Privy Council Appeal No. 17 *of* 1936.
Bengal Appeals Nos. 6–15, 21–23 & 26 *of* 1931 & *Nos.* 14 & 15 *of* 1933.

The Secretary of State for India in Council - - *Appellant*

v.

The Midnapore Zemindary Company, Limited, and others *Respondents*

Same - - - - - - - *Appellant*

v.

The Midnapore Zemindary Company, Limited - - *Respondents*

Same - - - - - - - *Appellant*

v.

The Midnapore Zemindary Company, Limited, and others *Respondents*

Same - - - - - - - *Appellant*

v.

The Midnapore Zemindary Company, Limited, and others *Respondents*

The Midnapore Zemindary Company, Limited - - *Appellants*

v.

The Secretary of State for India in Council - - *Respondent*

Consolidated Appeals.

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST MAY, 1937.

Present at the Hearing :

LORD MACMILLAN.
LORD MAUGHAM.
SIR LANCELOT SANDERSON.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* LORD MAUGHAM.]

In this case 14 appeals to His Majesty have been consolidated, 10 being brought by the Secretary of State for India in Council and four by the Midnapore Zemindary Company, Limited. Six of the former group (Nos. 6, 7, 8, 10, 11 and 15 of 1931) will be first dealt with. They arise out of six suits which were brought in 1921 and 1922 by the Midnapore Zemindary Company, Limited (the plaintiff company now respondents) and were tried by the Subordinate Judge of Rajshahi in 1927. The suits were numbered

21, 450, 451, 94, 95 and 454. In each the plaintiff company's case was that in the suit lands they had the right of a permanent tenure-holder at a fixed rate of rent and their claim was for a declaration of the invalidity of certain proceedings taken by the Revenue authorities in the course of which orders had been made purporting to enhance their rent.

The facts as to the plaintiff company's title are not in dispute and it is unnecessary to refer to them in detail. All the lands in question, which lie in different districts along the sides of the River Padma, had been part of a permanently settled estate, Tauzi No. 523 of the Murshedabad Collectorate at the time of the Permanent Settlement (1793). The plaintiff company's position in four of the suits was that of holders of patnis which had been created in 1836 and 1866. In suits 94 and 95 they had permanent tenure at a fixed rent, held not directly from the zemindars but from intermediate tenure-holders whose right dated back to 1814 and 1835 respectively. In suit 95 two out of their three subtenures were darpatni and a sepatni tenure: one—granted in 1860—was an ordinary subtenure at a fixed rate of rent. In suit 94 one subtenure only is involved: it is not of patni character and was granted in 1896.

The Revenue Survey in this part of Bengal took place in 1853-4 and showed the suit lands to be dry land of the revenue paying estate (touzi-mahal). In 1867-8 there was another survey (called a Diara Survey as its purpose was to ascertain the effect of fluvial action upon the lands) and the suit lands (with other lands) were shown to be then under water, in consequence whereof a deduction was, in 1871, made from the revenue payable by the zemindars to government, the deduction being made pursuant to the provisions of section 5 of the Bengal Alluvion and Diluvion Act (IX of 1847). The permanent tenure holders received no abatement of rent and it would seem that they claimed none. In 1913 the locality was again surveyed and action taken to assess the land revenue. Proceedings under Chapter X of the Bengal Tenancy Act, 1885, were begun. Under section 104 of the Act, the Revenue Officer having prepared a record of rights, took steps to settle fair and equitable rents for tenants of every class including the patnidars and to prepare a settlement rent roll. The lands in suit having reappeared above water were treated as land "added to [an] estate paying revenue directly to Government" within section 6 of Act IX of 1847. The Settlement Officer after some hesitation by order dated 18th March, 1919, proceeded to fix for these lands rents according to their value, disregarding the contractual rent fixed in perpetuity by the tenure-holders' leases. A much higher rent having thus been imposed upon the tenure-holders a corresponding assessment to revenue was made upon the zemindars. The zemindars, after some vacillation, refused to accept settlement on the terms offered with the result that Government proceeded to hold the estate khas paying malikana to them.

