

(1942) 07 CAL CK 0010
In the Calcutta High Court

Gaibandha Loan Office Ltd.

APPELLANT

Vs

Mt. Saiyadunnessa Khatun and Others

RESPONDENT

Date of Decision : 27-07-1942

Acts Referred:

Evidence Act, 1872 — Section 35

Public Demands Recovery Act, 1918 — Section 22, 23

Citation : AIR 1943 Cal 114

Judgement

1. One Gour Benode Choudhry was a part proprietor of Touzi No. 668 B (1) of the Rangpore Collectorate. He borrowed money from the Gaibandha Loan Office (hereafter called the bank) by mortgaging 36 mauzas of the said zamindary. The said bank enforced its mortgage and got a final decree for sale before the year 1928. In 1929 the mortgaged properties were sold in execution of that mortgage decree and purchased by the bank but the sale was set aside and there has not been any sale since then in execution of that decree. On 3rd June 1929 Gour Benode sold by five kobalas specified villages of the said zamindary to the five plaintiffs - namely, 23 villages to plaintiff 1, one village to plaintiff 2, one village to plaintiff 3, five villages to plaintiff 4 and 20 villages to plaintiff 5, Ajimuddin Mia Pahlowan. Plaintiff 1 is the wife and plaintiff 4 is a son of plaintiff 5. Out of the DO villages so sold, plaintiff 5, his wife and his son purchased 48 villages between them and the remaining two villages were purchased by the other two plaintiffs who are very near relatives of plaintiff 5.

2. It appears that the proprietors of the said touzi, including the plaintiffs, did not at times pay revenue and cesses with the result that the bank had to pay the revenue on some occasions to save the property from revenue sale. There were arrears of cesses for a number of kists and for the realisation of the same the Collector filed certificates under the Public Demands Recovery Act (3 of 1913). One of the certificates was for the arrears of cess for the March kist of 1930. It was numbered certificate Case No. 57 of 1930-1931. The arrears claimed therein amounted to Rupees 181 odd. In execution of this certificate, the mortgagee, namely the bank, purchased the right, title and interest of Gour Benode and of

the five plaintiffs on 5th August 1931 for Rs. 800. The said sale was confirmed after an ineffectual attempt by plaintiff 5 to set it aside under Sections 22 and 23, Public Demands Recovery Act (3 of 1918), and possession was delivered to the purchaser on 17th May 1932. The suit in which this appeal arises was filed on 23rd June 1933, that is, beyond one year of the date of the delivery of possession. The principal defendants to the suit are (1) the bank, that is the Gaibandha Loan Office and (2) the Secretary of State for India in Council. Gour Benode has also been made a defendant, but admittedly he has no interest in the litigation. The suit is based on two grounds. The plaintiffs say firstly, that the sale under the Public Demands Recovery Act is bad inasmuch as the notice u/s 7 of the said Act had not been served on them. Their alternative case is that there was fraud on the part of the auction purchaser, the bank. On these grounds they pray for recovery of possession of the fifty villages which they had purchased in 1929 from Gour Benode. The learned Subordinate Judge has negatived their case of fraud, but has accepted their case of non-service of the notice which is required to be served u/s 7 of that Act. As plaintiff 5 had appeared in the certificate case and had applied to set aside the sale u/s 23 of that Act he refused him relief but gave a decree to the other four plaintiffs for possession of the villages they had respectively purchased from Gour Benode. Against this decree, the bank has filed the appeal wherein it challenges the finding of the learned Subordinate Judge on the question of limitation and the finding on the question of the service of the notice issued u/s 7 of the Act on the plaintiff other than plaintiff 2. The plaintiffs have filed a memorandum of cross objections, wherein they challenged the finding of the learned Subordinate Judge on the question of fraud. We will first consider the cross-objections.

