

separately by defendant No. 2 and received by the landlords for a long series of years, that in itself is not sufficient to constitute a division of the tenure, and what is in itself insufficient to denote a division of the tenure can hardly be accepted as sufficient to supply the defect in the receipt in the present case.

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Beyond the receipt and the inference drawn from the *furd* of the year 1898 and the other evidence already referred to there is no evidence to prove that the landlord gave his consent in writing to the division of the tenure which has been pleaded by defendant No. 2 in his defence to the present suit. The receipt in our opinion fails to comply with the provisions of section 88 of the Bengal Tenancy Act, or to amount to a consent in writing by the landlord to the division of the tenure; and the inference fails to support the view that the tenure had been divided. The receipt then gains no greater value from the inference, and the conclusion at which the Subordinate Judge has arrived is not one which we are able to support.

31 C. 1026=8
C. W. N. 923.

We hold that the conclusions of the Munsif are correct, and that the defendant No. 2 has failed to prove that there was any division of the tenure with the consent of the landlord which would relieve him from liability jointly with the other defendants for the whole rent of the tenure. We accordingly set aside the judgment and decree of the Subordinate Judge and restore the judgment and decree of the Munsif in the plaintiff's favour. The appeal is decreed with costs.

Appeal allowed.

31 C. 1036 (=8 C. W. N. 880.)
[1036] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

HALIMANNISSA CHOWDHURI v. SECRETARY OF STATE FOR INDIA.*
[5th August 1904.]

Sale for arrears of Revenue—Revenue Sale Law (Act XI of 1859) ss. 6, 33 and 58—Public Demands Recovery Act (Bengal Act VII of 1868), s. 11—Sale under s. 11 of Act VII (B.C.) of 1868—Arrears of rent due to a Dakhal situated in a Government khas mehal—Highest bid offered by the defaulter's agent—Collector's closing the bid and purchasing the property at that bid, legality of.

A *dakhal* situated in a Government khas mehal fell into arrears, and it was advertised for sale under Act XI of 1859 pursuant to the provisions of s. 11 of Act VII of 1868 (B.C.)

Before the sale the agent of the defaulter offered to deposit the arrears, but the Collector refused to receive the money. The Collector began with a bid of one rupee; the agent of the defaulter followed with a bid of ten rupees, but the Collector enquired whether any one was willing to increase the bid, and as no one came forward, the Collector forthwith closed the bid and declared that he had purchased the property on account of Government on the bid of ten rupees, under s. 58 of the Revenue Sale Law (Act XI of 1859), inasmuch as that bid was insufficient to cover the arrears realizable.

Upon a suit to set aside the sale:—

Held, that the sale was bad, inasmuch as the procedure followed by the Collector and the purchase made by him were not in accordance with the provisions of s. 58 of Revenue Sale Law (Act XI of 1859).

[Dist. 46 I. C. 447=22 C. W. N. 769=28 C. L. J. 51.]

APPEAL by the plaintiff, Halimannissa Chowdhuri.

* Appeal from Original Decree, No. 402 of 1902, against the decree of H. Walsmsley, District Judge of Noakhali, dated July 23, 1902.

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This appeal arose out of a suit brought by the plaintiff to set aside a sale held under the Revenue Sale Law (Act XI of 1859) pursuant to the provisions of s. 11 of Act VII of 1868 (B.C.). The allegations of the plaintiff were that she was the proprietor of *dakhul* No. 1, bearing an annual *jama* of Rs. 1,922-12-7, situated in Government khas mehal, Char Ghazi, and that for arrears [1037] of rent it was sold and purchased by the Collector on behalf of Government for Rs. 10 only, on the 18th December 1900. It appeared that on the date fixed for sale the agent of the defaulter offered to deposit the arrears, but the Collector refused to accept the money. The Collector began with a bid of one rupee, the agent of the defaulter followed with a bid of ten rupees; then the Collector enquired whether there was anybody else who was willing to increase the bid; and as no one came forward, he forthwith closed the bid and purchased the property on account of Government at the bid of rupees ten, under s. 58 of the Revenue Sale Law. It further appeared that this very property on a previous occasion was put up to sale by reason of default of a previous instalment of rent, and although there was no other bidder except the defaulter, yet the offers rose till the Collector stopped at Rs. 800, and the property was knocked down to the agent of the defaulter for Rs. 805. The plaintiff further alleged that the property was not such a tenure as could be sold under Act XI of 1859; that there were irregularities in the publication of notices and in the conduct of sale, and that thereby she was put to heavy loss; that she appealed to the Commissioner, but her appeal was dismissed, and that accordingly she brought this suit to set aside the sale.

On behalf of the Secretary of State it was pleaded that the *dakhul* was a tenure saleable under Act XI of 1859; that the notices were duly served; that the inadequacy of price was not due to any fault on the part of the Collector; and that the Collector was justified in making the purchase on behalf of the Government.