The plaintiff company contend that the lands in suit being part of a permanently settled estate cannot validly be subjected to a fresh assessment of land revenue, notwithstanding that they have reappeared after abatement of revenue had been granted while they were under water. The plaintiff company contend further that if the lands can be reassessed to revenue the Settlement Officer acting under section 104 of the Bengal Tenancy Act could not fix a rent according to the assets of the tenures without regard to the fixed rent at which they were held. The Trial Judge accepted the plaintiff company's contentions on both points. In the High Court the plaintiff company succeeded on the second point but not upon the first, the learned Judges (Mukerji and Mitter JJ.) being of opinion that in view of the abatement of revenue granted in 1871 the suit lands were "added" lands within section 6 of the Act of 1847. In the six appeals which their Lordships are first considering, the Secretary of State in Council maintains the right of the Settlement Officer to disregard the contractual rate of rent and contends that the Civil Court has no jurisdiction in the matter.

The validity and character of the interest which the plaintiff company have in the lands in suit may first be noticed. By the Permanent Settlement Regulation (I of 1793) it was made clear that land held under the zemindar would be answerable for the revenue in common with the rest of the estate in case of default in payment by the zemindar, but that the rent payable to the zemindar would not be entered in Government records nor would the zemindar's grant or transfer be allowed to affect the rights or claims of Government any more than if it had never taken place. Government at the same time reserved the right to make regulations for the welfare of dependent taluqdars, raiyats and other cultivators of the soil. At first the zemindar was restricted in granting leases by a condition that the rent should not be fixed for a period exceeding ten years. This restriction was removed in 1812. The Bengal Patni Taluk Regulation (VIII of 1819) confirmed the validity of tenures at a rent fixed in perpetuity and proceeded to define, confirm and regulate the particular classes of such tenures called patni taluks and the dependent tenures thereunder called darpatnis, sepatnis and so forth. It may be noticed here that the recognition of the right to let and sublet at a fixed rent in perpetuity was given (as appears by the preamble to the Regulation) by way of abandonment of all intention or desire to have the old limitation to ten years enforced as a security to the Government revenue.

Two substantial questions, apart from a minor point on limitation of action to be considered later, arise for decision. First, is there power under Act IX of 1847 (which applies to the provinces of Bengal, Bihar and Orissa) to assess the lands in question as being lands "added to any estate paying revenue directly to Government" within the meaning of section 6 of the Act mentioned? Secondly, if the lands are

" added " to the estate within the meaning of section 6, does this bring them within section 104 of the Bengal Tenancy Act with the result that the Revenue Officer (subject to compliance with section 103A) has to settle fair and equitable rents for tenants of every class including all (or some) of the respondents?

Both questions involve elements of considerable difficulty. If the first, which their Lordships will proceed to examine, is answered in the negative, the second will not arise.

The Act of 1847 was considered with great care by the Judicial Committee of the Privy Council in an appeal from the High Court of Calcutta, entitled *Secretary of State for India* v. *Srimati Fahamidunnissa Begum* (1889, L.R. 17 Ind. App. 40). The case was twice argued, and was finally disposed of before a Board of six consisting of Lord Watson, Lord Hobhouse, Lord Herschell, Lord Macnaghten, Sir Barnes Peacock and Sir Richard Couch. The headnote, the first part of which is taken textually from the judgment delivered by Lord Herschell is as follows:—

> " Although by the legislation prior to 1847 it was intended to bring under assessment lands not included in the permanent settlement, whether they were waste or gained by alluvion or dereliction, yet all such lands as were comprised in permanently settled estates were to be rigorously excluded from further assessment. Lands so comprised which had become covered with water and afterwards reformed were not lands ' gained from the river or sea by alluvion or dereliction ' within the meaning of the said legislation, which was confined to lands so gained ' since the period of the settlement '. The intention and effect of Act IX of 1847 were merely to change the mode of assessment, not to extend in any way the liability to assessment, so as to include in such liability land reformed on the site of a permanently settled estate, the revenue of which had been paid without abatement since the permanent settlement."