3. The case of fraud is pleaded in paras. 5 and 6 of plaint. Plaintiff 5 had a sum of Rs. 4000 to the credit of his current account with the bank. The case of fraud as made in the plaint is that plaintiff 5 asked the bank to pay him the said sum in order that the plaintiffs may apply the same towards payment of the arrears of revenue and cesses but the bank pleaded inability to pay such a large sum in a lump. That thereafter at further request the bank promised to the plaintiffs that it would itself pay to the Collector out of the said amount such sums of money as would be required to clear the arrear of revenue and cesses. On the basis of that promise to the plaintiffs, it did file an application to the Collector undertaking to pay up the arrears of cesses but thereafter being actuated by greed it did not only break its promise but opposed the application of plaintiff 5 to the certificate officer for time to pay the certificate dues, with the result that that officer refused his application and the sale was forthwith held on 5th August 1931 at which it purchased the property at a grossly inadequate price. In support of this case, the learned advocate for the respondent relies upon the deposition of plaintiff 5, in which he supported, the aforesaid story, and the application of the bank to the Collector dated 27th June 1931 (EX. I) 11-56. A director of the bank has in his deposition given a denial to the plaintiffs' story. The case of fraud as made in the plaint rests on the alleged promise of the bank made to the plaintiffs

to pay up the arrears of cess. If the evidence does not support such a promise the case of fraud must fail. On a review of the documentary evidence on the record, we have come to the conclusion that no such promise was made by the bank to the plaintiffs or to any one of them.

4. It appears that for the non-payment of revenue for the March kist of 1931 the estate was advertised for sale for 27th June 1931. On 26th June 1931 the bank made an application to the Collector praying for exemption from sale on receiving from it the arrears of revenue. The Collector on a report from the Sheristadar made an order on the same date to the effect that the estate would be exempted from sale if the bank paid not only the arrears of revenue but also all arrears of cesses amounting to Rs. 881 odd. The next day the bank made another application to the Collector in which it stated that it was prepared to deposit on that day the arrears of revenue and cesses for the March kist of 1931 and that it was prepared to give an undertaking to pay up the remaining arrears of cesses before 4th or 5th July following or before the certificate sales. On that undertaking being given, the Collector exempted the estate from the revenue sale. It is on this petition that the plaintiffs rely. They say that the undertaking was given by the bank to the Collector in pursuance of the promise that the bank had made to plaintiff 5. The two petitions which we have referred to are however equally consistent with the case that the bank was only anxious to protect its own interest as mortgagee and gave that undertaking to the Collector with the sole purpose of avoiding the sale without there being any promise to plaintiff 5 as alleged. The subsequent conduct of the plaintiff 5 conclusively establishes the fact that that was the real position and the undertaking that was given by the bank to the Collector was not on account of any promise or assurance by the bank to plaintiff 5 as alleged by plaintiffs.

5. By orders passed in the certificate cases the dates of certificate sales were fixed for 15th July 1931 and the bank was informed by the certificate officer about those dates as the bank had given an undertaking to the Collector to pay up the certificate dues before the certificate sales. On that day the bank did not pay and a notice was issued by the certificate officer on the bank informing it that proceedings would be taken against it on the basis of the undertaking it had given to the Collector. Plaintiff 5 however appeared on 15th July 1931 and filed an application before the certificate officer pleading for time, on the ground that he was not in funds then but expected to get money due to them an account of landlords' transfer fees which were in deposit to their credit in the Government Treasury. Time was given and the certificate sale was fixed for 5th August 1931. On that date also, another application for postponement of the sale was made by plaintiff 5 on the ground that money could not be collected on account of the floods. The bank opposed this application. In none of these applications did plaintiff 5 give even the remotest hint of the alleged promise of the bank to him. In answer to the bank's opposition he never hinted that the bank having made the said promise its conduct was unfair. The sale was held on that date and the bank purchased the property. In his application to set aside the sale under

Sections 22 and 23, Public Demands Recovery Act, plaintiff 5 never stated that he had been placed in an awkward position by reason of the bank failing to keep its alleged promise to him. He made many statements in his application u/s 23 to excite the sympathy of the certificate officer and the Collector: but never made a statement to the effect that he lost his property because the bank after having made a promise to him to pay the certificate dues acted dishonestly at that last moment by not fulfilling its promise. These facts demolish the plaintiffs' case of fraud as made in the plaint. We accordingly do not see any substance in the cross objections.

