APPELLATE CIVIL.

Before Mitter J.

1937

Aug. 17, 20.

JNANENDRA NATH NANDA

v.

JADU NATH BANERJI.*

Crown Grant—Restrictive covenant in lease of land vested in the Crown, if affected by the provisions of general law statutory or otherwise to the contrary—Crown Grants Act (XV of 1895), s. 3.

Lands vested in the Crown by virtue of s. 39 of 21 & 22 Vict. c. 106 are Crown lands, and leases of such lands, *e.g.*, waste lands of the Sundarbans granted on behalf of the Secretary of State for India in Council by Sundarbans Commissioner, are Crown grants, and are governed by the provisions of the Crown Grants Act (XV of 1895).

Any restrictive covenant made in such grant is valid and enforceable, notwithstanding any rule of law, statute or enactment of the legislature to the contrary.

The Crown Grants Act affects not only the provisions of the Transfer of Property Act but of any other law, statutory or otherwise, which may be inconsistent with the terms and conditions made in the grant.

The Crown Grants Act has no application to grants of *khás mahal* lands where the Secretary of State occupies the position of a private proprietor.

Secretary of State for India in Council v. *Lalmohan Chaudhuri* (1) explained and distinguished.

Sheo Singh v. *Raghubans Kunwar* (2) referred to.

APPEAL FROM APPELLATE DECREE preferred by the defendants.

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

Phani Bhusan Chakrabarti and *Kali Pada Singha* for the appellants.

*Appeal from Appellate Decree, No. 193 of 1936, against the decree of Jitendra Nath Sen, Fourth Subordinate Judge of *24-Parganás*, dated Sep. 16, 1935, affirming the decree of Biman Bihari Sarkar, First Munsif of Diamond Harbour, dated Aug. 13, 1934.

(1) (1935) I. L. R. 63 Cal. 523. (2) (1905) I. L. R. 27 All. 634 ; L. R. 32 I. A. 203.

Amarendra Nath Basu and *Hemanta Kumar Basu* for the respondents.

Cur. adv. vult.

MITTER J. The subject matter of the suit, out of which this appeal arises, is a strip of land near the boundary of two adjoining lots in the Sundarban area. They are lots No. 114/1 and No. 114/2, the former being to the west of and adjoining the latter. Before 1896, the lands comprised in these lots were waste lands of the Government. In that year, two leases for terms of forty years were granted by the Secretary of State for India in Council to the plaintiffs' and the defendants' predecessors, the leases being executed by the Sundarbans Commissioner on behalf of the Secretary of State for India in Council. The first lease was in respect of the lands described as the first portion of lot 114 and is dated September 12, 1896, and was granted to the plaintiffs' predecessor-in-interest (Ex. 1). The second lease was in respect of the lands of the second portion of lot 114 and was granted to the predecessor-in-interest of the defendants on December 2, 1896. The eastern boundary of lot 114 (first portion) and the western boundary of lot 114 (second portion) is depicted by the same red line, as it must be, in the two maps attached to the said leases. In Ex. 1 the eastern boundary of lot 114/1 is described thus :—

> Sundarbania *khâl* and a straight line bearing 228° drawn from a point on the bank of the said Sundarbania *khâl* to a point on the bank of the Godamathura *khâl*.

In both the leases there is a clause (cl. 12) which runs in these terms :—

> That in the event of any boundary dispute arising between the lessee of this lot and the lessee of any adjoining lot already leased under the Waste Land Lease Rules, or which may subsequently be leased, the holders of this lease shall be bound to submit such dispute to the decision of the Commissioner of the Sundarbans, or other officer empowered by the Government to decide such disputes. The decision of the Sundarbans Commissioner, or other officer abovenamed, shall be appealable to the Board of Revenue and the decision of the Board of Revenue shall be final and binding on the lessees.

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The office of the Sundarbans Commissioner has been abolished, but the functions of the said Commissioner is being performed by the Collector of Khulna.

