Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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May 30.

KISHEN CHAND (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (DEFENDANTS).*

Contract by Government to grant proprietary rights in land—Contract entered into or acts done in the exercise of sovereign powers.

The plaintiff in this suit, alleging that the Government had granted him a lease of certain land with the rights of a proprietor, promising to confer on him the proprietary rights in such land if he did certain things; that he had done such things; that the Government had refused to perform such promise and had conferred the proprietary rights in such land on another person, claimed, by virtue of the contract between him and the Government and as against the Government and such person proprietary possession of such land.

Held per SPANKIE, J., that, assuming that the Government had entered into such a contract with the plaintiff as alleged, the suit would not lie, inasmuch as such contract was entered into, and the refusal of the Government to confer the proprietary rights in such land on the plaintiff, and the grant by it of such rights to such person were acts done, in the exercise of sovereign powers.

Held per STUART, C. J, that the Government had entered into the contract alleged by the plaintiff; that the suit would lie, as the Government had not entered into such contract in the exercise of sovereign powers but in the capacity of a private owner; but that the plaintiff's case failed, as he had not performed his part of such contract.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Spankie, J.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

The Court (STUART, C. J., and SPANKIE, J.,) delivered the following judgments:—

SPANKIE, J.—This was a suit on the part of the plaintiff-appellant under the following circumstances. The plaintiff avers that a certain forest in the district of Hamirpur belonged to the Nawab of Bánda, and was preserved for sporting purposes, and known as "Ramna." The Nawab became a rebel, and on the 20th October, 1858, the "Ramna" was confiscated by the Government, and a farming settlement was made of the lands with Thakur Das and Bhoj Raj.

* First Appeal, No. 86 of 1880, from a decree of Rai Raghu Nath Sahai, Subordinate Judge of Bánda, dated the 22nd April, 1880.

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They failed to fulfil the conditions of their agreement, and the lease was annulled, and the forest was resumed by Government by order dated 19th December, 1861. The plaintiff and one Madari applied on the 12th January, 1862, to the Collector to the effect that "Ramna" was conterminous to their village, and they prayed that the settlement of the lands might be made with them on condition that they paid Rs. 500 as Government revenue yearly, and cleared the forest or rather jungle within one year, and established a village. Should they fail to fulfil these conditions, they offered to pay any fine that the Government might impose upon them, and asked for an early reply to their petition, as it was the season for clearing jungle. Subsequently, when matters had advanced, the plaintiff and Madari on the 12th December, 1862, executed an agreement by which they bound themselves to clear half the jungle from the beginning of 1863 to the close of that year, and to bring it under cultivation, and in 1864 to clear and bring under cultivation the remaining half, excepting 200 bighas, which were to be reserved as pasture-land for cattle. They also bound themselves to locate tenants on the lands in 1863 and 1864 and to establish a village. If they failed to carry out these conditions their right to the enjoyment of proprietary rights would be extinguished, and the Government would be at liberty to annul the agreement and resume the estate. It is important to notice that at the outset of the agreement the plaintiff refers to an application made by him and Madari for a settlement of the proprietary right (*milkiat*) of the land on a *jama* of Rs. 500 yearly. The plaintiff avers that this agreement was accepted by Government, and a farming settlement in proprietary right was made with them on condition that the entire estate, 1,147 bighas 7 biswas *pucka*, with the exception of 200 bighas, was reclaimed within the period of two years. The Government further promised on the 3rd June, 1863, that, if the conditions were fulfilled, the proprietary right was to be conferred upon the farmers at the next settlement. The plaintiff fulfilled the conditions in all respects, and in 1867 the Government allowed him to change the name of the estate or township from mauza Rumna to mauza Kishenpur, and under its new name it was entered in the registers. In 1870, by purchase, the plaintiff became the owner of Madari's interests in the property. On the 24th August, 1878,

