Proceedings—Land Revenue—Procedure to be followed in resumption—Nature of resumption-proceedings—Newly formed land in the bed of a navigable river—Jurisdiction of Civil Courts—Limitation—Resumption of Revenue Regulation (II of 1819), ss. 5, 6, 10, 22, 23, 24—Special Commissioners Regulation (III of 1828)—Limitation Act (IX of 1908), Sch. I, Art. 149.

Proceedings of revenue authorities may be subject to being quashed in the ordinary Courts of Law, if they have been tainted by fundamental irregularity.

Secretary of State for India v. Jatindra Nath Chowdhury (1) relied on.

When a statute lays down a specific rule as to the manner in which an enquiry is to be held and jurisdiction to be exercised and such rules have not been strictly observed, an enquiry held by a superior authority cannot be taken to be a proper substitute for the procedure laid down by law.

An application by Government under Regulation II of 1819 it not a suit so as to make Art. 149 of the First Schedule of the Limitation Act applicable

SECOND APPEAL by the plaintiffs and some defendants.

The history of the case began in 1641 A.D., when the Emperor Shah Jehan made several grants under *sanads* in favour of the ancestors of the plaintiffs, who

*Appeal from Appellate Decree, No. 163 of 1923, against the decree of D. Vaughan Steven, Additional District Judge of Mymensingh, dated Aug. 10, 1922, reversing the decree of Brojo Gopal Chatterjee, Subordinate Judge of that district, dated Dec. 23, 1921.

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were the objectors to the resumption proceedings started under Regulation II of 1819. In 1765 A. D., the Dewany was obtained by the East India Company. In 1793 A. D., *i.e.*, at the time of the Permanent Settlement, the lands in dispute were not settled with any *zemindar*. In 1836 A.D., a resumption proceeding was started with respect to *lakhiraj* lands in the village, some of which were the subject-matter of the present proceedings. The settlement map of 1850 showed a creek over the disputed plot. In the thak map it appeared that the disputed lands were the bed of a dried up river. In 1883 and 1917, proceedings were started for resumption of these lands under Act IX of 1847, but the proceedings were abandoned on both occasions on the ground that Act IX of 1847 was not applicable for resuming these lands.

The present proceeding was initiated by an Assistant Settlement Officer in 1918, without obtaining the sanction of the Board of Revenue. His finding that the lands were assessable to revenue was however approved by the Board.

The objectors, who were in possession of these lands, brought the present suit to set aside the proceedings, and the decision of the Board of Revenue, contending that the proceedings were vitiated by irregularities and fit to be set aside and that the claim of the Secretary of State was barred on the principle of *res judicata*, as also by limitation.

The learned Subordinate Judge, while pointing out the various irregularities in his judgment, did not express his opinion on the point, but decreed the suit holding that the plaintiffs had acquired good title by adverse possession for more than sixty years under Art. 149 of the First Schedule of the Limitation Act. He however held that the plaintiffs had failed to prove that the lands in dispute were the identical

lands which had been the subject-matter of the proceedings in 1836 and hence the question of the principle of *res judicata* did not arise.

On appeal by the Secretary of State for India in Council, the Additional District Judge held that no limitation was applicable to these proceedings and that, even if Art. 149 applied, the plaintiffs having failed to prove possession for more than 60 years since the lands were formed, the question of limitation did not arise. On the question of irregularities, the lower Appellate Court held that the defects were cured by the ultimate approval of the Board of Revenue. The question of *res judicata* was not gone into. The learned Additional District Judge accordingly decreed the appeal and dismissed the suit.

Thereupon, the plaintiffs and some of the defendants preferred this appeal to the High Court.

Mr. Rishindra Nath Sarkar, advocate (with him *Babu Sudhangsu Sekhar Mukherjee*), for the appellants. Serious irregularities were committed by the revenue officer and these go to the very root of the matter. The proceedings were initiated by an Assistant Settlement Officer, but according to the Regulation, it should have been done by the Collector or by a person holding the office of a Collector: *vide* section 5 of Regulation II of 1819 and *Secretary of State for India in Council* v. *Fahamidannissa Begum* (1). In the next place, the previous sanction of the Board of Revenue not having been obtained, the proceedings were *ultra vires*: *vide* clause 1 of section 5 of Regulation II of 1819. Then again, the time allowed to take objection to the lands being assessed to revenue was not in accordance with law and the case being disposed of before the expiry of the time

(1) (1889) I. L. R. 17 Calc. 590, 599.