In the last cadastral survey and settlement the strip of land in suit was recorded as appertaining to the defendants' lot, *e.g.*, lot 114/2 and one particular *dâg* was recorded as a toe path. The plaintiffs in this suit say that the said lands appertain to their lot (No. 114/1) and not to the defendant's lot (No. 114/2). They pray for a declaration on that basis that the entry in the settlement record is wrong and for an injunction on the defendants to restrain them from raising a bund on the disputed area. Although the consequential prayer is injunction and not recovery of or confirmation of possession, I am of opinion that the dispute between the parties is a boundary dispute and comes within the terms of cl. 12 of the leases. I am also of opinion that the said clause contemplated the decision of such disputes between the *lotdârs* by the revenue authorities and not by the civil Court. How far the terms of the said clause can be availed of or enforced by the defendants is, however, a different question which I will deal with later on. One of the defences is based on this clause, which is that the civil Court cannot decide the question of boundary dispute and consequently no such relief as is prayed for by the plaintiffs can be granted by the civil Court till the plaintiffs obtain a decision in their favour of the boundary dispute from the revenue authorities mentioned in cl. 12 of the lease. This defence has been overruled by both the Courts below, the appellate Court holding that the covenant contained in said clause is illegal and void, being hit by s. 28 of the Indian Contract Act.

For the purpose of determining the eastern boundary line of lot No. 114/1, *i.e.*, for locating the red line shown in the plans attached to the leases,

a Commissioner for local investigation was appointed. He was directed to do the following things :—

(*i*) to determine the boundary line between lot 114/1 and lot 114/2;

(*ii*) to relay the lease map on the settlement map;

(*iii*) to report whether the disputed lands are covered by the plaintiffs' lease (Ex. 1);

(*iv*) to draw up a map of the disputed land; and

(*v*) to note any special features shown by the parties.

The Commissioner did carry out these directions. His report is that nearly the whole of the disputed land, with the exception of a very small bit in the south, is covered by the plaintiffs' lease. The defendants filed objections to the said report but could not succeed in displacing the Commissioner's report. The Courts below have accordingly passed a decree in favour of the plaintiffs substantially in accordance with their prayers. The defendants have accordingly preferred this appeal and Mr. Chakrabarti appearing for them raises two points before me,—

(*a*) that the civil Court had no jurisdiction to determine the boundary dispute, which is the foundation of the reliefs sought for by the plaintiffs;

(*b*) that the Commissioner's findings are based on mere conjectures and assumptions and not based on evidence and the Courts below have moreover overlooked and have left undecided fundamental objections of his clients and have misconceived the Commissioner's report and his evidence given in Court.

I may at once say that I do not consider the first of the aforesaid contentions of Mr. Chakrabarti to be sound, though not for the reasons given by the lower

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appellate Court, but there is great force in his second contention and with great reluctance I have to send back the case to the Court of first instance for a fresh local investigation.

With regard to the first contention, Mr. Chakrabarti urges that the Crown Grants Act (XV of 1895) applies to the leases and according to the provisions of s. 3 of that Act, cl. 12 of the leases is valid notwithstanding the provisions of s. 28 of the Indian Contract Act. Mr. Basu appearing for the respondents urges in reply that the Crown Grants Act does not apply to the leases and that, even if the said Act applies, the scope of the Act is to make inapplicable the provisions of the Transfer of Property only to a Crown grant. These contentions of the respective parties have to be considered first.

