

32 C. 502 (=9 C. W. N. 343=1 C. L. J. 14.)

[502] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Ghose, Mr. Justice Rampini, Mr. Justice Harington and Mr. Justice Brett.

ISMAIL KHAN v. ABDUL AZIZ KHAN.*

[30th January, 1905.]

Sale—Sale for arrears of revenue—Separate shares, sale of—Notification of sale—Specification of share—Material irregularity—Proof of substantial injury resulting—Act XI of 1859, ss. 6, 10, 33.

Act XI of 1859 requires that the estate or share to be sold must be specified; the question whether in any particular case the notification sufficiently specifies it, must depend upon the terms of the notification.

The connection between an irregularity in publishing or conducting a sale under Act XI of 1859 and the inadequacy of price must be established by evidence; the amount or nature of the evidence required in any case must depend upon its own circumstances.

[Dist. 32 Cal. 542: Ref. 10 C. W. N. 137=2 C. L. J. 325: Fol. 6 C. L. J. 163.]

REFERENCE to a Full Bench by RAMPINI AND MITRA JJ.

The Order of Reference was as follows:—

"This case came before one of the members of this Bench sitting alone on the 1st September 1903.

The following judgment was recorded:—

'On the 26th June 1899 a share of an estate No. 1836 of the Dacca Collectorate, called Lal Buktear, was sold for an arrear of the March kist of revenue and was purchased by the present appellant, the defendant No. 1, for Rs. 230. The proprietors of the share applied to the Commissioner asking to have the sale set aside; but the application was refused. The present suit was thereafter instituted under section 33 of Act XI of 1859.

[303] 'It has been found that the value of the share of the estate sold was Rs. 1,500, that there was an irregularity in the publication of the sale. Notification prescribed by section 6 of the Act, and that the plaintiffs have suffered substantial injury by reason of the irregularity.

'The only question argued before me is that there was no irregularity in the publication of the sale notice

'It appears that the notification of the sale contained the number of the estate in the Towzi, its name, the revenue of the entire estate, the revenue of the share to be sold and the arrear in respect of which the sale was to take place. It did not, however, contain a specification of the share in the sense that the exact fraction of the entire estate was not specified. The share to be sold was called the "residue," as a share of the estate had been separated under section 10 of Act XI of 1859, and the share so separated was not to be sold.

'In *Ram Narain Koer v. Mahabir Pershad Singh* (1) it was held that under section 6 of Act XI of 1859 it is not necessary when a share of an estate is to be sold that the notification should specify the exact fractional share. The learned Judges were of opinion that, if the sadar jama of the entire estate is specified and the jama of the residue is also specified, the estate is specified as required by section 6 and there is no irregularity in the notification.

'In *Annada Charan Mukhuti v. Kishori Mohon Rai* (2) a different view was taken. It was held that a mere description of a share to be sold "as the residue" without stating at the same time the share to be excluded in order to arrive at the residue, is an imperfect description of the share to be sold, and that, unless a specific share is stated, it is impossible for intending purchasers to know what is being

* Reference to Full Bench, in Appeal from Appellate Decree, No. 1874 of 1901.

(1) (1886) I. L. R. 13 Cal. 208.

(2) (1892) 2 C. W. N. 479.

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advertised for sale. In *Hem Chandra Chowdhry v. Sarat Kamini Dasya* (1) it was held, following *Annada Charan Mukhuti v. Kishori Mohon Rai* (2) that a notification of sale stating that the residue of the estate is to be sold without giving further particulars and stating what the residue is, is not a sufficient description of the share to be sold.

It seems to me that the decisions in the two later cases are in conflict with the decision in *Ram Narain Koer v. Mahabir Pershad Singh* (3).

As advertisements of shares of estates similar to the one in this case are common and the question raised in the case is one of general importance, and it may be necessary to refer it to a Full Bench. I think the case should be heard by the ordinary Division Bench.

The case now comes before a Division Bench of this Court.

It appears to us that the decisions referred to above are in conflict. According to the ruling in the case of *Ram Narain Koer v. Mahabir Pershad Singh* (3) the description of the property sold given in the sale-proclamation in this case was sufficient. The decision in that case was followed in *Dil Chand Mahtov. Baij Nath Singh* (4) which so far as regards the question of the description given in the notice of the property to be sold, is on all fours with the present case.

