

APPELLATE CIVIL.

Before Henderson and Latifur Rahman J.J.

MANINDRA CHANDRA SEN

v.

SHAMSUL HUQ MUKHTEAR.*

1939

April 4, 5.

Revenue Sale—Kist—*Latest day of payment*—*Partition of estates by the Collector*—*Notice on the proprietor of separate estate*—*Estates Partition Act (Ben. V of 1897), ss. 94, 95*—*Bengal Land-revenue Sales Act (XI of 1859), ss. 2, 3.*

If notice under s. 94 of the Bengal Estates Partition Act, 1897, served by the Collector on the proprietor of the separated estate mentions that the land revenue for the separate estate is payable in two *kists*, namely, January and March, and if thereafter under s. 95 of the Act no separate engagement for the payment of such land-revenue is entered into by such proprietor with the Collector, then the *kists* mentioned in the notice under s. 94 of the Bengal Estates Partition Act are the terms of the original engagement or *kists* within the meaning of s. 2 of Bengal Land-revenue Sales Act, 1859, and are not the latest day of payment under s. 3 of the Act.

APPEAL FROM APPELLATE DECREE preferred by the plaintiffs.

This was an appeal by the plaintiffs, whose suit for setting aside a revenue-sale was dismissed by both the Courts below. The material facts of the case appear from the judgment.

Atul Chandra Gupta and *Jitendra Kumar Sen Gupta* for appellant. The sale was premature. The latest day of payment of the revenue within the meaning of s. 3 of Act XI of 1859 had not passed, when the sale was held. In this case my clients had originally 2 as. 15 gds. share in the estate No. 113 and a separate account was opened in his name in respect of that share. The revenue for his share was Rs. 10-9 as. per year, payable in four *kists*. They

* Appeal from Appellate Decree, No. 1282 of 1937, against the decree of Ramesh Chandra Sen, Third Subordinate Judge of Dacca, dated Jan. 25, 1937, affirming the decree of Brajendra Saran Sanyal, Second Munsif of Manikganj, dated July 17, 1936.

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paid revenue regularly according to the said *kists*. It appears that the estate No. 113 was partitioned under the Estates Partition Act, 1897, and in lieu of the appellant's share in the *touzi* a separate *touzi*, viz., *touzi* No. 16751 was created and its annual revenue was fixed at Rs. 15-10-6p., payable in two *kists*, January and March. It is said that the March *kist* of this new *touzi* was in default and on that account the sale was held. Now, under s. 94 of the Estates Partition Act, 1897, after the partition of an estate is effected, a notice has to be served on the proprietors to whom separate estates are allotted, informing them of the separation of their estates and of the revenue payable for each of the separated estate and asking them to enter into separate engagement with the Government for payment of such revenue. In this case, there is a finding about service of such notice, but no separate engagement was entered into by the proprietors. The result is that under s. 95 of the Estates Partition Act, 1897, the terms in the notice should be regarded as the terms of engagement as between the proprietors and the Government. The notice mentions that the revenue is payable in two *kists*, January and March. These must be taken to be *kists* within the meaning of s. 2 of Act XI of 1859. So, in default of March *kist* of 1934, it became an arrear on April 1, 1934, and the latest day of payment was January 12, 1935. Hence the sale on June 24, 1934, was premature and without jurisdiction.

There is another point. Under s. 6 of Act XI of 1859, the date fixed for sale must not be less than thirty clear days from the date of affixing the notification in the office of the Collector. In this case the date of affixing the notification is May 21, 1934, and the date fixed for sale was June 20, 1934. The lower appellate Court holds that the irregularity is cured, because, though the date fixed for sale was June 20, 1934, the sale was actually held on June 21, 1934. This view is wrong, because the material date is the date fixed for sale and not the date of sale.

According to the Full Bench case in *Mobaruk Lal v. Secretary of State for India in Council* (1), such sale would be without jurisdiction, but that view was not accepted by the Judicial Committee in *Tasadduk Rasul Khan v. Ahmad Husain* (2). The present view is that it is a material irregularity for which sale may be set aside under s. 33 of Act XI of 1859 on the proof of substantial injury. This was held in *Gangadhar Das v. Bhikari Charan Das* (3). There is no question that the estate was sold at an inadequate price, but there is no finding that there is any connection between inadequacy of price and this irregularity. If I do not succeed on the first point, a remand may be necessary if your Lordships upheld my second contention.