on the report of the Commissioner of Allahabad, the Government transferred the proprietary right to Shaikh Paltu, who obtained possession on the 26th November, 1878. Under these circumstances the plaintiff asks for a declaration that he has fulfilled the contract entered into on the 3rd June, 1863, and that he is entitled to a proprietary settlement. He also prays that he may be placed in proprietary possession by the ejectment of Shaikh Paltu, and that he may receive a decree for the mesne profits from the date of suit to that of possession. The Collector of Bánda, on behalf of Government, contends that this is a suit to have a settlement made in plaintiff's favour, and is not cognizable by the Civil Court,—cl. (*b*), s. 241 of Act XIX of 1873. The plaintiff never applied for a permanent and absolute proprietary right in the mauza, nor was such right ever granted to him. He received merely a farming lease, and he was only entitled to proprietary possession for the stipulated term. The Local Government made no promise whatever to make a proprietary settlement with plaintiff at the next settlement. Assuming that such a promise was made, still he did not clear the jungle, and fulfil his agreement, and was an habitual defaulter, and lost his right to have the settlement renewed. Shaikh Paltu, defendant, relies on the proprietary grant made to himself. He has no concern with any contract entered into with plaintiff. No claim can be maintained against him in this suit, and he was entitled to remain in possession and to his costs.

The Subordinate Judge held (i) that there was no evidence that a promise was distinctly made that the proprietary title should be conferred upon the plaintiff at the next settlement; the wording "may be given" signifies that it was optional with the Government, and not compulsory, to make a settlement; (ii) that the plaintiff had not thoroughly cleared the jungle within the prescribed time; his mismanagement prevented the increase of population; he paid the revenue with difficulty; this was proved by the letters of the Commissioner, Collector, and Settlement Officer; the defendant's witnesses also proved that he made no arrangement within the prescribed time; (iii) that if it be assumed that the Government made a conclusive promise, still the Government had full power in all matters of management of estates, and its subjects cannot bind the Government to any promise or interfere with its

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arrangement—and the Subordinate Judge cites in support of his opinion *Nobin Chunder Dey* v. *The Secretary of State for India* (1); (iv) that the Government had made the settlement in the exercise of its Sovereign power, and as plaintiff had mismanaged the estate, the Government had power, in order to protect its own revenue, to make the settlement with another person, it being proved that plaintiff was an habitual defaulter; (v.) that cl. (*b*), s. 241 of Act XIX of 1873 barred the suit. The Subordinate Judge also observed that, with reference to Act IX of 1872, the contract has not yet reached its perfection, but he does not explain in what sense he means this. The lower Court dismissed the claim with costs and one set of pleaders' fees. The plaintiff contends in appeal that the lower Court misunderstands the claim, which is not barred by cl. (*b*), s. 241 of Act XIX of 1873; the suit was cognizable by the Civil Court; it was established in evidence that the Government promised to confer the proprietary right upon plaintiff and it was bound to carry out the promise, as plaintiff had fulfilled his engagements; the Collector's report was inaccurate; and certain material records, which appellant required, were not sent for by the lower Court, hence there has been an incomplete investigation.

It appears to me that we cannot look into this case on the merits, and give to plaintiff the relief that he claims. It is not solely because s. 241 of Act XIX of 1873 bars the interference of the Civil Courts, which it could only do in so far as the suit includes the claim of any person to be settled with, or affects the validity of any engagement with Government for the payment of revenue, or the amount of revenue, cess or rate to be assessed on any mahál or share of a mahál under the Act or any other Act for the time being in force. It is true that the claim asks for possession as proprietor and for the ejectment of the defendant No. 2, on whom the Government has conferred the proprietary right, and therefore practically may be said to involve the claim of a person to be settled with. But it is also a claim which, if there was any contract at all, and it is very doubtful if there was one, the plaintiff cannot legally enforce against the Secretary of State as representing the Government. The plaintiff complains that he applied for the farming settlement of the

