
(1870) 04 CAL CK 0009

Calcutta High Court

Case No: Regular Appeal No. 271 of 1869

Ram Golam Sahi and
Others

APPELLANT

Vs

Har Gopal Das and
Another

RESPONDENT

Date of Decision: April 23, 1870

Judgement

Bayley, J.

Baboo Har Gopal Das and Hansraj Sahu are (defendants) appellants, versus Ram Gopal Sahi and others, (plaintiffs), and the Collector (a defendant), respondents. The plaintiff sued for declaration of right and for possession of various shares in Mauzas Dhoondhee Pursoram, Koshra, and Chorah; Chuck Mahamood, Molkudhwa, and Juggudispore, appertaining to a Government rent-roll talook, named "Charraoh," and to cancel a sale by the Collector, held on the 8th May 1868, to realize the fees of a Batwara Ameen. It is alleged by the plaintiffs that certain co-sharers in a fractional share of the first of the above villages, viz., Dhoondhee Pursoram, applied for a batwara, or partition, unknown to the plaintiffs, and paid the Ameen's fees. It is admitted by the plaintiffs that they did not pay the balance of the fees, and that the sale took place for the realization of such balance. The cause of action is stated to have arisen on the 10th August 1868, the date of the confirmation by the Commissioner of the sale, for cancellation of which the plaintiffs bring this suit.

2. The first allegation in the plaint is that the procedure under Act XI of 1838 has not been followed, and that the sale is therefore illegal.

3. The second allegation is that, as the Ameen's fees could not be deemed an arrear due till the batwara should have been completed, which this batwara had not been, the sale was null and void, as there could be no legal sale when there was no legal arrear.

4. The third allegation is that, when the sale took place, there was no such arrear due as is contemplated by Act XI of 1838, inasmuch as the sum due was tendered before the

sale, and accepted by the Collector in the first instance; but, notwithstanding this, the sale was subsequently held.

5. The fourth allegation of the plaintiff is that, as the applicants for the batwara were Gavind Sahaye and others who represented only a fractional share of one village, and were so separately recorded in the Collectorate, the Ameen's fees should not have been called for or treated as an arrear due from other proprietors.

6. The fifth allegation is that the share of each individual proprietor should have been adjusted and recorded, and the demand for the fees of the Ameen made accordingly, and that only the individual who did not pay could be treated as liable for an arrear; as this procedure against each individual has not been adopted, the notice passed on a different principle, and the amount of balance calculated on the same principle, and the notifications setting them forth, together with the sale proceedings, are all illegal.

7. Har Gopal Das and Hansraj Sahu, the purchasers at the sale, plead in answer: firstly, that the sale was held in accordance with the law and the rules prescribed by the Board of Revenue; secondly, that the Collector's sale proceedings and notices were in accordance with the Collector's own Collectorate records, according to which the Collector was bound to act; thirdly, that the main pleas as to the illegality of the sale, with reference to the provisions of Regulation XIX of 1814, and Act XI of 1838, were not taken before the Commissioner, and consequently, u/s 33, Act XI of 1859, could not be allowed to prevail in a regular suit; fourthly, that Act XI of 1859 provides that, when the Batwara Ameen's fees are once fixed, and are not paid, they shall be realized as an arrear of revenue by sale of the defaulter's estate on the rent-roll; and that, under Act XI of 1838, the completion of the batwara is by no means a condition of the arrear accruing so as to justify a sale; fifthly, that the Collector, after the last date fixed for payment, has a discretion to refuse or to receive the sum due up to the time of sale, and is not legally required to accept payment after a week of the last day fixed for payment (in this case, 28th March 1867); sixthly, that Mauza Dhoondhee Pursoram is not a separate estate on the Collector's rent-roll, but a component part of Mehal No. 2101 on that rent-roll; that, under such circumstances, Gavind, as coparcener of a portion of that village, was also a coparcener of the whole of the estate No. 2101; that, under these circumstances, the estate was liable to be sold on the default of Gavind, or any other recorded proprietor, to pay the Government revenue, and that an unpaid demand for arrears of batwara fees was a demand realizable by law in the same way as arrears of Government revenue are; seventhly, that the notices were legal, and plaintiff had full cognizance of the demand and of the impending sale, as he tendered payment before the sale.

