PRIVY COUNCIL.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

SATISHCHANDRA SEN

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

P. C.*
1930
July 18, 21, 22; *Oct.* 14.

*Cantonment tenure—Possessory title—Absence of assessment or registration as private land—*Mouzâwrâi *register—Land acquisition—Bengal Cantonment Rules, 1836, cl. 6.*

When Government are acquiring land for a public purpose under Act I of 1894, it is for the person claiming compensation to establish his title to it affirmatively.

It is not a necessary implication from the Bengal Cantonment Rules, 1836, that all land within a cantonment in Bengal is Government property; but long possession by a private person is not by itself sufficient to establish his title to land so situate.

In 1917, the Government acquired, under the Land Acquisition Act, 1894, a plot of land, with a house, in the Barrackpore Cantonment. The respondent held a possessory title to the land from 1900, or possibly from 1871. The land, which was not shown to be *lâkhiraj*, had not been assessed to revenue, nor had it been registered as private property under the Bengal Land Registration Act, 1876, sections 38 to 41. An entry in 1853 in the *mouzâwâri* register referred to the land as a *mehâl khâs sarkâr*.

Held that the respondent, though entitled to the compensation awarded in respect of the house, was not entitled to the compensation awarded for the land, as he had not established his title thereto. The entry in the *mouzâwâri* register, although no proof of title in the Government, was of considerable significance in the absence of other records.

Robinson v. *Carey* (1) and *Kaikhusru Aderji* v. *Secretary of State* (2) referred to.

Decree of the High Court reversed.

Appeal (No. 80 of 1929) from a decree of the High Court (June 20, 1927) affirming a decree of the Special Land Acquisition Judge of 24-Parganâs (July 9, 1925).

The appeal arose out of proceedings under the Land Acquisition Act, 1894, whereby the Government acquired a plot of land, with a house thereon, situated

*Present : Lord Thankerton, Sir Lancelot Sanderson and Sir George Lowndes.

(1) (1864) Cor. Rep. 137.

(2) (1911) I. L. R. 36 Bom. 1; L. R. 38 I. A. 204.

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within the Barrackpore Cantonment. The Collector made an award in favour of the respondent in respect of the value of the house only. The question arising upon the appeal was whether the respondent was entitled also to the amount awarded by the Collector, after a remand, in respect of the land.

The facts of the case and the relevant provisions of a notification issued by the Secretary to the Government, Military Department, in 1836, appear from the judgment of the Judicial Committee.

The High Court, affirming the view of the Special Land Acquisition Judge, held that the respondent was entitled to the compensation. The learned Judges, Ghose and Roy JJ., were of opinion that the cantonment rules and other documents before them did not show that all land within a cantonment belonged to Government. It appeared from the rules that an owner of Government land so situated was bound to obtain the leave of the authorities before erecting structures upon it. The absence of any record of permission having been granted as to the land in question showed, in their opinion, that the Government had no concern with it. The presumption from the respondent's long undisturbed possession without payment of rent was that he was the owner.

Dunne K. C. and *Wallach* for the appellants. All land within a cantonment belongs *primâ facie* to Government. That view is supported by the terms of the Cantonment Regulation of 1836. The revenue survey map of 1851 shows that all lands in the Barrackpore Cantonment were Government property. Documents dating back to 1775 showed that Government acquired the land constituting the village of Barrackpore. In the absence of any assessment of the land to revenue, and of registration as private land under the Bengal Land Registration Act, 1876, the respondent did not discharge the onus upon him. No inference adverse to Government can be drawn from the fact that there was no record of sanction

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being given to erect the house. The facts were similar to those in *Robinson* v. *Carey* (1), in which Norman J. decided against a claim to land in the Barrackpore Cantonment based only on a possessory title.

[Reference was made also to *Kaikhusru Aderji* v. *Secretary of State* (2), *Bank of Upper India, Limited, Mussoorie* v. *Secretary of State for India in Council* (3), and to a decree of the Supreme Court, Bengal, in *Burney* v. *Bagshaw* (4).]

The plot of land now in question was recorded in the *mouzâwâri* register in 1853 as *mehâl* "*khâs* "*sarkâr*," *i.e.*, in the possession of Government.

Upjohn K. C. and *Dube* for the respondent. The question of ownership was one of fact, and there are concurrent findings in the respondent's favour. The judgment of the Board in *Kaikhusru Aderji's* case (2) has no bearing, as in Bombay all cantonment land was expressly declared by Regulation to be the property of Government. The rules of 1836 do not so declare, even by implication, as to cantonment land in Bengal. The observations in *Robinson* v. *Carey* (1), which are relied on, were *obiter*. The case before the Supreme Court in 1840 turned upon its particular facts; no general rule was laid down. The Allahabad case has no bearing. The respondent proved possession since 1871; that raised in his favour a strong presumption, which was not rebutted by the evidence. The entry in the *mouzâwâri* register was not admissible under section 35 of the Evidence Act.