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property in suit in proprietary right, and that he was invested with the proprietary right, and admitted to engage for the farm of the estate to the end of the current settlement, and that the Local Government promised to grant him full proprietary right at the next settlement, if he fulfilled certain conditions, which conditions he had fulfilled, but the Government has not carried out its promise. But when the plaintiff was allowed by the Local Government to engage for the farming lease, and when the lease was granted to him in proprietary right to the end of the then current settlement, the Government was exercising powers which cannot lawfully be exercised except by a Sovereign or private individual delegated by a Sovereign to exercise them, and therefore no action will lie because for reasons of its own the Government refused to continue any connection with the plaintiff, or to confer upon him the full proprietary right in mauza Kishenpur, the estate in suit. The law on the subject was fully explained and declared in the case of *The Peninsular and Oriental Company* v. *The Secretary of State*, Bourke's Reports, part vii, p. 166, and at pages 188-189, and the decision of the Supreme Court of the Presidency in that case was followed in *Nobin Chunder Dey* v. *The Secretary of State for India* (1). This was an appeal from a judgment of Mr. Justice Phear. Referring to the case of *The Peninsular and Oriental Company* v. *The Secretary of State for India*, that learned Judge observes that it was explained in that suit that the East India Company were not Sovereigns, and therefore could not claim all the exemption of a Sovereign, and they were not the public servants of Government, and therefore did not fall under the principle of the cases with regard to the liabilities of such persons. But they were a company to whom Sovereign powers were delegated, who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of Government and partly on their own account, which, without any delegation of Sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts so done in the exercise of what are usually termed Sovereign powers, and acts done in the conduct of undertakings which might be carried on by

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private individuals without having such powers delegated to them. When the Government of India was transferred from the East India Company to the Queen-Empress, it was enacted in s. 65, 21 and 22 Vict., c. 106: "The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company." Hence, as Mr. Justice Phear remarks, all suits such as might before the passing of 21 and 22 Vict., c. 106, have been brought against the East India Company, may now be brought against the Secretary of State in Council, and these suits seem to be limited to suits for acts done in the conduct of undertakings which might be carried on by private individuals without Sovereign power. The judgment of Mr. Justice Phear was affirmed by Garth, C. J., and Macpherson, J. The settlement of an estate is to be made with the proprietor of the land. This is not a suit in which there are more persons than one, or one set of persons, claiming to be proprietors of the land. The plaintiff is seeking, under an alleged promise and agreement, to compel the Government to confer the full proprietary right of the estate upon himself. He is not seeking to make any particular person or public officer responsible for any act done by such person or public officer. But he is trying to enforce what he avers is a contract against the Government of the country. The act of which he complains was that the Local Government, on the report of the Commissioner of Allahabad, transferred the zamindari rights in the whole of mauza Kishenpur to Shaikh Paltu, defendant No. 2, on the 26th November, 1878. It seems to me that this case is precisely one which is met by what Sir Barnes Peacock, C. J., lays down as the rule in the case cited by Mr. Justice Phear, that "where an act is done or a contract entered into in the exercise of powers usually called Sovereign powers, by which we mean powers which cannot be lawfully exercised except by a Sovereign or private individual delegated by a Sovereign to exercise them, no action will lie." I would therefore dismiss this appeal and affirm the decree of the lower Court with costs.

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STUART, C. J.—As I have formed the opinion that the Government are entitled to our judgment on the merits of the case, and that therefore the decree of the lower Court must be affirmed, and the appeal dismissed, it is unnecessary for me to discuss the question whether or not such a contract was made between the plaintiff and the Collector as could be enforced against the Secretary of State. But I may offer one or two remarks on the latter question, so far as it may be supposed to affect the present appeal.

The case of *Nobin Chunder Dey* v. *The Secretary of State for India* (1) has been referred to. That was a case decided by Mr. Justice Phear on the original side of the Calcutta Court, and whose judgment was affirmed on appeal by Sir Richard Garth, Chief Justice, and Mr. Justice Macpherson. It was there held on the evidence that there was no contract between the plaintiff and the Government, but it was also held by both the Courts that, even assuming there was a contract, the suit was not maintainable, seeing that it was in respect of acts done by the Government in the exercise of Sovereign powers, and it is argued that the relative position of the parties in the present case is the same. I entertain, however, serious doubts whether this contention is well founded. The facts in the Calcutta case had relation to licenses and other purely governmental acts on the part of the excise police authorities, and Mr. Justice Phear was perhaps not wrong in holding that the suit before him would not lie, although it appears to me that he rather strained the argument for the Government to an unnecessary elevation, by laying it down as undoubted legal doctrine that their action in that case was unimpeachable being in virtue of their Sovereign authority. The matter before him was simply one of government control derived from legislative powers which had been conferred on the excise and police themselves, and was therefore beyond the reach of litigation at the suit of private parties. In the present case, however, the facts are not only widely different, but there is a difference also, as I view them, as to their legal quality and character. I think it might be fairly contended that these facts show a kind of dealing between the Government and the plaintiff which amounted to a contract, and one also which

