

## APPELLATE CIVIL.

Before R. C. Mitter J.

DHANAI NAMASUT

v.

HAJI NIYAMATULLA.\*

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Dec. 12, 14.

*Assam Land Regulation—Person obtaining settlement in violation of the rights of a landholder, if liable for mesne profits—Assam Land and Revenue Regulation (I of 1880), ss. 32, 35, 39, 62.*

When a person takes possession of land by obtaining settlement from the settlement officer in violation of the rights of another who was in possession as a *landholder* and, under section 32(1) of the Assam Land and Revenue Regulation, was entitled to settlement, the former is liable to the latter for mesne profits for the period of his possession.

SECOND APPEAL by defendant No. 2.

The facts of the case and the points raised in the appeal are sufficiently stated in the judgment.

*Hemendrakumar Das* for the appellant.

*Urukramdas Chakrabati, Dr. Bijankumar Mukherji and Priyanath Datta* for the respondents.

*Cur. adv. vult.*

MITTER J. This appeal is on behalf of the defendant No. 2 in a suit instituted against him and the Secretary of State for India in Council as defendant No. 1 by the plaintiff-respondent for recovery of possession of land and mesne profits. Both the courts below have granted him a decree for possession. The first court granted him a decree for mesne profits also, making the Secretary of State for India in Council liable for one-fourth and defendant No. 2 for three-fourths of the mesne profits. Both

\*Appeal from Appellate Decree, No. 1463 of 1932, against the decree of Dheerendrakumar Mukherji, First Additional Subordinate Judge of Sylhet, dated Feb. 4, 1932, affirming the decree of Sirajuddin Ahmad, Second Munsif, of Sylhet, dated Aug. 6, 1931.

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the Secretary of State for India and defendant No. 2 preferred appeals to the learned District Judge. The Subordinate Judge who heard the appeals maintained the decree for possession, but absolved the Secretary of State for India from the liability of paying mesne profits and held that defendant No. 2 was alone liable. Defendant No. 2 has preferred this appeal and challenges the decree for mesne profits only.

The plaintiffs came to court with the case that one Shaikh Sheru of Kankurail was the owner of the disputed *beel*, which was treated as an estate and assessed to revenue by the Government under the Assam Land and Revenue Regulation, and an engagement for a term was entered into by Sheru with Government. The said term expired in 1918, when the Government officers took upon themselves the work of re-settlement under the said Regulation. In 1306, the plaintiff purchased the property from Sheru, paid revenue and remained in possession till 1918. No settlement was, however, offered to him. The defendant No. 2 obtained the *pâttâ* from the Government and began to possess the property. The Munsif found that Sheru was the owner of the *beel* and that the plaintiff acquired the same by purchase from him. He also found that plaintiff had the status of a landholder under the said Regulation and was in possession at the time of re-settlement in the year 1918, but was not offered a settlement by the Government. He, accordingly, decreed the claim of the plaintiff in the manner indicated above. The learned Subordinate Judge substantially affirmed these findings of the Munsif.

Before me it is contended by defendant No. 2 that he is not liable for mesne profits. It is said that he was in possession under a settlement from the Government and was in no sense a wrong-doer, and that, although he is bound to give up possession to the plaintiff, he is under no liability to pay mesne profits.

The question seems to be of first impression and depends upon the construction of sections 32, 35, 39 and 62 of the Assam Land and Revenue Regulation, I of 1886. Section 32 provides:—

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(1) The settlement officer shall offer the settlement to such persons (if any) as he finds to be in possession of the estate and to have a permanent, heritable and transferable right of use and occupancy;

(2) If the settlement officer finds no persons in possession as aforesaid, it shall be in his discretion..... to offer settlement to any person he thinks fit.

Section 35 states:—

If the person to whom a settlement is offered refuses to accept it, it shall be in the discretion of the settlement officer..... to exclude him for the term of the settlement from the possession of the estate, and to offer the settlement thereof to any other person he thinks fit.

The material portion of section 39 is as follows:—

Except as provided by sections 35 and 36.

—section 36 is not relevant to the case before me—

No person shall, merely on the ground that a settlement has been made with him or with some person through whom he claims, be deemed to have acquired any right to or over any estate, as against any other person claiming rights to or over that estate.

Section 62 preserves intact the right of a person to sue in a civil court for possession or declaration of his right to immoveable property to which he may deem himself entitled.

On the findings arrived at, the plaintiff was entitled to a settlement from the Government and defendant No. 2 did not acquire, as against the plaintiff, any right to the estate by reason of his obtaining settlement from the Government. The plaintiff could turn him out and this can only be on the basis that the plaintiff had the right to possession and the defendant No. 2 had no right to remain in possession, so far as he is concerned. The defendant No. 2 may have the right to recover possession on the basis of his settlement from third persons, if dispossessed by them, but against the plaintiff he had no such right. His possession is a

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wrongful one so far as the plaintiff is concerned and, as the liability for mesne profits depends solely upon wrongful entry, in my view, the defendant No. 2 is liable to the plaintiff for mesne profits. Any other view, in my judgment, would lead to manifest injustice. The Secretary of State is not liable to the plaintiff for any damage by reason of the unauthorised settlement made with defendant No. 2 by his officers, and the absolution of defendant No. 2 from liability would only exclude the plaintiff from the profits of the lands to which he is justly entitled. The appeal is, accordingly, dismissed with costs. My judgment does not affect order No. 34, dated the 26th May, 1932, passed by the Munsif.

*Appeal dismissed.*

A. A.