8. The statement of the Government pleader for the Collector defendant was that the Government did not wish to defend the suit.

9. The Subordinate Judge, Baboo Bhupati Roy, in a careful judgment, has fully considered the pleadings. He states the points for decision to be:--

First.--The powers of the Collector to fix the expenses of an Ameen employed to effect a partition, and to call upon the proprietors of the joint estate, other than the applicants for batwara, to pay the amount before the estimated expense receive the sanction, in conformity with Act XI of 1838, and to levy the same as arrears of revenue before the division was completed.

Second.--The authority of the Commissioner to sanction the probable expense, without reference to the Government of Bengal.

10. On these questions, the Subordinate Judge decides as follows:--"The plain object of the Legislature, as is apparently clear from the preamble of the Act, was to repeal section 15, Regulation XIX of 1814, and to remedy the mischief then complained of. Section 15 alluded to was to the effect that an authorized expense, viz., percentage on the jumma of the estate was to be allowed to the Ameen; a one-third of the above percentage was to be advanced to the Ameen, before the commencement of the work; one-third on the work being half completed; and the remainder on the completion of the division." In repealing that section, Act XI of 1838 thus provides:--"It shall be lawful for the Board of Revenue, with the sanction of the Government of Bengal, to fix the expenses of an Ameen employed to effect a partition, and to cause the same to be levied from the parties concerned in the same manner as arrears of revenue, at such periods and in such proportions as the Board may think fit." The Subordinate Judge then goes on:--"The question that then remains to be solved is whether or not the demand was an arrear. I have in the first place been able to show that it was no demand at the time, as the probable expense was not fixed and determined by the Board in conformity with Act XI of 1838. It necessarily follows that there was no arrear to justify the Collector to issue notice u/s 5. It was argued that the Collector, having estimated the probable expense, appointed a day for its payment, and the amount not being paid on the day specified became an arrear. This argument, I observe, is entitled to no credit, inasmuch as the Collector had no power to call upon the proprietors to pay the expense before it was fixed and determined by the Board."

11. "In the course of argument, it was urged that the Commissioner of Revenue in certain matters enjoys the power of the Board, and therefore the Commissioner of Patna was competent to sanction the expense to be incurred for the division of the estate. To support this argument, the pleader could not point out any law authorizing the Board to transfer to the Commissioner such duties as the Board, by a positive enactment, is bound to perform."

12. "The Commissioner is an authority to superintend the Collector's works, and is the proper channel for all communications with the Board. Assuming, however, that the Board, for the sake of convenience or facility of work, delegated its power to the Commissioner (which I can hardly think is the case), and granting that the Commissioner is empowered to fix the actual expense to be incurred in effecting a partition, without referring it to the Board, or without obtaining the sanction of the Government of Bengal,

still it does not appear that the Collector could call upon the proprietors to pay the expense before it was fixed and determined by the Commissioner. The estimate, cost, and the establishment were sanctioned by the Commissioner on the 30th January 1868; and, in accordance with the sanction, no day was appointed by the Collector calling upon the proprietors to pay their quota of the expenses. I do not understand, therefore, how the Collector could consider it as an arrear due by the proprietors, and issue notice u/s 5, fixing the latest day of payment."

13. "I shall not at the same time omit to notice that, in the opinion of the Collector, this demand was an arrear recoverable as land revenue under clause 3, section 4, Regulation XIX of 1814. The section enacts that the expenses incurred in making the division are to be borne by the proprietors at large, in the proportions which the jumma of their respective shares, after the division has been completed, shall bear to the jumma of the whole estate. Now, looking into the words of the law, I venture to pronounce that the Collector could not possibly consider such demand as an arrear, unless and until the division has been completed."

14. The Subordinate Judge concludes:--"Under all the circumstances, I am decidedly of opinion that the Collector had no power to fix the expenses in effecting the partition; that he was not legally competent to call upon the proprietors of the estate to pay their quota of the expenses, before the estimated expense was determined by the Board, with the sanction of the Government of Bengal; that the demand, for the recovery of which the Collector sold the estate, was not an arrear before the completion of the division, and therefore the Collector acted without authority, and consequently without jurisdiction in holding the sale of plaintiff's estate."

