1890

KHAGENDRA NARAIN CHOWDHRY v. MATANGINI DEBI.

The Government, who have attached the valuable point of the fishery pending this litigation make no claim, and they are really in the position of stakeholders.

The evidence in the opinion of their Lordships is insufficient, as already stated, to establish an exclusive possession by either of the parties. On the other hand it is equally cogent in their Lordships' opinion to show that there is possession between the two.

The result that their Lordships arrive at is that the decrees of the Subordinate Court and of the High Court should be respectively reversed and each of the parties be declared entitled to an equal moiety of the sota opposite to and adjoining their respective zemindaries, and be decreed to be put into possession thereof accordingly, and that both of the parties having failed in their contention as to an exclusive possession, each should bear their own costs of the litigation in the Subordinate Court, in the High Court, and of these appeals; and their Lordships will humbly advise Her Majesty accordingly.

Appeal allowed.

Solicitors for the Mechpara zemindars, Khagendra Narain Chowdhry and others: Messrs. *Watkins & Lattey.*

Solicitors for the representatives of the Chapar zemindar, Kirni Narain Chowdhry: Messrs. *T. L. Wilson & Co.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ghose.

MADHUB NATH SURMA (PLAINTIFF) *v.*

MYARANI MEDHI (DEFENDANT).*

1890
April 29.*

Assam Land and Revenue Regulation, 1886, *ss.* 2 *prov.* (*b*), 12, 39, 151, *and* 154—*Settlement-holder, his rights under a settlement—Nisf-kherajdar, his right to a settlement—Section* 154 *of the Regulation.*

The effect of sections 39 and 151 of the Assam Land and Revenue Regulation, 1886, is that a settlement made by a Settlement Officer, unless

* Appeal from appellate decree No. 943 of 1888, against the decree of A. C. Campbell, Esq., Deputy Commissioner of Kamrup, dated the 1st of February 1888, affirming the decree of Baboo Sibo Prasaud Chuckerbutty, Extra Assistant Commissioner of Gauhati, dated the 30th of August 1887.

1890

MADHUB NATH SURMA v. MYARANI MEDHI.

interfered with by the Chief Commissioner, is final; but the settlement-holder does not thereby acquire any right to the land so settled as against any person claiming rights to it.

The effect of an order by the Government of India before the passing of the Assam Regulation in regard to the right of a nisf-kherajdar to hold lands found upon survey to be in excess of his nisf-kheraj estate, and to obtain a settlement thereof, considered.

In 1881 *S.*, a nisf-kherajdar, obtained a settlement for a year of certain lands which were found upon survey to be in excess of his nisf-kheraj estate. Subsequently a pottah was granted to *S.* for a portion of the excess lands, while the other portion was settled by the revenue authorities under a kobala pottah with *M.*, who entered into possession under his settlement. In a suit by *S.* the nisf-kherajdar for a declaration of his right to a settlement of the portion settled with *M.* and for possession.

Held, that, having regard to the provisions of section 2, proviso (*b*), section 12 of the Regulation, and the order of the Government of India, the nisf-kherajdar was entitled to a declaration of his right to a settlement, but in view of section 154 he was not entitled to a decree for possession.

THIS was an appeal from the decision of the Deputy Commissioner of Kamrup, who held that the plaintiff's suit was barred by section 154, clause (*a*), of the Assam Land and Revenue Regulation, 1886.

On 27th Jhyt 1708 Sak (7th June 1785) certain lands were granted by the then Rajah of Assam to the predecessor of the plaintiff Madhub Nath Surma. This grant was subsequently confirmed by the British Government, and the lands were assessed as nisf-kheraj lands. At the nisf-kheraj survey in 1879 it was found that the plaintiff held certain lands in excess of his grant: and these excess lands, including the land in suit, were excluded from his nisf-kheraj estate. In accordance, however, with an order of Government that lands so excluded from a nisf-kheraj estate should first be offered at full rates to the nisf-kherajdar, the excess lands were in 1881 settled with the plaintiff for one year. Subsequently the plaintiff obtained a potta for a portion of the excess lands held by him, and the other portion, amounting to two bighas of land, was settled by the Revenue authorities under a kobala pottah with the defendant Myarani Medhi. The plaintiff afterwards brought a suit against the defendant for a declaration that he was entitled to a settlement of these two bighas of land, being part of the lands which had been excluded from his nisf-kheraj estate and settled with him in 1881, and also for possession of the same.

1890

MADHUB NATH SURMA v. MYARANI MEDHI.

