

(1937) 03 CAL CK 0017

Calcutta High Court**Case No:** Appeal from Appellate Decree No. 1635 of 1934

Provat Kumar Sinha and Others

APPELLANT

Vs

Sir Bijoy Chand Mahatab and
AnotherRESPONDENT

Date of Decision: March 20, 1937

Judgement

Ghose, J.

This is a second appeal by the Plaintiffs in a suit for setting, aside a sale of a putni taluk and it is directed against a decision of the learned District Judge of Burdwan, reversing the decision of the learned Subordinate Judge of Asansole. Putni Taluk No. 169, Lot Shyambazar, was brought to sale on 1st Agrahayan, 1337, B. S., corresponding to 17th November, 1930, the auction-purchaser being Defendant No. 2. The Plaintiffs Nos. 1 to 12 are the putnidars. The annual rent of the putni is Rs. 1,410-2-2 p. The cess payable is Rs. 82-0-5 pies and there is also lakheraj cess payable, namely, Rs. 31-6-9 pies. The demand for which the sale as held was made on the basis of six months' rental and it comprised" the following items:-

Rent	.. Rs. 702-15-0
Interest	.. Rs. 16- 2-8
Cess Interest	.. Rs. 56-11-10 on
Cess	.. Rs. 1-4-9
Costs	.. Rs. 1-14- 9
	Total Its. 779- 1- 0

The Plaintiffs seek to set aside the sale on various grounds which are traversed by the contesting Defendant No. 1, Maharajadhiraj of Burdwan, and by the auction purchaser Defendant No. 2. All of those grounds are not material to this appeal. It will be sufficient to say that the Subordinate Judge decreed the suit, holding that the sale notice had not been served at the mal kutchery of the defaulter at Shyambazar

with due formalities and further that the inclusion in the demand of items other than rent such as cess and costs was not authorized by law. There was an appeal by the Defendant No. 1. The learned District Judge held that the said notice was duly served at the defaulter's kutchery at Shyambazar and that the formalities required by law had been substantially complied with. As to the amount for cess being included in the demand, he held it was justified by the provisions of secs. 47 and 50 of the Cess Act. He further held that, even if the inclusion of the amounts other than rent was not authorised by law, the validity of the sale could not be affected by such inclusion in view of the fact that the putni rent was in arrears. In that view he reversed the decision of the Subordinate Judge and dismissed the suit. Hence this second appeal by the Plaintiffs.

2. In this appeal it is contended for the Appellants that the learned Judge below was wrong in holding that the inclusion in the demand of items other than rent was authorised by law and that the formalities required for the publication of notices had been substantially complied with.

3. The first point is whether the inclusion of the amount for cess in the advertised balance was authorised by law. The contention for the Appellants is that sec. 8 of the Putni Regulation, VIII of 1819, lays down, a special procedure in those Cases in which the right of bringing the property to sale is " specially reserved by stipulation in the engagements interchanged on the creation of the tenure." It is contended that such a right cannot be extended to cases of demand for something other than rent. It is pointed out that the putni patta is dated long before the Cess Act and that no provision is made therein for the payment of cess as a future impost. In this connection reference is made to the following clause in the putni potta.

We shall abide by any law and order which may be promulgated from the Sadar without any objection on our part. We shall not do anything in contravention of law-if we do we shall be answerable for the same.

4. The Courts below have held that this clause only refers to the general law which might come into force and it does not refer to any future impost with regard to cess. It seems to us that the reference is to such law as might be promulgated with reference to the subject-matter of the lease and the question of a future-impost is not excluded. We have been referred to the case of Raja Bhupendra Narain Sinha Bahadur v. Maharaj Bahadur Sinha 36 C. W. N, 888 (1932). where at page 894 it is stated the putni kabuliyat contains a term to the effect that the putnidar "remained bound to pay any additional revenue or any new impost which might be levied by the authorities on the zeminderies." It was held that cesses fall within these words. No doubt the reference there was clearly to a new impost which might be levied, while the present clause is in mere general terms. But nevertheless there is justification for holding that the clause in question means that the lessee would be bound to make such payments as he might be called upon to make in accordance with law. The clause in question is therefore no obstacle in the way of the zeminder

in this case. Now the question that directly arises is whether arrears of cess can be included in the demand for which the putni is liable to be sold under the provisions of sec. 8 of the Putni Regulation. The answer to this is to be found in sec. 47 of the Cess Act which runs as follows:

Every holder of an estate or tenure to whom any sum may be payable under the provisions of this Act may recover the same with interest at the rate of twelve and a half per centum per annum in the same manner and under the same penalties as if the same were arrears of rent due to him.