15. "It was contended for the defendant that the plaintiff who appealed to the Commissioner, u/s 26, Act XI of 1859, was debarred, by section 33 of the Act, to advance new pleas to contest the legalities of the sale. To this contention I do not altogether subscribe, for the sale which had a bad beginning cannot have a good end. If the Collector had no authority to hold the sale for the reasons stated above, it must, as a matter of course, become void, and the fact of the plaintiff's appealing to the Commissioner does not and cannot make the sale good, or stop or conclude the plaintiffs from advancing pleas other than those urged before the Commissioner to contest the legalities of the sale."

16. "The decision in [Bajinath Sahu and Others Vs. Lala Sital Prasad and Others](#) should be referred to, which holds that the Civil Courts are competent to entertain a suit for the cancelment of a sale on the ground of illegalities, although the party seeking the relief had not appealed to the Commissioner."

17. "The conclusion, therefore, is that the provisions of Act XI of 1859 do not apply to the plaintiff's case. The third issue, I observe, is no more necessary for the purpose of this case."

18. The Subordinate Judge having decreed the plaintiff's suit, the defendants, auction-purchasers, appeal on the following grounds:--

Firstly.--The lower Court is wrong in holding that the Collector had no authority to apportion the fees of a Batwara Ameen.

Secondly.--That the power conferred by Act XI of 1833 on the Government, and that conferred upon the Board of Revenue, has been delegated to the Commissioner of Revenue, hence the lower Court is wrong in this case to hold that the Collector had no jurisdiction to hold the sales.

Thirdly.--The precedent quoted by the lower Court does not apply to this case, for in the Full Bench case, a Civil Court having declared that the plaintiff was not to be liable for any expenses of batwara, there was nothing due from him, which was recoverable as arrears of Government revenue. But that here it is clear that the plaintiff was liable for something realizable from him as arrears of Government revenue, being his quota of the batwara expenses, therefore the lower Court has erred in holding that the plaintiff's claim should not have been entertained at all under the provisions of section 33, Act XI of 1859, as these points had not been raised before the Commissioner of Revenue.

19. It is admitted before us that there was the tender of payment before the sale as alleged; that the amount to be paid, if in arrear, was, as stated by the Collector, rupees 241; that the statement notifying the arrears to be payable on the 28th March was dated the 6th. And here I may observe that some stress was put upon the Board's Circular Order of the 30th August 1854 (batwara series), and in the book of Mr. Chapman, Secretary to the Board, paragraph 8, page 50, as indicating 30 days as the period of notice, whereas the above interval was only 22 days. But the law enacts that, not less than 15, and not more than 30, days shall be the interval Act XI of 1859, s. 6. The Board's Circulars may be intended as guides for the Revenue Officers subordinate to the Board of Revenue, in matters of revenue administration, but the Circulars or Rules are not law for Courts of law, or even law for Revenue Officers when sitting judicially.

20. As to the payment before the sale, I am of opinion that there was no illegality in refusing it, whatever absence of administrative discretion there might be, even on the very grounds stated by the Collector and Commissioner for refusing to take the payment in this case.

21. The main question before us is one of law, viz., whether the Collector acted in conformity with Act XI of 1838 so as to justify his treating the demand for rupees 241, unpaid Batwara Ameen's fees, as an arrear of revenue, and selling the whole estate as under Acts XI of 1838 and XI of 1859. If this first and main question be answered by us in the negative, then the other grounds of appeal need not be considered.

22. Now I do not hold that the Board must, under Act XI of 1838, obtain the sanction of the Deputy Governor of Bengal in every case, and I think a general "sanction" would be

within the purview of the law. Next, if Government has given a general sanction to the Board of Revenue, then the Board can, I think, make a general order, declaring in what sums, from whom, and at what period payable, the remuneration of the Ameen shall be levied.