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allowed by law to take objection, the whole proceeding was illegal: *vide* clause 2 of section 5 of Regulation II of 1819. Next, the notices served were not in accordance with law as provided in clause 2 of section 5 of Regulation II of 1819. Lastly, the officer did not make the enquiry as directed by the Regulation: *vide* section 5 of Regulation II of 1819. It is imperative that these enquiries should be made about the condition of the land at the date of the Permanent Settlement or, in case of alluvial lands, the date when the lands were formed, even if the objectors did not appear: *vide* clause 2 of section 2 of Regulation II of 1819. The enquiry must be full, because no evidence could be gone into by the Civil Court in case the matter be brought before it: *vide* clause 3 of section 10 of Regulation III of 1828. All the above irregularities constituted a violation of the fundamental statutory provisions of law and the Civil Court had jurisdiction to interfere in the matter: *Secretary of State for India* v. *Jatindra Nath Chowdhury* (1).

Secondly, the proceedings were barred by the principle of *res judicata*, because proceedings under Regulation II of 1819 are to be taken as suits: *vide* section 10 of Regulation III of 1828. Now, there was a proceeding under the above Regulation in 1836 with respect to lands within the village, in which the lands in dispute are situated. So it is to be presumed that these lands were the subject-matter of the proceedings of 1836 and hence the present proceeding is barred.

Thirdly, the case is governed by Art. 149 of Schedule I of the Limitation Act: *See Mahatab Chund Bahadoor* v. *Government of Bengal* (2) and *Ananda Kumar Bhattacharjee* v. *Secretary of State for India* (3). Though the onus ordinarily lies on the

(1) (1924) I. L. R. 51 Calc. 802; L. R. 51 I. A. 241.

(2) (1850) 4 Moo. I. A. 466, 508-9. (3) (1916) I. L. R. 43 Calc. 973.

person alleging adverse possession, still in this case the onus was on the Secretary of State to prove that the possession of the plaintiffs was not continuously for over 60 years. Under section 7 of Regulation II of 1819, the Collector is to enquire into the condition of the lands in 1793, when the Permanent Settlement was made or, in the case of alluvial lands, at the time of the formation of these lands.

The Senior Government Pleader (Babu Surendra Nath Guha) with the *Assistant Government Pleader (Moulvi Nuruddin Ahmed)*, for the Secretary of State, was called upon to answer the question of irregularities only. As some of the plaintiffs filed objections before the Assistant Settlement Officer and subsequently did not appeal, they must be held to have waived their rights and they cannot now take objection as to the sanction of the Board, the jurisdiction of the officer, the shortness of time and bad notice. Though the order-sheet states that the objection of some of the plaintiffs was rejected because they did not appear, still the officer made enquiries as required by law. The report that the officer sent to the Board shows that some sort of enquiry was made. The plaintiffs appeared before the Board of Revenue and hence the matter should not be allowed to be re-agitated before the Civil Court. The procedure prescribed in the Regulation is not strictly followed in reality and the irregularities complained of are not such as to vitiate the whole proceeding.

Cur. adv. vult.

NEWBOULD AND GRAHAM JJ. This is an appeal arising out of resumption proceedings under Regulation II of 1819. Certain lands to which the appellants claim *lakhiraj* title, were assessed with

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revenue on the ground that they had originally formed the bed of a navigable river and had subsequently been included by the appellants within their *lakhiraj* land. As provided in the Regulation, the decision of the Board of Revenue was questioned in a suit in the Court of the Subordinate Judge of Mymensingh. He decreed that suit, holding that the land in suit could not be assessed with revenue, as the claim of Government was barred by limitation. On appeal to the District Judge that decision was reversed and the suit brought by the appellants was dismissed.

The finding of the lower Appellate Court is attacked on three grounds. Firstly, that the resumption proceedings were illegal on account of several irregularities; secondly, that the claim to resumption was barred by *res judicata* and thirdly, that the claim was barred by limitation. On the second and third of these grounds we hold against the appellants. The plea of *res judicata* cannot succeed when it has been found by the Court that the land which was the subject of the former proceedings in 1837 has not been proved to be identical with the land which is the subject-matter of the present suit. On the plea of limitation we are in agreement with the learned District Judge that the application by Government under Regulation II of 1819 was not a suit so as to make Article 149 of the First Schedule of the Limitation Act applicable.

