PRIVY COUNCIL.

J. C. 1926.

July, 30.

JAGDISHWAR NARAYAN

v.

MUHAMMAD HAZIQ HUSSAIN.*

Bengal Land-Revenue Sales Act (XI of 1859), section 33 —Validity of Sale—Notice of Sale—Error in area stated— Absence of objection on appeal to Commissioner.

A notice of sale under the Bengal Land-revenue Sales Act, 1859, for arrears of revenue stated correctly the ijmali share to be sold and the revenue payable in respect of it, but understated the area of one of the mauzas, the error being about 1½ bighas out of a total of 158 bighas to be sold. No objection on the ground of the error was made on an appeal to the Commissioner under section 25 of the Act, and it was not proved that any substantial injury had been sustained thereby.

Held, that a suit to set aside the sale could not be maintained having regard to section 33 of the Act:

Quaere: Whether section 33 would have precluded the suit if, as was alleged but not proved, the sale had been at a date earlier than was permissible under the Act.

Mahant Krishna Dayal Gir v. *Syed Abdul Gaffar* (1), disapproved.

Judgment of the High Court reversed.

Appeal (no. 124 of 1924) from a decree of the High Court (August 13, 1923) affirming a decree of the Subordinate Judge of Monghyr.

The suit was brought by the respondents against the appellant to set aside a sale, under the Bengal Land Revenue Act, 1859, of an ijmali share in an estate for arrears of revenue.

The facts are stated in the judgment of the Judicial Committee.

* PRESENT: Viscount Cave, L.C., Lord Justice Warrington and Chief Justice Anglin.

(1) (1917) 2 Pat. L. J. 402.

1926.

JAGDISHWAR NARAYAN v. MUHAMMAD HAZIQ HUSSAIN.

The High Court, affirming the decree of the trial Judge, set aside the sale. The learned Judges (Das and Macpherson, JJ.) were bound by the decision of the High Court in *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffar* (1) to hold that an error in the area of the land as stated in the notice of sale made it wholly invalid, and that consequently section 33 of the Act did not preclude the suit although no objection on the above ground had been raised on an appeal to the Commissioner under section 25 and no substantial injury was proved.

1926 July 13 *Dunne, K. C.* and *Hyam* for the appellant.

Abdul Majid, for the respondents.

Reference was made in the decision above mentioned, also (for the appellant) to *Govind Lal Roy* v. *Ramjanam Misser* (2); for the respondents to *Bhawani Kuer* v. *Afzal Hussain* (3), *Haji Buksh Elahi* v. *Durlav Chandra Kar* (4), and *Balkishan Das* v. *Simpson* (5).

July 30. The judgment of their Lordships was delivered by—

VISCOUNT CAVE, L. C.—This is an appeal from a decree of the High Court of Judicature at Patna affirming a decree of the Subordinate Judge of Monghyr, by which a sale of certain land under the Bengal Land Revenue Sales Act (XI of 1859) was set aside as invalid.

The suit related to a portion of an estate known as Chak Maharuddin Khatik bearing no. 3309 on the Tauzi of the Collectorate of Monghyr, and paying an annual revenue to the Government of Rs. 129-13-0. The estate had belonged to a number of proprietors in several shares, but in respect of some of the shares separate accounts had been opened under section 11

(1) (1917) 2 Pat. L. J. 402.
(2) (1893) I. L. R. 21 Cal. 70; L. R. 20 I. A. 165.
(3) (1907) I. L. R. 34 Cal. 381.
(4) (1912) I. L. R. 39 Cal. 981; L. R. 39 I. A. 177.
(5) (1898) I. L. R. 25 Cal. 833; L. R. 25 I. A. 151.

1926.

JAGDISHWAR NARAYAN v. MUHAMMAD HAZIQ HUSSAIN.

of the Act, leaving a residue belonging to the respondents jointly and bearing an annual revenue of Rs. 80-9-0 payable by quarterly instalments. By a rule made by the Board of Revenue under section 3 of the Act, the latest dates for the payment of all arrears of revenue in respect of this and other estates had been determined to be the 7th June, 28th September, 12th January and 28th March.

It appeared by the books of the Collector of the district, that on the 7th June, 1917, the sum of Rs. 1-11-9 was in arrear and unpaid in respect of the residuary share of the estate belonging to the respondents jointly, and accordingly on the 5th August, 1917, the Collector gave notice in accordance with the Act that the ijmali (or joint) share constituting the residue of the estate would be put up for sale by auction on the 24th September, 1917, for the arrear of revenue; and at the auction held on that date the appellant was the highest bidder for the share and was declared the purchaser at the price of Rs. 850.