5. The scheme of the Act is that cess is an amount levied by Government and it is realised first from the person in actual occupation of the land by the immediate landlord who then passes it on to Government. What sec. 47 provides is a method of convenience, the landlord being enabled to realise the cess along with his rent and in accordance with the same procedure. Therefore where the landlord is entitled to a special procedure for the realisation of rent, he is also entitled to that special procedure for the realisation of cess. This is consistent with the clause: "in the same manner and under the same penalties as if the same were arrears of rent due to him." It is contended for the Appellants that it would be ultra vires the local legislature to modify an Imperial Act and consequently sec. 47 of the Bengal Cess Act cannot affect the Putni Regulation. But really sec. 47 of the Cess Act has not the effect of modifying any provision of the Putni Regulation. That section merely entitles the landlord to adopt the procedure in the Putni Regulation for the purpose of realisation of arrears of cess. The trial Court has held that the procedure of sec. 8 of the Putni Regulation cannot be applied to the case of arrears of cess and for this purpose it has relied on, a note in Board's Manual of Revenue and Putni Sale Laws, 1928 Edition. The learned District Judge, on the other hand, has pointed out that that note has since been withdrawn and substituted by another note in the 1933 Edition of the same Manual. This note in the Board's Manual no doubt has no binding force, but it seems to be clear that the practice has always been for the zeminder to include the arrear of cess in the demand which is made under sec. 8 of Putni Regulation. The practice does not appear to have been challenged and no decided case has been brought to our notice. In the case of *Sm. Khyarennessa Chowdhurani v. Kumar Satya Bhanu Gkosal Bahadur* 34 C. W. N. 519 (1929), there is a passage at page 553 which runs as follows.

With regard to the defect about including the cess in the advertised balance, the putni pottah has not been produced and we do not know if under the engagements entered into by the putnidar the cess subsequently to be levied was to be regarded as part of the fixed rental and we find that the form of notice in general use which has been sanctioned by the board of Revenue included the cess in the advertised balance.

6. Here the learned Judges were not considering the effect of the Cess Act. In that case also the learned Judges held that the notice was in substantial conformity with

sec. 8, cl. 8, pointing out that sec. 8 has to be read with sec. 10 of the Regulation and the proper amount of arrears could be ascertained and verified on the date of the sale. In the present case there is no question as to the amount in arrear either of rent or of cess. The notice of sale that was issued was in accordance with the form prescribed by the Board and it stated that the sale would be held unless three-fourths of the amount together with costs and interests be deposited. The notice was therefore not defective as it was in the case of *Nawab Khaja Ashanulla Khan Bahadur v. Hurri Churn Mazoomdar* L. R. 19 I. A. 191 (1892). There the notice did not intimate to the debtor in accordance with the terms of cl. 3 of sec. 8 that payment of three-fourths of the balance due would prevent the sale, but it followed the terms of cl. 2 and intimated that the whole arrears must be paid. Their Lordships held that in those circumstances the notice was essentially defective and the sale must be set aside.

7. In behalf of the Appellants further stress is laid on the demand for lakheraj cess. As regards this item the learned Judge relied on sec. 50 of the Cess Act according to which rent-free lands are to be deemed to form a part of the tenure within the local boundaries of which they are contained. It is, suggested for the Appellants that this should lead to a special proceeding for sale under the provisions of sees. 64A and 64B of the Cess Act, but those sections apply to the case of a demand made upon the lakherajdar by his immediate landlord. In the present case the demand is by the zemindar within whose estate the rent-free lands are situated. Therefore the provisions of sec. 47 would in the circumstances of this case apply to the arrears of lakhera case as well. Consequently the Zemindar is entitled to include such arrears in the advertised balance. The learned Advocate for the Appellant has relied on the case of *Maharaja Bahadur Sir Jotindra Mohun Tagore v. Srimati Bibi Jarao Kumari* (4). There again the question for consideration was whether the particular demand could be covered by a stipulation in the putni kabuliyat (4) L. R. 88 I. A. 301 s. c. 10 O. W. N. 201 (1905). and the provisions of the Cess Act were not under consideration. The case of *Kesho Prosad Singh v. Madho Prosad Singh* 146 I. C. 1049 (1933). is materially different on facts and there also the Cess Act was not under consideration.

