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**(1940) 07 CAL CK 0014**  
**In the Calcutta High Court**

Sir Bijoy Chand Mahatab

APPELLANT

Vs

Official Trustee of Bengal

RESPONDENT

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**Date of Decision :** 23-07-1940

**Acts Referred:**

Evidence Act, 1872 — Section 34

**Citation :** AIR 1941 Cal 337

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### Judgement

1. The appellant Maharaja Bahadur of Burdwan is the proprietor of a zemindary bearing touzi No. 1 of the Burdwan Collectorate. Appertaining to the said zemindary there is patni taluk known as Lot Kalachhara which belonged to the Mitters. The said patnidars did not pay the patni rent due to the Maharaja Bahadur for the year 1339 B.S., with the result that the latter started proceedings under Regn. VIII of 1819 on 1st Bysack 1340 for the purpose of realizing the said arrears. On 1st Jaistha 1340 corresponding to 15th May 1933, the said patni taluk was put up to sale by the Collector and was purchased by Haridas Roy for Rs. 17,500. Thereafter, Haridas took possession and an to make collections from the tenants holding under the patni taluk. The evidence indicates (re-examination of Bejoy Krishna Boy, naib of Haridas) that Haridas was successful in making collections but there is no evidence on the record indicating the amount he actually collected during the period he was in possession. The Mitters filed a suit under the provisions of Section 14 of Regn. VIII of 1819 on 14th May 1934. In that suit they impleaded as defendants as they were required to do, the Maharaja Bahadur and the auction-purchaser, Haridas. That suit has succeeded. The learned subordinate Judge by his judgment and decree dated 1st June 1936 has reversed the sale. Before him Haridas claimed to be indemnified by the Maharaja Bahadur at whose instance the sale was held under the provisions of para. 3, Section 14-First, of the said Regulation. In the decree made by the learned subordinate Judge on the said date he has directed the Maharaja Bahadur to pay Haridas the sum of Rs. 61,403-10-9. The Maharaja Bahadur has filed this appeal against this part of the decree. He has not challenged that part of the decree which has annulled the sale. The Mitters have

not appealed, the decree being in their favour.

2. Haridas has filed a memorandum of cross-objections. In the said memorandum he has taken grounds which challenge the decree for reversal of the sale but those grounds have not been pressed. Mr. Bose, the learned advocate appearing for him, urged only grounds Nos. 14 to 16 mentioned in the memorandum of cross objections. Haridas claimed against the Maharaja Bahadur a larger sum as compensation but the learned subordinate Judge has refused a part of it, about Rs. 2035. Ground No. 13 of the memorandum of cross-objections covers the sum refused but that ground has also been abandoned by Mr. Bose. The sum decreed namely, Rs. 61,403-10-9, is the sum total of the following items:

(1) Rs. 17,500-0-0. The purchase money deposited by Haridas Roy in the Collectorate. (2) Rs. 32,966-0-11. The rent paid by him to Maharaja Bahadur for the years 1340 to the Assin Kist of 1342. (3) Rs. 10,937-9-4. Collection charges including pay of collecting agents employed by him and other miscellaneous expenses said to have been incurred by him.  
----- Rs. 61,403-10-3.

3. The learned subordinate Judge did not allow interest on the first two items from the dates of payments by Haridas. Haridas claims interest thereon. That is the scope of ground No. 14 of the memorandum of cross-objections. Dr. Basak appearing for the Maharaja Bahadur concedes that the claim for item 1 is admissible. But he says that a sum of about Rs. 9000 which is in deposit with the Collector as surplus sale proceeds, ought to be deducted from the said claim as that sum is now, on the reversal of sale, Haridas's money and is available to him. He however contests the claims mentioned in items 2 and 3. Mr. Bose gives up his client's claim to item 3 but insists that his client is entitled to item 2. With regard to item 3 we are of opinion, even if Mr. Bose had not abandoned his client's claim to it, that the claim is not admissible u/s 14 of the Regulation and besides there is no evidence in support thereof. To prove that he incurred the expenses which constitute item 3, Haridas only proved papers which were extracts from his account books. The original account books have not been produced. They exist and are in his possession. The secondary evidence of the account books is not accordingly admissible. The copies produced have not been proved to be accurate copies of the entries of the accounts books. The men who made the copies have not been examined. Even if the original account books had been produced they could only be used u/s 34, Evidence Act, as corroborative evidence. No witness on his behalf speaks that the item of expenditure shown in the copies produced had actually been made and there is no other documentary evidence in corroboration.

