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"deemed to have been a matter directly and substantially in issue" in the former suit, and is *res judicata*.

But it has been urged that the first suit having been brought in 1876, the Code of Civil Procedure of 1877, and not the Code of 1882, governs the case; but it is to be observed that the Code of 1882 says that "No Court shall try any suit or issue"; that is, shall try after the passing of that Act, though the circumstances had arisen previously.

Neither should it be lost sight of that the Act of 1877 and the Act of 1882 were not introducing any new law, but were only putting into the form of a Code that which was the state of the law at the time.

The state of the law at the time was, that persons should not be harassed by continuous litigation about the same subject-matter.

Upon these grounds their Lordships will humbly advise Her Majesty that the judgment of the High Court should be affirmed and the appeal dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

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

Solicitor for the respondent:—Mr. *S. G. Stevens.*

C. B.

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*P. C.**
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June 29.

AHSANULLA KHAN BAHADUR (DEFENDANT), *v.* HARICHARN MOZUMDAR (PLAINTIFF).

(On appeal from the High Court at Calcutta.)

Sale for arrears of rent—Sale of putni tenure set aside upon defect in the notice required by Regulation VIII of 1819, *section* 8—*Difference in notices of mid-year sales, and of sales for a year's rent in default, under clauses* 3 *and* 2, *respectively—Objection taken for first time on appeal.*

The power of sale given to the zemindar by Regulation VIII of 1819, upon default in payment of the rent by a putnidar, is only exercisable subject to a condition as to notice to the defaulter. To bring into operation the provisions of clause 3 of section 8, relating to a mid-year sale, the

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

serving a notice, according to that section, intimating to the putnidar that payment of three-fourths of the balance due will prevent a sale, is a condition precedent to the sale. A notice relating to a mid-year sale was *held* to be essentially defective, as it followed clause 2 instead of clause 3 of section 8, and intimated that payment of the whole arrear would be the only way to stay the sale.

This objection was taken for the first time in the Appellate Court: *Held* that as a defect fatal to the whole proceeding appeared in the notice, the objection was competently taken in that Court. *Macnaghten* v. *Mahabir Pershad Singh* (1) distinguished.

APPEAL from a decree (31st January 1890) of the High Court, (2) affirming a decree (28th April 1888) of the Subordinate Judge of Mymensingh.

The plaintiff, now respondent, brought this suit on the 14th April 1887 to have set aside the sale of his putni taluk which took place on the 16th November 1886, at the instance of his zemindar, purporting to be under the provisions of Regulation VIII of 1819, "to declare the validity of certain tenures, and to define the relative rights of zemindars and putni talukdars, also to establish a process for the sale of such taluks in satisfaction of the zemindar's demand of rent."

The putni was granted to the plaintiff's predecessor in estate by the defendant's predecessor, he being zemindar in possession of a share in a zemindari named Kismut Duajani in the Mymensingh district; and the rent reserved on the putni was Rs. 212 a year. The plaintiff made default in payment of the rent due from Baisakh to Assin, six months of the Bengáli year 1293, corresponding to the period from the middle of April to the middle of October 1886. The defendant, now appellant, in consequence of the plaintiff's default took proceedings against him under Regulation VIII of 1819, applying to the Collector for the issue of a notice. The result was that on the 1st Aughran 1293, corresponding to the 16th November 1886, the putni taluk was sold for an arrear of about Rs. 111, and was purchased by the defendant himself for Rs. 125. The question now raised related to the effect of the notice not having been as required in clause 3 of section 8 of Regulation VIII of 1819.

(1) I. L. R., 9 Calc., 656; L. R., 10 I. A., 25.
(2) I. L. R., 17 Calc., 474.

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The plaint alleged irregularity in the proceedings; stating that notices in the form required by the Regulation had not been published at the suddar kutcheri, in the mofussil, in the mehal sold, or in the collectorate kutcheri, nor had the service of notice alleged in the rubakari for sale been according to law; also, that the value of the property sold was Rs. 20,000; and fraud was alleged.