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could, if necessary, be enforced. The negotiations with Kishen Chand and Madari appear to have begun on the 12th December, 1862, when these persons presented a petition to the Collector in which they asked the holding of mauza Rumna, and that the settlement of that property be made with them, subject to the condition of their paying Rs. 500 as Government revenue, and getting the jungle cleared within one year, and establishing the village. This offer was duly reported to the Board of Revenue, who, on the 15th June, 1863, addressed a letter to the Secretary to the Government, North-Western Provinces, the last paragraph of which is as follows: "The Board recommend that the offer of Kishen Chand and Madari for the lease of the village be approved; the proprietary right may be conferred on them at the next settlement." This letter was at once acted upon by the Government, as appears from one addressed by their Under Secretary in which it is stated that, if the conditions offered by Kishen Chand and Madari are fulfilled, proprietary right may be conferred on the farmer at the next settlement. Kishen Chand having in the meantime purchased Madari's rights had become the sole claimant of the right offered and granted. Such was the agreement made with Kishen Chand, and it appears to me that the argument that it fulfilled the legal requisities of a contract, and one which could be judicially enforced *at the suit of the Government*, might be reasonably maintained. And if it could be enforced by the Government *against* Kishen Chand, why could it not be equally enforced *by him* against them if necessary? Again there appears to be nothing in the position of the Government in the matter requiring the exercise of Sovereign rights or powers. The Government simply treats with Kishen Chand as an owner, and it would have been perfectly competent for them as such owner to have transferred their whole rights in the land in question to a third party absolutely, who, it could scarcely be contended, had thereby acquired Sovereign or any other rights beyond those of an ordinary proprietor.

I observe that Mr. Justice Phear in the Calcutta case, to which I have adverted, refers to the remedy by petition of right as in effect showing that a suit of the kind before him would not lie; but a careful examination of the Act of Parliament amending the

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law relating to such petitions, 23 and 24 Vict., c. 34, will show that proceedings against the Crown in England, even where there is a legitimate case for the remedy, have in effect reduced the procedure from the elevation of prerogative to that of ordinary right as between subject and subject, and that the only difference is a mere matter of form; the procedure even in respect of petitions of right being substantially identical with that of an ordinary action at law. And it is to be observed that the Act in question is throughout mandatory and not in any way merely provisional or conditional. Nor can the Sovereign's *fiat* that "right be done" be refused, the endorsement to that effect being a mere matter of form. Of course the petition, or suit as it may be called, being thus admitted to a hearing, has to run the gauntlet of the ordinary course of pleading before issue is joined, and a *demurrer* if allowed might, as in other cases, extinguish the claim. Very little therefore is taken by a reference to the procedure under such petition, the rights of the Crown being in fact given up, and resort to the ordinary tribunals being expressly allowed, not merely by the grace of the Crown, but by the express law provided by an Act of the Legislature.

I have thought it right to offer these observations on the Government's alleged immunity from litigation of this kind, but it is unnecessary for me to say more on the subject, as I have formed the clear opinion that the plaintiff's case fails by reason of his non-compliance with the conditions imposed upon him by his contract or treaty, or whatever it may be called, with the Government. The appeal is dismissed with costs.

Appeal dismissed.

CRIMINAL JURISDICTION.

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June 2

Before Mr. Justice Straight.

EMPRESS OF INDIA v. INDARMAN.

Obscene Book—Act XLV of 1860 (Penal Code), s. 293—Destruction of book by order of Criminal Court—Act X of 1872 (Criminal Procedure Code), s. 418.

A book may be obscene, within the meaning of the Penal Code, although it contains but a single obscene passage.

The defence to a charge of selling and distributing certain obscene books was that they were sold and distributed in good faith in prosecution of a religious