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subsisting mortgage would be an acknowledgment of his right to redeem if he established his title." Those Judges, therefore, regard the acknowledgment required as an acknowledgment of an existing right to redeem, or of an existing title in the mortgagor. Neither of these are to be found in the present case.

We, therefore, agree with the Court below that this suit is barred, and dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

MAHARAJAH OF BURDWAN (DEFENDANT) *v.* TARASUNDARI DEBI (PLAINTIFF.)

P. C.* 1882 *November* 23.

[On appeal from the High Court at Fort William in Bengal.]

Sale for arrears of rent—Regulation VIII of 1819, *s.* 8, *cl.* 2—*Proof of publication of notice before sale of patni taluk for arrears of rent.*

The due publication of the notices prescribed by Regulation VIII of 1819 s. 8, cl. 2, forms an essential part of the foundation on which the summary power to sell a patni taluk for non-payment of rent is exercised by the zemindar, who, when instituting this proceeding, is exclusively responsible for such publication being regularly conducted.

Although objection to the form of the receipt, and the absence of the receipt itself, need not be regarded, if the fact of the due publication of the notices having been made is not a matter of controversy (as held in *Sona Beebee* v. *Lalchand Chowdhry* (1); yet where that fact was in doubt owing to the evidence of it not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the zemindar—the finding of the High Court that due publication had not been established by such proofs as were forthcoming, was maintained by the Judicial Committee.

APPEAL from a decree of the High Court (22nd March 1880) reversing a decree of the Judge of the District of East Burdwan (2nd May 1878).

The question raised on this appeal was whether or not before the sale of the respondent's patni taluk, for arrears of rent due

Present: LORD FITZGERALD, SIR B. PEACOCK, SIR R. COUCH, and SIR A. HOBHOUSE.

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to the zemindar, there had been sufficient notification, according to Regulation VIII of 1819, s. 8, cl. 2, of the intended sale.

The patni tenure sold under that Regulation was lot Salmula in the East Burdwan district, formerly held by Brojomohun Banerji as patnidar. It was sold for default in payment of rent due to the zemindar for the half-year ending 1284 B. S., by public auction on the 8th Aughran 1284 (November 22nd, 1877), and was bought by Rash Behari Ghose, the highest bidder, for Rs. 2,000.

The present suit was afterwards instituted in the Court of the Judge of East Burdwan, alleging absence of the notice of the intended sale required by Regulation VIII of 1819 on Salmula. The defence was that the notice required had been duly published upon the land of the defaulter. At the hearing it appeared that notifications had been duly made at the Collector's kutchery, and in the Sadr kutchery of the zemindar; but the question was whether the notice required to be published on the land belonging to the defaulter had been duly given; and the Judge, upon the evidence, found that it had, although the serving peon had not brought back the receipt required. On this point the Judge was of opinion that the sale was not void and useless merely on account of this omission, although the Regulation required the receipt to be taken and filed. In this respect he considered the provisions of the Regulation to be merely directory. The suit was accordingly dismissed. On appeal to the High Court that judgment was reversed. The Judges of a Division Bench (WHITE, J., and MACLEAN, J.), there being no independent evidence that the peon had been entrusted with service of the notice in question, and none, except his own, to show that he even went to Salmula, found that the due publication of the notice had not been proved.

The facts, and the provisions of Regulation VIII of 1819, are stated in their Lordships' judgment.

On this appeal—

Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon* appeared for the appellant.

The respondent did not appear.

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For the appellant it was argued that the weight of the evidence was in favor of the conclusion at which the District Judge had arrived. A substantial compliance with the requirements of Regulation VIII of 1819 had been shown. Reference was made to *Sona Beebee* v. *Lalchand Chowdhry* (1); *Ram Sabuk Bose* v. *Monmohini Dossee* (2); and *Pitambar Panda* v. *Damoodur Doss* (3).

The judgment of their Lordships was delivered by

LORD FITZGERALD.—This case comes before us *ex parte*. The suit was to set aside a sale of a patni taluk, which took place by auction for non-payment of rent, the allegation of the respondent, who was the plaintiff in the suit, being that the sale was illegal in consequence of the non-observance of Regulation VIII of 1819. By that regulation it is provided, with reference to cases where sales are to take place in certain districts and under certain circumstances for non-payment of rent, "that before the first day of Baisakh 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 of the talukdars or other holders of an interest of the nature described in the preceding clause of this section." Having presented this petition both to the Civil Court and to the Collector, "the same shall then be stuck up in some conspicuous part of the kutchery, with a notice that, if the amounts claimed be not paid before the first of Jeyt following, the tenures of the defaulters will on that day be sold by public sale in liquidation." Then it provides that "a similar notice shall be stuck up at the Sadr kutchery of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the kutchery, or at the principal town or village upon the land of the defaulter." It is admitted that there was a compliance with the two earlier provisions, but the

(1) 9 W. R., 242.
(2) L. R. 2 I. A., 71: S. C. 14 B. L. R., 394; 23 W. R., 113.
(3) 24 W. R., 129.

