PRIVY COUNCIL.

NARAYAN DAS KHETTRY (SINCE DECEASED)
v.
JATINDRA NATH ROY CHOWDHURY AND OTHERS.

P. C.*
1927
March 21.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Sale for Revenue—Subject matter of sale—Buildings—Rights of owner of house—Compulsory acquisition of land before removal of house—Division of compensation—Ben. Act XI of 1859, s. 3—Ben. Act VII of 1868, s. 1.

In India there is no absolute rule of law that whatever is affixed or built on the soil becomes part of it, and is subject to the same rights of property as the soil itself.

As the "estate" which is liable to be sold under Act XI of 1859 for arrears of revenue is defined in Ben. Act VII of 1868, s. 1 as land or a share in land, without express mention of buildings, a sale for arrears of revenue does not include buildings upon the land That which is sold under the Act is not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the assessment. If there are buildings upon the land sold, the owner may remove them, provided he does so within a reasonable time.

Where, therefore, after land upon which there is a house has been sold under Act XI of 1859 and before the removal of the house, the whole property is taken under the Land Acquisition Act, 1894, neither the auction-purchaser nor the owner of the house is entitled to the whole of the sum which the award has given in respect of "structures." The owner of the house is entitled to an amount based on the right of removal which he would have had, and the consideration that the auction-purchaser might have been willing to buy the house at more than its demolition value.

Maharaja Surja Kanta Acharjya v. *Sarat Chandra Roy Chowdhuri* (1), followed.

Observations in *Thakoor Chander Poramanick* v. *Ram Dhone Bhuttacharjee*, (2) followed.

Decree of the High Court varied.

* *Present*: LORD PHILLIMORE, LORD DARLING, MR. AMEER ALI, AND SIR LANCELOT SANDERSON.

(1) (1914) 18 C. W. N. 1281, 1285. (2) (1866) 6 W. R. 228.

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APPEAL (No. 41 of 1926) from a decree of the High Court (March 12th 1925) varying a decree of the Subordinate Judge of 24-Parganas.

The deceased father of the respondents had been proprietor of a parcel of land, and had built upon it a residential house. In 1919 the land was sold under Act XI of 1859 for arrears of revenue. The appellant was the auction-purchaser, and a sale certificate was issued to him. In 1920 proceedings were taken for the acquisition of the land under Act I of 1894, and the sum awarded included Rs. 12,388 in respect of "structures". The appellant claimed that sum as purchaser, but was referred to the Civil Court; he accordingly brought the present suit

The Subordinate Judge made a decree for the whole sum. On appeal to the High Court the decree was varied, it being decreed that out of the total sum awarded for "structures", the sum of Rs. 2,300 should be deducted and that the present respondents were entitled to the balance.

The facts and the basis of the decree of the High Court appear from the judgment of the Judicial Committee.

Feb. 14, 15. *Sir George Lowndes K. C.* and *Dube*, for the appellant. Ben. Act VII of 1868 which defines the "estate" which is sold under Act XI of 1859 refers to it as land under assessment, and having regard to the General Clauses Act, 1897, s. 3 (*25*) and s. 4 land means immovable property. The house therefore passed to the appellant as auction-purchaser. No doubt observations in *Thakoor Chunder Poramanick* v. *Ram Dhone Bhattacharjee* (1) and *Shib Dhoss Banerjee* v *Baman Dhone Mookerjee* (2), are against this view, but those decisions are distinguishable.

(1) (1866) 6 W. R. 228. (2) (1871) 15 W. R. 360.

The first was a case of a sale by a Hindu widow, and brought in considerations which do not arise in this case. In the second there is only a dictum based on *Ramkoomar Sen* v. *Mohesh Chunder Sen* (1), a case not decided under the Act of 1859. Though a house is not an incumbrance on the land sold, yet if the house remains vested in somebody else, there would arise an easement which would be an incumbrance. (Act IX of 1859, s. 37, cl. 4 referred to.) Inconvenient anomalies arise if on a sale of land buildings upon it do not pass to the purchaser.