23. Now there is an order of the Deputy Governor of Bengal to the Board of Revenue (dated July 15th, 1840, No. 24) printed in Volume 2, page 10, Jones's Circular Orders, conveying the instructions of the Deputy Governor to the Board sanctioning batwara establishments. The larger term "establishments" includes, I think, the minor details, viz. the amount of fees, and the period and apportionment of their realization, all which are necessary under the law to put in form, and to render operative the "establishments" in question.

24. The Board have, however, to sanction in each case the establishment estimated in the statement to be prepared by the Collector for the purpose, and then that establishment has to be fixed by the Commissioner. This statement shows the amount of fees, the periods at which it is due, and from whom, and in what proportions. If, after this has been done by the Commissioner, the sanction of the Board is accorded, then, I think, under the provisions of Act XI of 1838, the amount of Ameen's fees not paid on demand according to the Collector's statement so fixed by the Commissioner, and sanctioned by the Board, would become an arrear of revenue liable to be realized by sale in the same way as an arrear of Government revenue.

25. I further think that the Subordinate Judge is wrong in holding that such unpaid amount is not an arrear until after completion of the batwara. Such it is true, appears to have been the law as laid down in clause 3, section 4, Regulation XIX of 1814. But the subsequent Act (XI of 1838) supersedes that law. The later law states that the Board, with the sanction of Government, may cause such remuneration (of a Batwara Ameen) to be levied at such periods, or by such apportionment, as the Board may decide. But in this case it is not shown to us that the Board's sanction was ever obtained, or that the Commissioner ever fixed the establishment. The Collector's tabular statement has an unattested note to the effect that the Commissioner passed the establishment proposed by the Collector in that statement, by a letter of the 30th July 1868, but no such letter is shown us, nor is any legal evidence of such act of the Commissioner placed, or attempted to be placed, before us. This is itself to my mind one fatal objection to the sale, for all admit that at least the Commissioner's sanction is necessary.

26. We are referred to the marginal note of paragraph 5, page 49 of Mr. Chapman's book, which says:--"Commissioners may sanction establishment subject to formal sanction." But Act XI of 1838 does not say so. As before observed, the law is to be found in the Act of the Legislature, not in the handbook (however ably arranged) of administrative details prepared "by order of the Board of Revenue."

27. Going however further, I hold that the Commissioner's sanction, had it been legally shown to have been given, would not have been enough by law, because I think that, under Act XI of 1838, the Board's sanction is absolutely necessary. Regulation I of 1829 did give Commissioners the powers of the Board to a large extent, but here we have Act XI of 1838 subsequently enacting especially that, as to batwara establishment, and the amount and proportion and proper time of realizing fees for such establishment, the Board's sanction is necessary. Now in this case the Board's sanction is not shown to have been conveyed to the Commissioner or the Collector for the statement fixing the batwara establishment, that is, the Ameen's fees, their amount, periods of realization, and the proportion in which, and parties from whom, they were to be levied. I hold then that the sale, as for arrears of Government revenue, for the balance set forth as due as fees in that statement, is illegal under Act XI of 1838; in other words, that there is no legal arrear u/s 5, Act XI of 1859, and consequently no legal sale at all.

28. In this view it is unnecessary to go into what would be the effect of section 33, Act XI of 1859, as to the plaintiff not having appealed on certain points to the Commissioner. The same remark applies as to other subordinate pleas raised in the arguments on both sides.

29. I would affirm the judgment of the Subordinate Judge, and set aside the sale by the Collector, The defendant to pay all costs.

Markby, J.

30. In this case, as is most frequent, and I must say, as I think, by a practice which is most objectionable, notwithstanding the very complicated nature of the proceedings which we have to consider, no part of them has been laid before us during the argument, and I should have been scarcely able to express any opinion at all in this case, had it not been for the courtesy of the pleaders who have supplied me with their own translations since the case was argued.