8. Then there is an item as to costs and the same contention is raised that it could not be included in the balance under sec. 8 of the Putni Regulations. The amount is Rs. 1-14-9 and we are informed that it is on account of the costs of the application. The point does not seem to have been raised at all in the lower Appellate Court, nor very seriously in the trial Court. It is contended for the Appellants that under the third clause of sec. 8 a zemindar has to present a petition " with a statement of any balances that may be due on account of the rent of the current year, etc." The argument is that this refers to rent only. It seems to us however to be quite reasonable to hold that the account should include costs which are incidental to the demand for rent. Otherwise the position would be absurd, because the defaulter might stay the sale by depositing three-fourths of the amount of rent in arrears

only, leaving the zemindar to recover the small amount of costs by instituting a separate suit. On the other hand sec. 17 which provides for the disposal of the sale proceeds shows that the zemindar is entitled to be paid interest and all charges incurred in bringing the taluk to sale. Sees. 14 and 10 show that there is provision for investigation in case of a dispute and the zemindar has to exhibit an account of his proper dues just before the sale is held. It seems to us therefore that the sale was not invalid by reason of the amounts other than rent being included in the demand.

9. Then comes the question as to the formalities being observed at the time of the service of notice. The learned Judge has found that the sale notice was published as stated by the Defendants at Shyambazar. As to the formalities it is held that the peon did not attempt to obtain a receipt from the defaulter but that he took the signatures of three persons, namely Nalinakshya Nag, Kali Prasanna Buxi who was the manager of the putnidar, and Pochai Muchi, an illiterate person, whose name was signed for him by the aforesaid Kali Prosanna Buxi. The learned Judge has held that, so far as Kali Prasanna Buxi is concerned, he was not called upon to sign as a manager, but that he was called upon to sign as a substantial person. We are not impressed by this argument and we do not think that it is likely that the serving peon appreciated the difference as between these two capacities. It is found as a fact that Kali Prosanna Buxi was the manager and that he did sign and there is no reason to suppose that he did not sign as manager. Even if his signature be taken to be only as that of a substantial person, the question would be whether there were signatures of three substantial person's. We are not prepared to hold that the signing of the name of the Chowkidar by the pen of Kali Prosanna Buxi was a defect. In this case the General Clauses Act, sec. 3, cl. (52) does apply, strictly speaking. It is found that Pochai Muchi consented to his signature being put by Kali Prosanna Buxi. That we think to be substantial compliance with the requirements of the section. In any case, since it has been found that there has been actual service, it must be held that the essential provision of the law has been complied with and that the defect in the formalities in the circumstances of the case are not material. This follows the authorities *Bhugwan Chunder Das? v. Sudden Ally* I. L. R. 4 Cal. 41 (1878). *Maharajah of Burdwan v. Tarasundari Debt* I. L. R. 9 Cal. 619 (1882) and *Be joy Chand Mahatab v. Amrita Lal Mukherji* ILR 27 Cal. 308 (1899). In this view the sale is not liable to be set aside by reason of any defect in the service.

10. The learned Judge has also pointed out that it is admitted that the putnidurs were in arrears of rent and that the Zemindar had the right to sell the property under the Putni Sale Law. The other amounts in the advertised balance were also not disputed and the learned Judge pointed out that the inclusion of these items did not make it impossible for the putnidars to deposit the amount of rent and thereby stop the sale. *Sm. Khyarennessa Chozvdhurani v. Kumar Sat yet Bhanu Ghoshal Bahadur* 34 C.W.N. 549 (1929). The appeal therefore fails on all the points and must be dismissed with one set of costs to be divided equally between the two sets of

Respondents, who appeared in this appeal.

Patterson, J.

I agree.