PRIVY COUNCIL.

P.C.* 1893 January 25, February 11.

MAHOMED ABDUL HAI (DEFENDANT No. 1) *v.* GUJRAJ SAHAI (PLAINTIFF) AND ANOTHER (DEFENDANT No. 2).

[On appeal from the High Court at Calcutta.]

Public Demands Recovery Act (Bengal Act VII of 1880)—Irregularity of proceedings—Ground for setting aside sale—Presumption.

The Collector having received a report from the tehsildar that arrears of road cess (Bengal Act IX of 1880) were due in respect of villages, took proceedings purporting to be in pursuance of Bengal Act VII of 1880. In the certificate of unpaid demand, the names of the persons described as debtors were those not of the present proprietor, but of former proprietors, and the copy and notice were addressed to them.

Held, that, even if the certificate and the proceedings following it had been duly authenticated, and intimated to the present proprietor, which had not been the case, they could not affect his right of property in the villages, inasmuch as the Act only authorized the attachment and sale of the property of the persons who were described as debtors. This of itself was a ground for cancelling the sale. Their Lordships also concurred in the view taken by the High Court that there was no evidence showing that the certificate had been duly signed; and were of opinion that the High Court had rightly found payment of the arrears before the sale.

APPEAL from a decree [2nd August 1889 (1)] of the High Court, reversing a decree (10th May 1888) of the District Judge of Tirhut.

The plaintiff in this suit was the present respondent, Gujraj Sahai, and the defendants were the appellant Mahomed Abdul Hai and the Secretary of State for India in Council. The object of the suit was to obtain a declaration of the invalidity of an auction sale held on the 15th April 1886, the result of proceedings taken by the Collector of the district under the Public Demands Recovery Act (Bengal Act VII of 1880) in reference to villages Ghouspore, Kadirpore, and Suratpore, in Mozufferpore, for road cess alleged to be due (Act IX of 1880).

* *Present :* LORDS WATSON, HOBHOUSE, and MORRIS, and SIR R. COUCH.

(1) I. L. R., 17 Calc., 414.

The first defendant, now appellant, had been declared to be the purchaser at that sale, and insisted on his right to possession of the villages.

The appellant was substantially the only defendant; the other person sued, the Secretary of State for India in Council, now named as a respondent on the record, but who did not appear, had taken no part in the defence.

The facts of the case appear on the report of the appeal below, in I. L. R., 17 Calc., 414, as well as in their Lordships' judgment.

The suit was dismissed with costs by the District Judge; but on appeal a Division Bench of the High Court (PIGOT and RAMPINI, JJ.) reversed that decree, finding that the arrears had been paid; that thereupon it became the duty of the Collector, under the provisions of sections 21 and 22 of Bengal Act VII of 1880, to enter satisfaction upon the certificate; and that a sale after that payment had been made was invalid. The Court also held that independently of the above, and apart from the question whether payment had or had not been made before the sale, the latter had not taken place in virtue of a certificate duly issued and completed against the proper person, so as to place the plaintiff, the proprietor of the villages sold, in the position of a judgment-debtor under the Act; and that the result had been that the subsequent proceedings were irregular and defective and the sale was invalid. A decree was therefore obtained by the plaintiff. See I. L. R., 17 Calc., 419, where the judgment is given at length.

On this appeal

Mr. *C. W. Arathoon*, for the appellant, argued that, on the facts, the District Judge had rightly presumed that the certificate was duly signed in accordance with the provisions of Bengal Act VII of 1880. It was endorsed by the Deputy Collector five days after it was filed, with the direction that notice should issue, and the acceptance of it, as properly made, in conformity with the requirements of the Act, was correct. The decision of the District Judge as to the non-payment of the arrears was well founded, on reference to facts in evidence which were brought forward, and his decree should not have been reversed. Reference being made

1893

MAHOMED ABDUL HAI v. GUJRAJ SAHAI.

to sections 8 and 22 of the Act, it was contended that, when a certificate had been made by the Collector, payment of the amount stated could only be made in the manner prescribed for the deposit of decretal amounts in execution and upon notice to the Collector. Even if the judgment of the High Court was right, it should have been made on terms of the appellant, as auction-purchaser, being repaid the purchase-money with interest. Reference was made to *Sadhusaran Singh* v. *Panch Deo Lal* (1); and *Rash Behari Mukerjee* v. *Petambori Chowdhrani* (2).