The last sentence indicates the ground on which the appellant has sought to distinguish this case. In the present instance the zemindars as already mentioned have had the advantage of the deduction made in 1871 from the revenue of estate No. 523 of Rs.4,034 in respect of the 28,087 bighas of land which had, as the phrase goes, " been washed away " from that estate. In the case decided by the judgment mentioned the proprietors of the mouza had obtained no such relief. In that case an area of land which in 1792 amounted to 10,042 bighas had been reduced to only 652 bighas in 1859 when the Thakbust survey (i.e., the survey preliminary to the regular survey) was made. When the regular survey was made even the remnant of 652 bighas had disappeared. By the year 1877 some 2,000 bighas had reappeared, and it was these 2,000 bighas which the revenue officials had purported to assess. They had, erroneously as it turned out, disputed the identity of the land which had reappeared as part of the site of the permanently settled estate; and they had also contended that in any case the land was land that had " accreted since the last previous survey " and was therefore liable under the Act to be treated as " added land ".

This last contention was based upon a view which had at one time found favour with the Courts of Bengal, namely, that the Act as a matter of procedure and evidence had made the former survey map conclusive as to the original limits of each permanently settled estate, and therefore made the comparison of the two maps by the revenue officer conclusive on the question of what had been washed away from and as to what had been added to the estate. This was an attractive view and it would have had the incidental advantage of preventing a quantity of litigation including the appeal now before their Lordships. It was, however, decisively negatived by the Full Bench of the High Court of Calcutta when the case which was the subject of the appeal to the Board just mentioned was before it (*Fahamidannissa Begum* v. *The Secretary of State for India in Council,* I.L.R. 14 Calc. 67). The Full Bench, overruling three previous decisions, came to the conclusion that the comparison of the maps was not conclusive and that what was meant was that the comparison was "to set the Revenue Authorities in motion", and that they were then, on the best materials they could procure, to proceed to assess what they deemed to be assessible. This decision was accepted as correct by the Board and has since then been acted upon in Bengal; and it was not questioned before their Lordships, who must consider the question which now arises for decision on the footing that it is a correct interpretation of the Act.

It should be observed at the outset that Lord Herschell's judgment so far as it dealt with the question whether the Act of 1847 was applicable to land reformed on the site of a permanently settled estate laid no stress on the circumstance that the revenue assessed on the land had been paid without abatement since the permanent settlement. There are three stages in the reasoning which led the Board to its conclusion. First, the terms of section 1 of the Act were said to show that the intention of the enactment was merely to alter the machinery of assessment and not to subject to assessment lands not liable thereto under the previous law. (It might perhaps be more accurate to substitute the word "mainly" for the word "merely".) Secondly, it was shown that under that law all lands comprised in permanently settled estates were entirely excluded from further assessment, and some solemn declarations of the Government in that sense were referred to. Thirdly, the terms of the Act of 1847 were examined with a view of showing, not only that no violence was done to the language of the enactment by rejecting a construction that would lead to the conclusion that owners of permanently settled estates might be liable to further assessment because they had suffered the misfortune to be deprived for a time of part of their lands by an incursion of the sea or river, but also that it would be straining the language to include in section 6 of the Act such a case as that with which their Lordships were then dealing, and that on the simple ground that lands originally part of a permanently settled estate "cannot be said to have been *added* to the estate to which they already belonged."

