**(1977) 01 GAU CK 0010**

**In the Gauhati High Court**

**Case No :** Civil Rule No. 213 of 1970

Padmasing Deka APPELLANT

Vs

Assam Board of Revenue and others RESPONDENT

**Date of Decision :** 03-01-1977

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** AIR 1978 Guw 1

**Hon'ble Judges :** M. Sadananda Swamy, J;D. Pathak, J;Baharul Islam, J

**Bench :** Full Bench

**Advocate :** J.P. Bhattacharjee and S.M. Choudhury, for the Appellant; J.C. Medhi, Advocate General, Assam, P.C. Kataki, J.N. Sarma and Dr. M.K. Sarma, Govt. Advocates, Assam, for the Respondent

**Final Decision :** Dismissed

## Judgement

Baharul Islam, J.—The petitioner, Shri Padmasingh Deka, was the Mauzadar of Jagial Mouza in the district of Nowgong. He defaulted in depositing the land revenues collected by him into the treasury. The Deputy Commissioner, Nowgong (respondent No. 2) placed him under suspension and the order of suspension was communicated to him under letter No. NRT. 23/67/20 dated 8-7-1967. The total amount due from him was Rs. 38,636.37 p. The Deputy Commissioner asked the petitioner to clear the dues by 15-5-1967. On his failure to pay up the amount, a distress warrant was issued for attachment and sale of his movable properties, including one 12 bore SBBL, sum and one 22 bore rifle. On 6-12-1967, a notice was issued fixing 13-12-1967 for the sale of the aforesaid gun and the rifle, but the sale did not take place on that date. A second notice being Notification No. NRT, 23/67/58 dated 12-2-1968, was issued for the sale of the guns at public auction at 1 P.M no. 23-2-1968 at the Court Office of the Deputy Commissioner and in pursuance of that Notification the sale was held on 23-2-1968; but due to insufficient bid, the sale continued till the next day on which the SBBL gun was sold to respondent No. 3, at Rs. 1,110/- and the rifle was sold to respondent No. 4 at Rs. 1,500/-. The sales were confirmed by the Deputy Commissioner on 27-2-1968.

2. The amount due by the petitioner to the Deputy Commissioner was sought to be recovered as arrear of land revenue and the above-mentioned sale was held under Chap. V of the Assam Land and Revenue Regulation (hereinafter called the Regulation'').

3. The petitioner preferred an appeal before the Assam Board of Revenue (respondent No. 1) (hereinafter called the Board'') against the aforesaid sale of the gun and the rifle, but the appeal was dismissed.

4. The petitioner has filed this application under Art. 226 of the Constitution challenging the judgment and order of the Board and the sale held by the Deputy Commissioner.

5. This Rule came up for hearing before a Division Bench of this Court. One of the questions involved in the case was whether the land revenue collected by a Mauzadar, who has defaulted in depositing the amount with the Government, can be realised as an arrear of land revenue under the Regulation. It was pointed out to the Bench that in two earlier decisions of this Court in the cases of Ghana Kanta Baruah v. Deputy Commissioner, Nowgong, C.R. No. 177 of 1968, disposed of on 21-5-1969 (Assam) and in Lakshmi Bhusan Barua v. Bakijai Officer, Sibsagar, Civil Rule No. 800 of 1970, disposed of on 28-6-1972, (reported in 1973 Ass LR 187) it was held that such amount could not be realised as an arrear of land revenue. It was submitted by the learned Advocate General, Assam, appearing for the respondents that certain provisions of the Regulation, which had great bearing on the point and decisive of the question, were not brought to the notice of the Court and, as such, the above two decisions did not lay down the correct proposition of law and needed reconsideration. The Division Bench, therefore, passed the following order :

As the case involves an important question of law regarding the procedure of recovering land revenue which has been collected by the Mauzadar but not deposited by him with the Government, and in view of the submission of the learned Advocate General, Assam, that this Court''s decisions in Lakshmi Bhusan Barua v. Bakijai Officer, Sibsagar (1973 Ass LR 187) and Ghana Kanta Baruah v. Deputy Commissioner, Nowgong in Civil Rule No. 177 of 1968 disposed of on 21-5-69 and some other decisions of this Court on the point require reconsideration, this case is referred to a larger Bench.