[504] "The proclamation of sale published in this case is as follows :—

NOTICE *Ka.*

Is hereby given under sections 6 and 13 of Act XI of 1859 that the undermentioned Mehals and shares of Mehals comprised within the District of Dacca shall be sold by auction at 12 o'clock after 26th June 1899 in the office of the Collector of the said District for the realization of the arrears of revenue and other amounts of claim which are realizable as Government revenue according to law.

1	2	3	4	5	6	7	8	9
Number of Towji.	Names of Mehals and Parganas.	Revenue of the entire Mehal.	Whether the entire Mehal will be sold or not.	If only a share or shares are to be sold, full description of the said share or shares.	Name of the Maliks (proprietor) of the property to be sold.	If only a share is to be sold, the revenue of that share.	If the entire Mehal is to be sold, the arrears of revenue thereof.	If only a share is to be sold the arrears of revenue thereof.
		Rs. a. p.				Rs. a. p.		Rs. a. p.
1896	Pur g a n a Isokabad, Taluk Lal Boktar.	2 10 8	...	Remainder	Matabuddi Gazi and others.	1 10 11	...	1 6 7

DACCA COLLECTORATE : }

The 8th May 1899.

J. T. RANKIN.

"Such sale proclamations are issued in a printed form, to be found at page 100 of the Board's Manual of the Revenue and *puni* Sale Laws, at the foot of which there is a note to the effect that 'when in columns 5, 7 and 9 of the above statement it is stated that only a share is to be understood that a separate account is kept for that share.'

"This proclamation describes the share to be sold as the remainder or "residue" after deduction of the separated share. It specifies the Government revenue of the whole property and of the share about to be sold. It states the arrears for which the share is to be sold, so that intending purchasers could calculate the value of the

(1) (1902) 6 C. W. N. 526.
(2) (1892) 2 C. W. N. 479.

(3) (1886) I. L. R. 13 Cal. 208.
(4) (1908) 8 C. W. N. 387.

Government interest as well as the value of the share of the property to be sold as the Subordinate Judge points out by means of the rule of proportion.

"The ruling *Ram Narain Koer v. Mahabir Pershad Singh* (1), has also been followed in the as yet unreported case of *Deonandan Singh v. Manboadh Singh*, Appeal from Original Decree No. 171 of 1901, decided by Rampini and Bodilly, JJ., on the 21st June last (2).

"On the other hand, as pointed out above, in *Annada Charan Mukhuti v. Kishori Mohon Rai*, (3) and *Hem Chandra Chowdhry v. Sarat Kamini Dasya* (4) [505] a different view has been taken. According to these cases the description of the property given in the notice in this case would not be a sufficient description, but "one wholly insufficient under the law." It is to be noticed that one of the Judges, who took part in the decision in *Hem Chandra Chowdhry v. Sarat Kamini Dasya* (4) was also a member of the Bench, who decided the case of *Dil Chand v. Baij Nath Singh* (5).

"We consider that the decision in the cases reported at 2 Calcutta Weekly Notes 479, and 6 Calcutta Weekly Notes 526, are not correct, and that the cases reported at I. L. R. 13 Calcutta, 208 and 8 Calcutta Weekly Notes 387, should be followed. But as they are in conflict, we must refer this case to a Full Bench.

"The present case raises a further question with regard to which also there is a conflict of rulings. The Subordinate Judge, who decided the appeal in this case after remand, has held, relying on the case of *Hem Chandra Chowdhry v. Sarat Kamini Dasya* (4) 'that when there is a material irregularity in the notification of the sale, a Court of Justice may reasonably and legitimately infer that it was due to this irregularity that the property was sold at an inadequate price.' The same view was taken in the case of *Gur Buksh Lal v. Jawahir Singh* (6), *Surnomoyee Debi v. Dakshina Ranjan Sanjal* (7), *Jamuni Mohan Nundy v. Chandra Kumar Roy* (8), *Bhilarai Misra v. Surjamon Patmahadai* (9), *Sheo Ratan Singh v. Net Lal Sahu* (10), and *Moti Lal Roy v. Bhawani Kumari Debi* (11). But this is opposed to the rule laid down by their Lordships of the Privy Council in *Tasadduk Rasul Khan v. Ahmad Husain* (12) in which their Lordships have held that there must be direct evidence to connect the inadequacy of price with an irregularity. Their Lordships expressed the same opinion in *Olpherts v. Mahabir Pershad Singh* (13) and *Aruna Chellam v. Aruna Chellam* (14) and the decisions of this Court in *Tripura Sundari v. Durga Churn Pal* (15), *Lala Mobaruk Lal v. Secretary of State* (16), *Satish Chunder Rai Chowdhuri v. Thomas* (17), and *Hazi Mahomed v. Bindu Basini Debi* (18), are to the same effect. The Allahabad High Court following *Tasadduk Rasul Khan v. Ahmad Husain* (12) has held the same in *Jagan Nath v. Makund Prasad* (19) and *Shirin Begam v. Agha Ali Khan* (20).