It should also be noted that the Full Bench of the High Court of Calcutta had unanimously come to the same conclusion as that embodied in Lord Herschell's judgment and for the same reasons; and they too did not rely on the fact that no remission of land revenue had been obtained. Mitter J. expressed the conclusion on this point very succinctly:—"The provisions of Act IX of 1847 are," he said, "applicable to lands gained from the sea or from rivers by alluvion or dereliction. But land re-formed on the site of an estate, the proprietary right in which is vested in a private individual, does not fall under the category of lands gained from the sea or from rivers by alluvion or dereliction."

It seems to their Lordships that the reasons on which these judgments are based must be regarded as of general application to lands which formed part of a permanently settled estate, whether or not the *sadar jama* of the estate has been reduced because of land having been washed away from the estate, unless—and this seems to be the only possible qualification—it can be shown that when the assessment was reduced the lands which had been washed away or lost had in some way ceased upon the reduction being made to form a part of the original estate. If the lands have remained part of the original permanent settlement but have received a reduction of assessment under section 5 it might indeed still have been argued if the matter were *res integra* that section 6 is so worded that these lands on their re-appearance after being submerged ought to be treated as "added" lands; but it seems to their Lordships that every line in the judgment of Lord Herschell applies on that hypothesis. They would still not be added lands in any true sense. That judgment has often been cited and followed, and it would seem much too late to question the force and validity of the reasons which led the Board in 1889 after much consideration to their conclusion. Nor do their Lordships see any good reason for doing so.

What then is the ground for contending that, when a reduction in the *sadar jama* is made under section 5 in respect of lands washed away, there is any alteration in the title or ownership of those lands? It is to be noted that section 5 is *primâ facie* not dealing with a question of title at all. The general law on the subject of land "diluviated," to use the expression used in India in these cases, or on the subject of accretion is not in doubt. It was very clearly expressed in the year 1870 in a judgment of the Board delivered by Lord Justice James (*Lopez* v. *Muddun Mohun Thakoor* 13 Moo. Ind. App. 467). Dealing with Regulations which were in force prior to the Act of 1847 he showed beyond doubt that land forming part of a *mouzah* on the banks of the Ganges, which had gradually been washed away and submerged, but which had ultimately been re-formed on the original site, had never ceased to be the property of the original owner or his assigns. "The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided

the ownership of the site be ascertained." There is, however, a passage in the judgment which no doubt requires consideration in a proper case. It is as follows:—

> " Their Lordships however, desire it to be understood that they do not hold that property absorbed by a Sea or a River is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the Sea or River of the State, and so liable to the written law as to accretion and annexation."

Leaving aside for the moment the question of abandonment, it seems to their Lordships to be clear that section 5 does not purport to transfer the title of the site which has been covered by water. All that is predicated as to the land is that it " has been washed away from or lost to any estate paying revenue directly to Government." In other words the cultivable soil (though of course not the site) has been washed away and the river now flows over the site, so that under normal circumstances no income can be derived from it. The legislature must be taken to have been well aware that this alone would not avail to shift the title of the site from the zemindar to the Government.

On the other hand the operation of section 6 is very different. The assumption there is that land has been added to an estate paying revenue to the Government. In such a case in India under Regulation XI of 1825 it was provided that if gained by gradual accretion, " it should be considered an increment to the tenure of the person to whose land or estate it is thus annexed." Section 6 refers to cases of gain, or acquisition by means of gradual accession of lands which, at any rate in a normal case, are assumed not to have been part of " the estate paying revenue directly to the Government," since the land is added to that estate. In a word section 5 is dealing, *primâ facie* at least, with a loss of cultivable value, while section 6 is dealing with an acquisition of title by means of accretion.