The defendant's written statement denied fraud, and alleged that the notices served had been sufficient to satisfy the requirements of the Regulation. Issues having been fixed, raising the points in dispute, the Subordinate Judge made a decree in the plaintiff's favour, setting aside the sale, on the ground that the notices required to be published in the several places mentioned in the Regulation had not been shown to have been duly published in all of them.

On an appeal by the zemindar, the High Court (NORRIS and MACPHERSON, JJ.) affirmed the decree, (1) but not on the finding of the Court below as to publication. The Judges held that even had the notice been as a fact served, it was defective in itself. It had not stated that the sale might be stayed by payment of so much of the arrears as would reduce them to one-fourth of the total demand of the zemindar. There was a wide difference according to the judgment between the notices under the one clause and those under the other. Under clause 2, a putnidar, dur-putnidar, incumbrancers, and others, were to learn from a notice, served in the places named, that the tenure would not be released from an impending sale unless the whole year's rent should have been paid before the date fixed for the sale. Under clause 3, payment of three-fourths of the half-yearly rent due would suffice to have the effect of staying the sale, and the notice under clause 3 was to be varied accordingly. The judgment concluded thus: "We therefore think that the ground that the notice was bad in law is a substantial ground, and upon it the appeal must be dismissed with costs." Both Courts concurred in setting aside the sale, though not on the same grounds.

Mr. *J. H. A. Branson* for the appellant:—There was error in the decision that the notice under the circumstances of this case, and with regard to the time when the objection was taken, was

(1) I. L. R., 17 Calc., 474.

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insufficient to support the sale, which in other respects had been found to be regular. The High Court had given effect to the objection, taken for the first time during the argument of the appeal, when other objections had been disallowed. The informality of one part of the same section having been treated as applicable instead of the other had not been shown to have occasioned any material injury to the interests of the plaintiff. An application which had not been granted had been made that the defendant might have an opportunity to show that the form used was the one in general use. A reference to the cases would show that, where irregularities had occurred, the test of its having occasioned injury to the interests of the party complaining was applied. He referred to *Pitamber Panda* v. *Damoodar Doss* (1), *Maharaja of Burdwan* v. *Tarasundari Debi* (2), *Macnaghten* v. *Mahabir Pershad Singh* (3), *Maharani of Burdwan* v. *Krishna Kamini Dasi* (4).

Mr. *T. H. Cowie, Q.C.*, Mr. *C. W. Arathoon*, and Mr. *W. H. Rattigan*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by

LORD SHAND :—Their Lordships do not think it necessary to call for any reply in this case.

A zemindar having an interest in a taluk of this kind has undoubtedly, under the provisions of Regulation 8 of 1819, a power of sale in the case of default in payment of the rent; but that power of sale, which is given as a very summary remedy, and which may be exercised immediately on arrears arising, is given under important conditions, the fulfilment of which is of the utmost consequence, not only to the person having a right to the taluk, but to all those who have rights under him; not only to the putnidars, but to the sub-lessees, mortgagees, and other incumbrancers, whose rights may be affected or extinguished by the sale taking place.

The Regulation provides for two separate cases. It provides under clause 2 of section 8 for the case of an arrear which has extended twelve months; and under clause 3 of the same section, it

(1) 24 W. R., 129.

(2) I. L. R., 9 Calc., 619; L. R., 10 I. A., 19.

(3) I. L. R., 9 Calc., 656; L. R., 10 I. A., 25.

(4) I. L. R., 14 Calc., 365; L. R., 14 I. A., 30.

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provides for a still shorter arrear, namely, non-payment of the rent due at the end of six months. In the case of arrear occurring, the Regulation provides for specific notice to be given of the intention to proceed to sale. Clause 2 of the section is as follows:—"On the first day of Baisakh, that is, at the commencement 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 talukdars, or other holders of an interest of the nature described in the preceding clause of this section. The same shall then be stuck up in some conspicuous part of the kutcheri, with a notice that, if the amount 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."

The notice in that case ought to state, in terms of the clause, that if the full amount due, and specified in the notice, be not paid before the date therein mentioned, the tenure of the defaulter will be sold by public sale. In order to have that notice in proper form it must contain, not merely a specification of the arrears, but a notification that the sale will proceed unless payment of the rent be made within the time limited.