[Reference was made also to the Cantonment Acts, 1889 and 1910, and rules thereunder.]

Dunne K. C. replied.

The judgment of their Lordships was delivered by

Sir George Lowndes. This appeal arises out of certain land acquisition proceedings. The Government notified for acquisition a plot comprising some

(1) (1864) Cor. Rep. 137.
(2) (1911) I. L. R. 36 Bom. 1; L. R. 38 I. A. 204.
(3) (1910) I. L. R. 33 All. 229.
(4) (1840) Unreported case, decided by Ryan C. J., Grant and Seton JJ. on July, 24. Record, Pt. II, pp. 61, 62.

5¼ *bighâs* of land with a house upon it situated in the Barrackpore Cantonment. The respondent was in possession under a title which will be presently considered. The Collector valued the buildings at Rs. 11,467-11, which, together with Rs. 1,720-2-5, the statutory addition of 15 per cent. for compulsory acquisition, he awarded to the respondent, and this part of his award is not in dispute. He valued the land at Rs. 9,510-10, but refused to award any part of this to the respondent, on the ground that the land being cantonment land was the property of Government. The respondent claimed a reference in the ordinary course. The case came before the Special Land Acquisition Judge, who held that the respondent was entitled to the value of the land also, and, accordingly, passed a decree in his favour for the additional sum of Rs. 10,937-3-6, being the above-mentioned sum of Rs. 9,510-10 together with the additional 15 per cent. The Secretary of State appealed to the High Court, but his appeal was dismissed, and the matter now comes before His Majesty in Council upon the High Court's certificate.

The question seems to have been dealt with in India as if the matter were one of apportionment between two contending claimants, the sole criterion being which of the two had made out the better claim to a particular part of the compensation. Their Lordships, however, have no doubt that, when Government are acquiring immovable property for a public purpose under Act I of 1894, it is for the person claiming compensation to establish his title to it affirmatively.

The difficulty, in the present case, arises mainly from the fact that the acquired property is admittedly within the Barrackpore Cantonment, and the tenure of such property is in many cases of a somewhat anomalous character. It seems clear that much, at all events, of the land comprised in this cantonment, and probably in other cantonments in different parts of India, was originally acquired by Government for military purposes, but that private individuals were

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allowed to erect houses upon various plots. Government appear to have encouraged this form of development as providing a simple solution of the varying demand for officers' quarters, and to have recognised, subject to certain restrictions, rights of private ownership in the buildings, while, at the same time, retaining in themselves the property in the soil. This is sometimes referred to as "military or canton-"ment tenure."

There have been, from very early times in Bengal, rules promulgated by Government for the control of buildings in cantonments, and, on the 12th September, 1836, in supersession of previous orders, a "Regula-"tion" of the Governor-General in Council was notified dealing primarily, at all events, as their Lordships think, with applications to build upon unoccupied land in cantonments. Clause 6 of this Regulation is in the following terms:—

6. No ground will be granted except on the following conditions, which are to be subscribed to by every grantee, as well as by those to whom his grant may subsequently be transferred:

1st.—The Government to retain the power of resumption at any time, on giving one month's notice, and paying the value of such buildings as may have been authorised to be erected.

2nd.—The ground, being in every case the property of Government, cannot be sold by the grantee; but houses or other property thereon situated may be transferred by one military or medical officer to another, without restriction, except in the case of reliefs, when, if required, the terms of sale or transfer are to be adjusted by a Committee of Arbitration.

3rd.—If the ground has been built upon, the buildings are not to be disposed of to any person, of whatever description, who does not belong to the army, until the consent of the Officer Commanding the station shall have been previously obtained under his hand.

4th.—When it is proposed, with the consent of the Commanding Officer, to transfer possession of a native, should the value of the house, buildings or property to be so transferred exceed Rs. 5,000, the sale must not be effected until the sanction of Government shall have been obtained through His Excellency the Commander-in-Chief.

It is contended for the appellant that these rules, and in particular the 2nd paragraph of clause 6, declare all lands in cantonments to be the property of Government. Their Lordships are not satisfied that this is the necessary implication, though the rules certainly suggest that some, and probably the greater part, of the land was at that time Government property.