Next, it is to be noted that when on inspection of the new map, made after an interval of not less than ten years from the date of the previous survey, it appears that land has been washed away from or lost to the revenue-paying estate, the revenue authorities are not given any discretion as to their action. Not only are the words mandatory, but they are directed " without loss of time " to make the deduction. There is no room here for an implication of any negotiation with the zemindars. No application whatever by them is necessary. Still less can it be right to postulate an implied bargain with them. They are entitled to say to the revenue authorities, " Observe, gentlemen, that we make no contract with you and that we give up none of our rights. All we desire is that you shall perform your statutory duties under the Act." In these circumstances their Lordships, with great respect to the opinions expressed by Mukerji and Mitter JJ., are unable to take the view that the effect of an abatement of revenue taken for the portion of the estate washed away must be regarded as an abandonment of that portion of the estate for the benefit of the

public domain. Abandonment must depend on the intention of the person alleged to be giving up a legal right. It cannot be right to draw such an inference from the attitude of a zemindar who simply pays the land revenue legally demanded from him by the revenue authorities. It may be observed that he may have been paying land revenue for ten years in respect of lands wholly or partly submerged. He may be using the river bed for a wharf, a jetty, or some other building, and there may be evident signs that the river (or the sea) is now receding. The deduction to which he is entitled under section 5 may be small as compared with the present value of the land covered as it is with water and trifling as compared with its future value if the river recedes. Yet the section is wholly silent as to any right being given up by the proprietor; and it seems to their Lordships that to make an implication that his title to the lands is being taken away is without justification. In the present case there is a further cogent reason against a presumption of abandonment. The appellants and their predecessors as permanent tenure holders had continued to pay their rents without abatement to the proprietors who had accepted these unabated rents without demur. This seems to be quite inconsistent with the assumption that a part or parts of the estate from which the zemindars were continuing to receive rents had been abandoned to the Government.

It must be admitted that the Act in question was not very carefully framed, an observation which has been made before in reference to the legislation of Bengal at so early a date as 1847. Their Lordships have been perfectly aware of the fact that unless "added" lands within the meaning of section 6 can be held to include lands which, having been the subject of an abatement of *sadar jama* under section 5, have re-appeared above the waters, there is no express provision for any land revenue being payable in respect of those lands. For the reasons above given, and being satisfied that the title to the submerged lands has remained with the original proprietors, their Lordships cannot hold that the word "added" ought to be given so artificial a meaning as to include, in addition to lands the title to which has accrued in a true sense to the permanently settled estate, lands which have all along remained part of that estate but have been exempted from revenue because they were at some previous date covered by water. It may be asked, what then is the position from the revenue point of view when the land or a portion of it emerges? There are two possible views; the first is that an implication may be derived from the Act that when lands re-appear after a deduction has been given there ought to be a corresponding re-instatement of the proper proportion of the *sadar jama;* the second is that the case of re-appearance has not been dealt with, and in other words that it is *casus omissus* in the Act. Their Lordships are unable to deal with the first view in the absence of any argument upon it: there are no doubt serious difficulties which will have to be duly considered if the Government makes a claim of the kind

indicated. As to the second possible view it may be pointed out that until the Act came into force in Bengal, Bihar and Orissa in 1847 the Government of Bengal, while duly assessing with revenue alluvial increments to permanently settled estates, had not previously provided for any deduction being made from such estates if lands had been "washed away." In 1847 it may have been thought that the possibility of such lands re-appearing in the case of permanently settled estates was not sufficiently important to need special legislation. In any case a possible defect of that kind in an Act concerned with taxation cannot alone be a ground for implying a clause imposing an obligation on the subject for which there is otherwise no warrant.

Their Lordships' conclusion on this part of the case is that the appeals in the Title Suits Nos. 21, 94, 95, 450, 451 and 454 must be dismissed with costs.

The remaining eight appeals arise out of four money suits whereby the plaintiff company sought repayment from Government of rents which Government had realised from them on the basis of the settlement proceedings and in addition to the fixed rents of their tenures. Four of these eight appeals are brought by the Secretary of State in Council and are governed by the result of the six appeals already dealt with by their Lordships. These are appeals Nos. 9, 12, 13 and 14 of 1931, which accordingly fall to be dismissed.