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. H. A. Branson*, for the respondent, Gujraj Sahai, were not called upon.

Their Lordships' judgment was given by

LORD WATSON.—This suit, which relates to three villages, Ghouspore, Kadirpore, and Suratpore, situate in the district of Mozufferpore, in Tirhut, was brought by Gujraj Sahai, one of the respondents, in the Court of the District Judge, against the Secretary of State for India, and other defendants, including the present appellant, Abdul Hai. The plaint prays for confirmation of his right and for cancelment of a certificate dated the 13th January 1886, issued under the Act No. VII of 1880, and of an auction sale in execution of that certificate upon the 15th April 1886. The appellant defends, on the ground that he acquired a valid right to the lands as purchaser at the sale sought to be cancelled. The Secretary of State applied for an extension of the time for lodging his written statement, but made no further appearance in the action, although his name appears as that of a respondent in this appeal.

Gujraj Sahai, who may be properly described as the respondent, in May 1882 purchased the three villages in question from the Land Mortgage Bank of India, and in October 1884 he was entered as proprietor in the land register kept for the Mozufferpore district. The previous proprietors were Bibi Amina, Bibi Nisar Fatima, and Bibi Manzural Fatima. Notwithstanding the purchase and subsequent mutation of names in the land register, these ladies continued to be treated by the Collectorate as the proprietors liable for road cess; and the form of the proceedings taken by the

(1) I. L. R., 14 Calc., 1. (2) I. L. R., 15 Calc., 237.

Collector under Act No. VII of 1880, which are the subject of controversy in this case, is obviously due to that circumstance. Demands of road cess made against Bibi Amina were duly met by the respondent from the time of his purchase till the end of 1884; but none of the three instalments of cess falling due in the year 1885 were paid. Accordingly Jogeswar Sahai, a tehsildar, to whom the collection of these instalments had been entrusted, reported to the Collector that the arrears of road cess in respect of the three villages amounted with interest and commission to Rs 43-4-6. The only names mentioned in the report are those of Bibi Amina and Bibi Nisar Fatima as the holders of the estate for which the arrears were due.

Thus far there is really no dispute as to the facts of the case. After he received the tehsildar's report, it appears that the Collector did take certain proceedings for recovery of the arrear, which were meant to be in pursuance of Act No. VII of 1880, and which terminated with the exposure of the three villages to auction sale on the 15th April 1886. With regard to the actual tenor as well as the legal effect of these proceedings, the parties are widely at variance. In substance, the respondent's case is that these proceedings were in themselves informal and ineffective to displace his title as owner; and that, assuming them to be formal, the sale was illegal by reason of his having previously paid the arrear due to the Collector.

The appellant disputes the fact of payment, and maintains that the whole procedure was in conformity with the provisions of the Act of 1880, and that the property of the three villages has been duly vested in him as auction purchaser at the sale of the 15th April 1886. Two of the issues adjusted for the trial of the case sufficiently raise all the questions which were argued in this appeal; these being,—

"4th.—Before the 15th April 1886, did plaintiff pay the amount due by him to any person authorized to receive the same?

"6th.—Was the certificate of the 13th January 1886 informal? If so, what is the effect?"

The District Judge answered both these issues in the negative, and dismissed the suit. On appeal his decision was reversed by a

1893

MAHOMED ABDUL HAI v. GUJRAJ SAHAI.

Divisional Bench of the High Court at Calcutta and the suit decreed with costs to the present respondent, both against the Secretary of State and against the appellant.