6. The period of limitation for suits brought u/s 36, Public Demands Recovery Act, is provided for in that section itself. So no question of the applicability of Article 12, Limitation Act, arises. Section 36 of the Act says that such a suit must be filed within a year of the date of delivery of possession to the purchaser at the certificate sale. Here that date is 17th May 1932. But the suit was filed on 23rd June 1933, that is beyond a year from the relevant date. The certificate-holder, namely the Secretary of State for India in Council, was made a defendant and the other principal defendant was the auction purchaser at the certificate sale, namely the bank. A notice was served on the Secretary of State for India in Council u/s 80, Civil P.C., and only if the Secretary of State was a necessary party to the suit the period of the notice, namely two months, can be excluded, and in that event the suit would be in time. The only question on which the question of limitation depends is accordingly whether the Secretary of State was a necessary party to the suit. As certificate-holder he was vitally interested in maintaining the sale and so would prima facie appear to be a necessary party. In *Gobinda Chandra Shaha v. Hemanta Kumari Debi* 31 WB. 159 it was held by a Division Bench that where the Secretary of State was the certificate-holder he was a necessary party to a suit brought to set aside the certificate sale. That case was, however, decided when the Public Demands Recovery Act of 1895 (Act 1 of 1895) was in force. Mr. Gupta appearing on behalf of the bank tries to distinguish that case on the ground that the reason given in that decision is not available after the repeal of that Act and the enactment of Act 3 of 1913 (B.C.). In that case Maclean C.J. based his decision on the sole ground that Section 6 of Act 1 of 1895 (Section 8 is obviously a slip) had enacted that a certificate filed u/s 5 shall have the effect of a decree of a civil Court and the Secretary of State for India in Council (that is, the certificate-holder) shall be deemed to be the decree-holder. As this provision is not in Act 3 of 1913 his argument is that that decision is no longer good law.

7. Generally speaking, the scheme of the two Acts is the same and the provisions of Act 3 of 1913 so far as they are material to the question before us are in substance a reproduction of the provisions of the repealed Act. There are differences in detail but those differences need not be considered in this case. The one departure which is material is that under Act 1 of 1895 the procedure for execution of a certificate and post-sale proceedings, i.e., proceedings to set aside such sales, etc., were to be regulated by the relevant rules of the Code of Civil

Procedure, whereas the Act now in force (3 of 1913) is a self-contained Act, which contains provisions which deal with execution of certificates, certificate sales and those post-sale proceedings. As the procedure for execution of certificates and the post-sale proceedings had to be regulated by the CPC under the repealed Act, it was necessary to say in that Act that a certificate would have the force of a civil Court decree and the certificate-holder and the certificate-debtor were to be deemed as the decree-holder and the judgment-debtor respectively. Act 3 of 1913 being a self-contained Act, it was no longer necessary to retain that provision, but the essence of a certificate, in our judgment, is not modified by that omission. It is conceded before us that if the certificate-holder be a private person, for instance, a ward of the Court of Wards, he would be a necessary party to a suit brought u/s 36 of Act 3 of 1913. There cannot also be any doubt that in a suit brought u/s 34 of that Act for cancellation of a certificate - and such a suit would ordinarily be instituted before the certificate sale - the Secretary of State, if he is the certificate-holder, would be a necessary party to that suit, for the only person who could be made the defendant would be the certificate-holder, there being no other person at that stage to oppose that suit.

8. Section 36 of Act 3 of 1913 does not state who are to be the defendants in a suit brought under it. The suit contemplated therein follows in point of time, i.e., comes after the certificate sale. The auction purchaser would be a defendant, and no doubt, he would be there to support the certificate sale. The certificate-holder, be he the Secretary of State for India or any other individual, would also be interested in maintaining the sale, for if the sale be set aside, apart from the trouble and expense of a re-sale, the re-sale may not fetch the same price which the first sale had fetched, and that price may not cover the amount of the certificate debt. In these circumstances, are we to hold that the certificate holder need not be made a party-defendant simply because he would have had in the suit a common interest with the auction purchaser? If there had not been any indication in the Public Demands Recovery Act of 1913, it could possibly have been argued on the analogy of suits brought to set aside a revenue sale, that where the certificate-holder is the Secretary of State, he need not be made a party-defendant, that is to say, he may be a proper but not a necessary party. In fact Mr. Gupta's argument proceeds on the decisions given in that type of cases, namely, suits to set aside revenue sales, namely, *Bal Mokoond Lall v. Jirjudhan Roy* 9 WB. 271 and *Bal kishen Das v. Simpson* 25 WB. 83. In the first place, it would not be right to proceed by way of analogy when the scope of the two Acts, the Bengal Revenue Sales Act and Bengal Public Demands Recovery Act is different. But apart from that consideration other provisions of Public Demands Recovery Act (3 of 1913) furnish the clue. There are two alternative but mutually exclusive procedures, provided for in the Public Demands Recovery Act of 1913 to set aside a certificate sale on the ground of non-service of the notice issued u/s 7 of that Act. One is by an application to the certificate officer (Section 23), and the other is by suit in a civil Court (Section 36). Where the first method is adopted by the certificate-debtor his application must be heard with notice to