In the four appeals brought by the plaintiff company (Nos. 23, 21, 22 and 26 of 1931) they complain that the trial Court and the High Court have by an error applied against them Article 16 of the First Schedule to the Limitation Act (IX of 1908). By the terms of that article it applies to suits "against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears." For such suits the period of limitation prescribed is one year from the time when the payment is made. If this article be not applicable to the present cases, learned Counsel for the Secretary of State do not resist the plaintiff company's claim as being barred in whole or in part by any other article. The sums claimed by Government were claimed as rents payable by the plaintiff company for lands held by them, being the rents "settled" by the Settlement Officer under section 104 of the Bengal Tenancy Act (VIII of 1885). Such rents are not arrears of revenue and unless it can be shown that by some enactment they have been made to come under that description or have been made recoverable as arrears of revenue, Article 16 cannot be applied to them. The learned Trial Judge appreciated that the money realised was really "patni rent" but considered that as Government was holding khas the lands of a recusant proprietor the demand was recoverable as arrears of revenue. This, however, would not follow unless some enactment has provided to that effect. In the High Court the Bengal Land Revenue Sales Act (Bengal Act VII of 1868) which amended and

extended an Act of similar title—viz. Act XI of 1859, was thought to have supplied the necessary provision by defining the word " revenue " to cover " every sum annually payable to Government by the proprietor of any estate or tenure in respect thereof." This would mean that the plaintiff company's tenures could, for arrears of rent, be sold by the Collector without " certificate procedure " and without reference to the Civil Court, in like manner as an estate may be sold for default in payment of the revenue. Learned Counsel for the plaintiff company disputed this reading of the Acts of 1859 and 1868, maintaining that as his clients did not hold directly under Government they were not " proprietors " within the meaning of the latter Act. Upon this point learned Counsel for the Secretary of State did not seek to uphold the High Court's view and their Lordships have not had occasion to construe the Acts in question. He argued only that the claim to the enhanced or settled rents came within the Bengal Public Demands Recovery Act (Ben. Act III of 1913) citing in particular article 8 of the First Schedule thereto. This, however, would not, in their Lordships' view, assist to bring into operation article 16 of the First Schedule to the Limitation Act which requires for its application that the demand, if not for arrears of revenue, should be " recoverable as such arrears." To show that it is recoverable as a " public demand " is not to the point. The result is that these four appeals by the plaintiff company should be allowed, the decrees of the High Court set aside, and the decrees of the Trial Courts in suits 440 of 1924, 104 and 105 of 1925 and 42 of 1926 varied by including those items of the plaintiff company's claim which have been disallowed as barred by limitation: interest at 6 per cent. per annum from date of each payment till realisation will be allowed on such additional items as well as on the items already decreed: also the usual interest on the decretal sum (including costs) at 6 per cent. If not sooner ascertained the exact sum to be decreed in each suit will be ascertained, in default of agreement, by or under direction of the High Court. In lieu of the order for costs made by the Trial Judge in these four suits the order will be that the plaintiff company do get their costs of the Trial Court: they will also get their costs in these cases of the appeals to the High Court.

Their Lordships will humbly advise His Majesty in accordance with their conclusions on the various appeals as above stated.

The plaintiff company will get from the Secretary of State in Council their costs of the consolidated appeal. With regard to the appeal arising out of a suit No. 452 of 1922 in which special leave to appeal was granted on the 26th June, 1933, which appeal was subsequently abandoned, the plaintiff company must pay the Secretary of State's costs in connection with that order and there will be a set off as regards these costs against the costs of the consolidated appeal which the Secretary of State must pay to

the plaintiff company. There will be no order for costs in the case of respondents Nos. 5, 6, 7, 8 and 19 (4) (minors who appear by Profulla Kumar Guha) who did not take part in the hearing before either Court in India and who need not in their Lordships' opinion have separately contested this appeal.

(42602—3A) Wt. 8151—17 190 6/37 P. St. G. 338

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