"It would seem to us to be of great importance to have it settled how far the Courts of this country are justified in disregarding the rule laid down by the Privy Council in *Tasadduk Rasul Khan v. Ahmad Husain* (12).

[505] We, therefore, refer this case to a Full Bench and would propound the following three questions for their decision.

- (1) Whether the description of the share of the estates to be sold given in the sale proclamation in this case was sufficient or not?
- (2) Whether the cases of *Annada Charan Mukhuti v. Kishori Mohon Rai* (3), and *Hem Chandra Chowdhry v. Sarat Kamini Dasya* (4), were rightly decided so far as regards the sufficiency of the description of the property sold in these cases?
- (3) Whether, when there has been an irregularity in the publishing or conducting of a sale under Act XI of 1859, the inadequacy of price may be inferred to be the result of such irregularity or must be established to be so by direct evidence?"

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| (1) (1896) I. L. R. 13 Cal. 208. | 20 I. A. 176. |
| (2) (1904) I. L. R. 82 Cal. 111. | (13) (1882) L. R. 10 I. A. 25; I. L. R. |
| (3) (1892) 2 C. W. N. 479. | 9 Cal. 656, (sub. nom. <i>Macnaghten v.</i> |
| (4) (1902) 6 C. W. N. 526. | <i>Mahabir Pershad Singh</i>). |
| (5) (1903) 8 C. W. N. 937. | (14) (1888) I. L. R. 12 Mad. 19; L. |
| (6) (1898) I. L. R. 20 Cal. 599. | R. 15 I. A. 171. |
| (7) (1896) I. L. R. 24 Cal. 291. | (15) (1884) I. L. R. 11 Cal. 74. |
| (8) (1901) 6 C. W. N. 44. | (16) (1885) I. L. R. 11 Cal. 200. |
| (9) (1901) 6 C. W. N. 48. | (17) (1885) I. L. R. 11 Cal. 658. |
| (10) (1902) 6 C. W. N. 688. | (18) (1897) 2 C. W. N. colxxix. |
| (11) (1902) 6 C. W. N. 836. | (19) (1895) I. L. R. 18 All. 97. |
| (12) (1893) I. L. R. 21 Cal. 66; L. R. | (20) (1895) I. L. R. 18 All. 141. |

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Dr. *Rash Behary Ghose* (Babu *Jnanendra Nath Bose* and Moulvie *Zahadur Rahim Zahed* with him), for the appellant. On the first question, namely, whether the description was sufficient under the law, see ss. 6 and 13 of Act XI of 1859; in the notification in this case the revenue of the share to be sold is specified and the revenue of the entire estates is specified; the numerical value of the share may be worked out from these data by the rule of three and is therefore sufficiently specified; whatever may be rendered certain is certain and here only a question of arithmetic is involved; nobody could be misled: *Ram Narain Koer v. Mahabir Pershad Singh* (1), *Deonandan Singh v. Manbodh Singh* (2). In *Annada Charan Mukhuti v. Kishori Mohon Rai* (3) *Ram Narain Koer v. Mahabir Pershad Singh* (1) was not referred to; in *Hem Chandra Chowdhry v. Sarat Kamini Dasya* (4) separate account had been opened under s. II of Act XI of 1859; in the present case the separation of shares is under s. 10—there is a considerable difference between the provisions of the two sections and in that view the case last cited may be distinguished: see *Dilchand Mahto v. Baijnath Singh* (5): the first question should be answered in the affirmative.

The second question need not be answered.

The answer to the third question depends on the construction of s. 33 of Act XI of 1859. This section seems to have been taken from the corresponding provision in Act VIII of 1859 corresponding to s. 311 of the present Code of Civil Procedure. The point is [507] really concluded by the three judgments of the Privy Council mentioned in the referring order: *Olpherts v. Mahabir Pershad Singh* (6); *Arunachellam v. Arunachellam* (7); and *Tasadduk Rasul Khan v. Ahmad Husain* (8); see also *Mahabir Pershad Singh v. Dhanukdari Singh* (9).

