(1867) 03 CAL CK 0003

Calcutta High Court

Case No: Special Appeal No. 992 of 1866

Shahabooddeen		APPELLANT
	Vs	
Futteh Ali and Another		RESPONDENT

Date of Decision: March 13, 1867

Judgement

Sir Barnes Peacock, Kt., CJ.

1. Several Regulations have been referred to. The first was Regulation VII of 1799, cl. 1, s. 15, of which declares that "any zamindar, talookdar, or proprietor, or farmer of land, to whom an arrear of rent may be due from a dependant talookdar, kutkinadar, jotedar, or other under-tenant of whatever denomination, which cannot be realized by distaining the personal property of such, under-tenant and his surety (if he shall have given security), is at liberty, after demanding such arrear from the defaulter, and from his surety if forthcoming, or without any express demand if he have reason to believe that the defaulter or his surely is prepared to abscond, to cause the immediate arrest of such defaulter and his surety in the manner following." Cl. 7 of the same section provides that, "if the defaulter be a dependant talookdar, or the holder of any other tenure which, by the title-deeds or established usage of the country, is transferable by sale or otherwise, it may be brought to sole, by application to the Dewanny Adawlut, in satisfaction of the arrear of rent; and the purchaser will become the tenant for the new year." By Act VIII of 1835, the power of the Dewanny Adawlut to sell in satisfaction for arrears of rent was transferred to the Collectors of Revenue. Cl. 7, s. 15, Regulation VII of 1799, to which we have adverted, does not, in express terms, say whether, when a tenure is sold under its provisions, it is sold free from, or subject to, incumbrances which may have been created by the former holder.

2. S. 8 of Regulation VIII of 1819, by which putnee talooks were recognized, enacts that zamindars, i.e., proprietors, under direct engagements with the Government, may apply in the manner therein pointed out "for periodical sales of any tenures upon which the right of selling or bringing to sale for an arrear of rent may have been especially reserved by stipulation in the engagements interchanged on the creation of the tenure." And cl. 1, s.

11 of the same Regulation declares that any talook or saleable tenure sold under the rules of that Regulation, for arrears of rent due on account of it, "is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives, or assigns, unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written engagements under which the said talook may have been held." Cl. 3 of the same section, however, provides that nothing therein contained shall be construed "to entitle the purchaser of a talook or other saleable tenure intermediate between the zamindar and actual cultivators, to eject a khoodkasht ryot, or resident and hereditary cultivator, nor to cancel bona fide engagements made with such tenants by the late incumbent or his representative, except it be proved in a regular suit, to be brought by such purchaser for the adjustment of his rent, that a higher rate would have been demandable at the time such engagements were contracted by his predecessor." So that, although sales of tenures for arrears of rent due under them, made under the provisions of Regulation VIII of 1819, were free from all incumbrances, there was the proviso which protected resident cultivators who held under engagements made bona fide with them by the former incumbent, provided that, at the time, when the engagements were made, as high a rent was reserved as was demandable at that time.

3. It is to be remarked that s. 8 applied to the sale of those tenures only upon which the right of selling or bringing to sale for arrears of rent has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure. If the engagements contained a stipulation to that effect, then the proprietor might apply to have the tenure sold in the manner provided by the section and, by s. 11, the sale was declared to be free of incumbrances. It was not at that time expressly stated whether a sale of a tenure of the nature defined in s. 8 of Regulation VIII of 1819, if sold by any other process than that prescribed by cls. 2 and 3 of that section, was free of incumbrances created by the former proprietor of the tenure or not, and consequently Regulation I of 1820 was passed to clear up any doubt upon that subject. That Regulation recited that "whereas it has been omitted to provide in the rules of Regulation VIII of 1819, whether, in case the proprietor of an estate paying revenue to Government should desire to bring to sale a saleable tenure of the nature defined in cl. 1, s. 8 of that Regulation, for the realization of arrears of rent due thereupon, by any legal process other than that prescribed by the 2nd and 3rd clauses of the said section, such sale should be made in the public manner provided for the periodical sales therein described; and whereas it is consonant with justice, and was intended by the said Regulation, that, in every case of the sale of such tenures for arrears of the zamindar"s rent, the sale should be public, for the security of the interests of the owner of the tenure sold; which object can in no manner be duly secured, except the sales to be so made be conducted by an officer of Government in the same manner as the periodical sales provided for by s. 8 of the said Regulation:" the following additional rule has accordingly been passed by the Governor-General in Council to take effect from the date of its promulgation." Cl. 1, s. 2, enacted that, whenever the proprietor of an estate, paying revenue to Government, shall