This is how this case has come up before this Special Bench for disposal. The entire case is before us.

6. The "important question of, law" that falls for decision by this Bench is, as stated above, whether an amount of land revenue, collected by a Mauzadar but not deposited by him with the Government, can be recovered as an arrear of land revenue under Chap. V of the Regulation.

 

7. The caption of Chap. V is as follows:

ARREARS AND MODE OF RECOVERING THE LIABILITY FOR REVENUE AND DEFAULT.

Chapter V lays down the procedure for recovering arrear of land revenue. It contains Ss. 63 to 95 . Section 63 provides:

Land revenue payable in respect of any estate shall be due jointly and severally from all persons who had been In possession of the estate or any part of it during any portion of the agricultural year in respect of which that revenue is payable.

''Land revenue'' has been defined under S. 3(e) of the Regulation as follows:

''Land revenue'' means any revenue assessed by the State Government on an estate and includes any tax assessed in lieu of land revenue.

Mr. J.P. Bhattacharjee, learned counsel appearing for the petitioner, submits that the land revenue collected by the Mauzadar from rayats in respect of estates held by rayats do not fall within the definition of ''land revenue'' and, as such, it cannot be recovered by resorting to the procedure laid down by Chap. V of the Regulation. The submission, in our opinion, has force. In 1973 Ass LR 187 (supra) the Division Bench of this Court held, and in our opinion correctly, that a demand by the Deputy Commissioner from the Mauzadar for the payment of land revenue collected by him "cannot be considered as demand for land revenue payable in respect of any estate and therefore S. 63 is not attracted". In Civil Rule No. 177/68 (supra) another Division Bench also considered S. 63 of the Regulation and held.

As is apparent from S. 63 of the Regulation, the defaulter of land revenue is a person who had been in possession of the estate or any part thereof and did not pay the land revenue. The money collected by the Mauzadar is not land revenue payable by the Mauzadar ......

The learned Advocate General has not seriously challenged that the amount collected by the Mauzadar from rayats is not ''land revenue''. He, however, submits that the amount can, nevertheless, be realised from the Mauzadar as an arrear of land revenue. In support of his contention, he refers to Ss. 94, 144 and 144-A of the Regulation. Section 94, which is in Chap. V. is in the following terms :

94. The provisions of this chapter shall, so far as may be, apply to the recovery of any sum of money realisable under any enactment for the time being in force as if it were an arrear of land revenue (emphasis supplied).

Sections 144 and 144-A, which are in Chap. VIII, that deals with ''Procedure'' may be set out:

144. All fees, rents, fines, costs and other money payable under this Regulation,

 

or under rules made by the State Government under this Regulation, shall be recoverable as a land revenue.

144-A. All rents, fees and royalties due to the Government for the use or occupation of land or water (whether the property of the Government or not) or on account of any products thereof and all moneys falling due to the Government under any grant, lease, security bond, or contract which provides that they shall be so recoverable, may be recovered under this Regulation in the same manner as an arrear of land revenue, (emphasis added).

Although a sum of money is not ''land revenue'' as defined under the Regulation, Section 94 has made it realizable as an arrear of land revenue if any enactment has made it so realizable.

The second part of S. 144-A, provides that all moneys falling due to the Government under, inter alia, a contract, which provides that it shall be recoverable as arrear of land revenue, can be so recovered under Chap. V of the Regulation. "Any sum of money" in S. 94 and "all moneys falling due to the Government under ........... a contract" in S. 144-A, do not fall within the definition of ''land revenue'' under S. 3(e) of the Regulation. But they are made ''land revenue'' by fiction of law and made realizable as an arrear of land revenue.

8. The learned Advocate General refers to the kabuliyat executed by the petitioner in favour of the Deputy Commissioner. It, inter alia, lays down the manner of payment of land revenue collected by the Mauzadar to the Deputy Commissioner, The relevant clauses of the kabuliyat are Cls. 4 and 5. The kabuliyat is in Form No. 110 in Vol. II of the Regulation. The form is prescribed by Executive Instruction No. 135 which is in the following terms;

Every Mauzadar before his appointment shall execute a written agreement (kabuliyat) in Form No. 110.

