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it is still incumbent upon them to satisfy the Court that their cause of action is not within the ambit of section 63, and if they fail to do so the suit or legal proceeding will fail.

The result is that the decree of the lower Appellate Court is set aside, and the suit will be sent back to the trial Court to be heard on the merits in accordance with law. The plaintiffs will have their costs of and incidental to the present appeal and in the lower Appellate Court in any event. The costs in the trial Court will abide the event.

MALLIK J. I agree.

N. G.

Appeal allowed; case remanded.

APPELLATE CIVIL.

Before Page and Mallik JJ.

HARENDRA KUMAR ROY CHOWDHRY

v

THE SECRETARY OF STATE FOR INDIA.*

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Aug. 14.

Public Demand—Certificate—Bengal Public Demands Recovery Act (Beng. III of 1913) ss. 34, 35 and 37—Record of Rights—Bengal Tenancy Act (VIII of 1885) ss 104 H, 104J and 111A—Limitation.

If at the time when a certificate under the Bengal Public Demands Recovery Act is signed there is no "public demand" due from the "certificate debtor" the certificate is *ultra vires*, and all proceedings founded thereon are null and void.

Balkishen Das v. *Simpson* (1) referred to.

*Appeals from Appellate Decrees, Nos. 1113 and 1114 of 1926, against the decrees of Kumude Nath Roy, Additional Subordinate Judge of Mymensingh, dated Dec. 17, 1925, affirming the decrees of Moulvi M. Ahmed, Munsif of Tangail, dated March 19, 1925.

(1) (1898) I. L. R. 25 Calc. 833; L. R. 25 I. A. 151.

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When the certificate is void the right to seek relief in a Court of law is not taken away.

APPEAL by the plaintiffs Rai Bahadur Harendra Kumar Roy Chowdhry and others.

The plaintiffs were fractional shareholders in a zemindari, and 16 annas patnidars thereunder. Certain lands having accreted to that zemindari and the zemindars having refused to take settlement of such accreted lands, the Government took khas possession of them, and the plaintiffs were recorded as the tenants of the separate diara mehals. Thereafter rent and cesses in respect of such mehals being in arrear five different certificates under the Bengal Public Demands Recovery Act were issued against the plaintiffs on the 28th October, 1920, 26th March, 1922, and 31st January, 1924. The plaintiffs paid the amounts under protest, and brought the present suit on the 21st July, 1924, for a declaration that they were not liable for the rent and cesses in respect of those diara mehals, and that the certificates were *ultra vires*, and also claimed a refund of the sums paid under the certificates. The defence was that the suit was barred under the Public Demands Recovery Act, and under sections 104H and 104J of the Bengal Tenancy Act the plaintiffs were precluded from challenging the correctness of the record of rights.

The learned Munsif dismissed the suit, and the lower Appellate Court upheld that decision. On that this appeal was filed.

Mr. Dwarka Nath Chakraverty (with him *Mr. Kali Kinkar Chakraverty*), for the appellants. The plaintiffs were never in possession of the diara mehals and no 'public demand' is recoverable from them. The certificates were *ultra vires*, and all proceedings taken under them are null and void.

Balkishen Das v. *Simpson* (1), *Girjanath Roy Chowdhry* v. *Ram Nardin Das* (2). The certificates being without jurisdiction the plaintiffs were not bound to follow the procedure in the Public Demands Recovery Act. They had their relief under the general law. *Janakdhari Lal* v. *Gossain Lal Bhaya Gaywal* (3). Either Article 120 or Article 62 of the Limitation Act and not the special provision in the Public Demands Recovery Act would apply in this case. *Sarada Charan Bandopadhaya* v. *Kista Mohun Bhattacharjee* (4), *Sookan Sahu* v. *Lala Badri Narain* (5).

The settlement record only raises a presumption which is rebuttable.

Mr. Surendra Nath Guha (with him *Mr. Syed Nasim Ali*), for the respondent. The plaintiffs' suits are barred by limitation. The plaintiffs not having taken advantage of section 34 of the Public Demands Recovery Act for proving that no "public demand" was recoverable from them within the time provided therein cannot have recourse to the general law. The settlement record is in favour of the defendant. The plaintiffs have taken no steps to have the record corrected as provided in section 104H of the Bengal Tenancy Act. *Uma Charan* v. *Lakshmi Narayan* (6). The plaintiffs were bound to follow the procedure in the Act itself, and not having done so their suit is barred.