desire to cause any tenure of the nature of those described in cl. 1, s. 8, Regulation VIII of 1819, to be sold for arrears of rent due to him on account thereof, and shall, under any summary process authorized by the general Regulations, have acquired the right of causing such a sale to be made, the same shall be conducted, after application from the zamindar, by the register or acting register of the Zillah or city Court, or, in his absence, by the person in charge of the office of Judge of the district, in the mode prescribed by Regulation VIII, above quoted, for periodical sales." Cl. 2 of the same section enacted that ten days" notice of the sale should be given; and then cl. 3 enacted that the "rules of ss. 9, 11, 13, 15, and 17, Regulation VIII of 1819, are extended to all sales made after the manner herein provided." So that, when-ever a sale of any of the tenures of the nature described in s. 8, "Regulation VIII of 1819, took place, whether the sale was made under the provisions of that section, or under any summary process authorized by the general Regulations, the sale was subjected to the provisions of s. 11, and was consequently free of all incumbrances, except those referred to in cl. 3, and amongst others, the tenures of cultivating ryots who had engagements entered into with them by the former proprietor at rents which were as high as were demandable at the time when the engagements were entered into. Still the law which rendered the sale free from incumbrances was confined to tenures of the nature defined in s. 8, Regulation VIII of 1819, viz., tenures upon which the right of selling or bringing to sale for arrears of rent had been specially reserved by stipulation in the engagements interchanged on the creation of the tenure, and did not apply to the other class of tenures described in cl. 7, s. 15 of Regulation VII of 1799, viz., tenures saleable by the usage of the country.

4. That being the state of the law when Act X of 1859 was passed, it was enacted by s. 105 of that Act that, "if the decree be for an arrear of rent due in respect of an under-tenure, which, by the title-deeds or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force." That section in effect incorporated the provisions of s. 15, Regulation VII of 1799, and ss. 8 and 11 of Regulation VIII of 1819; and by incorporating those provisions, it enacted that all tenures of the description mentioned in s. 8, Regulation VIII of 1819, were to be sold free from incumbrances, according to the stipulation of s. 11 of that Regulation. There WAS no law in force according to the rules of which any tenures other than such as were of the nature defined in s. 8 of Regulation VIII of 1819, viz., those tenures upon which the right of selling or bringing to sale for an arrear of rent had been specially reserved by stipulation in the engagements interchanged on the creation of the tenures, were to be sold free of incumbrances. S. 105, Act X of 1859, applies not only to the class of tenures specially mentioned in s. 8, Regulation VIII of 1819, but also to those which are transferable by the custom of the country. Those which were transferable by express stipulation, and came within the class defined in s. 8, Regulation VIII of 1819, would be sold free from all incumbrances, except such incumbrances as were described in cl. 3, s. 11, Regulation

VIII of 1819. There being no provision that other tenures, not so transferable, were to be sold free from all incumbrances, they would, consequently, after the sale, be subject to incumbrances. There were two classes of tenures saleable for arrears of rent under s. 15, Regulation VII of 1799, viz., those in which the tenure was saleable by the stipulations in the title-deeds, and those which were saleable by the established usage of the country. The former only were included in s. 8, Regulation VIII of 1819; and it was only in respect of them that the sale was declared by s. 15 of that Regulation to be free from incumbrances.

