**(1918) 01 CAL CK 0015**

**Calcutta High Court**

**Case No:** None

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| The Secretary of State for India in Council | | APPELLANT |
| | Vs | |
| Kamal Krishna Pal | | RESPONDENT |

**Date of Decision:** Jan. 17, 1918

**Acts Referred:**

- Bengal Tenancy Act, 1885 - Section 178(3)(f), 52

**Citation:** 44 Ind. Cas. 222

**Hon'ble Judges:** Richardson, J; Beachcroft, J

**Bench:** Division Bench

**Judgement**

1. This appeal is preferred by the Secretary of State from the judgment and decree of the Subordinate Judge of Chittagong, dated the 23rd May 1914, confirming the decree of the Munsif of Chittagong, dated the 8th April 1913. The Secretary of State is the defendant in the suit. The plaintiff is the holder of a temporary tenure within a Noabad estate belonging to the Government. The plaintiff purchased the tenure at a sale for arrears of revenue. The tenure was created in the year 1896 and it was held under a kabuliyat of that year. One of the terms of the contract is that diluvion or no diluvion the liability of the tenant to the full rent payable should remain. The suit was brought by the plaintiff on the ground that more than one-half of the land of the tenure had been diluviated and that he was entitled to abatement u/s 52, Bengal Tenancy Act. The Courts below have decided in his favour and made a decree allowing him a proportionate deduction of the rent. For the Secretary of State it is argued that the question whether the rent is liable to abatement on the ground of diluvion does not depend on Section 52 alone but depends also on the terms of the. contract between the parties. Section 52 begins no doubt with the words " every tenant" and, apart from any question of contract, is applicable both to tenure-holders and to raiyats. On the other hand, the general principle is that an individual may renounce an advantage conferred upon him by a legislative

enactment, in the phrase sometimes used, he may contract himself out of the Act. Under the provisions of Sub-section (3), Clause (f) of Section 178, a raiyat is expressly prohibited from contracting himself out of his right to apply for reduction of rent u/s 52. There is no corresponding provision, however, in the case of a tenure holder. It would seem, therefore, that the tenure-holder is at liberty to contract himself out of his right to apply for a reduction of his rent on the ground of diluvion. For the plaintiff-respondent it is argued that inasmuch as Section 52'' expressly applies to every tenant, it must be taken that Sections 52 and 179 of the Act cover the whole field, so that Section 52 would apply to the case of every tenant under a lease which is not a permanent lease within the meaning of Section 179. This argument appears to me unsound. No doubt there is Section 179, which expressly provides that nothing in the Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent mokarari lease on any terms agreed on between him and his tenant. But obviously that section has no application to the case of the holder of a temporary tenure or the lessee under a lease for a term of years, such as the lease in the present case. Such a lease is not within the section and in order to find oat how the Act deals with such a lease we must look elsewhere than in Section 179. In my opinion reading Sections 52 and 178 together the plaintiff in this case must be taken to be bound by the terms of his contract. The opening words of Clause (3) of Section 178 are: "Nothing in any contract made between a landlord and a tenant after the passing of this Act shall." Then follow a number of Clauses (as) to (h), in which different classes of tenants are referred to. Clause (a) refers to raiyats generally, Clause (6) is limited to the case of occupancy raiyats and so on. Clause (g) refers to landlords and tenants and Clause (h) is also applicable to landlords and tenants. It seems to follow that if the Legislature had intended to prevent the holder of a temporary tenure from parting with his right to apply for reduction of rent u/s 52, express provision would have been made to that effect. That has not been done. In my opinion, in the case of the holder of a temporary tenure Section 52 must be read subject to the terms of the contract between him and his landlord. His freedom of contract, is bound by some but not by all the restrictions imposed by Section 178, in cases within Section 179 none of the restrictions are applicable.

2. The view of the learned Subordinate Judge that the plaintiff, as purchaser of this tenure at a sale for arrears of revenue, is not bound by the terms of the kabuliyat creating the tenure is not supported at the Bar and cannot be accepted.

3. The result is that, in my opinion, the conclusion arrived at by the Court below is erroneous and this appeal must be allowed and the suit dismissed with costs throughout.

Beachcroft, J.

4. I agree.