The relevant part of Cl. 4 of the kabuliyat is as follows :

4. I will pay into the treasury within one month of the date on which they come into my hands all sums collected by me on account of any demand which I have not already paid to Government in full I undertake to pay into the treasury the full amount of all installments of land revenue and local rates included in the jamabandi.............. within one month of the date on which they fall due for payment to me and I undertake to pay into the treasury the full amount of tauzi bahir revenue and all other sums the recovery of which may be entrusted to me, within four months from the date of the receipt from the Deputy Commissioner or Subdivisional Officer of a list of such dues.

The material part of Cl. 5 may be set out:

In default of payment of any instalment of land revenue, local rate......... or other dues, within the said period, Government may without prejudice to any criminal charge to which I may be liable as a public servant recover the arrears from me or my sureties in the manner prescribed for the recovery of land revenue and may also cancel my engagement.

The second part of S. 144-A provides, inter alia, as stated above that all moneys falling due to the Government under a contract, which provides that hey shall be recoverable as arrears of and revenue, may be recovered as such under the Regulation.

9. Rule 130, which is a Rule framed under Chap. V. is, in our opinion, one of he "rules made by the State Government" under the Regulation as contemplated by S. 144. It provides that every un-payable on account of land revenue hall fall due on the dates specified in he Rule shall be payable in such manner and in such installments as described therein. The rule further provides that in the Assam. Valley, in villages which pay their land revenue or considerable proportion of their land avenue, by the production and sale of mustard or pulse (matikalai) one instalment on the 15th March, in villages which pay their land revenue or a condonable portion of their land revenue by the production and sale of jute, one installment on the 15th November, Rule 130 further provides that in Assam alley "Revenue is due from mauzadars me month after the installments, as prescribed above, become due provided that mauzadar shall not be pressed before be 1st May, to make good balances uncollected by him. At the discretion of be Deputy Commissioner the period of race may be extended to the 31st May" is, therefore, clear that under R. 130 avenues due from the mauzadars become due after the 1st day of May unless the period is extended by the Deputy Commissioner at his discretion upto 1st May. Therefore, the land revenue uncollected, or yet to be collected, by the mauzadar is ''revenue'' due from a mauzadar as contemplated by R. 130, and is also money falling due to the Government within the meaning of S. 144-A. is, therefore, crystal clear that revenue due from a mauzadar is recoverable as an arrear of land revenue under (sic) 130 read with S. 144-A of the Regulation.

10. It is not in dispute in the instant case that ''revenue'' or ''money'' is due by he petitioner to the Government. But Shri Bhattacharjee submits, with regard o S. 144-A, that the contract in question s not a statutory contract, and, as such as not enforceable in law. In our opinion he submission is fallacious. Section 144-A does not enjoin that the contract must be a statutory contract under the Regulation. What the section requires is that (i) the money must fall due to the Government, and (ii) it must be under a contract. If both the conditions are fulfilled, the amount shall be, recoverable as an arrear of land revenue under the Regulation. We cannot add the word ''statutory'' before ''contract''. It is against the rules of interpretation to add words to a provision of law when the provision, as it stands, is capable of a reasonable meaning which will give effect to the intention of the legislature on the words. (See Strawboard Manufacturing Co. Vs. Gobind, ).

11. We have already referred to Cl. 5 of the kabuliyat. True it is that the kabuliyat is executed in a form in pursuance of an Executive Instruction; it is also

 

true that an Executive Instruction does not have the force of law; it is also true that a kabuliyat cannot be said to be a statutory contract. But it does not follow that the contract is not valid and unenforceable in law because it is not statutory. The settled law is that an Executive Instruction does not have the force of law, but it does not follow that a contract executed in a form prescribed by an Executive Instruction is not enforceable in law even if it is otherwise valid.