On the 10th December, 1917, some of the respondents preferred an appeal to the Commissioner of Revenue under section 25 of the Act against the sale, alleging a number of irregularities in the sale (none of which are now relied upon) and that it was a hardship that property which they alleged to be worth a very large sum should be sold on account of an arrear of only Rs. 1-11-9 for Rs. 850. The Commissioner, having heard the appeal, found on the 8th February, 1918, that no material irregularity had been disclosed or indeed pressed in argument; as regards the plea of hardship, he said that the then appellants appeared to be habitual defaulters and that accordingly he felt precluded from making a recommendation to the Board on the ground of hardship. The appeal was accordingly dismissed, and the appellant paid his purchase-money and was let into possession of the property on the 29th April, 1918.

On the 7th February, 1919, the present suit was instituted by some of the respondents against the

appellant, praying that the sale might be set aside, the other respondents (who had been co-proprietors with the plaintiffs) being made co-defendants. The Subordinate Judge framed issues for trial, of which the following only are now material :—

" 9. Whether there was any arrear due in respect of the kist for which the sale took place?

" 10. Is the sale liable to be set aside? "

The suit was heard by the Subordinate Judge who, on the 31st January, 1920, delivered judgment, holding that the sale was void on two grounds. First he held (under issue 9) that the sum of Rs. 1-11-9 in respect of which the sale was made, did not become payable under the settlement and kistbundi of the mahal until the 7th June, 1917, and accordingly did not become an arrear under section 2 of the Act until the 1st July, 1917; and this being so, he held that the latest date for payment of the arrear under section 3 of the Act was the 28th September, and accordingly that the sale on the 24th September was irregular. Secondly he held (under issue 10) that one of the mauzas included in the property sold, which was described in the notification of sale as containing 17 cathas 19 dhurs, in fact contained 2 bighas 15 cathas 12 dhurs, and accordingly that the sale must be deemed to be a sale of a portion only of the residuary share and not of the whole, and was therefore made without jurisdiction. He accordingly made a decree setting the sale aside.

On an appeal by the first defendant (the present appellant) to the High Court at Patna, that Court (consisting of Das, J. and Macpherson, J.) disagreed with the Subordinate Judge on the first ground of his judgment, holding on the documents that there was an arrear in respect of which the 7th June, 1917, was the latest day for payment. They further held that in any case this objection, not having been taken on the appeal to the Commissioner of Revenue, was not open to the plaintiffs in the suit. Upon the second point dealt with by the Subordinate Judge the Court held itself bound by the decision of a Full Bench of

1926.

JAGDISHWAR NARAYAN v. MUHAMMAD HAZIQ HUSSAIN.

the High Court in *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffar* (1), to affirm the decision of the Subordinate Judge; and accordingly, while expressing their dissent from the decision in the case cited, and agreeing with the dissenting judgment of Chapman, J., in that case, they dismissed the appeal. It is against this decision of the High Court that the present appeal is brought.

With reference to the first ground upon which the learned Subordinate Judge rested his decision, their Lordships agree with the High Court in holding that it has no foundation in fact. Their Lordships entirely accept the contention, put forward on behalf of the respondents, that if the sum in question in fact became payable on the 7th June, 1917, it did not become an arrear under section 2 of the Act until the 1st July, and that in that case the latest date for payment under section 3 of the Act and the rule made by the Board of Revenue was the 28th September, so that a sale on the 24th September was irregular. This view of the law is in accordance with the decision of this Board in *Haji Buksh Elahi* v. *Durlav Chandra Kar* (2). But the argument depends for its validity upon the assumption that under the settlement and kistbundi of the mahal the amount in question did not become payable until the 7th June, 1917, and for the reasons given by the learned Judges of the High Court their Lordships do not accept that assumption. The result of an examination of the Collector's books, of the grounds of appeal to the Commissioner of Revenue and his replies, and of the pleadings in the suit, is to make it plain that the sum in question became due at some time before the 1st June, 1917, and so became an arrear on that date; and if so, the latest date for payment of the amount under section 3 of the Act and the rules of the Board was the 7th June, 1917, so that a sale on the 24th September was regular. Upon this view of the facts it is unnecessary to consider whether, if the sale had been shown to be

(1) (1917) 2 Pat. L. J. 402. (2) (1912) L. R. 39 I. A. 177.

premature, section 33 of the Act would have been an answer to this objection.