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question arises whether a copy or extract of the notice applying to the individual case was sent by the zemindar to be published "at the kutchery of the principal town or village upon the land of the defaulter." The Regulation goes on: "The zemindar shall be exclusively answerable for the observation of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter or of his manager for the same; or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot. If it shall appear from the tenor of the receipt or attestation in question that the notice has been published at any time previous to the 15th of the month of Baisakh, it shall be a sufficient warrant for the sale to proceed upon the day appointed. In case the people of the village should object or refuse to sign their names in attestation, the peon shall go to the kutchery of the nearest Munsiff, or, if there should be no Munsiff, to the nearest thana, and there make voluntary oath of the same having been duly published, a certificate to which effect shall be signed and sealed by the said officers and delivered to the peon." That is a very important Regulation, and no doubt it was enacted for a certain and defined policy, and ought, as a rule, to be strictly observed. Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the zemindar, who institutes the proceeding, exclusively responsible for its regularity. Their Lordships do not, however, intend at all to controvert a decision to which their attention was called, of Sir Barnes Peacock, when he filled the office of Chief Justice of the High Court of Bengal, to the effect that if the notice itself has been duly published, if it is not matter of controversy, if the fact was ascertained that it was published, then one would not regard any objection either to the form of the receipt or the absence of the receipt itself. That decision was alluded to in a case before this tribunal, in which their Lordships say they are disposed to agree with the judgment of the High Court confined as it is to cases where there is proof that the notice

was duly served. That, again, is where there is no controversy as to the fact of the service. It seems to their Lordships that the object of the Regulation was that due service or publication should not be left matter of controversy. The evidence should be secured immediately afterwards, and exist in writing, and be referred to by the proper officer as part of the foundation of the sale. Accordingly, if, immediately upon posting the notice, the peon posting it can find the defaulter or his manager, he is bound to ask for a receipt from the defaulter or his manager, signed under his hand, and if he gets such a receipt there is an end to all question as to the service. If he does not find the defaulter or his manager, or if that person will not sign a receipt, then he is to call in three substantial people of the village to attest the fact, which will be apparent to their eyes, that the notices in question have been published. If they object, as very likely villagers would object, to be parties to the proceedings for the enforcement of a sale, then he is obliged to go to the nearest Munsiff, and make a voluntary oath of the fact of service, which act is immediately recorded, and forms the foundation upon which the officer afterwards proceeds in carrying out his sale. Thus the evidence that the notice has been given is immediately preserved, and the fact is not left to be matter of controversy afterwards.

The issue in this case is as to whether the provisions of Regulation VIII of 1819 have been complied with. The case before us differs from that before the Chief Justice of Bengal, and equally from that case which was before this tribunal, in this, that the fact of service here is matter of controversy. We should be obliged to assume, in order to arrive at a conclusion one way or the other, either that there was a conspiracy to cheat and deceive upon the part of the plaintiff Charoo and the two chowkidars who are represented to have assisted in the fraud, or that there was a conspiracy on the part of the peon sent to effect this publication, who, having, it is said, neglected his duty, conspired afterwards with a confederate to make a false statement and forge a receipt.

The Judge in the primary Court delivered his judgment in favour of the appellant. He had the advantage of seeing and

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hearing the witnesses, and he has expressed his decision in vigorous language. But there was an appeal on the question of fact, and upon that question of fact two Judges of the High Court have concurred in thinking that the Judge of the Court below was wrong, and have come to the conclusion that the plaintiff and her witnesses have told the truth. It shows that not alone is the fact of publication in controversy, but that the matter is so involved that it is difficult to come to a safe conclusion upon it. Their Lordships do not propose to say upon this controverted question of publication on which side the weight of evidence lies.

Their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and upon this ground: The doubt or difficulty in the case is one that would not have existed save by the neglect of those representing the Maharajah. There is no evidence save the statement of the peon Khetu that the notice was ever entrusted to him; but supposing it was entrusted to him for publication, his duty, and that of the officers of the Maharajah, would have been clear and plain. He should have ascertained when he went to make the service that the person whom he represents to be Charoo, to whom he says he delivered the notice, was the defaulter or the agent of the defaulter. He should then have obtained his receipt, a receipt proper in form. If he could not obtain it he should have followed the course prescribed by the Regulation, and should at once have returned the documents to the proper officer of the Maharajah. It would then have been the duty of that officer to examine the receipt and see that it was in all respects complete and regular as part of the foundation of the title afterwards to be given by sale. Their Lordships have before them a copy of the supposed receipt, which appears to be enveloped in mystery from the time it was alleged to have been signed. The peon gives no history of it. What did he do with it? To whom did he give it? Where has it been? All that is left in obscurity, and no confirmatory proof is produced from amongst the servants of the Maharajah that the peon, having effected what he alleged to be service, brought in this receipt with him, and filed it in the Collectorate or with the proper officer of the district. What

is the document itself when we come to look at it? The professed signatures are at the top. The first is that of Brojomohun Banerji. That purports to be the name, not quite the correct name, of the registered proprietor of the taluk, who has been dead many years, and if this had been brought to and examined by the servants of the Maharajah they must have seen that the dead man could not have signed it; there is no doubt that they knew that this registered proprietor was not alive. The next signature is that of Redoynath Banerji, who is put down as the karpurdaz, meaning the karpurdaz of the dead man, Brojomohun Banerji. This turns out to be a non-existing individual; there is no such person. Then we come to the attesting witnesses at the foot, and they are Goburdhun Chowkidar and Gopal Chowkidar, residents of Salmula. The inference from that would be that they were the chowkidars of Salmula. If there are such persons in existence, there are no such chowkidars at Salmula, and neither of the chowkidars of Salmula have been produced on either one side or the other. This document or receipt so produced by the peon is by no means a compliance with the provision of Regulation VIII. Their Lordships think that the absence of that care and attention which ought to have been shown with reference to this document, and the absence of any contemporaneous inquiry whether there had or had not been a publication of this notice, as required by the regulation, has created the very difficulty which the Regulation was intended to prevent; and as the regulation makes the zemindar exclusively answerable for the observance of its provisions, their Lordships are of opinion that the issue as to the Regulation ought to be found in favor of the respondent; and will therefore humbly report to Her Majesty, as their opinion, that the decree of the High Court of Judicature ought to be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: Mr. *T. L. Wilson*.