That being so, we do not find any difficulty in holding that Cl. 5 of the kabuliyat is a provision of a contract contemplated by S. 144-A of the Regulation and that the dues from a Mauzadar can be recovered as an arrear of land revenue under the Regulation. In our opinion the amount of land revenue collected by a Mauzadar but not deposited by him with the Government can be recovered as an arrear of land revenue under Chap. V of the Regulation, and the decisions of this Court in Civil Rule No. 177 of 1968 (Assam) (supra) & C. R. No. 800 of 1970: (reported in 1973 Ass LR 187) (supra) do not lay down the correct law. They are overruled. The errors in the decisions were due to the fact that Sections 144 and 144-A of the Regulation and R. 130 framed thereunder, were not brought to the notice of the Courts.

No "other decisions of this Court", mentioned in the order of reference, have been brought to our notice.

12. The only other submission of the petitioner is that even if the mauzadar''s due can be recovered as an arrear of land revenue under Chap. V of the Regulation, the sale of the guns in question was bad in law inasmuch as it was in violation of the Regulation and the Rules made thereunder.

13. Section 69, which is in Chap. V of the Regulation, deals with sale of movables. It provides:

69. (1) The Deputy Commissioner may, for the recovery of an arrear, order the attachment and sale of so much of a defaulter''s moveable property as will, as nearly as may be, defray the arrear.

(2) Every such attachment and sale shall be conducted according to the law for the time being in force for the attachment and sale of moveable property under a decree of a Civil Court, subject to such modifications thereof as may be prescribed by rules framed by the State Government for proceedings under the Assam Land Revenue Regulation.

(3) Sub-section (2) of S. 69 presses into service the relevant provisions of, inter alia, Rr. 65, 66, 68 and 69 of O. 21 of the Civil P.C.

Rules 64 to 73 deal with "Sale Generally", that is to say, sale of both movable and immovable properties. Rule 65, inter alia, provides that save as otherwise prescribed, every sale in execution of a decree shall be made by public auction in manner prescribed.

The relevant portion of Rule 66 may be extracted:

 

66. Proclamation of sales by public auction.?(1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible?

(a).........

(b).........

(c).........

(d) the amount for the recovery of which the sale is ordered; and

(el every other thing which the Court considers material for a purchaser to know in order to judge of the nature and the value of the property.

Mr. Bhattacharjee submits that R. 66 is mandatory and its violation renders a sale void. His submission is that in the sale proclamation neither the amount of the arrears, nor the value of the guns was mentioned in the sale proclamation.

Rule 68 provides:

68. Time of sale.--Save in the case of property of the kind described in the proviso to R. 43, no sale hereunder shall, without the consent in writing of the judgment debtor, take place until after the expiration of at least.........fifteen days in the case of moveable property calculated from the date on which the copy of the proclamation has been affixed on the Court house of the Judge ordering the sale.

In the instant case the sale took place after ten days of the proclamation sale.

Rule 69 provides:

69. Adjournment or stoppage sale.--(1) The Court may, in its discretion, adjourn any sale hereunder to specified day and hour, and the office conducting any such sale may in his discretion adjourn the sale, recording hi reasons for such adjournment

Provided...........

(2) Where a sale is adjourned under sub-r. (1) for a longer period than seven days, a fresh proclamation under R. 6 shall be made, unless the judgment-debtor consents to waive it.

There is an Assam amendment to sub rule (2) and the period of "seven days" has been substituted by "one calends month". In the instant case, therefor adjournment made by the sale officer no being for a longer period than one calendar month, Rule 69 has not been violate.

It is true that Rr. 66 and 68 have no been complied with, as contended by the petitioner; but R. 78, which deals wit sale of movable property, provides:

78 Irregularity not to vitiate sale, by any person injured may sue.? No (sic) regularity in publishing or conduction the sale of moveable property shall vital the sale; but any person sustaining an injury by reason of such irregularity the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the (sic) property and for compensation in default of such recovery.

Rule 78 clearly shows that violation any of the provisions relating to the sale of movable property does not ipso fact make the sale void. The sale is merely irregular. With regard to the objection of the petitioner that the arrears due from the Mauzadar were not mentioned in the sale proclamation, the answer is that the amount due from him was know to the petitioner himself, as, in his application to the Deputy Commissioner dated 24-2-1968 (vide Annexure ''I'' to the petition) he himself has admitted, "I have now to pay only Rs. 16,000.00. With regard to the omission to put the value of the guns sold, the petitioner in his application dated 24-2-1968 (vide Annexure ''J'' to the petition at page 23 of the paper book) requested the Deputy Commissioner "not to dispose the same at such ridiculously low price". But he has not mentioned the value, according to him, of the guns, nor in the petition before us the petitioner has mentioned the proper value, according to him, of the guns. On the contrary, the Board has found, "In the present case, we find that the gun and the rifle were sold at a reasonable price and no substantial injury has resulted from the sale of these two guns". This is a finding of fact, (emphasis supplied).