Dunne, *K. C.*, and *Kenworthy Brown*, for the respondents. It is well settled that in India the principle that everything attached to land forms part of it has no application. As between a proprietor of settled land and Government, the latter has no right or title to a house on the land; what is sold on a sale for revenue is the interest of the Government subject to the assessment: *Collector of Trichinopoly* v. *Lekkamani* (2), *Maharaj Surja Kanta Acharjya* v. *Sarat Chandra Roy Chaudhuri* (3), *Sashikanta Acharyya* v. *Sarat Chandra Rai Chaudhuri* (4). In the absence of any express words as to buildings in the definition in Ben. Act VII of 1868, the "estate" sold cannot be treated as including the house. The respondents have the right to remove the house, and are entitled to the whole of the compensation awarded in respect of it.

Sir George Lowndes, *K. C.*, replied.

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The judgment of their Lordships was delivered by

SIR LANCELOT SANDERSON. This is the plaintiff's appeal against the decision of a Division Bench of the High Court of Judicature at Fort

(1) (1860) 1 Sud. Ad. 637.
(2) (1874) L. R. 1 I. A. 282, 306.
(3) 18 C. W. N. 1281, 1285.
(4) (1921) 34 C. L. J. 415, 421.

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William in Bengal, given on the 12th March 1925, which reversed a judgment and decree dated the 24th August 1922, of the learned Subordinate Judge of the 24-Parganas.

The material facts are as follows :—

Satyendra Nath Roy, who was the predecessor of the defendants, was the proprietor of the holding in question.

The holding was sold in December 1919, under the provisions of Act XI of 1859 for arrears of the Government Revenue of Rs. 2 annas 8 and pie 1.

The plaintiff purchased the holding at the sale for the sum of Rs. 2,900. Application was made to the Divisional Commissioner by the defendants or their predecessor to have the sale set aside, but the application was refused.

On the 5th July 1920, a sale certificate was issued to the plaintiff by the Collector of the 24-Parganas, certifying that the plaintiff had purchased, under Act XI of 1859, the mahal, which was specified in the certificate and which was situate in the Touzi of the district of the 24-Parganas.

It appears from the copy of the certificate which is before their Lordships that it was therein stated that the purchase took effect on the 1st day of May 1919. At the hearing of the appeal by their Lordships there was a dispute as to the correctness of the last-mentioned date. Walmsley, J., in his judgment referred to this date as the 1st May 1920, while Mukherji J., referred to it as the 1st May 1919. If it becomes necessary to ascertain the correct date, a reference will be necessary for that purpose.

On the 2nd August 1920, a declaration was made under the provisions of the Land Acquisition Act, viz., Act I of 1894, in respect of the holding, and on the 11th March 1921, the Deputy Collector made his

award. The total amount of the award was Rs. 14,569 (omitting annas and pies).

The sum awarded in respect of the land and trees, and the additional compensation under s. 23, sub-s. (2) was Rs. 2,181, and the amount in respect of "Structures" and the additional compensation was Rs. 12,388. The "structures" consisted of a residential house which had been erected by Satyendra Nath Roy, and it was standing on the land at the time of the plaintiff's purchase.

The plaintiff's name had been registered under Act VII of 1876 (B.C.), and he claimed the whole amount of the compensation money, viz., Rs. 14,569. The collector decided that it was necessary for the plaintiff to produce an order of a competent Court before the money could be paid to him.

Accordingly, the plaintiff instituted the present suit, in which he claimed that his right, title and interest to the holding in question and to the whole of the compensation money should be established and declared. He prayed for a further declaration that he was entitled to withdraw the compensation money deposited in the Alipore Collectorate.

It was urged on behalf of the defendants in the Trial Court that the sale was not valid or binding on them. The learned Subordinate Judge found against the defendants on this issue, and this finding was not disputed in the High Court or on the appeal to this Board.

Assuming the sale to be valid, it was not disputed that the plaintiff was entitled to the compensation money awarded in respect of the land and trees.

It was, however, urged on behalf of the defendants that the plaintiff had not acquired any title to the building on the land by his purchase at the above-mentioned sale, and consequently that he was not

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entitled to any of the compensation money awarded in respect thereof.

The learned Subordinate Judge held that the building on the land passed with the holding to the auction-purchaser (*i.e.*, the plaintiff) by the revenue sale and that the plaintiff was entitled to recover the entire compensation money.