31. As far as I can understand, on the 12th June 1867, Gavind Sahaye and others, proprietors of a one-third share of mauza Dhoondhee Pursoram, one of the eight mauzas of Mehal Charraoh, applied for a partition under Regulation XIX of 1814. On the same day, the Collector issued a notice to all the shareholders, calling upon them to come in within one month, and shew such cause, and offer such objections, and make such representations as they should think fit. Mussamat Ganga, proprietor of a half share in Phoolwara, another mauza in the same mehal, made a similar application. Panchowry Sahaye, the proprietor of 1 anna 4 gandas share of Charraoh, a third mauza in the same mehal, made a similar application. And lastly, Fati Narayan Sahaye, the proprietor of 17 gandas 8 krants share in the last mentioned mauza, made a similar application. Notice of the first of these applications was served upon the plaintiffs, who are owners of shares in several of these mauzas, but they appear to have done nothing in respect to it; nor did they take any part, as far as I can discover, in the matter, either to assist or impede the

partition.

32. The proceedings for a partition appear to have been based on all of these applications; and on the 19th August 1867, the Collector drew out a tabular statement, purporting to be in pursuance of section 4 of Regulation XIX of 1814. In this the particulars of the property which is to be divided are mentioned. In the column which contains the "Names of Proprietors," the above mentioned applicants are described as first, second, third, and fourth petitioners respectively. Ram Golam Sahaye and others are described as one set of defendants, and Deon Roy and others are described as a second set of defendants. The name of the Ameen is then given, and the amount of personal allowance which he is to have. Then comes the amount of commission, which is directed to be paid as soon as the advertisements are issued; and then follows the column which is the important one for this case, which professes to give the shares into which the expenses are to be divided. On the same day a notice was issued to the proprietors, ordering them to pay their respective quotas of expenses accordingly.

33. The apportionment of expenses is said to have been confirmed by the Commissioner on the 20th of January 1868. It never received any other confirmation prior to the sale hereinafter referred to.

34. On the 6th March 1868, an order was made by the Collector, founded on a schedule in which the names of the plaintiffs appear as defaulters for two sums, rupees 251-3-2, and rupees 9-9-6, that a proclamation should be issued in accordance with paragraph 4 of section 5 of Act XI of 1859, directing the defaulters to pay the Government revenue, by which, no doubt, was meant the expenses of this partition, on Saturday the 28th March 1868, and such proclamation was accordingly issued.

35. After this date had expired, one of the plaintiffs came in and offered to pay all that was then due and outstanding for the expenses. At that time no expenses had actually been incurred, and the Collector ordered the amount to be deposited, and said that he would pass a proper order before the day of sale. On the 8th April, the day fixed for the sale, the Collector held that there were "no valid grounds for the neglect to deposit the oonda. The notices were first issued in July 1867, and the plea now put forward (by the applicants) that they were on a pilgrimage, is admittedly an absurd one, as they allow that they only started on this pilgrimage 1■ months ago. It is very necessary to put a stop to the delays that are put in the way of batwaras by those who object to them. Application rejected." The sale accordingly proceeded, and the whole interest of the plaintiff's mal in the mauza, was accordingly put up for sale, and sold for rupees 16,900.

36. The plaintiff then appealed to the Commissioner, who seems to have received some report from the Collector on the subject, and he states that, under the circumstances reported by the Collector, he declines to interfere. He says:--"The misl has been carefully inspected, and no irregularity appears upon the papers. The case may appear hard at first sight, but it is a common thing in these batwara cases for maliks to withhold payment

of oonda, simply to give trouble and annoyance, and prevent the completion of the batwara proceedings. It is such conduct as this on the part of proprietors which keeps these batwara cases on the file for years and years. Appeal dismissed."

37. The plaintiff accordingly brought this suit, to recover from the purchaser the property sold, and the Subordinate Judge of Tirhoot has, for reasons which I consider sound and satisfactory, held the proceedings of the Revenue authorities to be wholly irregular; that there was never any apportionment of the expenses by the proper authorities, and consequently no arrear for which the property could be sold.