[GHOSE, J. Circumstances and facts may be evidence to prove casualty.]

But the Privy Council says there must be direct evidence.

[BRETT, J. Suppose in the case of the sale of a metal which is really gold, it is described as brass, can it not be presumed that the injury was due to the misdescription?]

In section 33 of Act XI of 1859 "upon proof" means when there is direct evidence. The answer to the question must be that it should be proved by direct evidence—it may remain a question as to what is meant by direct evidence.

Babu *Nilmadhub Bose* and Moulvie *Abdul Javad*, for the respondents, were not called upon.

MACLEAN, C. J. I do not think that we can properly, or usefully, proceed with this reference.

The question whether in any particular case, the notification sufficiently specifies the estates or shares of estates to be sold must, I think, depend upon the terms of the notification in such case. All I can say is that the estate or share must be specified: that is what the Act says. As regards the other question whether, when there has been an irregularity in publishing or conducting a sale under Act XI of 1859, the inadequacy

(1) (1886) I. L. R. 13 Cal. 208.

(2) (1904) I. L. R. 32 Cal. 111.

(3) (1892) 2 C. W. N. 479.

(4) (1902) 6 C. W. N. 526.

(5) (1908) 8 C. W. N. 337.

(6) (1882) L. R. 10 I. A. 25; I. L.

R. 9 Cal. 656 sub. nom. *Macnaghten v.*

Mahabir Pershad Singh).

(7) (1888) I. L. R. 12 Mad. 19; L. R.

15 I. A. 171.

(8) (1893) I. L. R. 21 Cal. 66; L. R.

20 I. A. 176.

(9) (1904) I. L. R. 31 Cal. 815.

of price may be inferred to be the result of such irregularity, there can, I should say, be no question in the face of the decisions of the Judicial Committee. The connection must be established by evidence, but I do not see how, upon a reference like the present, we can lay down any rule [508] as to the amount, or nature, of the evidence. Each case must depend upon its own circumstances.

The case will be remitted to the Division Bench for decision.

GHOSE, J. I agree with my Lord in the observations he has made upon this reference. There is, however, one word that I should desire to say with reference to the two cases mentioned in the second question submitted to the Full Bench. Those cases simply lay down that the specification of the estate, or share of the estate, as the case may be, should be such as to inform intending purchasers what may be the precise property that is to be sold. And it was held, with reference to the facts and circumstances of those cases, that the specification of the share as given in the sale notification was not sufficient.

RAMPINI, J. As this second appeal is to be returned to the Referring Bench for disposal, I say nothing in respect of the first question propounded for our decision.

As I read the decisions in the cases referred to in the second question put to us, they lay down a general rule, viz., that "merely advertizing that the residue of an estate is to be sold without giving further particulars, and stating what that residue is cannot be considered a sufficient description," and they have been so understood by the Lower Courts before whom the case, from which this second appeal arises, came. In so far as they lay down such a general rule, I think they have not been correctly decided. Such a rule is opposed to the terms of section 6 of Act XI of 1859 and the ruling of this Court in *Ramnarain Koer v. Mahabir Pershad Singh* (1). I would therefore answer the second question in the negative.

It is unnecessary to answer the third question, as the point it raises will be dealt with by the Bench, to which the appeal is returned.

HARRINGTON, J. I agree in the judgment delivered by my Lord.

BRETT, J. I agree in the judgment delivered by the Chief Justice.

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[509] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Mitra.

ISMAIL KHAN v. ABDUL AZIZ KHAN.*

[7th February, 1905.]

Sale for arrears of revenue—Separate shares, sale of—Notification of sale—Specification of share—Residue—Setting aside sale—Material irregularity—Substantial injury resulting, proof of—Evidence—Act XI of 1859 ss., 6, 10, 83.

The non-specification in a notification under section 6 of Act XI of 1859 of the exact share to be sold in a case where separate accounts had been opened under section 10 of the Act, is not a material irregularity, if the notification was sufficient to give notice to an intending purchaser as to what was about to be sold.

* Appeal from Appellate Decree, No. 1874 of 1902, against the decree of Bipin Behari Sen, Subordinate Judge of Dacca, dated July 9, 1901, reversing the decree of Mohini Chandra Sarkar, Munsif of Dacca, dated March 7, 1901.

(1) (1886) I. L. R. 13 Cal. 208.

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