On appeal to the High Court, the learned Judges held that the ownership of the building did not pass to the plaintiff on the above-mentioned sale, but that the defendants remained the proprietors thereof.

The learned Judges then proceeded to the consideration of the question whether the defendants were entitled to the whole of the compensation money awarded in respect of the building, and for the reasons set out in the judgments of the learned Judges they decided that the defendants were entitled to the whole amount awarded for the building, less a sum of Rs. 2,300. The sum of Rs. 2,300 was awarded by the learned Judges as compensation to the plaintiff at the rate of Rs. 100 per month in respect of 23 months, which period was calculated from the 1st May, 1919, to the 11th March, 1921, when the Collector took possession of the premises.

From this decision the plaintiff has appealed. The first question is whether the learned Judges of the High Court were right in holding that the title to the building did not pass to the plaintiff by reason of his purchase at the revenue auction sale.

It was not disputed that if the plaintiff's case was based upon a conveyance by the late proprietor of the land, the house would pass with the land to the purchaser; but it was argued on behalf of the defendants that as the sale in question was under the Act XI of 1859 it was merely a sale by the Collector of the Government's interest.

This part of the defendants' contention is, in their Lordships' opinion, correct; for in *Maharaj Surja Kanta Acharjya* v. *Sarat Chandra Roy Chaudhuri* (1), the Judicial Committee held that on the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined, and that by a sale held under Act XI 1859, what was sold was not the interest of the defaulting owner, but the interest of the Crown subject to the payment of the Government assessment.

It is therefore necessary to ascertain what was the interest of the Crown which was subject to the Government assessment.

The preamble to Act XI of 1859 recites that it is desirable, among other things, to improve the law relating to sales of land for arrears of revenue in the provinces of Bengal, Behar and Orissa.

Section 3 provides for the sale of the "estates in arrear" in the payment of revenue at public auction to the highest bidder.

There is no definition of the word "estates" in the 1859 Act, but in the Bengal Act VII of 1868, which is to be read with and taken as part of the said Act of 1859, provision is made that in that Act and the Act XI of 1859 "the word 'estate' means any land "or share in land subject to the payment to the Govern- "ment of an annual sum in respect of which the name "of a proprietor is entered on the register known as "the general register of all revenue-paying estates "or in respect of which a separate account may, in "pursuance of section 10 or section 11 of the said Act "XI of 1859, have been opened".

It was argued on behalf of the defendants that it was the land so entered on the register, and not

(1) (1914) 18 C. W. N. 1281, 1285.

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the building on the land, which was subject to the payment of the Government revenue and which passed to the purchaser at the auction sale held under the provisions of Act XI of 1859.

The property in question lies in the 24-Parganas, outside the boundaries of Calcutta, and it was conceded that the maxim, which is found in English law, viz., "quicquid plantatur solo, solo cedit," has at the most only a limited application in India.

The case of *Thakur Chandra Paramanick* v. *Ram Dhone Bhuttacharju* (1), to which reference was made in the High Court's judgment, differs materially from the present case in its facts, and the decision itself is not applicable. The following statement, however, is to be found in the judgment of the Full Bench which was delivered in 1866 :—"We have not been able to find in the Laws or Customs of this country any traces of the existence of an absolute Rule of Law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself."

Their Lordships, therefore, are of opinion that in construing the provisions of the above-mentioned Acts it is necessary to bear in mind the statement made by Sir Barnes Peacock in the above-mentioned case, which seems to have been accepted for many years as a correct pronouncement.

This being so, the word "estate" must be taken to have a more limited meaning than it would have in English law and the Government's power of sale for arrears of revenue *primâ facie* is limited to the land, which is subject to the payment to the Government of the annual revenue, and in respect of which the proprietor is entered in the general register of revenue-paying estates, and having special regard to

(1) (1866) 6 W. R. 228.

the view held in India respecting the separation of the ownership of buildings from the ownership of the land, and to the recognition by the Courts in India that there is no rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself, their Lordships are of opinion that in order to make a house erected upon the land, as well as the land itself, subject to the Government power of sale for arrears of revenue, special words indicating the intention of the Legislature to make the building subject to sale would be necessary.

