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32 C. 683=9 C. W. N. 567

Such being the nature of *babuana* property, we see no reason to refuse the recognition of a right to alienate that property subsisting in the holder, subject only to the contingent interest of the Maharaja; the contingency being remote in a country where the line of male descendants can be reinforced by the practice of adoption. The estate created by these grants is, therefore, virtually an absolute estate. To refuse the right to deal with and transfer such an estate would be tantamount to placing persons *sui juris* in the category of proprietors under disability, and allowing them to incur obligations, it may be to the full value of the estate, without responsibility for the same and in disregard of their inherent right to alienate.

It is true that for many years after the grant of pargana Jabdi, made in the year 1807, there were no alienations of *babuana* property, but in, and after, the year 1891 we find eighteen such transactions. The Subordinate Judge says that these dispositions do not establish the fact that *babuana* properties are alienable, and his argument is that "the alienations were made long after the grants, and, with the exception of one, all were in favour of defendant No. 1." He is in error here; for we find that two were in favour of a third party, Ganga Pershad. It seems to us immaterial to enquire into the motives of the defendant No. 1 in lending money on the security of these *babuana* properties. He took the risk, and it was only natural for him to come to the assistance of his extravagant and impoverished relative Durgadut Singh. The Maharajah was severely cross-examined on this point. We are of opinion that it was unreasonable to expect him to know full details of the course of dealing with *babuana* property adopted by the junior members of his family, and to put to him hypothetical cases involving consideration with which we are now dealing after a protracted litigation between the parties.

[690] It is worthy of note that the witness Amarendra Singh, father of the plaintiff No. 2, when questioned on this subject, deposed:—"I have made no enquiry as to who from among the Babus have hypothecated, mortgaged in *sudbharna* and sold their *babuana* property. My father Babu Durgadut Singh, is at home. I see him every day. I have come here without making enquiry from Durgadut Singh about the transfer of *babuana* property." There can be no doubt that the Babus have regarded and dealt with their *babuana* property as alienable in all respects, and there is nothing to show that it is not. The necessity for raising money has only recently become acute owing to the increase in the number of the original grantee's descendants and the indebtedness of Babu Durgadut Singh.

We, therefore, allow this appeal with costs.

Appeal allowed.

32 C. 691 (=1 C. L. J. 360.)

[691] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Holmwood.

BARHAMDEO NARAYAN SINGH *v.* BIBI RASUL BANDI.*

[30th March, 1905.]

Certificate—Public Demands Recovery Act (Bengal Act I of 1895), ss. 7, 10, 16, 19, 31—Signature as Collector—Notice, service of, by registered post—Certificate,

* Appeal from Original Decree No. 144 of 1903, against the decree of Tej Chandra Mukerjee, Subordinate Judge of Saran, dated Jan. 31, 1903.

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execution of—Proclamation of sale—Signature as Judge—Irregularity in publication—Suit to set aside sale—Civil Procedure Code (Act XIV of 1882), s. 244—Limitation Act (XV of 1877), Sch. II, Art. 12 (b).

A certificate under s. 7 of the Public Demands Recovery Act, drawn up on an old form where the word "Collector" occured, but which was signed by a person, who obviously was the Certificate Officer, and who had in another part of the document signed himself as such is not invalid.

Under the proviso to s. 31 of the Public Demands Recovery Act, service of notice required by s. 10 can, in the first instance, be made by registered post addressed to the judgment-debtor's last known residence though no other mode of service has been previously resorted to.

A sale proclamation, when issued by the properly qualified officer, is equally effectual whether he signs himself as "Certificate Officer" or as "Judge."

Where there is credible evidence of the service of the sale proclamation, and there has been a considerable lapse of time, it is to be presumed that all the necessary formalities were complied with.

S. 19 of the Public Demands Recovery Act, as amended by Act I (B. C.) of 1867, renders s. 244 of the Civil Procedure Code applicable in its entirety to proceedings in execution of a certificate, and a separate suit to set aside a sale held in the enforcement of such certificate is not maintainable.

Janki Dass v. *Ram Golam Sahu* (1) referred to.

The present suit, if regarded as one to set aside a certificate under s. 7 of the Public Demands Recovery Act, is barred by s. 16; and if as one to set aside the sale, is barred by Art. 12 (b) of Sch. II of the Limitation Act.

[**Diss.** 32 Cal. 1130; 2 C. L. J. 504; **Ref.** 34 Cal. 811 (F. B.)=5 C. L. J. 696=11 C. W. N. 756; 34 Cal. 787=11 C. W. N. 745; 5 C. L. J. 76; 2 M. L. T. 153; 14 C. L. J. 83=10 I. C. 532.]

[692] APPEAL by the defendant, Barhamdeo Narayan Singh.