Cur. adv. vult.

PAGE J. The plaintiffs are 7 annas and odd co-sharers in a zemindari, and 16 annas patnidars under

(1) (1898) I. L. R. 25 Calc. 833; L. R. 25 I. A. 151.
(2) (1891) I. L. R. 20 Calc. 264.
(3) (1909) I. L. R. 37 Calc. 107 13 C. W. N. 710.
(4) (1897) 1 C. W. N. 516.
(5) (1905) 5 C. L. J. 686.
(6) (1926) Unreported. S. A. No. 2411 of 1923, decided on 17-2-1926.

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the zemindars. Certain lands have accreted to the zemindari, and diara proceedings were taken by the Government for the purpose of the resumption and settlement of the accreted lands, and the assessment thereof with revenue under Regulations VII of 1822 and I of 1825, Act XXXI of 1858, Act IX of 1847, and Chapter X of the Bengal Tenancy Act. The zemindars refused to take settlement of the accreted lands, and were granted malikana in respect thereof. The Government then took khas possession of the accretions, and in the record of rights the plaintiffs were recorded as the tenants of the separate diara mehals Nos. 13618, 13116 which had been formed out of the accreted lands. Thereafter five certificates under the Public Demands Recovery Act (Beng. III of 1913) were issued, and notices served upon the plaintiffs for the recovery of arrears of rent and cesses alleged to be due from them as tenants of these diara mehals under the Government. The plaintiffs under protest paid the amounts demanded under the certificates on the 28th October, 1920, 26th March, 1922, and 31st January, 1924. On the 21st July, 1924 the plaintiffs brought the present suits for a declaration that they are not liable for the rent and cesses in respect of these two diara mehals, and that the certificates were issued *ultra vires* and were null and void. The plaintiffs also sought to recover by way of refund the sums paid thereunder to the Government.

Three defences were raised by the Secretary of State for India.

(1) That the plaintiffs had failed to bring the present suits within six months of their petition denying liability under section 9 of the Public Demands Recovery Act, and, therefore, under sections 34, 35 and 37 of the Act the suits were barred by limitation.

(2) That as the plaintiffs had failed to bring a suit within the time limited by section 104H of the Bengal Tenancy Act the plaintiffs in the present suits were precluded under sections 104J and 111A from challenging the correctness of the entries in the record of rights to the effect that they were tenants of the diara mehals under the Government, and were liable to pay the rent therein stated to be settled.

(3) That on the refusal of the zemindars to take settlement of the lands that had accreted to their zemindari the Government was entitled to treat the plaintiffs as tenants under the Government of the new estates that had been created out of the accretions, and to recover rent and cesses in respect of the same from the plaintiffs.

The first contention on behalf of the defendant raises the question whether the only mode in which the validity of a certificate issued under the Public Demands Recovery Act, and the liability of the certificate-debtor to pay the "public demand" thereunder, can be challenged is by resorting to the machinery provided in the Act.

The general rule is "that an affirmative statute "giving a new right does not of itself and of necessity "destroy a previously existing right. But it has that "effect if the apparent intention of the Legislature is "that the two rights should not exist together" [per Lord Cranworth, L. C. in *O'Flaherty* v. *M'Dowell* (1).] Whether the new remedy is exclusive or cumulative in each case will depend upon the true construction of the statute under consideration.

Now, it is to be observed that in section 37 the Legislature, when limiting the common law right of the subject to seek relief in a Court of law, refers to

(1) (1857) 6 H. L. Cas. 142, 157.