38. Besides the very important interests at stake between the parties, the question which arises in this case is one which requires a very careful consideration, because it shows that the Revenue officers take a wholly different view of the procedure to be adopted in these batwara cases and the powers which they possess from that taken by the Subordinate Judge, by myself, and, I believe, by Mr. Justice Bayley also. In the Regulation (I of 1793) in which the general policy to be followed in revenue matters is declared, Government, as might naturally be expected, contemplated the necessity which would arise from the subdivision of estates which were then assessed singly, of apportioning the revenue between the several owners. That Regulation does not, however, seem to contemplate that the officers of Government would take any part in the division of an estate between shareholders, but only that, when a division had been made, that the Revenue authorities should be informed of it, in order that the revenue might be properly apportioned upon the several shares into which the estate was divided. But in the special Regulation of the same date (Regulation XXV), it is directed (section 4, clause 1) that not only the apportionment of the revenue, but the division of the estate itself, is to be made by the Collector. By clause 1 of section 4, if all the proprietors do not join in the application for a division, the expenses of the partition are to be borne by those who apply in the proportion of their shares: substantially the same provisions are made by Regulation XXVI of 1803, section 32, clause 1. Both these provisions are repealed by Regulation V of 1810, and it is provided by section 3, clause 2, that in all cases the expenses of the partition are to be apportioned between all the proprietors in proportion to their jummas; and if they are not paid as apportioned, they are to be levied by the same process against defaulting proprietors as is prescribed for levying arrears of revenue.

39. All these Regulations are repealed by Regulation XIX of 1814, but the provisions of Regulation V of 1810, section 3, clause 2, are substantially re-enacted by section 4, clause 3 of the new Regulation. By section 15 of this Regulation, a scale is laid down for the expenses and remuneration of the Ameen. It is not very clear on these provisions, whether the Collector or the Board is the authority which is to fix and apportion the expenses. All the proceedings of the Collector, however, are to be reported to the Board, and only "authorized" expenses can be apportioned. I imagine, therefore, that the expenses must have been authorized by the Board under this Regulation.

40. Section 15 of this Regulation is repealed by Act XI of 1838, but not section 4, clause 3. By section 2 of this Act, the Board of Revenue, with the sanction of the Governor (now Lieutenant-Governor) of Bengal, is to fix the remuneration of an Ameen or other persons employed to effect a partition of an estate under the Regulation enacted for that purpose, and to cause the same to be levied from the parties concerned in the same manner as an arrear of revenue at such period and in such proportions as the Board may think fit.

41. I have some difficulty in discovering what view the Board of Revenue and the Government of Bengal took of their duties under this provision of the Legislature. Up to the year 1850, I cannot discover that anything at all was done beyond generally directing Collectors to do their duty. In the year 1850, however, a letter was written to the Commissioner (6th December 1850, No. 76), which reprobates the practice of receiving the whole expenses from the applicant shareholders, as provided for by Regulation XIX of 1814, section 4, clause 3; and orders that, to obviate this, the direction to all the proprietors to contribute to the expenses should be made at the date of the application for partition. It is admitted that this will lead to delay, but it is pointed out that justice renders submission to delay unavoidable.

42. This Court does not possess copies of the orders of the Board of Revenue of the years 1852 and 1853, but that just now stated as well as a great many previous and subsequent orders were rescinded by an order of the 30th August 1854. This directs the Collector to make to the Commissioner a preliminary report in the form of a tabular statement, and the Commissioner is declared competent to authorize the entertainment of the necessary establishments for the partition of any estate, and to fix the amount of remuneration to be allowed, furnishing quarterly statements for the eventual sanction of the Board. The Collector is directed to estimate the expenses likely to be incurred; and when the amount and time of collection have been determined, notices are to be served on the proprietors, informing them that a batwara has been applied for, of their liability to pay a quota of the expense; and informing them also that, unless they do so, their interest in the estate to be divided will be liable to sale. The tabular form annexed to the order contains no column for the apportionment of expenses, but it was probably intended that this should be included in the Collector's report.

43. Subsequently the Secretary of the Board of Revenue, with the authority of the Board, published a collection of the Board's Rules, in which the order of 30th August 1854 appears, but with important modifications. The form in which the Collector is to report to the Commissioner contains a column for the proportions in which it is "proposed" to levy the remuneration of the Ameen, and the eventual sanction of the Board which is to be given to the expenses, and the apportionment is described as "formal" only.

44. How far these orders of the Board of Revenue were made with the concurrence or sanction of the Lieutenant-Governor of Bengal, does not appear from anything that is laid before us.