This was an appeal arising out of a suit to set aside a sale in execution of a certificate under the Public Demands Recovery Act in respect of arrears of road cess. The plaintiff was the proprietress of a 5 annas 4 pies share in mehal Bhabhopali, pargana Bara, Tauzi No. 1091. On the 30th December 1896, the Certificate Officer of Saran district made a certificate, No. 1087, under ss. 7 and 9 of the Public Demands Recovery Act in the Schedule form No. 2. The heading of the certificate, which was drawn up on an old form, was "Certificate of arrears of public demand filed in the office of the *Collector* of the district of Saran." In column 5 the name of the authority or person, who is to be deemed to be the decree-holder, was omitted. Further, it was signed by "Zakir Hussain, *Collector*," though immediately below such signature was an entry—"Satisfied, Zakir Hussain, *C. C.*"

A copy of the said certificate was sent in the name, and to the last known address, of the plaintiff at Dumri by a registered letter; and the postal receipt was signed in her name by her grandson, Azizal Hasnayan Khan, on the 29th January 1897.

In execution of the said certificate an order for the sale of the plaintiff's share in the mehal was made, and the proclamation required by s. 287 of the Civil Procedure Code signed by "S. Z. Hussain, *Judge*," was issued on the 1st April 1897. The return of service of the proclamation stated that it had been published and a copy posted on a tree in the mehal on the 17th June 1897. The serving peon deposed to the publication throughout the village, the beating of the drum and the posting of the copy. Another witness spoke to the latter act. There was no paper in the record of the Certificate case showing publication either in the office of the Certificate Officer or of the Collector, but a witness deposed to having

(1) (1901) I. L. R. 28 Cal. 813.

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seen copies of the sale notification on the notice boards of these officers. The sale took place on the 5th August 1897, the plaintiff's interest being purchased by the defendant Mohabir for Rs. 9, and was confirmed on the 10th October following. On the 18th April 1898 the plaintiff applied to the Certificate Officer to set aside the sale, and it was annulled. This order was upheld by the Collector, but was set aside on revision by the Additional Commissioner on the 15th September 1899.

[693] The plaintiff then filed her plaint on the 14th March 1900 in the Court of the Subordinate Judge of Saran, alleging that it was only in April 1898 that she was informed of the sale of her share in the mehal, and submitting that the certificate and sale were invalid on the grounds, amongst others, that the certificate was signed by Zakir Hussain as Collector ; that her place of residence was not at Dumri but at Majhoulia in a different district, and the notice under s. 10 of Act I of 1895 (B.C.) was not brought to her residence ; that the sale proclamation was signed by Zakir Hussain as Judge ; that it was not duly published and did not contain the necessary particulars showing the value of the property ; that her share which was valued at Rs. 7,000, ought not to have been advertised for sale for the recovery of the small sum due ; and that owing to these irregularities there was a great inadequacy of price. She prayed for a declaration that the certificate and sale were invalid, and that the sale had already been set aside, or an order setting aside the sale, if it should be held that the sale was still in force. The defendants traversed these allegations and contentions, and submitted that the suit was not maintainable and was further barred by limitation.

The Subordinate Judge passed a decree in favour of the plaintiff, holding that the suit was maintainable under s. 11 of the Civil Procedure Code, and was not prohibited by the Public Demands Recovery Act or by ss. 244 and 312 of the Civil Procedure Code ; that the certificate was not duly made by reason of its non-compliance with Schedule form No. 2 in respect of the title and column 5, and on account of the signature of Zakir Hussain as Collector; that there was no proof of service of the notice upon the plaintiff; that the service by registered post was not legal where no other mode of service had been previously resorted to ; that the sale notification was bad in law, having been signed by Zakir Hussain as Judge ; that there was no evidence on the record of the Certificate case of the publication of the sale notification in the Court house of the Certificate Collector or in the Collectorate, nor was there oral evidence of any person, who posted the notifications, or proof of the date of posting in these places ; that the notification did not specify the value of the property as required by s. 287 (*e*) of the Civil Procedure Code ; that there was no service **[694]** in the mofussil ; and that the inference as to the inadequacy of price being due to these irregularities was irresistible, direct evidence of the same not being necessary.

From this decision the defendant appealed to the High Court.

Babu *Umakali Mukerjee* and Moulvi *Mahomed Mustafa Khan* for the appellant.

Babu *Saligram Singh*, for the respondent.

RAMPINI AND HOLMWOOD, JJ. This appeal arises out of a suit brought to set aside a sale held in execution of a certificate drawn up under the Public Demands Recovery Act. The Subordinate Judge has given the plaintiff a decree, holding

(i) that the certificate was not duly made ;

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(ii) that there was no service of the notice under section 10 of the Act upon the judgment-debtor ;

(iii) that the sale proclamation was incorrectly framed and not duly served ; and

(iv) that the property was sold for an inadequate price, which was the result of the above-mentioned irregularities.

The defendant-appellant impugns before us the correctness of the Subordinate Judge's findings on all these points, and further contends that the suit is barred by section 244 of the Code of Civil Procedure as well as by limitation.

We are of opinion that the appeal must succeed.