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"a certificate *duly* filed under this Act", and, in my opinion, it is a condition precedent to the issue of a valid certificate that the "public demand" should be due and payable by the certificate debtor, and if at the time when the certificate is signed by the certificate officer there is no "public demand" due from the certificate debtor the certificate is *ultra vires*, and all the proceeedings founded upon it are null and void. The ruling of the Judicial Committee in *Balkishen Das* v. *Simpson* (1), relating to the cognate provisions of the Bengal Land Revenue Sales Act (XI of 1859) is applicable to the Public Demands Recovery Act [*Janakdhari Lal* v. *Gossain Lal* (2), *Nandan Missir* v. *Lala Harakh Narain* (3) *Pratap* v. *Secretary of State for India* (4), *Dhorendra Krishna Mukherjee* v *Mohendra Nath Mukherjee* (5). In *Balkishen Das* v. *Simpson* (1) Lord Watson, in delivering the judgment of the Board, observed that "the Act does not "sanction and by plain implication forbids the sale of "any estate which is not at the time in arrear of "Government revenue . . . . But the chief and "substantial objection upon which the appellants' "plaint is based is that at the time when their 5-annas "share of the village Shahzadpur Anderkilla was sold, "there were no arrears of revenue due by them in "respect of it. . . . . The result is that the "whole of the proceedings of the Collector with a view "to the sale of the 5-annas share were beyond his juris-"diction, and are not entitled to the protection given "him by the Act in cases where sale is authorised, "although it may be attended with some irregularity "or illegality" (*ibid* p. 842); *Sheikh Haji Mutasaddi*

(1) (1898) I. L. R. 25 Calc. 833 ; L. R. 25 I. A. 151.
(2) (1909) I. L. R. 37 Calc. 107.
(3) (1910) 14 C. W. N. 607.
(4) (1922) 35 C. L. J. 304.
(5) (1922) 27 C. W. N. 386.

Mian v. *Mahomed Idris* (1), *Mahomed Jan* v. *Ganga Bishun Sing* (2).

The issue to be determined, therefore, is whether the arrears and cesses in suit were due from the plaintiffs at the time when the certificates were issued. The defendant's second contention is that under sections 104J and 111A of the Bengal Tenancy Act the plaintiffs are precluded from asserting in the present suits that they are not liable as tenants to pay the rent settled and cesses in respect of the two diara mehals, as they have failed to challenge the entries to that effect in the record of rights as provided by the Act. The answer to that contention is that under section 104J, although the entry relating to the rent settled is conclusive, any other entry is not irrebuttable, but "shall be presumed to be correct until it is proved by evidence to be incorrect" [section 103B (3)] *Priya Nath Basu* v. *Tara Chand Moral* (3), *Uma Charan* v. *Lakshmi Narayan* (4). Now, the entries in the record of rights that the plaintiffs are tenants of the two diara mehals and are in possession of the same through sub-tenants clearly are rebutted by the following facts found by the lower Appellate Court, that "no settlement was or could under the law be offered to them as patnidars", and that "the plaintiffs were not in possession of the diara mehals, and refused to take settlement thereof".

Nevertheless, the third contention of the defendant is that, notwithstanding the refusal of the plaintiffs to become tenants under the Government, after the zemindars had declined to take settlement of the lands that had accreted to their zemindari the Government was entitled to treat the plaintiffs as

(1) (1915) 19 C. W. N. 764.
(2) (1911) L. R. 38 I. A. 80.
(3) (1923) 27 C. W. N. 982.
(4) (1926) Unreported S. A. No.2411 of 1923 decided on 17-2-1926

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tenants under the Government, and to claim rent and cesses from the plaintiffs in respect of the two diara mehals. In my opinion, this contention is ill-founded. No doubt in the circumstances the plaintiffs under the law were entitled to claim these accreted lands as appertaining to their patni tenure, but to contend that the Government could compel them to take settlement of the accreted lands even against their will is to advance a proposition opposed to good sense and justice, and for which, I apprehend, there is no justification in law.

In the present case it is not pretended that the plaintiffs have taken possession of the lands in suit, or that they have entered into any agreement to take settlement of the lands from the Government, and I am of opinion that at the time when the certificates were issued there was no "public demand" due from the plaintiffs, that the certificates were *ultra vires* the certificate officer, and that all the proceedings founded upon the certificates were null and void.

I am of opinion that the plaintiffs are entitled to the declarations for which they pray, and as the claim for a refund of the arrears and cesses that were paid under protest is in substance one for money had and received by the Secretary of State to their use Article 62 of the first schedule to the Limitation Act, (IX of 1908) is applicable, and the plaintiffs are entitled to recover the sums paid under protest, except the amount of the payment on 28th October 1920, which was not made within three years of filing of the suit. The decrees of the lower Appellate Court will be set aside, and a decree in the above sense passed in favour of the plaintiffs with costs in all the Courts.

MALLIK J. I agree.

N. G. *Appeal allowed.*

[END OF VOL. LV.]