4. We cannot also uphold Dr. Basak's contention in respect of item 1. The auction, purchaser is entitled to look to the zamindar for indemnity. Where there is a surplus in the sale proceeds the law and the procedure to be followed is indicated in *Preolal Gossain v. Gyau Turungini Dossia* ('70) 18 W R 161. The

5. Regarding item 2 the position stands thus. Haridas paid the patni rent and cesses before the reversal of the sale to Maharaja Bahadur and obtained formal receipts from his Sherista. The details are shown in the tabular statement:

Rs. as. p.

6. The question is whether Haridas is entitled to recover this amount which he paid as rent to the Maharaja Bahadur, and if so, is he entitled to recover interest from the dates of payment made by him as indicated in column 1 of the tabular statement. These two questions depend upon the construction of para. 3 of Section 14-First of the Regulations which is as follows:

7. It is clear from this provision that the zemindar must indemnify the auction purchaser against all loss. The controversy in this case centres round the question as to what is the loss to the auction purchaser Haridas in this case.

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which we have to determine.

9. Dr. Basak contends that before any question of indemnity can arise, the auction purchaser will have to prove that he has suffered loss by reason of the reversal of the sale and if he succeeds in that respect he must further prove the amount of his loss. It is only the amount of the loss proved by him which the zemindar is liable to make good. So far the position is clear. These propositions formulated by Dr. Basak have not been and cannot be controverted by Mr. Bose. But the difference between them is on the next proposition formulated by Dr. Basak. He says that when it appears that the auction purchaser (Haridas in this case) had made collections from the patni muhal he cannot be taken to have suffered any loss by reason of the reversal of the sale unless he can show that the collections less the collection charges made by him fell short of the amount of rent which he paid to the zamindar and the amount of his loss would be the difference between the two.

If the amount of collections less the collection charges made by him from the patni mahal exceed the latter amount he cannot recover anything from the zamindar. He recognizes the fact that the auction purchaser, who had taken actual possession of the patni muhal and had made collections, is liable to pay mesne profits to the defaulting patnidar on the sale being reversed, but In answer says that it would not work any injustice on the auction-purchaser if the principle he is contending for be accepted, for in a suit brought against the latter by the defaulting patnidar for meane profits be would be entitled to and would be given credit of what he had paid as rent to the zamindar while he was in possession and for a period before the reversal of the sale. This argument at first sight appears to be attractive, but in our judgment is not sound.

10. By his purchase at the sale of the patni taluk held under the Regulation the auction purchaser acquired the patni taluk and the relationship of landlord and tenant is created between him and the zamindar. On the reversal of the sale at the suit instituted in the civil Court u/s 14 either by the defaulting patnidar or by any person deriving an interest from the latter which would be affected by the sale the relationship of landlord and tenant between the zamindar land auction purchaser does not cease as from the date of such reversal. The legal effect of such a decree made by the civil Court is as if the sale had never been held. The right of the defaulting patnidar continues in such a case as from before as if the sale had never been held. It is he and he only who is liable to pay patni rent to the zamindar for that period.

11. In fact in this case that position has been accepted by the Maharaja" Bahadur for he has, as appears from the affidavit filed by Mr. Bose's client, instituted a suit for rent for this period against the Mitters and has already recovered a decree in the trial Court and that decree is now under appeal. The auction purchaser at a sale subsequently reversed in a suit instituted u/s 14 is accordingly to be considered never to have [been a tenant of the zamindar. The zamindar is not entitled to retain after the reversal of the sale the money which

he, the auction purchaser had paid to him as rent for the period intervening between the date of the sale under the Regulation, to be more precise between the date from which the sale takes effect under the Regulation (1st Bysack or 1st Karticst Bysack 1340 in the case before us), and the date when it is reversed by the civil Court, and the retention of the said money by the zamindar after the reversal of the sale is itself the loss to the auction-purchaser such retention being of another's, the auction purchaser's money. This in our judgment is a fundamental and clear principle. The measure of that loss must be the amount paid by the auction purchaser to the zamindar and retained by him together with interest at a reasonable rate from the date of payment till repayment, for unless interest is paid there would not be full indemnity to the auction purchaser.