In the first place, there does not appear to be any such error in the certificate as would invalidate it. It is correctly drawn up and is signed by Zakir Hussain, the certificate officer. Unfortunately he has made use of an old form in which the word " Collector " occurs, but he obviously was the certificate officer, for in another part of the certificate he has signed himself as such and has noted that the certificate has been satisfied. There is no denial or evidence to show that he was not the certificate officer at the time the certificate was issued, and it stands to reason that he would not have signed and issued it, if he had not been invested with the powers of a certificate officer.

Then we consider that the notice under section 10 was duly served through the post by a registered letter at the last known address of the judgment-debtor, and that it was received by her **[695]** grandson, Azizul Hasnayan, who was residing with her. The Subordinate Judge has misread the law. He observed that under section 31 of Act I of 1895 it is only after other modes of service have been unsuccessfully resorted to, that service by post can be made. This is not so. Service can be made by post " if the certificate officer shall so direct." Then, it has been argued that the judgment-debtor was not living at Dumri, but at Majhoulia, when the notice was sent to her there. But her house at Dumri was her last known residence and seems to have been her permanent place of abode. It is in evidence that she returned there on the occasion of the marriage of Azizul Hasnayan, and in her own muktarnama, dated 19th August 1897, some time after the service of the notice on her, she describes herself as " inhabitant of mouza Dumri."

Then, it is said that the sale proclamation has been signed by the certificate officer as " Judge ; " but this was evidently because the clerk, who prepared it, made use of a form of proclamation under Chapter XIX of the Civil Procedure Code. This cannot be held to invalidate the proceedings. A sale proclamation is not a solemn deed transferring title. It is a mere notice to intending purchasers. It is equally effectual when it is issued by the properly qualified officer, whether he signs himself as " certificate officer " or " Judge."

There is credible evidence of the service of the sale proclamation, and it is to be presumed that all the necessary formalities were complied with. It is impossible to produce formal proof of due compliance with all the formalities of the law after a considerable lapse of time.

Finally, there is no evidence to connect the alleged inadequacy of price with the alleged technical defects in the proceedings. On all these grounds, we consider the sale should not have been set aside.

But there are even more cogent reasons for decreeing this appeal.

We consider that the suit is not maintainable under the provisions of section 244 of the Code of Civil Procedure, which prohibits the bringing of

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a separate suit to set aside any order [696] passed in the execution of a decree, and duly made certificate is a decree.

It will be observed from the decision in the case of *Janki Dass* v. *Ram Golam Sahu* (1) that the reason why section 244 was formely held not to bar a sepatate suit of the nature of the present suit was that under the wording of section 21 of Act I of 1895 before its amendment by Act I of 1897, section 244 applied only so far as regards the *procedure* to be followed in execution proceedings to enforce the certificate and realize the amount thereunder, and it was not applicable in its entirety and did not apply so far as to bar a separate suit to set aside the sale. In that case it is said : " We must not, however, be understood as ruling that this is the effect of section 21 of Act I of 1895 as amended by Act I of 1897."

But section 19 of Act I of 1895, as amended, applies to this case, and we are decidedly of opinion that the terms of the second sub-section of section 19 as now amended make the provisions of section 244 of the Civil Procedure Code applicable in their entirety and bar such a suit as the present. It is sufficient to quote the terms of the sub-section in question, which is to the effect :—" Such certificate may be enforced and executed in the manner provided by Chapter XIX of the Code of Civil Procedure for the enforcement of decrees for money ; and *all the provisions of that Chapter*, except section 310A thereof, and of Chapter XX of the said Code, shall apply, so far as they are applicable."

We also consider that the suit, if regarded as one to set aside the certificate, is barred by section 16 of the Act, and if as one to set aside the sale, is barred by Art. 12 (*b*) of the Limitation Act, Schedule II.

For all these reasons we decree this appeal with costs.

Appeal allowed.

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32 C. 697 (=9 C. W. N. 612.)

[697] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Pargiter.

GALSTAUN *v.* DOONIA LAL SEAL.*

[12th April, 1905.]

Nuisance—Injunction, in cases of nuisance—Damages—Municipal drains.

Under the Municipal law no private person can claim a right to foul an ordinary drain by discharging into it what it was not intended to carry off.

Where the defendant, the owner of a shellac factory, discharged into the Municipal drain, which was not constructed or intended for carrying off such stuff, refuse liquid of an offensive character, which interfered with the ordinary comfort of the plaintiff's occupation of property and caused him special injury.

Held that the plaintiff was entitled to restrain him.

St. Helen's Smelting Company v. *Tipping* (2) ; *Crump* v. *Lambert* (3) referred to.

Where, moreover, the defendant discharged the liquid into the drain knowing from the condition of the drain and the nature of the liquid that it could not be efficiently carried away, but must stagnate, decompose and create a nuisance:

Held, that the defendant must be responsible for the necessary consequences of his action, and was not entitled to shift the responsibility on to the Munici-

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* Appeal from Original Decree No. 212 of 1904, against the decree of Bhuggobuty Charan Mitter, Subordinate Judge of 24-Parganas, dated February 25th, 1904.

(1) (1901) I. L. R. 28 Cal. 813, 816.
(2) (1865) 11 H. L. C. 642.
(3) (1867) L. R. 3 Eq. 409.