It is first necessary to observe that the waste lands of the Sundarbans were not the property of any subject. The area was in the days of East India Company a vast impenetrable forest and was the property of the said company. By s. 39 of 21 & 22 Vict., C. 106, the statute by which Government of India was transferred from the East India Company to Her Most Gracious Majesty Queen Victoria, all lands and hereditaments and other real and personal estate of the East India Company vested in the Crown. By s. 40, the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council, was authorised to sell and dispose of the properties which so vested in the Crown. There was some practical difficulty in the working of this section, for conveyances and contracts executed in Presidency-towns which required a seal according to previous practice could not be executed in India on behalf of the Secretary of State as the seal was in England. During the days of the East India Company there was no difficulty, for, although the real seal of the East India Company was in England, copies were kept in Calcutta,

Madras and Bombay (Ilbert on Government of India, p. 195, 3rd Ed.) To obviate this difficulty a statute was passed the very next year (22 & 23 Vict., C. 41). By s. 1 of the said Act, the Governor-General of India in Council, the Governors in Council of Bombay and Madras and the Lieutenant-Governor of the North-Western Provinces, which then included Bengal, or any officer for the time being entrusted with the "Government, charge or care of any "presidency, province or district in India" were empowered to sell or dispose of any real or personal estate whatsoever in India so vested in Her Majesty under 21 & 22 Vict., C. 106. Although the officer in charge of a district in India was one of the officers so empowered, it was held that the officer in charge of a district within a province or presidency was not meant by the term, as for instance, a Collector of a district of Bengal was not meant to be included, apparently on the ground that he is not entrusted with Government. This section, as is stated by Sir Courtney Ilbert, was interpreted to mean that only the Governor-General of India in Council, the Governors of the Presidencies in Council and the Lieutenant Governors and Chief Commissioners of provinces only were so empowered. In Madras, however, the scope of the section was misunderstood and the Inam Commissioner made some grants of Crown lands. That led to the passing of a statute by Parliament (33 & 34 Vict., C. 59). Section 1 of the said statute validated the grants executed by the Inam Commissioner but a general section (s. 2) was also enacted. That section empowered the Governor-General by resolution in Council, to select and empower officers who are to execute in India instruments of grant, *etc.*, of Crown lands on behalf of the Secretary of State for India in Council and the mode in which they were to be executed. A resolution of the Government of India in the Home Department was issued under this section on March 28, 1895. (Ilbert on Government of India, p. 195, 3rd Ed.).

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The history of legislation, which I have traced above, leads me to no other conclusion than that grants or leases of Sundarban lands, which are lands vested in the Crown by s. 39 of 21 & 22 Vict. C. 106, executed by the Sundarbans Commissioner on behalf of the Secretary of State for India in Council, are Crown grants and to these grants the Crown Grants Act (XV of 1895) applies.

The next question is what is the scope of the Crown Grants Act. Does it affect only the provisions of the Transfer of Property Act or does it affect also any other law, statutory or otherwise, which may be inconsistent with terms and conditions made in the grant? Mr. Basu contends for the acceptance of the first proposition. Section 3 is in the widest possible form, but Mr. Basu contends that there is an ambiguity in that section, the ambiguity, according to him, is caused by the use of the words "such grant" occurring therein. He says that in such circumstances it is legitimate to refer to the preamble of the Act to find out the scope of the Act for the purpose of clearing the ambiguity. He further says that the preamble indicates that the object of the Act was to make inapplicable only the provisions of the Transfer of Property Act to Crown grants.

It is no doubt a principle of construction that the preamble of an Act can be invoked for removing an ambiguity in an Act, but it is equally a well-settled principle that the preamble cannot be invoked for creating an ambiguity in the Act.

It is, therefore, necessary to see firstly if there is any ambiguity in s. 3 and secondly what is the meaning of the preamble.

In my judgment, there is no ambiguity in s. 3; the words "such grants" clearly mean grants made on behalf of the Crown. The preamble mentions two objects, namely:—

(*i*) to remove doubts about the operation of the Transfer of Property Act on Crown grants, and

(*ii*) to remove doubts on the power of the Crown to impose limitations and restriction upon grants and other transfers of land made by the Crown.