The Court of first instance dismissed the suit on the ground that the land had been excluded from the plaintiff's nisf-kheraj estate and settled with the defendant, who had entered into possession under his settlement. An appeal from this decision was dismissed by the Deputy Commissioner, who was of opinion that inasmuch as the defendant had obtained a kobala pottah in respect of the land, a decree for possession would affect the validity of the settlement made by the Revenue authorities, and that section 154, clause (*a*), of the Assam Land and Revenue Regulation, 1886, barred the suit.

The plaintiff appealed to the High Court.

Baboo *Jasoda Nundan Paramanick* for the appellant.

Baboo *Sharoda Churn Mitter* for the respondent.

The judgment of the High Court (O'KINEALY and GHOSE, JJ., was as follows :—

The facts of this case, as we gather from the two judgments of the lower Appellate Court, dated the 1st February 1888 and 23rd July 1889, are shortly these. A certain estate, known as "nisf-kheraj," was settled very many years ago by the then Rajah of Assam with the predecessor of the plaintiff. This grant was subsequently confirmed by the British Government. In the year 1879, when the said nisf-kheraj estate was surveyed, it was found that the plaintiff held certain lands in excess of his grant: and these lands, including the land in suit, were excluded from the nisf-kheraj estate and settled in 1881 with the plaintiff for a year. This settlement was in conformity with an order of the Government of India that when lands were thus excluded from a nisf-kheraj estate, settlement was first to be offered at full rates to the nisf-kherajdar. Subsequently, however, a pottah was given to the plaintiff for a portion of the lands held by him, and the other portion was settled under a kobala pottah with the defendant. The plaintiff afterwards brought the present suit to recover possession of two bighas of land, being a part of the lands excluded from the nisf-kheraj estate and settled with him in 1881.

The suit of the plaintiff is upon the ground of unlawful dispossession; and the question which we have to consider upon the facts found by the lower Appellate Court is whether he is entitled to any relief in this action. The learned Deputy Commissioner is of

1890

MADHUB NATH SURMA v. MYARANI MEDHI.

opinion that inasmuch as a settlement has been made with the defendant by the Revenue authorities, a decree if given to the plaintiff would affect such settlement; and that this suit cannot, by reason of the provisions of section 154, clause (*a*), of the Assam Land and Revenue Regulation, 1886, lie in the Civil Court.

It has been further contended before us by the learned vakeel for the respondent, referring to sections 2, 6, and 11 of the Assam Regulation, that all previous Regulations and Rules (if any) in regard to any of the matters dealt with by the said Regulation have been rescinded, and could not therefore now be relied upon; that the Regulation recognises only certain rights which are specifically mentioned in section 6; and that the right claimed by the plaintiff does not fall within that section.

Section 2 no doubt says that "all Regulations and Rules (if any) in force there relating to any of the matters provided for by this regulation shall be repealed:" but the proviso (*b*) to this section lays down that "all rules prescribed, appointments and settlements made, powers conferred and notifications published under any enactment hereby repealed, and all other rules (if any) in force on the date on which this Regulation comes into force relating to any of the matters hereinafter dealt with, shall (so far as they are consistent with this Regulation, and could be prescribed, made, conferred, or published thereunder) be deemed to have been respectively prescribed, made, conferred, and published thereunder."

With reference to this proviso, we have to consider whether the orders of, and the rule laid down by, the Government of India, and referred to in the judgment of the Deputy Commissioner "are consistent with this Regulation, and could be prescribed, made, conferred or published thereunder."

Section 6 provides as follows:—"No right of any description shall be deemed to have been, or shall be, acquired by any person over any land to which this chapter applies, except the following:—

(*a*) rights of proprietors, landholders, and settlement-holders other than landholders, as defined in this Regulation, and other rights acquired in manner provided by this Regulation;

(*b*) rights legally derived from any right mentioned in clause (*a*);

(*c*) rights acquired under sections 26 and 27 of the Indian Limitation Act, 1877;

(*d*) rights acquired by any person as tenant under the rent law for the time being in force:

Provided that nothing in this section shall be held to derogate from the terms of any lease granted by or on behalf of the British Government."

Sections 7, 8, 9, and 10 declare the rights of proprietors and landholders.

Section 11 refers to settlement-holders, and it is as follows:—"A settlement-holder, who is not a landholder, shall have no rights in the land held by him beyond such as are expressed in his settlement lease."