In 1840, a question as to house property in this cantonment came up for decision by the Supreme Court at Calcutta. Part of the estate, in an administration suit, consisted of cantonment houses, and their devolution seems to have depended upon the question whether they were realty or personalty. The Master, to whom this question was referred, found and reported that "the whole land within the limits of the "cantonment at Barrackpore is the property of the "East India Company," and that "all private houses "built thereon and all parts of such land as are "appropriated to private purposes are built and "appropriated on leave given by Government," and he, accordingly, found that the property in question was personalty. His finding was accepted by the Court and was embodied in its decree, a certified copy of which forms part of the record in this appeal. The conclusion come to seems to have been based in part, at all events, upon the rules of 1836, and though, upon the materials now available, their Lordships are not prepared to affirm that all land in the cantonment is necessarily the property of Government, the decision suggests that, in 1840, when these rules had only recently come into operation, there was no common knowledge of the existence of any privately owned land in the cantonment.

For the respondent it is contended that, under these rules, a register and plan were to be kept, upon which all grants by Government were to be entered, and reliance is placed upon the fact that no such records are produced. Their Lordships are driven to the conclusion that these provisions have been disregarded by the military authorities, but, in the absence of any proof that the respondent's buildings were erected after 1836, they think that no presumption can be drawn in his favour from this apparent dereliction of duty.

Reference has also been made to the more recent Cantonment Acts and rules, which have gradually developed into a regular code of municipal law, and it is pointed out by the respondent that many of the

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provisions evidently contemplate the existence of privately owned property within cantonment limits.

Turning now to what is known about the Barrackpore Cantonment in particular, a number of official letters have been produced, commencing with one from Warren Hastings, dated the 2nd February, 1775, which make it clear that, between that date and 1814, Government acquired a considerable quantity of land for the cantonment, and a survey map has been put in evidence, dated in 1851, which shows the cantonment as consisting of 889 acres, 1 rood, 31 poles. It is on a small scale, but in great detail, and shows the plot, the subject of this appeal, with buildings upon it, which are no doubt those, of which the value has been awarded to the respondent by the Collector. An entry has also been produced from the *mouzâwâri* register, dated the 30th September, 1853, in which the Barrackpore Cantonment, with the same area as above, is entered as a *mehâl* "*khâs sarkâr*," which seems to mean—in the possession of Government. Counsel for the respondent has objected to the admissibility of this entry, but there is no trace of any objection having been taken to it in the courts in India, and their Lordships think that it is admissible, for what it is worth, under section 35 of the Indian Evidence Act.

Their Lordships hold that the fair inference from these facts, taken in connection with the rules of 1836, is that much, and possibly most, of the land in this cantonment was and is the property of Government; that houses were erected upon it by the licence of Government, the buildings being recognised as the property of the persons by whom they were erected, and the land remaining in the ownership of Government, but that there may nevertheless have been, within the cantonment limits, some land which was never acquired by Government, and of which the ownership was always in private hands.

If it lay upon the appellant to prove the acquisition of the particular plot, which is the subject of this appeal, there can be no doubt that he has

failed to do so. Both courts in India have come to this conclusion, and, considering that this disposes of Government's claim to the land, they have, as their Lordships think, assumed that it must be the property of the respondent. Their Lordships are unable to concur in this assumption. In their opinion, the respondent, in order to succeed in his claim to compensation for the land, must prove his title to it in the ordinary way. The plot in question may have been privately owned, and may have passed from such owners to the respondent, but there is, in their Lordships' opinion, no ground for assuming this: it must be a matter of proof by the respondent, and it is upon this that the respondent's claim to the compensation money must stand or fall.

The title vouched by the respondent is remarkable for the meagreness of its written record. There is a mortgage, dated in 1889, which covers a somewhat indeterminate fraction of the property. This is implemented by a certificate of purchase by the respondent of the same fraction at a court sale in January, 1899—presumably under a decree passed on the mortgage. Then there is a second sale certificate of August, 1899, under which one Jogeshchandra Sen, who may have been a co-parcener of the respondent, purchased another fraction of the property, and a third sale certificate under which the respondent purchased the interest of his mortgagor in apparently the larger part of the property. It is impossible to make out from these documents any title at all to the whole of the $5\frac{1}{4}$ *bighâs*, which the Government has now acquired, but this does not appear to have been noticed in the Indian courts, and their Lordships do not desire to found their judgment in any way upon this deficiency. In addition to these documents, there is the deposition of the respondent, who says that he has been in possession since 1900, but has no title deeds, and had never seen any of prior date to his mortgage. It is said that the recitals in this deed carry back the possession to 1871, but their Lordships doubt if these

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recitals are evidence as against the appellant—see per Lord Buckmaster in *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1). It is admitted that the sale certificates passed nothing but the right, title and interest of the judgment-debtor, whatever it was, and the mortgage, without anterior title deeds, is of no more determinate value.