The point whether violation of R. 68 of O. 21 makes a sale void, fell for consideration of a Division Bench of this Court in the case of M/s. Dasuram Mirzamal v. Balchand Surana, reported in AIR 1970 A&N 117. In that case it was held: (at p. 119)

The judgment-debtor in absence of substantial injury cannot be heard to say that the sale, on account of those irregularities complained of, is a nullity and that the Court had no jurisdiction o continue the sale of the property. The question, however, will be different when ;he judgment-debtor complains substantial injury resulting from these material regularities which, although will not make the sale a nullity, will subject it to close scrutiny to find out whether it has resulted in any substantial injury to the judgment-debtor as in this case. The terms of O. 21, R. 68 are indeed imperative, but even so a sale that takes place without complying with these provisions nay not per se be null and void.

Their Lordships relied on a decision of the Privy Council, reported in (1893) 20 AP 176 (PC) that considered S. 290 of the old Civil P.C. corresponding to O. 21, R. 68 of the present Civil P.C. and held:

The Privy Council held that, noncompliance of S. 290 is a material irregularity within the meaning of S. 311, but a sale in disregard of S. 290 is not a nullity and will not be set aside unless direct evidence of substantial injury resulting from the irregularity has been given.

14. We respectfully agree with the view taken by their Lordships of the Division Bench.

15. In our opinion the same reasonings hold good with regard to the non-compliance of R. 66 of O. 21 of the C.P.C. We, therefore, hold that the sale in question is not void for non-compliance of Rr. 66 and 68 of the C.P.C.

16. It may be mentioned at this stage that the two auction purchasers, respondents 3 and 4 herein, were not made parties to the appeal before the Board. In the application before us there is neither any allegation of any collusion between them and the Deputy Commissioner, nor has the attachment of the guns been challenged. So even if a writ of certiorari be issued to quash the order of the Board, the attachment and possession of the guns by the auction purchasers cannot be disturbed as no mandamus can be issued against the latter. In the case of Sohanlal Vs. The Union of India (UOI), , their Lordships of the Supreme Court held (at p. 532);?

Normally, a writ of mandamus does not issue to, or an order in the nature of Mandamus is not made, against, a person directing him to do some particular thing, specified in the order, which appertains to his office and is in the nature of a public duty.

In the case before the Supreme Court a displaced person was illegally evicted from certain premises in contravention of the express provisions of S. 3 of the Public Premises (Eviction) Act and another displaced person was put in possession, by the Union of India. There was no allegation of any collusion between the Union of India and the person so put in possession. Their Lordships of the Supreme Court held (at p. 532):?

The eviction of a displaced person in contravention of the express provisions of S. 3 of the Public Premises (Eviction) Act is illegal and a writ of mandamus can issue to or an order in the nature of mandamus can be made against, the Union of India to restore possession of the property to him from which he has been evicted if the property is in possession of the Union of India. If, however, the property is in possession of another displaced person and he is not in collusion with the Union of India or has no knowledge that the eviction was illegal, a writ of mandamus cannot issue to or an order in the nature of mandamus cannot be made against him.

17. In the instant, case, therefore, no mandamus can be issued against respondents 3 and 4 directing them to return the gun and the rifle as there is no allegation of collusion between them and the Deputy Commissioner or that the auction-purchasers knew that material provisions of law were violated in conducting the sale. Even if the sale be held to be illegal, no writ of mandamus can be issued to respondents 3 and 4; as such it will be futile to issue a writ of

 

mandamus against the Deputy Commissioner, even if justified.

18. In the result the application is rejected. The Rule is discharged. We, however, make no order as to costs.

M. Sadanandaswamy, J.

19. I agree.

D. Pathak, J.

20. I agree.

 