45. I find the same difficulty about gathering from these orders the view which is taken by the Board of the respective duties of the Commissioner and Collector, as I do in ascertaining what view they take of their own. No evidence or statement as to the practice of the Revenue Courts has been laid before us, but I suppose I must assume it to be that which the Collector has adopted in this case, which, as I understand it, is this. He has treated his notices to the shareholders to pay their respective quotas of expenses as sufficient to constitute such a demand as will render defaulters liable; provided only that his report is subsequently adopted by the Commissioner. I am also inclined to think that this is the practice which the Board intended its officers to adopt.

46. I am, however, of opinion that such a practice is not in conformity with the provisions of the law. As I have already said, section 4 of Regulation XIX of 1814 appears to me to treat the proceedings of the Collector, in ascertaining and apportioning the expenses, as undertaken solely for the information of his superior authorities. At any rate this is clearly the nature of his proceedings after the passing of Act XI of 1838, and they are so treated by the Board's Rules issued in 1854. The proceedings of the Collector, therefore, cannot in any way constitute a demand which will create a debt due from the shareholders; and under the orders which it has been thought fit to issue (though I do not at all intimate that a more simple and convenient course might not have been adopted), I think nothing is due until the remuneration of the Ameen has been sanctioned by the Board of Revenue, and by the Lieutenant-Governor of Bengal, and the time at which the expenses are to be levied, and the proportions have been sanctioned by the Board of Revenue. It seems to me that the Lieutenant-Governor has expressly reserved his control over these expenses by the Circular Order of July 15th, 1840, the Board of Revenue being authorized to sanction batwara establishments, but subject to the eventual orders of Government, on the submission of a general half-yearly statement. I do not think any one has a right to treat the sanction of the Lieutenant-Governor, or of the Board of Revenue, as merely formal, so as to make it a matter of indifference whether that sanction has or has not been obtained. It is true that the powers possessed by the Board were transferred to the Commissioners by Regulation I of 1829, but it is only the powers then possessed by the Board of Revenue, and until otherwise provided by law. There was not, therefore, in my opinion, even until the date of sale, any such sanction of the demand on the plaintiff as would constitute a final determination of the amount, or date of payment or not, and therefore there could be no arrear.

47. But I also think that even if the sanction of the Commissioner had been sufficient, and could be considered as having finally determined the amount due from the plaintiffs, and the date of payment, still there was no arrear until there had been a second demand of the amount from the parties liable, after this final determination had been come to. This claim on the part of Government is not like a claim for an arrear of revenue, the exact amount and date of payment of which the parties know before hand, but it is a matter of estimation and calculation, and I do not think that there can be said to be any default, until after the amount due from each person or set of persons is finally ascertained, the date of

payment finally fixed, and a demand made in accordance therewith. It was contended that the proclamation of the 6th March 1868 was a sufficient demand; I do not think so. There is no information contained in it that the final determination of the Commissioner (even supposing it to be final) has been come to. Moreover I understand it to be the opinion of Mr. Justice Bayley, and in this I concur, that, before action can be taken u/s 5 of Act XI of 1859, there must be an arrear, whereas when this proclamation was issued there was no arrear, this being the first demand after the amount had been finally ascertained.

48. In addition to these grounds, it was contended that there was no evidence that the report of the Collector had been sanctioned by the Commissioner. The Subordinate Judge found that it was so sanctioned, and a memorandum to that effect appears upon the Collector's report. I should not be inclined to disturb the Subordinate Judge's finding on this point.

49. It was also contended that the reasons given by the Commissioner and the Collector for refusing to accept payment when tendered u/s 19 of Act XI of 1859 were altogether insufficient, and such as ought not to have influenced them in exercising their discretion. The facts of this part of the case as stated are, as it appears to me, not a little extraordinary, and I have had a good deal of hesitation in accepting them as true. They have, however, not been denied, though the Collector, and through him the Government, is a party to the suit. For the purposes of this case, therefore, I must accept them as true.