5. The question is, whether the tenure in this case is one which falls within the class of tenures described in Regulation VIII of 1819, or not? No evidence was given as to the terms of the document under which this tenure was created. It appears to be referred to by the record-keeper of the Collector as having been created in August, 1847. It appears to the Court that we ought to know whether a right of sale for arrears of rent was specially reserved in the engagements interchanged on the creation of the tenure. If such a right was specially reserved, then, coupling s. 105 with the other sections to which I have referred, the Court are of opinion that the sale would be free from incumbrances. If there was no such stipulation, then it would not be free from incumbrances. We therefore think that the case ought to go back to the Division Bench, by which it was referred to us, in order that it might be ascertained whether the lease contained such a stipulation or not. If it did not contain such a stipulation, the defendant is entitled to the benefit of the solehnama, and, consequently, the plaintiff''s suit must be dismissed. If, on the other hand, the lease contains such a stipulation, then the sale under the decree was free from incumbrances, and the defendant is not entitled to the benefit of the solehnama.

6. But the defendant in his defence in this case set up that there was no bona fide sale of the tenure under the decree of the Court for arrears of rent. He set up that the decree and sale under it were all a pretence and sham, for the purpose of getting rid of the solehnama. Therefore, if it should appear to the Division Bench that there was a special reservation that the tenure was to be saleable for arrears of rent, then, having been sold free from incumbrances, the case must go back to the first Court, to raise and try the issue whether or not the decree and sale under it were bona fide or fraudulent, for the purpose of getting rid of the solehnama.

7. The law of this case does not depend merely upon our construction of the Regulations to which I have referred. There are decisions of the Sudder Court upon the construction of these Regulations, which show what was considered to be the law at the time when s. 105, Act X of 1859, was passed. The principal decision is the case decided by the Sudder Court in 1851, Satkouree Mitter v. Useemuddeen Sirdar S.D.A., 1851, 626. In that case the Court said:-- Cl. 1, s. 11, Regulation VIII of 1819 attaches extensive legal consequences, as regards the avoidance of under-leases or tenures, to sales made under the rules of that Regulation. Regulation I of 1820 applies the rules of s. 11, Regulation VIII of 1819, to sales of tenures of the nature of those described in cl. 1, s. 8, Regulation VIII of 1819, viz., ''tenures upon which the right of selling or bringing to sale,

for an arrear of rent, may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure." The gantee tenure referred to in this case does not come under the above description. The sale of such tenures is made under Act VIII of 1835, under which no powers analogous to those of cl. 1, s. 2, Regulation VIII of 1819, are conveyed to their purchasers." That decision was in accordance with the view which we have now taken of the construction of the Regulations prior to Act X of 1859. In a subsequent case of Rajkishon Dutt v. Bulbhudder Misser S.D.A., Rep., 1859, 389, Mr. Sconce, differing from the other Judges, thought that the decision of 1851 was correct, and therefore upheld it. The other two Judges, Messrs. Raikes and Loch, did not actually dissent; but they said that it was unnecessary to decide the point, as it did not arise in that particular case, inasmuch as the certificate of sale expressly stated that it was the rights and interests of the defaulting tenant alone which had been sold. That decision cannot be taken as a decision in affirmance of this view, but only as a dictum of Mr. Sconce in affirmance of the decision of 1851. Several decisions have been cited to-day as being at variance with the decision of 1851; but, in most of those cases, the point does not appear to have been raised before the Court as to whether the tenure was one which came within the meaning of s. 8, Regulation VIII of 1819, as containing an express reservation of the right to sell or not. At any rate the point was not brought to the notice of the Court, nor was the case decided by the Sudder Court in 1851 referred to. In one of the cases to which reference has been made, Dwarkanath Doss v. Manick Chunder Doss 3 W.R., 197, the matter was brought to the attention of the Judges; and though the decision of 1851 was cited, they dissented from it, and, therefore, that case is in direct conflict with the decision of 1851. Bayley and Campbell, JJ., in that decision said:-- "On a full consideration of this case, we dissent from the doctrine laid down by the decision of the late Sadder Court in the case of Satkouree Mitter S.D.A., 1851, 626 to the effect that a sale of a tenure under Act VIII of 1835 does not convey the tenure free from all incumbrances, but only the rights and interests of the debtors. Looking to the general policy of the revenue laws, to the terms of Regulation VII of 1799, s. 15, cl. 7, to those of Regulation VIII of 1819, s. 18, cl. 4, and Act VIII of 1835, also to the analogy and presumption derived from the re-enactment of those provisions contained in s. 105, Act X of 1859,-- we think that the sale of a tenure for arrears of current revenue is a good sale of the tenure itself, and carries the rights of all interested in it, giving to the purchaser the tenure in the shape in which it was originally created, and destroying all rights of all persons holding either jointly with or under the debtor as undivided sharers, or sub-tenants not otherwise protected." Although the greatest respect is due to the learned Judges who decided that case, we cannot concur with them in the reasons which they have given for dissenting from the decision of the Sudder Court of 1851. It appears to us that the case of a tenure, which is not expressly made saleable for arrears of rent by the documents by which the tenure was created, is not governed by the general policy of the revenue laws, nor saleable free from incumbrances by Regulation VII of 1799. We have shown that it does not fall within s. 8 of Regulation VIII of 1819. Act VIII of 1835 merely transferred the power of selling from the Dewanny Adawlut to the Collectors of Revenue. We cannot see what analogy or presumption can be derived from the enactment