The Court below held that the plaintiff was not entitled to ask for a reversal of the sale, inasmuch as it took place in conformity with the provisions of the Revenue Sale Law, although it found that the plaintiff suffered substantial loss. The plaintiff appealed to the High Court.

Moulvi *Mahomed Mustapha Khan*, for the appellant. The purchase by the Collector under s. 58 of Act XI of 1859 is a nullity. The case is not governed by Act XI of 1859 or by Act VII of 1868 (B. C.), because the property sold is neither an estate nor a [1038] tenure, but only a *dakhul* or holding under the Government khas mehal. The Collector had no jurisdiction to refuse the tender of arrears made on the day of sale because s. 6 of the Revenue Sale Law does not apply to the present case. At any rate, the Collector, knowing of the fact of the tender, could not purchase the property under s. 58 of Act XI of 1859 on the ground that the sale bid did not come up to the arrears. The Collector had no right to buy at the bid offered by the agent of the defaulter without asking whether he was willing to offer more. The Collector ought to have competed with the agent of the defaulter and then purchased the property.

Moulvi *Serajul Islam* (on the same side). The Government in this case was the zemindar, and must be subject to the same liabilities as an ordinary zemindar. The Collector when bidding for the property was not acting for the State, but as an agent of a zemindar, and hence s. 58 of Act XI of 1859 did not apply.

Babu *Prish Chandra Chowdhry*, for the respondent. The Collector has the choice to proceed either under the Revenue Sale Law or under the

Public Demands Recovery Act. He was not bound to proceed under the latter Act. The refusal of the Collector to accept payment of the amount due after sunset on the latest day for payment, does not make the sale under Bengal Act VII of 1868 illegal: see *Azimuddin Patwari v. The Secretary of State for India* (1). The terms of s. 58 of Act XI of 1859 strictly apply to the case. The bid not having come up to the arrears due, he was right in purchasing the property at the amount of the highest bid which was ten rupees in this case.

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BRETT and MOOKERJEE, JJ. This is an appeal on behalf of the plaintiff in a suit instituted by her under section 33 of Act XI of 1859, for the reversal of a sale, held under that Act pursuant to the provisions of section 11 of Act VII of 1868 (B. C.). The plaintiff alleges that she is the proprietor of what is described in these proceedings as *dakhlat* No. 1, situated in Government khas mehal Char Gazi, that she defaulted [1039] to pay the rent and cesses due on account of the August instalment of 1900, that the property having been advertised for sale, her agent offered to deposit the arrears before the sale, but the Collector, acting under the last paragraph of section 6 of Act XI of 1859, refused to receive the money, and that consequently the property was sold and purchased by the Collector on the 18th December 1900 for Rs. 10 under section 58 of Act XI of 1859. The plaintiff appealed to the Commissioner, but her appeal was dismissed on the 1st March 1901. The plaintiff accordingly sues to set aside the sale on the ground that it has been made contrary to the provisions of Act XI of 1859 and Act VII of 1868 (B. C.), and that she had sustained substantial injury by reason of this irregular sale under which her property, worth Rs. 1,100, had been transferred to the Collector for Rs. 10. The learned District Judge has held that the sale took place in conformity with the provisions of the Revenue Sale Law, that there had been no such irregularities in the publication of the prescribed notices and in the conduct of the sale as would vitiate it, and that consequently although the plaintiff had suffered substantial loss, she was not entitled to ask for a reversal of the sale. The learned District Judge has accordingly dismissed the suit, and against his decree the plaintiff has appealed to this Court.

On behalf of the plaintiff-appellant, the decision of the learned District Judge has been assailed on various grounds, which it is not necessary for us, in the view we take of this matter, to discuss in detail. In our opinion the sale in this case ought to be annulled on the ground that it has not been held in accordance either with the letter or the spirit of section 58 of Act XI of 1859. The facts, so far as they bear upon this question, are practically undisputed, and may be briefly stated. This very property was put up to sale on the 14th March 1900, by reason of default of payment of a previous instalment of rent; the Collector began with a bid of one rupee; the defaulter followed with a bid of ten rupees; there was no other bidder, but the offers rose till the Collector stopped at Rs. 800, and the property was knocked down to the agent of the defaulter for Rs. 805. On the occasion of the sale of the 18th December [1040] 1900, which was held after the refusal of the Collector to receive the full amount of arrears tendered, and which is impeached in the present suit, the Collector began with a bid of one rupee; the agent of the defaulter followed with a bid of ten rupees; there was no other bidder, but the Collector enquired whether any one was willing to

(1) (1898) I. L. R. 21 Cal. 360.

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increase the bid : as no one came forward, the Collector forthwith closed the bid and declared that he had purchased the property on account of the Government, at the bid of ten rupees under section 58 of the Revenue Sale Law, inasmuch as that bid was insufficient to cover the arrears realizable. We are of opinion that the procedure adopted by the Collector is not in accordance with the provisions of section 58, which provides for purchase by the Government at a revenue sale in two classes of cases.