50. As we are informed, long before the day of sale, above half the expenses of the batwara had already been placed in the hands of the Collector. Notwithstanding this, however, nothing had been done towards the division of the estate, though it may be fairly supposed that there was sufficient in hand to carry that proceeding a good way towards completion. Even had there been any risk of exceeding that amount before notice could be given that the funds were exhausted, the Collector had always in reserve the power of recovering it by the sale of property, which was worth, as it turns out, sixty times the amount. I can conceive no reason, therefore, why this batwara should have been delayed a single day, and none is assigned by the Collector or Commissioner. It seems rather as if the plaintiff were treated as contumacious in not obeying the order for payment of his quota, and that the tender was refused by way of punishment as an example to others. I am most unwilling to adopt this view of the proceedings, but I can see no other interpretation of the words in which the decisions are expressed when taken with reference to the facts laid before us.

51. It is of course quite clear that the very extraordinary powers put into the hands of Revenue officers were never intended, even in the case of a default in payment of revenue, to be used for any other purpose than for the protection of Government from loss, and then only so far as was actually necessary; and in cases where nothing was really due to Government, as in this case, and Government is, as far as I can see, in no way interested one way or other in carrying on the proceedings, it is obvious that the powers ought to be exercised with still greater caution. But though the power of

exemption given to the Collector and to the Commissioner, by section 18 of Act XI of 1859, no doubt makes it incumbent on these authorities to hear and decide upon any application for exemption which may be made by the defaulting parties; and though I cannot accede to the views taken by those authorities as to the mode in which that application was to be considered, I do not think that the error complained of in disposing of such an application could be said to vitiate the sale. Lastly, it was contended that there never had been, even by the Commissioner, any such apportionment of the expenses as the law requires. I think there has not. In the tabular statement submitted to the Commissioner, and which is relied on as the apportionment, I find in the column headed "Names of Proprietors," the following:--"Gavind Sahaye, Kali Charan Sahaye, Dayal and Udit Narayan Sing, first petitioners; Mussamat Gangapat Koer, second petitioner; Ram Charan Sahaye, third petitioner; Ram Golam Sahaye and others, defendants; Bandhu and others, petitioners; Deon Roy and others, defendants." In the column headed Shares of Oonda, I find the following:--"First share, rupees 4-12-10; second share, rupees 33-11-9; third share, rupees 18-1-8; fourth share, rupees 471-6-10; first share, rupees, 4-6-3; second share, rupees 24-13-9." From this it might possibly be inferred that the persons described as "Ram Golam Sahaye and others, defendants" were to pay rupees 471-6-10. But in the notices issued, the sums required are altogether different, namely, rupees 376-14-11, rupees 15-9-5, rupees 14-6-4, rupees 53-13-0, rupees 33-11-8, respectively. In these notices, the name Ram Golam Sahaye appears twice. He is called upon, together with a number of other persons who are named, to pay two sums of rupees 376-14-11 and rupees 14-6-4. I cannot reconcile this with the apportionment in the Collector's report. Two other tabular statements were laid before us, which we have not been able to find upon the record, but which were suggested as reconciling the report with the notices issued. They do so to some extent, but not fully; and even if they did so fully, they would show either that the apportionment submitted to the Commissioner was incomplete, or that it had been subsequently modified. The defendants, therefore, have failed to satisfy me on the evidence before us that the sums actually demanded were sanctioned even by the Commissioner.

52. I think therefore that this sale is absolutely void, on the ground that there never was any arrear for which the estate could be sold. I think the sanction of the Commissioner is not sufficient for a demand, which on default may be treated as an arrear of Government revenue; and even if the Commissioner's sanction were sufficient, I think there was no arrear when the sale proclamation of the 6th March was issued, and that disobedience to that proclamation did not create one; and further that the arrear which is alleged to be due by that proclamation is not any portion of a demand which had been sanctioned even by the Commissioner.

53. It was contended that these objections were not taken in the appeal which the plaintiff made to the Commissioner after the sale had taken place, and therefore they could not be entertained by this Court by reason of the provisions of section 33 of Act XI of 1859. But I think, for the reasons stated, that there was no arrear; and it was hardly contended

that in this view this case could be distinguished from the decision in [Bajinath Sahu and Others Vs. Lala Sital Prasad and Others](#), where it was held that, as nothing was due, the Revenue authorities had no jurisdiction to proceed to a sale. For these reasons, I think, the appeal ought to be dismissed with costs.