The second ground taken by the learned Subordinate Judge in his judgment is of a different nature. It appears to be the fact that, while the property offered for sale, namely the ijmali share which formed the residue of the estate, was correctly described on the face of the notice of sale, and the revenue payable in respect of it (namely Rs. 80-9-0) was correctly given, there was an error in the details of the area of the property noted on the reverse side of the notice, this error amounting to about 1½ bighas out of a total of 158 bighas. It was not alleged or proved that the price given for the property was affected by the misdescription, nor was the point raised on the appeal to the Commissioner; but it has nevertheless been held on the authority of the previous decision of the High Court that the misdescription was sufficient to invalidate the sale. The correctness of the decision under this head depends upon the effect to be given to section 33 of the Act of 1859, which provides as follows:—

"No sale for arrears of revenue, or other demand realizable in the same manner as arrears of revenue are realizable, made after the passing of this Act, shall be annulled by a Court of Justice except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of: and no such sale shall be annulled upon such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under section XXV of this Act; and no suit to annul a sale made under this Act shall be received by any Court of Justice unless it shall be instituted within one year from the date of the sale becoming final and conclusive, as provided in section XXVII of this Act."

At first sight this section appears to be a complete answer to this part of the case. The effect of it is that, in order that a sale may be annulled by the Court, a plaintiff must prove (1) that the sale was made contrary to the provisions of the Act, (2) that he had sustained substantial injury by reason of the irregularity complained of, and (3) that he specified the irregularity in question in his appeal to the Commissioner; and in the present case, while it may be assumed that the sale under an inaccurate description was contrary to the provisions of the Act, it is

1926.

JAGDISHWAR NARAYAN v. MUHAMMAD HAZIQ HUSSAIN.

plain that the plaintiffs proved no substantial injury by reason of the misdescription and did not raise the point before the Commissioner. But it was held in the case cited, which the High Court felt itself bound to follow, that the section had no application to such a case; and the point for decision is whether that view is correct.

In the Patna case cited (1), as in the present case, the residuary share of an estate was offered for sale and the sadr jama of the residuary share was correctly stated in the notice of sale; but an error was made in stating the particulars of the property, a small interest being omitted from those particulars. An appeal to the Commissioner had failed as having been preferred out of time, and on a suit being brought to set aside the sale, it was not proved that the error had seriously prejudiced the sale; but the Full Bench, holding that the Collector must be taken to have offered for sale less than the whole amount of the residuary share and that he had no jurisdiction so to do, set the sale aside. In other words, they held (as Das, J. put it in his judgment in the present case) that the existence of the Collector's jurisdiction to sell, and not its exercise only, was affected. No doubt that decision covered the present case, and the High Court was under an obligation to follow it; but in their Lordships' opinion the decision cannot be sustained. In that case, as in this, the notice showed plainly the intention of the Collector to offer for sale the whole of the residuary share; for the expression "the ijmali share" which appeared upon the face of the notice, denotes (as Chapman, J. said in the case cited) the rights of those proprietors who have not opened separate accounts. Further, the sadar jama specified on the face of the notice was the amount payable in respect of the whole residuary share. The intention to offer the whole residue for sale was, therefore, clear; and although an error occurred in noting on the reverse side of the notice the particulars of the area of the property, that was an error in the exercise

(1) (1917) 2 Pat. L. J. 402.

1926.

JAGDISHWAR NARAYAN v. MUHAMMAD HAZIQ HUSSAIN.

of the Collector's powers and had no effect on his jurisdiction. This being so, it might have been made the subject of an appeal to the Commissioner, and the omission to specify the point as a ground for that appeal is a bar to its being raised in suit. The point is stated with admirable lucidity in the judgment of Das, J., with which Macpherson, J., concurred; and their Lordships are entirely satisfied with his reasoning on this point.

It is only necessary to add that it would be regrettable if the title of a purchaser under the Act of 1859 were liable to be impeached by suit in respect of a trifling error which is not proved, as in *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka* (1), to have substantially affected the price given for the property. As was pointed out by the Board in *Gobind Lal Roy* v. *Ranjanam Misser* (2) the first persons to suffer by such an interpretation of the Act would be the defaulting proprietors, for the effect would be to deter purchasers from bidding freely at a Revenue sale.

Counsel for the respondents attempted to raise a further point, based on an alleged breach of duty by one of the defendants in not paying the amount due for revenue; but this argument, which was negatived by the Subordinate Judge and was abandoned in the argument before the High Court, is not now open to the respondents.

For the above reasons their Lordships are of opinion that this appeal should be allowed, and that judgment in the suit should be entered for the first defendant (the present appellant) with costs here and below, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Barrow, Rogers and Nevill.*

Solicitors for respondents: *Chapman, Walker and Shephard.*

(1) (1914) I. L. R. 42 Cal. 897; L. R. 42 I. A. 79.
(2) (1893) I. L. R. 21 Cal. 70, 83; L. R. 20 I. A. 165, 175.