

(1878) 03 CAL CK 0015

Calcutta High Court

Case No: None

Sudder Ally and
Others

APPELLANT

Vs

Bhugwan Chunder
Dass and Another

RESPONDENT

Date of Decision: March 14, 1878

Citation: (1879) ILR (Cal) 41

Hon'ble Judges: Richard Garth, C.J; McDonell, J

Bench: Division Bench

Judgement

Richard Garth, C.J.

We do not think it necessary to go into the question, which has been fully dealt with by the Court below, as to whether there was any bona fide service of notice at all in this case. Taking for granted that everything was done upon which the appellants' pleader relies, we consider that there was no sufficient publication of the notice according to law. The Reg. VIII of 1819, Section 8, provides that the notice which the law requires to be sent in to the mofussil, is to be published by being stuck up in some conspicuous part of the cutcherry, or at the principal town or village of the defaulting talukdar. Then follow some provisions to which it is only necessary for us to allude in order that we may the better explain what we believe to be the meaning of the authorities to which we have been referred during the argument. These provisions are to the effect that the notice thus required to be published is to be served by a single peon, who is to bring back the receipt of the defaulter; on failing this, the signatures of three substantial persons residing in the neighbourhood in attestation of the notice having been published on the spot. The section, therefore, provides, first, how the notice itself is to be served or published; and secondly, what steps are to be taken for the purpose of more effectually verifying the fact of publication.

2. Let us now turn to the authorities that have been referred to, and see what they decide. The first is the case of *Raghab Chandra Bannerjee v. Brajanath Kundu Chowdhry* 9 B.L.R. 91, 14 W.B. 489, decided by Loch and Dwarkanath Mitter, JJ. It was a suit to set aside the sale of a patni under Reg. XIX of 1819 upon several grounds. The lower Courts had held that the sale was bona fide and in all respects properly conducted by the zamindar. The High Court, however, on special appeal, set aside the sale upon the ground that the notice had not been duly published according to the requirements of the section. They considered that the object of the notice was both to give information to parties wishing to purchase, and to give proper information to the defaulter, that in case the rent was not paid by a certain day the property would be sold; and as we understand their judgment, they held that the due publication of the notice in the way prescribed by the Regulation was imperative.

3. We now come to the case of *Sana Beebee v. Lall Chand Chowdhry* 9 W.R. 242, decided by Sir Barnes Peacock and Mr. Justice E. Jackson. This was also a similar suit to set aside a patni, and the Chief Justice, who delivered the judgment of the Court, says: "The material part of Clause 2, Section 8, Reg. VIII of 1819, so far as this case is concerned, is that the notice required to be sent into the mofussil shall be served. The zamindar is exclusively answerable for the observance of the forms prescribed by that clause. The subsequent part of the section, which prescribes that the serving peon shall bring back the receipt of the defaulter or of his manager, or, in the event of his inability to procure it, that he shall obtain that which by the Regulation is substituted for it, is merely directory; and if not done, does not vitiate the sale, provided the notice is duly served".

4. The due service of the notice was proved in that case; and the question was, whether the sale was vitiated by the provisions with regard to the verification of the service not being duly observed. But we think that the only reasonable inference which can be drawn from the language of the Court is that due service of the notice was essential to the validity of the sale; and that, as long as that service is effected, the provisions which relate to the verification of the service are merely directory; and that the non-observance of those provisions would not vitiate the sale, provided that the notices were duly served.

5. The next is the case of *Ram Sabuk Bose v. Kaminee Koomaree Dossee* 14 B.L.R. 394: 23 W.R. 113, decided by their Lordships in the Privy Council. There, again, there had been a proper service of the notice itself, and the only question was, whether the fact of one of the witnesses who had been called upon to verify the service not being a substantial man was sufficient to vitiate the sale. In that case their Lordships quoted with approbation the passage which we have just extracted from the judgment of Sir Barnes Peacock and agreed with it. They say: "Their Lordships are disposed to agree with the judgment of the High Court as delivered by Sir Barnes Peacock, confined as it is to cases where there is proof that the notice was duly

served". We certainly understand this to mean that the proper service of the notice is essential, although the mode of verifying it is not.

6. The only case which would seem to throw any doubt upon this view of the matter is that of *Gouree Lall Singh v. Joodhishtir Hajrah* 25 W.R., 141 decided by Glover and Mitter, JJ. In that case the notice had been served in the first instance at the cutcherry, but it was then taken down and served upon the defaulter himself; and it was contended that, under these circumstances, the service was bad. Mr. Justice Mitter held that the service was not effected as required by the Regulation; but he seemed to think that Sir Barnes Peacock had decided that actual service at the cutcherry was not necessary. His words are: "It has been decided by Sir Barnes Peacock, C.J., in the case of *Sona Beebee v. Lall Chand Chowdhry* 9 W.R., 242 that a patni sale should not be set aside for mere formal defects in the publication of this notice, if it be proved that it has been served upon the defaulter. This case has been quoted with approbation by their Lordships in the Judicial Committee of the Privy Council in the case of *Ram Sabuk Bose v. Kaminee Koomaree Dossee*" 14 I.L.R.394 : 28 W.R.113. This view of the law has been taken by a Division Bench of this Court in the case of *Sreemutty Sreemutty Dassee v. Pitambur Panda* 24 W.R.129.

7. The learned Judge goes on afterwards to say that Section 14 of this Regulation gives to the defaulter the right of contesting the validity of the sale only upon "a sufficient plea" being established, and he proceeds to consider whether in that particular case the plaintiff had established "a sufficient plea" to set aside the patni, and whether service upon the defaulter under the particular circumstances of that case was an equivalent for the mode of service required by the Regulation, and whether the defaulter had any right to complain.

8. We venture to think that the law thus laid down by Mr. Justice Mitter, and assented to by Mr. Justice Glover, is not quite in accordance with the views expressed by Sir Barnes Peacock and by the Privy Council in the cases to which we have alluded, nor with the decision of *Pontifex and Lawford* JJ. 24 W.R.129.

9. It appears to us that in all those cases the due service of the notice in the manner prescribed by the Regulation was held to be essential to the validity of the sale; and that the provisions which are considered as non-essential are those relating merely to the mode of proving or verifying that service.

10. It seems to us that it would be very dangerous to leave it open to the Court in each instance to say whether what has been done is equivalent to the mode of service prescribed by the Regulation.

11. But assuming, for the sake of argument, that the law admits of any equivalent for actual service of the notice, we consider that in this case there was no such equivalent.

12. There were here three persons whose names were entered in the zamindar's sherista as owners of the tenure. Upon one of these there was personal service of footed, another was served through one of his servants, and the third was not served at all. The only thing that can be said with regard to the third is that he admits some service having been effected upon some one some time in the month of Kartick.

13. It also appears that there were other persons interested in the tenure who were never served with any notice; so that what Mr. Justice Mitter considered equivalent to a service at the cutcherry has not been effected here.

14. The appellant has, therefore, failed to make out any case, even assuming the truth of his evidence.

15. The appeal is dismissed with costs.