The two following sections of the Act carry out these two objects. Section 2 deals with the Transfer of Property Act and s. 3 declares the unfettered discretion of the Crown to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be. If Mr. Basu's contention be right, s. 3 would be redundant. There is high authority also that the Crown Grants Act does not contemplate only the Transfer of Property Act. In *Sheo Singh* v. *Raghubans Kunwar* (1) Sir Arthur Wilson held that under the Crown Grants Act the Crown in a Crown grant can modify the Hindu law of inheritance.

The case cited by Mr. Basu [*Secretary of State for India in Council* v. *Lalmohon Chaudhuri* (2)] has no application, because the grant in that case was not a Crown grant, but a grant of *khâs mehâl* lands where the Secretary of State for India in Council occupied the position of a mere landlord. I, accordingly, hold that by reason of s. 3 of the Crown Grants Act, cl. 12 of the leases is not affected by s. 28 of the Contract Act.

The benefit of that covenant contained in cl. 12 of Ex. 1, however, cannot be availed of by the defendant. Clause 12 of the lease (Ex. 1) rests on contract and contract only. That is a contract between the Secretary of State and the plaintiff's predecessor and the defendant, although a lessee of an adjoining lot cannot have the benefit of the said clause on the principle that his predecessors-in-interest was not a party to the contract entered into between the Secretary for State in Council and the

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plaintiff's predecessor. I, accordingly, hold on this reason that the civil Court had jurisdiction to decide the boundary dispute.

Regarding the second contention raised by Mr. Chakrabarti, it appears from the Commissioner's report, which is made clearer by the Commissioner's evidence in Court, that he made no attempt to fix any of the two points on the Sundarbania or Godamathura *khâls* from which and to which the red boundary line between the two lots was to be drawn. If he had fixed on the locality the two points or only one of them and had drawn the line with the bearing given in the leases after correcting the magnetic variation, the result could have been satisfactory, but he did neither. He proceeded upon the assumption that the *khâls* had remained exactly in the same position throughout and he has said in his report that was the admission of both the parties. On examining, however, the proceedings of the Commissioner of March 16, 1934, I find that the defendant's pleader contended that the two *khâls* "are always "variable". The said pleader insisted on locating on the spot the two points at the extremities of the red boundary line on the banks of the two *khâls*. Later on the Commissioner examined one witness produced on behalf of the plaintiffs and one produced on behalf of the defendants. The defendants' witness did not admit that the *khâls* had not changed a bit but remained all along in *exactly* the same position. He only said that their position was "*almost* the "same". The comparative map, which the Commissioner has prepared, shows the position of the relevant portions of the two *khâls* according to his own relaying, according to the lease and according to the relaying by the settlement authorities. In the comparative map their positions do not tally. That shows that either his relaying is wrong or there is no foundation for the assumption on which he proceeded in his report, namely, that the *khâls* have remained in exactly the same position since 1896 and that there

has been no change in their bends and contours. If any of the terminal points of the boundary line be placed not exactly on the points of the banks of the *khâl* as indicated in the lease map, the boundary line would shift in a parallel way. In their objection to the Commissioner's report the defendants expressly mention that the said two points on the banks of the *khâls* have not been located correctly by the Commissioner and that he was wrong in assuming that the channels of the two *khâls* have all along remained constant "though in fact they are always variable" (grounds Nos. 4 and 5 of the objections). These grounds which are vital ones have not been considered by any of the Courts below. The Commissioner's evidence would show that what he did was only guess work. I, accordingly, hold that in accepting the Commissioner's report the Courts below have not only left undetermined two very relevant objections of the defendants to the Commissioner's report but have accepted his report on a misconception of evidence, *e.g.*, of his report and deposition.

I, accordingly, set aside the judgment and decrees of the Courts below and direct the case to be reheard on the question of boundary dispute after a fresh local investigation. The report of the Commissioner is discarded. The local investigation is to be made by a different Commissioner.

The appeal is allowed and the case is remanded to the Court of first instance. Costs to abide the result.

Appeal allowed; case remanded.

A. A.