Their Lordships think, therefore, that the title of the respondent must be taken to be a purely possessory one, and whether dating from 1900 or from 1871, seems to be immaterial, as it is clear, from the map referred to above, that the property had been included in the cantonment, at all events, from 1851.

No Government assessment has ever been paid by the respondent, nor apparently has the land ever been assessed. No evidence was offered that it was *lakhirâj* land and so exempted from assessment, though this appears to have been the respondent's contention before the Special Judge. Nor is there any suggestion that the land has been entered in the land registers as private property, though, under the provisions of Part IV, sections 38 to 44, of the Bengal Land Registration Act, VII of 1876, such registration is compulsory. Their Lordships would have expected that the respondent, who is an attorney, when taking a mortgage of the property in 1889, would have made some enquiry as to registration, and would, if he believed that the land was the property of his mortgagor, have taken steps to register his mortgage, as he was entitled to do under section 44 of the Act, or would at least have seen to the registration of his title, when he bought at the court sales. It is to be noted that the provisions of section 38 apply not only to "estates," *i.e.*, land paying Government revenue, but to revenue-free property or any interest therein, and section 42 covers the case of any person succeeding to any proprietary right in an estate or revenue-free property, whether by purchase, inheritance, gift or otherwise. In fact the only entry in the Government registers, so far as is disclosed by the record of this

(1) (1916) I. L. R. 44 Calc. 186 (198); L. R. 43 I. A. 249 (254).

case, is that in the *mouzâwâri* register already referred to. Their Lordships recognise that such an entry is no proof of title, but it is at least of considerable significance in the absence of all other records.

Under these circumstances, their Lordships are unable to hold that possession of the land with the house standing upon it from 1900, or even from 1871, if that can be assumed, is any proof of title to the land. It is in every way consistent with a mere cantonment tenure, which has never been denied by Government, but which would carry with it no property in the land. Indeed, the facts that no assessment is levied and that no private title has been registered suggests this as the more probable origin of the respondent's possession.

Reference has been made in the arguments to the case of *Robinson* v. *Carey* (1), which came before the High Court of Calcutta in 1865. In this case, which was concerned with another house in the Barrackpore Cantonment, Norman J., the trial Judge, delivered himself as follows :—

> With respect to the property of the soil in cantonments, where there is no evidence that the land is part of a settled estate, there being no proof that it pays revenue to the Government, nothing in fact to show that it is held by any other tenure, I think it must be taken that the soil is the property of the Government, and that the occupation by the owners of bungalows is permissive.

Whether this would be sufficient to establish the title of Government, where the burden was upon them, may be open to doubt, but their Lordships think that it affords a very cogent answer to a merely possessory title.

In *Kaikhusru Aderji* v. *Secretary of State* (2), a case very similar to the present one, but dealing with a house in the Poona Cantonment, came before this Board. The Bombay Regulations, by which the case was governed, provided definitely that no private property was to be included in the cantonment, and the absence of any corresponding provision in the

(1) (1864) Cor. Rep. 137, 147.

(2) (1911) I. L. R. 36 Bom. 1; L. R. 38 I. A. 204.

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Bengal Regulations no doubt weakens the application of the decision. But much of Lord Robson's judgment is in point. There, as here, a paper-title of sorts was relied on, but it was put aside as of no weight, and the real question was the effect of long possession. The cantonment was founded in 1822, and official correspondence was put in, which showed, as in the present case, that, in the immediately ensuing years, the military authorities were arranging for the indemnification of the expropriated owners.

"It seems reasonably clear, therefore," Lord Robson says, "that from the first the military authorities were conscious, as they could scarcely help being, of the inconvenience and risk of having absolute owners of land within the cantonment, and of the necessity of propitiating them by proper settlements and compensation. Even if the appellant established that his house was built at or before the time the cantonment was formed, there is still, under the circumstances of the case, a strong probability that he was duly compensated along with other proprietors for the change in his position as owner to that of licensee."

He goes on to point out that this "probability" is made stronger by the provision of Bombay Regulation III of 1826, which laid down that private property was not to be included in the cantonment limits, and he continues (p. 19) :—

In this state of things it is impossible to say that mere possession or occupation of the bungalow on this site affords any presumption whatever that the possessor or his predecessors-in-title were owners in fee. The presumption is all the other way * * *

On the whole, therefore, their Lordships have come to the conclusion that the respondent has not established his title to the land as apart from the buildings, and they will humbly advise His Majesty that the decrees of the Special Land Acquisition Judge and of the High Court should be set aside and the award of the Collector restored. The respondent must pay the costs of the appellant throughout.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondent: *Watkins & Hunter.*