both the auction purchaser and the certificate-holder (proviso to Section 25). We do not see why both of them should not be necessary parties, defendants, in a suit u/s 36 where the same relief is asked for and on the same ground. For these reasons, we hold that the Secretary of State for India in Council (now the Province of Bengal) was the necessary party to a suit u/s 36, Public Demands Recovery Act. This suit was accordingly instituted in time.

9. The last point for consideration is whether the service of notice u/s 7, Public Demands Recovery Act, has been proved. We take it that where in a suit instituted by the certificate-debtor u/s 36 of the Act, service of notice u/s 7 is denied by the plaintiff the initial onus is on the person who alleges service, that is to say on the defendant who tries to maintain the certificate sale. There is some authority for this proposition : Nabadwip Chandra Nandi v. Dol Gobinda Nandi 11 I.C. 472 (Cal.) and Rakhal Chandra Rai v. Secretary of State 12 WB. 603. To discharge that onus the bank did not adduce oral evidence. It did not prove the return of service of the peon, or his affidavit. It simply exhibited the order sheet of the certificate sale. That order sheet (Ex. 14) shows that there were six certificate debtors. It further shows that the certificate was filed, although no service return on certificate-debtor 6, who is plaintiff 2 in the suit, was received. The bank concedes that there is no proof of service of the notice on him. The sale against him cannot therefore stand. He is interested in one mouza only, which is mentioned in Schedule Kha of the plaint. The sale of that mouza therefore must be set aside. The order sheet, however, records the fact of service of notice on the other certificate-debtors. The question is whether the entry is some evidence of service. In a number of cases decided by this Court, Mir Tapurah Hossein v. Gopi Narayan 7 C.L.J. 251 ; Radhay Koer v. Ajodhya Das 7 C.L.J. 262; Nabadwip Chandra Nandi v. Dol Gobinda Nandi I.C. 472 (Cal.) and Prafulla Nath Tagore and Others Vs. Shital Khan and Others, , it has been held that an entry in the order sheet recording that notice had been served is no evidence of service. In none of these cases Section 35, Evidence Act, was considered.

10. In Manindra Chandra Roy Chowdhury and Another Vs. Gopi Ballav Sen and Others, this Court laid down two propositions, namely (1) that such an entry is evidence of the fact of service and (2) that such an entry raises a presumption u/s 114, Evidence Act, that the service was in accordance with the rules prescribed. For the second proposition reliance was placed on the decision of the Judicial Committee in AIR 1934 217 (Privy Council) . It seems that the earlier cases on the point decided by Division Benches of this Court were not brought to the notice of the Court or considered by it. The only case which was cited by the respondent was the case in Aahanullah Khan v. Trilochan Bagchi 13 WB. 197. That case had no bearing on the point, for it only decided that Section 114, Evidence Act, did not authorise a presumption that a notice had been issued. In these circumstances we are asked by the plaintiffs respondents not to follow the decision in Manindra Chandra Roy Chowdhury and Another Vs. Gopi Ballav Sen and Others, in so far as it has laid down that an entry in the order sheet to the

effect that notice had been served is evidence in support of service. If there had not been any decision of the Judicial Committee on the point, we would not have acted on that decision but would have adopted the constitutional method of referring the matter to a Full Bench, for where a Division Bench disagrees with the decision of another Division Bench it is its duty to refer the matter to a Full Bench and it cannot simply ignore the earlier decision.