No such special words are to be found, and their Lordships are of opinion that the conclusion at which the learned Judges of the High Court arrived, viz., that the ownership of the building did not pass to the plaintiff by reason of the revenue sale, was correct, although they are not prepared to adopt all the reasons which were advanced for that conclusion.

The question then arises whether the defendants are entitled to the compensation money which was awarded in respect of the building, or to what, if any, portion of such money.

Their Lordships are not prepared to adopt the basis on which the learned Judges of the High Court acted in this respect. Their Lordships are of opinion that, in order to arrive at a decision on this part of the case, it is necessary to consider what would have been the position and the respective rights of the parties after the sale, if no acquisition had taken place under the Land Acquisition Act.

In such a case it would be reasonable that the parties should arrive at an arrangement as to what should be done, and their Lordships therefore suggested that learned counsel appearing for the appellant and respondents should enquire whether any arrangement

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could be made. Their Lordships have been informed that it has not been found possible to arrive at any arrangement or to agree upon a sum to be paid to the defendants, and their Lordships have, therefore, to deal with this part of the case.

It is difficult to lay down any principle upon which the compensation money awarded in respect of the house should be apportioned, but the position seems to their Lordships to involve certain matters which should be taken into consideration by the Court which makes the apportionment.

After the sale the plaintiff would have been the owner of the land and the defendants would have been the owners of the house.

The plaintiff would have had the right to call upon the defendants to remove the house. If the defendants did remove the house, the value to them would be small, and in the ordinary course would be no more than what has been called "demolition value," viz., the value of the materials less the cost of removal; and if the defendants did not remove the house they would lose it.

There is, however, the possibility that (if the land had not been acquired under the Land Acquisition Act) the owner of the land would not have desired or required the removal of the house, and he might have been willing to pay to the defendants, the owners of the house, more than the mere demolition value of the house.

In other words, the owner of the land would be a possible purchaser, who might be willing to give more for the house than anyone else, as he was the owner of the land.

It is also to be remembered and taken into consideration that if the defendants were called upon to

remove the house they would be entitled to a reasonable time for such removal, and that during such time the plaintiff would be kept out of enjoyment of the land.

All the above-mentioned matters will have to be taken into consideration in assessing what portion of the compensation money awarded in respect of the house should be paid to the defendants.

Their Lordships are not in a position to make the apportionment, and as the parties have not been able to agree upon an amount, it is necessary to remand the case to the learned Subordinate Judge in order that he may decide to what portion of the Rs. 12,388 the defendants are entitled, having regard to the matters which are mentioned in this judgment.

Their Lordships have been informed that the balance of the compensation money, ordered by the High Court's decree to be refunded, has not yet been refunded.

Their Lordships therefore will humbly advise His Majesty that the appeal should be allowed, that the case should be remanded to the learned Subordinate Judge for the above-mentioned purpose, and that the decree of the High Court should be varied as follows:—That it be declared that out of the total compensation money, *i.e.*, Rs. 14,569-9-6, the plaintiff is entitled to Rs. 2,181-9-2 and such further sum as the learned Subordinate Judge on remand may find due to him in respect of his share of the sum of Rs. 12,388-0-4 awarded by the Collector in respect of the house, and that the plaintiff do refund to the defendants the sum which the learned Subordinate Judge may find due to the defendants as their share of the said sum of Rs. 12,388-0-4.

In their Lordships' opinion, the plaintiff was compelled to bring the suit, and though he claimed

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more than he should have done, he was entitled to a substantial amount of the compensation money, and their Lordships think that the defendants should pay the plaintiff the costs incurred by him in respect of the trial in the learned Subordinate Judge's Court. With respect to the subsequent appeals to the High Court and to His Majesty in Council, the claims of both parties were in excess of their rights, and such claims were persisted in to the end. Their Lordships therefore are of opinion that the plaintiff and the defendants should bear their own costs in respect of the appeals to the High Court and to this Board.

The costs of the hearing on remand will be in the discretion of the learned Subordinate Judge.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellant: *Watkins & Hunter.*

Solicitor for the respondents: *Solicitor, India Office.*

A. M. T.