

(1892) 06 PRI CK 0003

In the Privy Council

Nawab Khaja Ahsanulla Khan Bahadoor

APPELLANT

Vs

Hurri Churn Mozoomdar

RESPONDENT

Date of Decision : 29-06-1892

Acts Referred:

Citation : (1892) 19 IndApp 191

Hon'ble Judges : Watson, Hobhouse, Richard Couch, Shand, JJ.

Judgement

Shand, J. 1. Their Lordships do not think it necessary to call for any reply in this case. A zemindar having an interest in a talook of this kind has undoubtedly, under the provisions of Regulation VIII. of 1819, a power of sale in the case of default in payment of the rent; but that power of sale, which is given as a very summary remedy, and which may be exercised immediately on arrears arising, is given under important conditions, the fulfillment of which is of the utmost consequence, not only to the person having a right to the talook, but to all those who have rights under him; not only to the putnidars, but to the sub-lessees, mortgagees, and other incumbrancers, whose rights may be affected or extinguished by the sale taking place. 2. The regulation provides for two separate cases. It provides under Clause 2 of Section 8 for the case of an arrear which has extended to twelve months; and under Clause 3 of the same section it provides for a still shorter arrear, namely, non-payment of the rent due at the end of six months. In the case of arrear occurring, the regulation provides for specific notice to be given of the intention to proceed to sale. Clause 2 of the section is as follows: "On the first day of Bysakh, that is, at the commencement of the following year from that of which the rent is due, the zemindar shall present a petition to the Civil Court of the district, and a similar one 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 talookdars, 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 kucheree, with a notice that if the amount claimed be not paid before the first of Jyete following, the tenures of the defaulters will on that day be sold by public sale in liquidation." 3.

The notice in that case ought to state, in terms of the clause, that if the full amount due, and specified in the notice, be not paid before the date therein mentioned, the tenure of the defaulter will be sold by public sale. In order to have that notice in proper form it must contain, not merely a specification of the arrears, but a notification that the sale will proceed unless payment of the rent be made within the time limited. 4. In the case now before their Lordships of six months' arrears of rent only having become due, the provision applicable is in these terms: "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 Asin, and to cause similar publication to be made of a sale of the tenures of defaulters, to take place on the first of Aughun, 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 kistbundee, calculated from the commencement of the year to the last day of Kartick." 5. It appears to their Lordships to be clear that the notice, which is a condition precedent to any sale taking place under this clause, must in all material respects comply with the provisions of the clause, and that therefore there should be intimation made to the debtor, in terms of the clause, not only of the balance due, but an intimation that 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 a fourth of the total demand of the zemindar, the sale will take place. 6. But it is conceded in this case that the notice, instead of being framed as Clause 3 required, and so containing an intimation that payment of three-fourths of the arrear would prevent a sale, contained a distinct statement that, unless the whole of the arrears were paid, the sale would take place. In short, the notice followed the terms of Clause 2, whereas the case was one under Clause 3; and it not only failed to give the intimation of the proportion of the arrear which if paid would prevent a sale, but gave an erroneous and misleading intimation, at least by implication, that payment of the whole arrear was necessary to prevent this. 7. The following passage in the judgment of the High Court appears to their Lordships to present the correct view of the law: "The object of the publication of this notice, is to give not only to the defaulting putnidars, 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. 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 serving 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." Their Lordships adopt this expression" of opinion; in this case the notice was essentially defective, and the sale was consequently bad, and must be set aside. 8. It has been contended on the part of the Appellant that this objection came too late. No doubt the objection was one which ought to have been taken before the Court of first instance; but their Lordships are not prepared to hold that an objection of this kind, fatal to the whole proceedings, and appearing upon the face of the notice itself, was not competently raised before the High Court, and entertained by them. 9. The case of Olpherts and Macnaghten v. Mahabir Pershad Singh and Another Law Rep. 10 Ind. Ap. 25, to which their Lordships have been referred, is of a totally different character. In that case a question was raised for the first time before the High Court, which would have necessitated inquiry as to whether there had been pecuniary injury to the party complaining of the alleged irregularity in the proceedings which resulted in a sale, and that inquiry ought to have been made, if the point was to be maintained, in the Court of the Subordinate Judge. In this case the objection, which is at the root of the whole proceedings, arises upon the notice which the zemindar himself gave, and no inquiry of any kind is necessary; and their Lordships are of opinion that it was not too late to take such an objection before the High Court, and that the High Court properly disposed of it. It was, indeed, maintained that the objection in this case did raise matter for inquiry, because it was said that it could be proved that the form of notice given in this case had been generally in use for a number of years, even in case of a six months' arrear only. But the Court could not allow any such inquiry, because no extent of general use of such a form of notice could enable parties to dispense with a material and essential part of it. 10. Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss the appeal. The Appellant will pay the costs of the appeal.