11. There is, however, a decision of the Judicial Committee, relevant to the point, we are considering, but unfortunately it was not noticed *Manindra Chandra Roy Chowdhury and Another Vs. Gopi Ballav Sen and Others*, . The case is AIR 1934 157 (Privy Council) . In that case the plaintiff claimed an impartible estate from the widow of the last holder on the basis of a transfer from the son of one *Indrajit Mai*. One of the questions in the suit was whether *Indrajit Mai* was an agnate of *Raja Kaushal Kishore Prosad Mal*, the last male holder of impartible estate. That depended on the question as to whether *Indrajit's* lineal male ancestor, *Ananda Mal*, was a brother of *Lakshmi Narayan Mal*, the lineal male ancestor of *Raja Kaushal Kishore*. To prove that fact, the plaintiffs filed a certified copy of a decree passed in a suit of 1805 between a female ancestor of *Raja Kaushal Kishore* and a third person. To the said decree were attached two genealogical tables (Exs. P-5 and P-6). The decree recited that those pedigrees had been filed by both the parties to the suit. If that statement in the decree was admissible in evidence the said pedigrees would have proved the plaintiff's case on the point, for the statement of relationship as made therein would have been almost conclusive, being the statement of the Raja's ancestor. Their Lordships of the Judicial Committee held that the statement in the decree that the pedigrees had been filed by the parties to that suit was admissible u/s 35, Evidence Act. That statement of the Judge in the decree was regarded as an entry in a public record made by a public servant - the Judge - in the discharge of his official duty. The entry in the order sheet by the certificate officer would therefore be admissible u/s 35, Evidence Act, if the statement made therein be of a fact in issue or of a relevant fact. The fact in issue in the case before us is whether the notices u/s 7, Public Demands Recovery Act, had been served on five of the certificate-debtors and the entry in the order sheet is that they had been served. The entry therefore is evidence of the fact of service of notice. It is no doubt only one item of evidence. But whether from that item of direct evidence the Court would be justified in holding that the fact of the service of the notices had been sufficiently proved would depend upon the facts and circumstances of the particular case.

12. In the case before us, there is the fact that in the certificate proceedings plaintiff 5 appeared many times, both before and after the certificate sale. He is interested in many mouzas of the touzi and the other plaintiffs are his near relatives and dependents. He is the principal figure. To explain his appearance in the certificate proceedings he says in his deposition that he did not appear because the notice u/s 7 had been served on him, but because he got information of these proceedings from a person while he was travelling in a train.

In view of the many false statements he made both in his deposition and in his petitions before the certificate officer made u/s 23 of the Act for setting aside the certificate sale we cannot accept his explanation. We hold that he came to know of the certificate proceedings from the notice that had been served on him. It is proved that the other plaintiffs resided in the same house with him at the time of the service of the said notice on him. It is there, fore impossible to believe that the peon would serve the notice on him alone and would leave unserved the notices on the other plaintiffs then living in the same house with plaintiff 5 and on whom notices had been issued at the same time as the notice on plaintiff 5. Taking into consideration the entry in the order sheet of the certificate case along with these facts we hold that the notices u/s 7 of the Act had in fact been e served on all the plaintiffs except 2. In our judgment there is no presumption u/s 114, Evidence Act, that a notice had in fact been served, but when the fact of service of the notice is proved, there would be a presumption under that section about the regularity of the service, namely, that at the time of the service, all the formalities required by the rules framed under the Public Demands Recovery Act, namely, Rules 2 to 8 of Schedule 2, had been observed. This, in our judgment, is the effect of the decision of the Judicial Committee in AIR 1934 217 (Privy Council) . We accordingly hold that notice u/s 7, Public Demands Recovery Act, had been duly served on all the plaintiffs except on plaintiff 2. The certificate sale of the mouzas mentioned in schedules Ka, Ga, Gha and Uma, annexed to the plaint must therefore stand.

13. The sale of the mouzas described in schedule Uma cannot be set aside on the additional ground that plaintiff 5 not only appeared in the certificate proceedings but also because he filed applications under Sections 22 and 23, Public Demands Recovery Act. The result is that this appeal is allowed in part. The decree of the learned Subordinate Judge so far as it has set aside the certificate sale of the mouzas described in schedules Ka, Ga and Gha annexed to the plaint is set aside and the plaintiffs' suit in respect thereto is dismissed with proportionate costs throughout against plaintiffs 1, 3, 4 and 5 and in favour of the bank. Hearing fee five gold mohurs. The said decree in so far as it has set aside the certificate sale of the mouza described in schedule Kha is affirmed. Plaintiff 2 would get the costs of the lower Court against the bank proportionate to the value of the said mouza. As the bank did not press its appeal against plaintiff 2, the bank and plaintiff 2 would bear their respective costs in this Court. In the view we have taken it is not necessary to consider the application of the bank for permission to adduce additional evidence in this Court.