The section first provides that if there be no bid when an estate is put up for sale under the Act, the Collector may purchase the property on account of the Government for one rupee ; this clearly implies that the Collector is himself not to bid in the first instance, that he is to ascertain whether there are any bidders for the property, and it is only when no one offers any bid that the Collector may purchase the estate for one rupee. The section then goes on to provide in the second place that when there are bidders but the highest bid is insufficient to cover the amount realizable, the Collector may take or purchase the estate on account of the Government at the highest amount bid. We are of opinion that the highest bid, here referred to, is one not arrived at by competition between the Collector and the ordinary bidders. It appears to be clear that, as in the first class of cases, the Collector is to take no action till he has ascertained that there are no bidders, so also in the second class of cases the Collector is to take no action till he has ascertained that the highest amount offered by the bidders present is insufficient to cover the amount realizable. We do not think it would be a reasonable construction of section 58 to hold that it is open to a Collector to compete with the other bidders and after he has been defeated and the highest bid determined against him, that he may turn round and claim the benefit of the second part of section 53. If the Collector chooses to enter the ring [1041] as an ordinary bidder, he must be treated as such, and in order to succeed, he must outbid the other intending purchasers. If, on the other hand, he desires to take advantage of the second part of section 58, he must wait and see whether the highest bid is or is not sufficient to cover the demand realizable. In the case before us, the first bid of one rupee offered by the Collector was clearly not one under the first part of section 58, inasmuch as there was at least one person, the agent of the defaulter, ready to offer bids. When therefore the second bid of Rs. 10 was offered, if the Collector desired to purchase the property, the only course open to him was to advance his own bid, like any ordinary bidder. We must hold accordingly that the procedure followed by the Collector and the purchase made by him were not in accordance with the provisions of section 58 of the Revenue Sale Law.

If, however, we take a narrow and restricted view of the scope of section 58 and hold that the sale was conducted in a manner strictly within the letter of that section, the conclusion is inevitable that under the circumstances disclosed in the evidence, the sale can in no way be regarded as a fair and impartial sale held in accordance with the spirit and true intent of that section. It is clear from the evidence of the Collector and of his Sheristadar that the Collector was dissatisfied with the owner of the property as she was a habitual defaulter, and that as a punishment he was determined to have the property sold and placed out of her hands. It further appears from the evidence that this was the first and last occasion on which the Collector had bought a property

under section 58, at the highest amount bid. When we take these circumstances alone with the fact that only a few months before when this very property had been put up to auction, the Collector had increased his bids from Re. 1 to Rs. 800, it is only natural that the agent of the defaulter should be misled and completely taken by surprise at the action of the Collector who began with a bid of 1 Re., and as soon as this was followed by a bid of 10 Rs. on behalf of the defaulter, turned round, and without any notice or warning, closed the sale under section 58 of the Revenue Sale Law. We entirely agree with the observation of the learned [1042] District Judge that the circumstances are ugly and that between the astuteness of the Collector and the folly of her agent, the plaintiff has suffered real hardship. It is of the utmost importance that sales under Act XI of 1859, the provisions of which in the interest of the State have a character of unusual stringency, should be conducted with all possible fairness and impartiality. We hold without any hesitation that the sale which is now impeached before us is not of this description; it has been brought about by what must be regarded as an abuse of the provisions of section 58, if indeed it may be regarded as a colourable compliance therewith; the consequence has been that a valuable property has passed into the hands of the Government for a nominal sum, while the defaulting proprietor still continues liable for the unsatisfied arrears. We must further observe that the evidence discloses that purchases are made by the Collector on behalf of the Government systematically in the district of Noakhali, which practice is hardly to be regarded as satisfactory or one contemplated by the Law. As pointed out in paragraph 4, section VI of the rules made by the Board of Revenue under Act XI of 1859, the power vested in the Collector by section 58 must be exercised with discretion. It seems to us to be hardly desirable that purchases should be systematically made on behalf of the Government by the Collector who himself has the conduct of the sale and whose duty it is to see that it is conducted with absolute fairness and impartiality.

The result therefore is that this appeal must be allowed, the decree of the Court below reversed, and the sale annulled under section 33 of Act XI of 1859 on the ground that it has been made contrary to the provisions of section 58 of that Act. The plaintiff's suit is accordingly decreed with costs in both Courts.

Appeal allowed.

31 C. 1043 (=9 C. W. N. 83.)

[1043] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

SADASOOK AGARWALLA v. BAIKANTA NATH BASUNIA.*

[11th July, 1904].

Limitation—Acknowledgment in writing—“Signing,” what amounts to—Limitation (Act XV of 1877) s. 19—Hatchitta—Interest.

Money was lent on a *hatchitta* which bore at the head of it the name and signature of the debtor. Under an entry of a certain date on the debit side

* Appeal from Appellate Decree, No. 500 of 1902, against the decree of Benode Bihari Mitter, Subordinate Judge of Jalpaiguri, dated Sept. 25, 1901, affirming the decree of Behari Lal Chatterjee, Munsif of that district dated Nov. 19, 1900.

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