

(1904) 06 CAL CK 0001**Calcutta High Court****Case No:** Appeal from Original Decree No. 208 of 1901

Mohamed Jarip and Others

APPELLANT

Vs

Shyama Sundari Dasi and Others

RESPONDENT

Date of Decision: June 14, 1904**Final Decision:** Dismissed**Judgement**

1. The Appellants in this appeal sued to set aside a sale of their estate for arrears of revenue, held on the 20th of December 1898. The estate was sold for a sum of Rs. 8-2 said to have been due on account of September kist of 1898. Various grounds were taken in support of the suit, but the one which is important for the purposes of this appeal is that stated in the 8th paragraph of the plaint, That paragraph runs as follows :--"That the annual Government revenue of the Mehal No. 11266 is less than Rs. 50, and according to sec. 3 of Act XI of 1859 and the provisions of the circular and notification of the Hon'ble Sudder Board, payment of the Government revenue for mehals whose annual Government revenue is less than Rs. 50, is to be made in two kists, namely, January kist and March kist and in no other kists. According to the provisions of law, no other day can be considered as the latest day of payment than the last dates for January and March kists. It was not in accordance with law to have taken the September kist as a kist in counting the arrears in this case; arrears ought not to have been ascertained upon a kist fixed in contravention of the provisions of law; nor was the property legally liable to be sold in auction for such arrears, and the latest day of payment with respect to the estate in arrears could not be regarded as having arrived before the January kist fell due. The estate which was sold originally formed part of another estate, the number of which was 6446. That parent estate was partitioned and two new estates were created out of it. The revenue originally payable on the old estate was Rs. 305 annas 3. On the partition the new estate which was created and which fell to the share of the Plaintiffs was estate No. 11266, and the revenue fixed on that estate was Rs. 26. The Rule on which the Plaintiffs relied appears as the first of a series of Rules issued by the Board of Revenue under the powers conferred on them by sec. 3 of Act XI of 1859. That Rule

provides, amongst other things, that estates paying an annual revenue exceeding Rs. 10 but not exceeding Re. 50 shall pay the revenue in two kists due on the 12th January and 28th March. In February 1896, a Revenue Circular appears to have been issued by the Board of Revenue in consequence apparently of the view held by the Collectors that, after partition of an estate, the new estates formed by such partition fell, so far as the payments of kists of revenue were concerned, under the provisions of that Rule, and in consequence in cases where the revenue of parent estates had been over Rs. 100, and the revenue had been payable in four kists, and on partition new estates had been formed with revenues less than that amount they had fixed the dates for the payment of the kists of these new estates paying small amounts of Government revenue in accordance with that Rule. The circular was intended to lay down that even after the partition of an estate and the formation of new estates with revenues less than Rs. 100, the Rule applicable to the parent estate still applied to the new estates.

2. The Subordinate Judge dismissed the Plaintiff's suit disallowing the objection which they had taken to the effect that the circular provided a new Rule and that as it had not been notified as required by sec. 3 of Act XI of 1859, it could not provide new dates for the payment of kists modifying the Rule No. 1. The Subordinate Judge held that the objection taken was not tenable, because in his opinion Circular No. 12 did not provide any new Rule but only explained the meaning of Rule No. 1 and therefore that in the case of such a circular no notification in the Gazette under sec. 3 of the Act was necessary. He accordingly dismissed the Plaintiffs' suit.

3. The Plaintiffs have appealed to this Court. The main ground which has been taken before us and it is the one on which we think that the appeal must succeed, is that the Circular No. 12 which appears subsequently to have been introduced into the Rules of the Board as Rule No. 4, not having been duly notified as required by sec. 3 of Act XI of 1859, could not lay down a new Rule fixing the dates for the payment of the kists of revenues on newly formed estates after partition. In accordance with our directions the learned vakil for the Respondents who has appeared to support the finding of the Subordinate Judge had applied to the Board of Revenue to ascertain whether the Circular Order No. 12 was in fact notified as required by sec. 3 of Act XI of 1859, and he has produced before us a memorandum from the Board of Revenue to the effect that the circular was not notified. In our opinion as that circular was not duly notified and advertised as required by sec. 3 of the Act, it could not have created a new Rule modifying Rule No. 1 passed by the Board under the powers conferred by sec. 3 of Act XI of 1859. Rule No. 1 provides generally that in the case of estates of certain values the kists shall fall due on certain dates; and the provisions of the Estates Partition Act VIII, (B. C.) of 1876 prescribe that after the partition of an estate, the new estates formed by such partition, shall form fresh estates to be entered under new numbers in the Revenue Roll of the Collectorate. Such new estates would, in our opinion, after formation, fall, so far as the kists of revenue be subject to the Rule No. 1 to which we have referred. The result of the

Circular No. 12 was not in our opinion merely to explain the Rule No. 1, but it was in fact a new Rule excepting from the operation of the old Rule estates formed by partition, and declaring with regard to them that the Rule applicable to the parent estates of higher value out of which they had been formed applied to them. This new Rule, in our opinion, required, in order to constitute it a valid Rule under which revenue could be realised from the new estates, that it should be published by advertisement and notification at least three months before the close of the official year preceding that in which the new dates were to take effect. No such notification or advertisement in the case of this circular was, however, made. In our opinion, therefore, the new estate No. 11266 belonging to the Plaintiffs created at the time of the partition with a revenue of less than Rs. 50 fell so far as its liability to pay revenue according to kists was concerned under the provisions of Rule 1 so far as it applied to estates bearing revenue of that amount. The dates fixed for the kists of estates paying revenue between 10 and 50 rupees are the 12th of January and the 28th of March. The kist for which this estate was sold is said to have fallen due on the 28th September, but as we hold that under the provisions of the old Rule no kist was due in respect of the Plaintiffs' estate in September, so we must also hold that at the time of the sale there was no arrear of revenue outstanding against this estate for which it could be put up for sale. The sale was therefore not a legal sale as the estate was sold for an arrear which was not then due and on that account the sale must in our opinion be set aside.

4. We therefore set aside the judgment and decree of the Subordinate Judge and decree the appeal and in lieu thereof direct that the Plaintiffs' suit be decreed with costs, that the sale be set aside and that they do recover possession of their estate.

5. We have been asked to make a decree setting aside the sale subject to the condition of repayment by the Plaintiffs to the Defendants-Respondents of the purchase-money paid by them for the estate. There are no materials before us to show that the Plaintiff-Appellants have received any portion of the purchase-money, and, in our opinion, it is very unlikely that they have done so, as, under the provisions of sec. 33 of the Act, it is provided that "no person shall be entitled to contest the legality of a sale, after having received any portion of the purchase-money."

6. We do not therefore think under the circumstances that there is any ground for holding that the Plaintiffs in this case have received any portion of the purchase-money and we accordingly decline to make the decree subject to the condition as desired. The result then is that the appeal is decreed with costs.