Gopendra Nath Das, Abdul Quasem and Abdul Aleem for respondents. The dates mentioned in the notice under s. 94 of the Estates Partition Act, 1897, are really latest days of payment within the meaning of s. 3 of the Act XI of 1859. They are mentioned in the *touzi*-ledger of the collectorate as the latest dates of payment. The word *kist* in *touzi*-ledger is really the latest day of payment. I rely on the case of *Dina Bandhu Chatterji v. Ashutosh Chatterji* (4).

HENDERSON J. This appeal is by the plaintiffs. They were proprietors of a 2as. 15gds. share in a certain estate in the district of Dacca. They opened a separate account. There were subsequent partition-proceedings, as a result of which their separate account was formed into a new estate, which was given the number 16751 on the roll of the Dacca Collectorate. Revenue was fixed at Rs. 15-10-6p. to be payable in two instalments, Rs. 10 in January and the balance in March. It may be noted that this revenue is greater than that attached to their previous separate account. The plaintiffs went on paying

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(1) (1885) I. L. R. 11 Cal. 200.

(3) (1911) 16 C. W. N. 227.

(2) (1893) I. L. R. 21 Cal. 66 ;
L. R. 20 I.A. 176.(4) I. L. R. [1938] 2 Cal. 665 ;
L. R. 65 I. A. 380.

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revenue as before. Their case is that they did not know that the partition had been given effect to and a new estate was created. It is difficult to see what object they could have had in behaving in this way, if they really knew of it and for my part I should have no difficulty in accepting their explanation. Be that as it may, the estate naturally fell into arrears and was brought to sale and purchased by the respondent. The plaintiffs then instituted the present suit in order to get the sale set aside. They failed in both the Courts below and now appeal to this Court.

The first ground urged in support of the appeal is that the sale was without jurisdiction because it was premature. This point depends on the old troublesome question whether the January and March *kists* are the *kist* days under s. 2 or the latest days of payment under s. 3 of the Act.

The learned Munsif relied upon the entries in the *touzi*-register, which go to show that the *kist* day referred to is the latest day of payment under s. 3. There is no other evidence in support of this case. It is not at all clear from the judgment of the learned Subordinate Judge in appeal on what exactly he relied in reaching his decision. However, it cannot be disputed that the estimate of this evidence made by the learned Munsif was correct and there is no doubt that according to the entries in the *touzi*-register these two days are the latest days of payment under s. 3. The question is whether the entries in the register are right or wrong.

On the other side, the plaintiffs produced Ext. D, which is a certified copy of the notification under s. 94 of the Estates Partition Act. With great respect to the learned Subordinate Judge it appears to me that he has misconceived the nature and the legal effect of this notice.

Section 94 provides that the Collector is to deliver possession of the separate estates. He is to give

notice to every proprietor, informing him of the date from which separation will take place, when he will be separately liable for the amount of land-revenue specified in the notice. The notice is also to call upon him to enter into a separate engagement.

Section 95 provides that from the date specified in the notice each separate estate will be borne on the revenue-roll as a distinct estate separately liable for the amount of land-revenue assessed upon it. The proprietor will be so liable, whether he has entered into a separate engagement or not.

In the present case, the plaintiffs did not enter into an engagement. They are therefore liable for the separate revenue of the newly separated estate from the date specified in the notice.

The present estate is item No. 14 in the notice. The plaintiffs were informed that they would have to pay in accordance with the *kistibandi* attached thereto and were called upon to enter into an engagement. Those *kists* must, from the very nature of the case, be the *kists* referred to in s. 2.

Mr. Das has argued that it was possible to insert the latest day of payment under s. 3, instead of the *kists* under s. 2. It is really quite meaningless to insert the latest days of payment under s. 3 into a *kabuliyat* executed by the proprietor. The latest day of payment has nothing to do with the proprietor and nothing to do with the Collector. It depends upon the Board of Revenue and may be altered from time to time. These *kists* in the notices under s. 94 are fixed and cannot be altered except by agreement. It may well be that, when the proceedings under s. 94 were being conducted, the revenue-officer might have had the latest day of payment in his mind. We are not concerned with that. We are only concerned with the legal effect of what was done. We have no doubt that the only possible interpretation of the notice under s. 94 is that these *kists* are the *kists* referred to under s. 2 of the Act.

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As the sale proceeded upon the basis that these were not the *kists* under s. 2, but the latest day of payment under s. 3, the sale was premature and was without jurisdiction.

It is, therefore, not necessary for us to consider whether the appeal should be remanded in order that the Court may determine whether any injury was caused to the plaintiffs by the irregularity in connection with the notice under s. 6.

The appeal is allowed. The decrees of the Courts below are set aside. The plaintiffs will be given a decree as prayed for with costs in all the Courts.

LATIFUR RAHMAN J. I agree.

Appeal allowed.

N. C. C.