In the case now before their Lordships of six months' arrears of rent only having become due, the provision applicable is in these terms:—"On the first day of Kartick in the middle of the year, the zemindar shall be at liberty to present a similar petition, with a statement of any balances that may be due on account of the rent of the current year up to the end of the month of Assin, and to cause similar publication to be made of a sale of the tenures of defaulters, to take place on the first of Aughran, unless the whole of the advertised balance shall be paid before the date in question, or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick, to less than one-fourth, or a four-anna proportion of the total demand of the zemindar, according to the kistibundi, calculated from the commencement of the year to the last day of Kartick."

It appears to their Lordships to be clear that the notice, which is a condition precedent to any sale taking place under this clause,

must in all material respects comply with the provisions of the clause, and that therefore there should be intimation made to the debtor, in terms of the clause, not only of the balance due, but an intimation that, unless the whole of the advertised balance shall be paid before the date in question, or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick, to less than a fourth of the total demand of the zemindar, the sale will take place. But it is conceded in this case that the notice, instead of being framed as clause 3 required, and so containing an intimation that payment of three-fourths of the arrear would prevent a sale, contained a distinct statement that unless the whole of the arrears were paid, the sale would take place. In short, the notice followed the terms of clause 2, whereas the case was one under clause 3; and it not only failed to give the intimation of the proportion of the arrear which if paid would prevent a sale, but gave an erroneous and misleading intimation, at least by implication, that payment of the whole arrear was necessary to prevent this.

The following passage in the judgment of the High Court appears to their Lordships to present the correct view of the law :—" The object of the publication of this notice is to give not only to the defaulting putnidars, but dur-putnidars, mortgagees, and other incumbrancers, notice of the sale. It may well be, that the putnidar, dur-putnidar, mortgagees, or other incumbrancers would have available, for the purpose of saving the estate from sale, 75 per cent. of the arrears due, but not the whole. We are of opinion that if the zemindar chooses to bring into operation the provisions of clause 3, section 8, and to get a half year's rent by means of this Regulation, he must strictly comply with the conditions laid down in the section. We think that all the requirements in clause 2 of section 8 must be imported into clause 3 of that section *mutatis mutandis*, and therefore we think that the serving of the notice is a condition precedent to the sale being held, and that the notice so served must be a good notice, that is to say, it must be a notice which shall put all parties concerned in saving the tenure from sale, in possession of the knowledge of what really they will have to do if they desire to save the tenure, and would-be purchasers in possession of information as to the amount they will have to spend if they wish to purchase the

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property." Their Lordships adopt this expression of opinion; in this case the notice was essentially defective, and the sale was consequently bad, and must be set aside.

It has been contended on the part of the appellant that this objection came too late. No doubt the objection was one which ought to have been taken before the Court of first instance; but their Lordships are not prepared to hold that an objection of this kind, fatal to the whole proceedings, and appearing upon the face of the notice itself, was not competently raised before the High Court, and entertained by them.

The case of *Macnaghten* v. *Mahabir Parshad Singh* (1), to which their Lordships have been referred, is of a totally different character. In that case a question was raised for the first time before the High Court, which would have necessitated inquiry as to whether there had been pecuniary injury to the party complaining of the alleged irregularity in the proceedings which resulted in a sale, and that inquiry ought to have been made, if the point was to be maintained, in the Court of the Subordinate Judge. In this case the objection, which is at the root of the whole proceedings, arises upon the notice which the zemindar himself gave, and no inquiry of any kind is necessary; and their Lordships are of opinion that it was not too late to take such an objection before the High Court, and that the High Court properly disposed of it. It was indeed maintained that the objection in this case did raise matter for inquiry, because it was said that it could be proved that the form of notice given in this case had been generally in use for a number of years, even in case of a six months' arrear only. But the Court could not allow any such inquiry, because no extent of general use of such a form of notice could enable parties to dispense with a material and essential part of it.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss the appeal. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Pemberton & Garth.*

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

C. B.

(1) I. L. R., 9 Calc., 656; L.R., 10 I. A., 25.