It will be convenient to begin with the sixth issue, and first of all, to consider the evidence on record of the precise terms of the proceedings which were taken by the Collector for recovery of these arrears of cess under the Act of 1880. The initial step prescribed by the Act is the making of a certificate by the Collector in statutory form, setting forth the amount and particulars of the arrears demanded, and the name and address of the debtor by whom they are owing. The Act requires that the certificate shall be signed by the Collector. When completed and duly filed, the certificate has, in so far as regards the remedies for enforcing it, the force and effect of a decree of a Civil Court, the Secretary of State being the judgment-creditor, and the person therein described as debtor being the judgment-debtor. There has been produced from the Collector's office a document bearing date the 13th January 1886, which is in the form of a statutory certificate of demand. When produced, it was in a tattered condition, and that part of the paper upon which the Collector's signature should have been written was wanting. It will be necessary to consider hereafter whether it ought to be presumed that, as originally prepared, the document was completed by his signature, that being one of the points upon which the Courts below have differed in opinion. The amount of arrears, and the property in respect of which they had accrued, are stated in terms similar to those of the tehsildar's report of the same date. The names of the defaulters are given as "Bibi Amina, Bibi Nisar Fatima, and Manzural Fatima regarding the property purchased by Baboo Gujraj Sahai."

When the certificate has been filed, the Act prescribes that the Collector shall serve a copy thereof, together with a notice in statutory form, upon the judgment-debtor. The notice contains an intimation that if the debtor fails to show cause within 30 days, or does not show sufficient cause why the certificate should not be executed, it will be executed in the same manner as if it were a decree of a Civil Court, unless the amount certified as being in arrear is paid into the Collector's office. Upon due service of

the copy-certificate and notice, the certificate binds all immoveable property of the judgment-debtor within the jurisdiction of the Collector, to the same effect as if it had been attached under section 274 of the Civil Procedure Code. There is produced from the office of the Collector a notice dated the 21st January 1886, which bears that a copy of the certificate was annexed. There is a dispute as to its service, but assuming the document to have been duly served upon the respondent, it is open to the same observations as the certificate. It is addressed not to the respondent Gujraj, but to the ladies who had been previous owners of the property.

No one having appeared to show cause why the certificate should not be executed against the judgment-debtors, a sale followed, on the 15th April 1886, at which the appellant appears to have made the highest bid of Rs. 560. That is evidenced by a memorandum of bids, produced from the office of the Collector, which is signed by the appellant as highest bidder and purchaser at the sale. The subjects exposed for sale on that occasion are described in the memorandum as "the right and interest owned by Mussammat Bibi Amina, Bibi Nisar Fatima, and Bibi Manzural Fatima, in the property purchased by Baboo Gujraj Sahai, in Mouzah Ghouspore, &c." Any certificate of sale issued to the purchaser would presumably and certainly ought to have run in the same terms. But the appellant has not produced a certificate, and he has neither alleged nor attempted to prove that he paid the price; yet he had the courage to argue that, in the event of his failing in this appeal, he ought to have a decree against the respondent for repayment of the Rs. 560.

Assuming that the certificate of the 13th January 1880, and the steps of procedure which followed upon it, were authenticated in terms of the Act and were duly intimated to the respondent, their Lordships are of opinion that they could not in any way affect his right of property in the three villages for which arrears of cess were due. If they were directed against the respondent, and were meant to attach his interest, these proceedings were unwarranted by the provisions of Act VII of 1880, which only authorise the attachment and sale of property of the persons who, on the face of them, are described as the judgment-debtors. The

1893

MAHOMED ABDUL HAI v. GUJRAJ SAHAI.

Act gives no authority to attach and sell the estate of any other person in satisfaction of the arrears due by the judgment-debtors. The certificate upon which the appellant relies could not have the force and effect of a decree of a Civil Court for the purpose of execution, except against Bibi Amina, Bibi Nisar Fatima, and Bibi Manzural Fatima. If, on the other hand, the property sold in execution of the certificate was merely the interest of the three ladies, as the memorandum of bids very strongly suggests, the respondent's title and proprietary possession remain unimpaired.

These considerations are in themselves sufficient to dispose of the present appeal. But their Lordships desire to express their concurrence with the view taken by the learned Judges of the High Court, that there is no evidence to show that the certificate of the 13th January 1886 was ever signed by the Collector in compliance with the requirements of the Act. Direct evidence there is none; but the District Judge found, as a matter of fact, that it had been signed, applying the maxim *omnia rite et solenniter acta*. According to the learned Judge's own showing, the circumstances of the case are not very favourable to the presumption. Of one writing produced, he says:—"Like everything else which has come under my cognizance from a road cess office, it is a most slovenly document." The certificate in question he does not seem to have regarded as an exception from the general rule. He describes it as drawn up "in the usual slovenly manner;" and he ascribes the error of inserting the ladies' names as debtors, after mutation in the land register, to "oversight and general slovenliness." When the extant parts of an incomplete writing exhibit such traces of careless preparation, their Lordships think it would be straining the maxim too far to presume that the parts which have disappeared must necessarily have been free from error.