12. The cases decided in this Court have laid down that on the reversal of the patni sale the only remedy of the auction purchaser for indemnity against the zamindar is to proceed u/s 14 of the Regulation. After the reversal of the sale, he has to apply for compensation from the zamindar in the Court which had set aside the sale, and he cannot institute a different suit against him: Abdul Hamid Sardar Vs. Bijoy Chand Mahatap and Others, . After the order for reversal had been made, the plaintiff who brought that suit would no longer be interested in the suit. That plaintiff of the suit for reversal of the sale may be the defaulting-patnidar or he may be a subordinate tenure holder under, or a mortgagee from, the defaulting patnidar. In any event after he had got an order for reversal in his favour he would not be interested in the further progress of the suit in that Court, that is in the issue, which must be distinctly raised, Juecurn Boid v. Pirthichand Lal ("18) 5 AIR 1918 PC 151 at p. 58, between the auction purchaser and the zamindar relating to compensation.

13. If Dr. Basak's contention be accepted, the finding of that Court as to the amount of collections made by the auction purchaser in the period between the sale and its reversal arrived at for arriving at a decision of the said issue would not be binding on the defaulting patnidar in the suit he may thereafter bring against the auction purchaser for mesne profits. Accordingly, the zamindar cannot, in our judgment, answer the auction purchaser's claim for refund with interest of the money which had been paid as rent to him by setting up the plea that the former would in the suit for mesne profits by the defaulting patnidar be entitled to set off the balance of the sum, in case the sum of money paid to the zamindar as rent falls short of the collections made by him, the auction purchaser, from the patni mahal. Even in a case where the collections made by the auction purchaser exceed the sum that he paid to the zamindar he would not be entitled to claim a credit from the defaulting patnidar in the mesne profits suit for the interest which the zamindar is liable to pay to the former on the arrears of rent that he the auction purchaser had paid or had to pay. He would, moreover, thus be still in loss with regard to the interest on the sums he had actually paid to the zamindar from the dates of payment which he is entitled to get from the zamindar under the clause of full indemnity contained in Section 14. We accordingly hold that Haridas is not bound to prove his collections in this suit

and that he is entitled to get a decree for the sum mentioned in item 2 from the Maharaja Bahadur. The view we take is in consonance with the observations, taken with the context, made by Markby and Mitter JJ. in *Tarachana v. Nafar Ali* ("78) 1 CLR 236 at p. 238. He is also entitled to get interest at 6 per cent, on the sums of money included in item 2 from the dates of payment thereof as indicated in col. 1 of the tabular statement. He is also entitled to get a decree for Rupees 17,500, the purchase money which he deposited with the Collector with interest at the said rate from the dates of deposit on Rs. 2650 from 15th May 1933 and on the balance, Rs. 14,850 from 19th May 1933: *Bejoy Chand v. Amritalal Mukherjee* (1900) 27 Cal 308 at p. 314. The decree against the Maharaja Bahadur would be on the above lines. The claim of Haridas against the Maharaja Bahadur in all other respects is disallowed. But this order of ours would not be taken to prejudice his claims and contentions in the mesne profits suit brought by the Mitters with regard to item 3.

14. As we have indicated above, the Maharaja Bahadur will be at liberty to make an application to the lower Court for an order requiring the Collector to send the surplus sale proceeds to that Court and that Court must if so moved make an order requesting the Collector to send the surplus sale proceeds. Such amount that the Collector may send to Court in pursuance of that request will be paid over to Haridas Roy and satisfaction of his decree against the Maharaja Bahadur to be recorded to that extent.

15. The result is that both the appeal and cross-objections succeed in part. The respondent, Haridas Roy, would get proportionate cost of the lower Court and proportionate costs of this Court from the Maharaja Bahadur with interest at 6 per cent. in respect of the former amount from the date of lower Court decree and in respect of the latter sum from this date till realisation. The amount decreed in items 1 and 2 will bear interest at 6 per cent. from the date of the lower Court's decree till realisation. The Maharaja Bahadur will get credit towards the decretal amount such amounts as have been already realised from him in execution by the auction purchaser, Haridas Roy. Let the affidavit filed on 15th July 1940 be kept on the record.