contained in s. 105 of Act X of 1859. If Act X of 1859 was a mere re-enactment of the former laws, it does not extend the provisions of the old laws to cases which did not fall under them. Reading s. 105, Act X of 1859, as enacting that the under-tenures therein described may be brought to sale in execution of a decree for arrears of rent due in respect thereof, according to the rules "for the sale of under-tenures for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force;" and referring to those laws to which we have adverted as the laws which were then in force, and to the Sudder decision of 1851, it appears to us that, unless there was a stipulation in the documents by which the tenure was created, providing for the sale of such tenure for arrears of rent, the tenure was not sold free from incumbrances.

8. It has been argued that s. 105, Act X of 1859, must have been intended to be a general declaration by the Legislature that all sales, under the provisions of that section, were to be sales free from all incumbrances. But if we were to give that construction to the section, we should have no means of protecting that class of tenants who are protected by the proviso in cl. 3, s. 11, Regulation VIII of 1819, which was extended to sales under Regulation I of 1820 by cl. 3, s. 2 of that Regulation.

9. The question which we are determining is not so important now as it was before the passing of Act VIII of 1865 of the Bengal Council; because, by s. 16 of that Act, it is enacted that "the purchaser of an under-tenure sold under this Act, shall acquire it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives, or assigns, unless the right of making such incumbrances shall have been expressly vested in the holder, by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it, his representatives, or assigns." That section contains a proviso in almost the same words as cl. 3, s. 11, Regulation VIII of 1819. "Provided that nothing herein contained shall be held to entitle the purchaser to eject khoodkasht ryots, or resident and hereditary cultivators, nor to cancel bond fide engagements made with such class of ryots or cultivators aforesaid by the late incumbent of the under-tenure, or his representatives, except it be proved, in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rent would have been demandable at the time such engagements were contracted by his predecessor." S. 16, Act VIII of 1865 of the Bengal Council, seems to have been enacted for the very purpose of getting rid of the difficulty which has now arisen upon the construction of s. 105 of Act X of 1859. All tenures sold under the provisions of s. 16, Act VIII of 1865 of the Bengal Council, for arrears of rent, are sold free from incumbrances, but subject to the proviso in that section, which is in the same words as that contained in cl. 3, s. 11, Regulation VIII of 1819. It has been contended that, by virtue of Act VIII of 1865 of the Bengal Council, the sale in this particular instance was free from incumbrances. But s. 16 applies only to purchasers of under-tenures sold under that Act. The sale of the under-tenure in question was before that Act. That under-tenure was sold under the law as it then existed, that is s. 105 Act X of 1859. The case will go back to the Division Bench which referred it, with the above

expression of our opinion, and the document by which the tenure was created will be sent for from the office of the Collector for the purpose of being inspected by the Division Bench, who, after inspecting that document, will finally decide the case.

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(1) See Beng. Act VIII of 1869, ss. 59 and 66; see also Mir. Jansimuddin v. Sheikh Monsur Ali, 6 B.L.R., App., 150; Forbes v. Baboo Lutchmeeput Singh, 10 B.L.R., 141.