Their Lordships are also of opinion, with the learned Judges of the High Court, that the respondent has proved payment of the arrear of cess specified in the certificate before the date of the sale proceedings; and that the fourth issue ought therefore to be answered in the affirmative. The receipt is proved to have been delivered to the respondent's mukhtar, in exchange for the money, by Laldhari Singh, who at that time was admittedly one of the tehsildars employed in the collection of cess. The District Judge

negatived the payment because of the impossibility of separate receipts for the same cess having been issued to two different tehsildars, as deponed to by the Deputy Collector. Now the evidence of the Deputy Collector hardly goes that length. He only says that "it is never the custom to write the same demand in more than one cheque book," which is very different from saying that such a thing could not occur. Had the evidence of payment rested simply upon the receipt, there might have been some room for doubt. But the important evidence comes from the office of the Collector. The money was paid into the treasury by Laldhari Singh, accompanied by a *chalan* under his hand, dated the 1st February 1886, which states the payment to be on account of cess of mouzah Ghouspore, &c., remitted by Bibi Amina, one of the judgment-debtors. The payment thus made was entered in the register of receipts of the treasurer of Mozufferpore treasury for the month of February 1886, reference being made to the *chalan* for particulars. Whether Laldhari Singh had or had not proper authority to collect the arrear is really a matter of no consequence, because it is clear that more than six weeks before the auction sale the money was paid into the Government treasury, along with a distinct statement that it applied to the arrears of cess for the three villages now in dispute.

Upon the arrear being paid into the treasury, it became the statutory duty of the Collector, under section 22 (*b*) of the Act, to enter satisfaction upon the certificate of the 13th January 1886, under his hand and signature, which he failed to do. The appellant argued that there being no such entry upon the certificate on the 15th April, his purchase of that date was valid. It would be a singular result if a Collector's neglect of his statutory duty gave him statutory power to sell in execution the property of a person who owed nothing to the Government. That such was not the intention of the Legislature is abundantly clear. By the terms of the notice served upon the judgment-debtor, along with a copy of the certificate, all that the debtor is required to do, in order to prevent execution of the certificate, is to pay the amount of arrears demanded into the office of the Collector.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellant

1893

MAHOMED ABDUL HAI v. GUJRAJ SAHAI.

Abdul Hai must pay to the respondent, Gujraj Sahai, his costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent, Gujraj Sahai: Mr. *J. F. Watkins.*

C. B.

P.C. * 1893 *February* 1 & 18.

ISMAIL ARIFF (PLAINTIFF) *v.* MAHOMED GHOUS. (DEFENDANT).

[On appeal from the High Court at Calcutta.]

Declaratory decree, suit for—Specific Relief Act (I of 1877), s. 42—*Mere possession on the one side and unjustifiable dispossession on the other—Right of the possessor dispossessed by a wrong-doer, as against the latter—Injunction—Wakf.*

Lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser. The former can obtain a declaratory decree, and an injunction restraining the wrong-doer.

In such a suit the defence was that the land was *wakf*, and the defendant *mutwalli* of it. Both Courts found that the plaintiff was in possession as purchaser from some of those who were entitled to sell. But the first Court did not find a fact, which the Appellate Court found, *viz.*, that the property had been constituted *wakf*. Both Courts, however, concurred in the finding that the defendant at all events was not the *mutwalli*, and had no title.

Held, that the plaintiff was entitled to a declaratory decree against this defendant as to his right, and an injunction restraining him from interfering with his possession. For the purposes of the plaintiff's claiming such a decree, it was not necessary that he should negative the *wakf*, as to the validity of the endowment no decision being needed. This could not be decided either way in this suit, as parties interested were not before the Court.

APPEAL from a decree (27th July 1888) of the Appellate High Court, reversing a decree (27th March 1888) of the High Court in its Original Jurisdiction.

The main question between the plaintiff, appellant, and the defendant, respondent, was whether, on the state of facts that

* *Present:* LORDS WATSON, HOBHOUSE and MORRIS, and SIR R. COUCH.