(1890) 01 CAL CK 0007

Calcutta High Court

Case No: None

Hurri Churn Mozoomdar	APPELLANT
Vs	
Ahsanulla Khan Bahadoor	RESPONDENT

Date of Decision: Jan. 31, 1890

Citation: (1890) ILR (Cal) 474

Hon'ble Judges: Norris, J; Macpherson, J

Bench: Division Bench

Judgement

Norris and Macpherson, JJ.
The Subordinate Judge upon a consideration of the whole of the evidence gave the plaintiff a decree setting aside the sale. And his judgment is based upon the ground that the notice required to be published in the mofussil upon the land or at the kutcheri of the defaulting putnidar was not, as a matter of fact duly published.

2. Against that decision the defendant has appealed to this Court. I shall presently consider the judgment of the Subordinate Judge and the evidence which has been given by the defendant to prove the due publication of the notice in the mofussil. But whilst we are of opinion that the view taken by the Subordinate Judge of that evidence is not correct, we are still obliged to arrive at the conclusion that this decree must be upheld, upon a ground to which I shall presently refer. It will be convenient probably in the first place to deal with the points which were argued by the learned Counsel for the respondent, Mr, Woodroffe, in support of the judgment.

3. One objection of Mr. Woodroffe was that the petition which has to be presented to the Collector under Clause 2 of Section 8 of Regulation 8 of 1819 under which the sale was held, or rather under Clause 3 of Section 8 of that Regulation, that is, the petition containing a specification of the balance of arrears that may be due, ought to have been filed on the 1st Kartick, whereas, as a matter of fact, it was not filed until the 2nd of Kartick. We think that no force can be attached to this objection. The petition could not be received before the 1st of Kartick, because the rent which is in arrears and for which the putni is put up for sale has to be made up to the last day

of Assin. We think that that portion of the section is directory merely. The Collector is put in force by the presentation of that petition. The 1st Kartick 1293 fell upon a Sunday, and we think that the petition was properly received on the 2nd Kartick. No injury, as it seems to us, could possibly ensue to the putnidar, or to the dur-putnidar or to the mortgagee, if there existed a durputni or mortgage, by the non-presentation of the petition on the exact day specified.

4. It was further urged by Mr. Woodroffe that non-compliance with the provisions of the Regulation which require that the petition shall be stuck up in some conspicuous part of the kutcheri was fatal to these proceedings. We think, to use the words of the Privy Council in the case of the Maharani of Burdwan v. Krishna Kamini Dad ILR Cal 371, that this publication of the petition is not a substantial portion of the process to be observed by the zemindar. No injury could result to the putnidar or any one holding under him by the non-publication of this petition, which, as I have already pointed out, is only the method prescribed by the Regulation for putting the executive machinery in force. Further, it is to be observed (though we are not inclined to lay very much stress upon this) that the provisions of Clause 3, of Section 8 do not appear to be so stringent as those of Clause 2 of the same section.

5. Another point urged by Mr. Woodroffe was that there was no certificate of the Munsif as required by this section of the Regulation. We think that this objection too fails. The section says: "In case the people of the village should object or refuse to sign their names in attestation, the peon shall go to the kutcheri of the nearest Munsif or, if there should be no Munsif, to the nearest thana, and there make voluntary oath of the same having been duly published, certificate to which effect shall be signed and sealed by the said officers and delivered to the peon." We think that "certificate to this effect" means a certificate to the effect that the peon did come before the Munsif or Police officer, as the case may be, and did make voluntary oath as to the service of the notice: and, as pointed out by Mr. Evans for the appellant, this provision of the section would be fully complied with if the peon went before the Munsif or Police officer and made a deposition upon oath, and if the Munsif appended at the foot of that deposition a statement to the effect that the deponent had that day made that deposition in his presence, that would have been, we think, a certificate within the meaning of el. 2 of Section 8. And if, as in this case, the peon went before the Munsif with an affidavit which had been prepared and sworn to, the jurat of the Munsif would have been as much a certificate as if the peon had made a deposition on oath and the Munsif had recorded the fact of his so having made the deposition on oath.

6. The next point taken by Mr. Woodroffe is that, supposing for the sake of argument, we should hold that notice was, as a matter of fact, served as required by the provisions of the Regulation in the mofussil, upon the land of the defaulting putnidar, and at the Collector''s kutcheri, the notice in this case is a bad notice. This objection, we think, is well sustained. Clause 2 of Section 8 of the Regulation says:

"On the first day of Bysack, that is, at the commencement of the following year from which the rent is due, the zemindar shall present a petition to the Collector, containing a specification of any balances that may be due to him on account of the expired year, from all or any talukdars or other holders of an interest of the nature described in the preceding clause of this section. The same shall then be stuck up in some conspicuous part of the kutcheri, with a notice that, if the amount claimed be not paid from the first of Jeth following, the tenures of the defaulters will on that day be sold by public sale in liquidation. Should, however, the first of Jeth fall on a Sunday or holiday, the next subsequent day, not a holiday, shall be selected instead; a similar notice shall be stuck up at the Sudder kutoheri of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the kutcheri or at the principal town or village upon the land of the defaulter. The zemindar shall be exclusively answerable for the observance of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter, or of his manager, for the same, or, in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot." Clause 2 having dealt with the case of bringing a putni to sale for arrears of rent extending over a whole year, Clause 3 deals with mid-year sales, and says: "On the first day of Kartick, in the middle of the year, the zemindar shall be at liberty to present a similar petition, with a statement of any balances that may be due on account of the rent of the current year, up to the end of the month of Assin, and to cause similar publication to be made of a sale of the tenures of defaulters, to take place on the 1st of Aughran, unless the whole of the advertised balance shall be paid before the date in question, or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick, to less than one-fourth or a four-anna proportion of the total demand of the zemindar, according to the kistbundi, calculated from the commencement of the year to the last day of Kartick."

7. Now it is apparent that there is a very wide difference between what is to be contained in a notice served under Clause ''2, and what is to be contained in a notice served under Clause 3. Under Clause 2 the defaulting-putnidar and the dur-putnidar and all encumbrancers and the public are to learn from an inspection of the notice served upon the land of the defaulting-putnidar, and at the Collectorate kutcheri and on the kutcheri of the zemindar who is bringing the putni to sale, that the tenure will not be released from sale unless the whole year''s arrears are paid So that if any person wants to buy the putni as a speculation, or the putnidar wants to release it from sale, or the dur-putnidar or encumbrancer wants to release it from sale in order to preserve their respective securities, they know that none of them can do what he wishes to unless he is willing to pay the whole year''s arrears But the Legislature says that if the zemindar chooses to make use of the provisions of this,

what 1 may call, highly penal regulation in respect of arrears of rent for six months, it will not deal so harshly with the defaulting-putnidar, as it does when the zemindar wishes to make use of the regulation in respect of a year''s arrears of rent; for a putni may be released from sale on payment either of the whole arrears or of 75 per cent, of it, that is to say, 75 per cent, of the arrears due up to the end of Assin, and 75 per cent, of what has accrued due from the end of Assin to the end of Kartick, that is, 75 per cent, of another month''s rent.

8. Now, the Privy Council have, as we think, distinctly laid down that a substantial compliance with the substantial portions of this Regulation is a condition precedent to the right of the zemindar to bring the tenure to sale under the provisions of the Regulation, and that non-compliance with any one of the substantial requirements is, in the words of Section 14, which allows the putnidar to sue to set aside the sale, a "sufficient plea."

9. The notice in this case is as follows: (reads notice ante p. 476). As I have already pointed out the object of the publication of this notice is to give not only to the defaulting-putnidar but dur-putnidars, mortgagees and other encumbrancers notice of the sale. It may well be that the putnidar, dur-putnidar, mortgagees or other encumbrancers would have available for the purpose of saving the estate from sale 75 per cent, of the arrears due, but not the whole. Take an illustration; supposing the arrears amount to a lakh of rupees, a putnidar, or dur-putnidar, or mortgagee, or other encumbrancers, may have 75,000 rupees in his pocket, or lying with his bankers, or in Government Promissory notes on which he could raise a loan, and release the property from sale, but he may not have the whole amount. The object being to allow all persons interested in saving the tenure from sale an opportunity of doing so, we are of opinion that if the zemindar chooses to bring into operation the provisions of Clause 3, Section 8, and to get a half-year''s rent by means of this Regulation, he must strictly comply with the conditions laid down in the section. We think that all the requirements in Clause 2 of Section 8 must be imported into Clause 3 of that section mutatis mutandis: and therefore we think that the service of the notice is a condition precedent to the sale being held, and that the notice so served must be a good notice, that is to say, it must be a notice which shall put all parties concerned in saving the tenure from sale in possession of the knowledge of what really they will have to do if they desire to save the tenure, and would-be purchasers in possession of information as to the amount they will have to spend if they wish to purchase the property. We are therefore of opinion that this notice was not such a notice as ought to have been stuck up under the provisions of the Regulation: and therefore upon that ground the decree must stand. (The learned Judges then considered the evidence as to the publication of the notice, and came to the conclusion that the notice had been duly published, and continued):

We therefore think that the ground upon which the Subordinate Judge has proceeded in setting aside the sale is an erroneous one. But as I have already said,

we think that the ground that the notice was bad in law is a substantial ground, and that upon it the appeal must be dismissed with costs.

10. The result is that the decree must he affirmed, though not upon the ground on which the Subordinate Judge has based it.

11. The appeal is dismissed with costs.