But on the other point we hold that the appellants have established their case. Both sides rely on the decision of the Judicial Committee of the Privy Council in *Secretary of State for India* v. *Jatindra Nath Chowdhury* (1). Though in that case the final decision was in favour of Government and it was held that the proceedings of the Revenue authorities

(1) (1924) I. L. R. 51 Calc. 802; L. R. 51 I. A. 241.

were to be upheld, their Lordships were careful to point out that the proceedings of the assessing authorities may be still subject to being quashed in the ordinary Courts of law if they have been tainted by fundamental irregularity. In the present case we must hold that it has been established that there was such essential and fundamental violation of statutory requirements as would give ground for quashing the proceedings in a Court of law. From the commencement the proceedings were marked by a disregard of the express provisions of the Regulation. In the first place, before the Collector can commence proceedings he must report the circumstances to the Board of Revenue or other authority exercising the powers of that Board, who, should they be of opinion that proper grounds exist for enquiry, shall direct the Collector or other officer exercising the power of the Collector to enter on an investigation of the case in the manner hereafter mentioned. Here the proceedings for resumption were instituted by the Assistant Settlement Officer without any previous report of the Board of Revenue or any direction by that Board that that officer should enter on an investigation of the case. Where the Legislature provides that an officer shall not act of his own motion but only under the direction of a superior authority, if he acts in disobedience of this provision it is difficult to hold that he is acting within his jurisdiction. The second clause of section 5 provides that "the Collector, on receiving the authority of the Board of Revenue, shall call the party before him by a notice stating the demand of Government on the lands, and requiring him to attend either in person or by vakil, within the period of one month, and to produce all *sanads* or other writings in virtue of which he may possess the lands, or under which they have been, or

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may be, claimed to be held free of assessment." In this case the Assistant Settlement Officer without receiving the authority of the Board of Revenue called on the parties before him to file objections within the period of 15 days. This notice is objectionable for two reasons: firstly, the period was half of that required by the statute, and secondly, the parties were not called on to appear before him, but were directed to file objection for transmission to the Settlement Officer. It would appear that after the issue of these notices it was decided that the case should be investigated not by the Settlement Officer but by the Assistant Settlement Officer, but it does not appear that the parties were informed that the Assistant Settlement Officer would himself deal with the case. However that may be, the case was adjourned for two days only, and on none of the parties appearing the Assistant Settlement Officer proceeded *ex parte*. Here again he overlooked the provisions of the Regulation. Section 6 provides that, "if the party shall not appear the Collector shall "proceed to investigate and decide upon the case in the "same manner as if the party had appeared, answered "and entered into proof" and the nature of the enquiry to be made by the Collector is set out in section 7 which directs that the "Collector shall institute a full "and particular enquiry into the circumstances and "condition of the land in question at the period of the "decennial settlement, and, in cases of alluvion land "into the period of its formation". It does not appear that any enquiry was made by the Assistant Settlement Officer upon these two points.

It is contended on behalf of the Secretary of State that when the matter finally came before the Board of Revenue after the Assistant Settlement Officer's enquiry was concluded the parties had full opportunity of representing their case to the Board, and that the

Board having heard their objection, no substantial wrong has been done to the appellants. We are unable to hold that when a statute lays down a specific rule as to the manner in which an enquiry is to be held and jurisdiction to be exercised, the enquiry held by a superior authority can be held to be a proper substitute for the procedure laid down by law. The necessity of proper investigation by the Collector appears obvious if we consider the provisions of Regulation III of 1828 which was enacted in modification and in extension of the provisions contained in sections 22, 23 and 24 of Regulation II of 1819. The third clause of section 10 of that Regulation provides the procedure to be followed in suits to contest the Board's decision and under that section the parties are prohibited from producing before the Court any evidence that has not been produced or tendered before the Collector or the Board, except under special circumstances. We therefore hold that the resumption proceedings were vitiated by fundamental irregularities and that the plaintiffs' suit should have been decreed.

We accordingly decree this appeal. We set aside the judgment and decree of the lower Appellate Court. The plaintiffs' suit is decreed and it is ordered that the order of the Board of Revenue declaring the land in suit liable to assessment of revenue be set aside.

The plaintiffs will get their costs in all Courts.

S. M

Appeal allowed.