The Regulation then proceeds in section 12 to give to the Chief Commissioner certain powers, and it runs as follows:—"The Chief Commissioner may make rules for the disposal, by way of grant, lease, or otherwise, of any land over which no person has the rights of a proprietor, landholder, or settlement-holder under this Regulation." So that the Chief Commissioner is empowered to make rules for the disposal of any land in respect of which no person may have a right under the Regulation.

We then find that in giving to the Settlement Officer a discretion in respect of the settlement of lands in which no person has a permanent and heritable interest, the Regulation lays down in section 32 (2) that this discretion must be "subject to such rules as the Chief Commissioner may make under section 12." And section 35 lays down "If the person to whom a settlement is offered refuses to accept it, it shall be in the discretion of the Settlement Officer, subject to such rules as the Chief Commissioner may make under section 12, to exclude him for the term of the settlement from possession of the estate, and to offer the settlement thereof to any other person he thinks fit."

Now, referring back to the proviso (*b*) of section 2, it would appear that, assuming that the plaintiff has no right to this land as a *settlement-holder* (as in fact he has none), the rule, prescribed by the Government of India before the promulgation of the Regulation, that when lands were found by survey to be in excess of a nisf-kheraj estate, a settlement thereof should be, in the first instance, offered to the nisf-kherajdar, was a rule which is fully "consistent with this Regulation, and could be prescribed, made,

1890

MADHUB NATH SURMA v. MYARANI MEDHI.

conferred, or published thereunder" by the Chief Commissioner under section 12; and as such, it must be taken to have been prescribed under this Regulation.

In this view of the matter, it seems to us that the plaintiff has a right to hold the land and obtain settlement thereof, and that this right can only be forfeited if he refuses to take settlement at full rates. And it does not appear that a settlement was offered to the plaintiff, and that he refused to accept it. That being so, the Settlement Officer was not justified in excluding the plaintiff from settlement.

It would appear, however, from the judgment of the Deputy Commissioner that a kobala pottah for the land in question had been granted by the Settlement Officer to the defendant when this suit was brought. We do not know what are the terms of this settlement.

Section 39 of the Regulation provides that, "subject to the provisions of section 151 of this Regulation, the order of a Settlement Officer as to the person to whom a settlement should be offered, the amount of revenue to be assessed, and the *nature* and term of the settlement to be offered, shall be final, and a settlement concluded with that person shall be binding on all persons from time to time interested in the estate; but, except as provided by sections 35 and 36, 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."

And section 151 lays down:—"The Chief Commissioner, a Commissioner, a Deputy Commissioner, a Settlement Officer, and a Survey Officer, may call for the proceedings held by any officer subordinate to him, and pass such orders thereon as he thinks fit."

Sections 39 and 151 read together amount to this—that a settlement made by a Settlement Officer, unless interfered with by the Chief Commissioner, is *final*; but the settlement-holder *does* not thereby acquire any *right* to the property as against any other person claiming rights to it. So that the settlement already made with the defendant cannot now be interfered with; but he has not thereby acquired any *right* to the land as against the plaintiff.

And section 154, which has been relied upon by the Deputy Commissioner as debarring the plaintiff from obtaining relief in the Civil Court, has merely the settlement actually made by a Settlement Officer in view. The first portion of the section runs as follows:— "(1) Except when otherwise expressly provided in this Regulation, or in rules issued under this Regulation, no Civil Court shall exercise jurisdiction in any of the following matters:—

(*a*) Question as to the validity or effect of any settlement, or as to whether the conditions of any settlement are still in force;

(*b*) Question as to the amount of revenue, tax, cess, or rate to be assessed; and the mode or principle of assessment."

It is not necessary to notice the remaining portion of the section except (*m*) "Any matter respecting which an order expressly declared by this Regulation to be final, subject to the provisions of section 151, has been passed." And then clause (2) says: "In all the above cases jurisdiction shall rest with the Revenue authorities only."

If the plaintiff had sought in this case to set aside the settlement made with the defendant, we apprehend we could not give him that relief. But he does not ask for that: what he asks for is the declaration of his right, and recovery of possession of the land from which he has been dispossessed. We think that, having the right to hold the land and to obtain a settlement thereof, his dispossession under the circumstances already mentioned was improper. But the property having already been settled with the defendant by the Revenue authorities on the date when the suit was brought, and the defendant having entered into possession under that settlement, we are unable to interfere with it, and give a decree to the plaintiff for possession. He is, however, in a position in this case to obtain a declaration that he is entitled to a settlement of the lands in question.

We, therefore, direct that the plaintiff be declared entitled to a settlement of the lands in suit, and that the decrees of both the lower courts be set aside, but, in the circumstances, without costs.

C. D. P. *Appeal allowed.*