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after laying down the amount of stamp duty to be paid when the property is an estate paying revenue to Government, where the settlement is temporary, and where it is permanent, goes on to say, that such and such amount shall be taken to be the market value of such property, unless and until the contrary be proved. This case is a suit for pre-emption, and the plaintiff claims the right of prior purchase over this property at the price of 2,200 rupees. According to his own showing, therefore, the value of the property is not 250 but 2,200 rupees. The very best proof that this is the value of the property is, that he is asking to pay that sum for it. It appears to us that this case comes exactly under the words of the law, and that although 250 rupees may represent ten times the sudder jumma of the estate, it has most certainly been proved by the plaintiff's own admission that the value is very much higher. The decision of the Court below is therefore affirmed but considering that this objection was not taken in the Court of first instance, each party must pay his own costs.

MITTER, J.—I concur. The suit was clearly under-valued, and brought in the wrong Court. It ought to have been brought in the Court of the Subordinate Judge.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

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 Aug. 14.

MANGINA KHATUN AND OTHERS (PLAINTIFFS) v. THE COLLECTOR OF JESSORE, ON BEHALF OF GOVERNMENT AND OTHERS (DEFENDANTS)*

Act XI. of 1859—Sale for Arrears of Government Revenue.

Where there has been a sale under Act XI. of 1859, for arrears of revenue, but it is found that no revenue is actually due to Government, the sale must be set aside as not coming within the provisions of the Act.

Baboo *Girija Sankar Mozoomdar* for appellants.

Baboo *Jaggada Nand Mookerjee* for Government, respondents; and *Bangshi Dhur Sen*, for *Giridhur Sen*, respondent.

BAYLEY, J.—I am of opinion that this case must be remanded to the lower Appellant Court to try, on the evidence on the record, whether there were any arrears of Government revenue due to the plaintiffs at sun-set on the last day of payment.

The plaintiffs sued for the recovery of possession of a certain talook, and for the reversal of a sale held for the realization of arrears of Government revenue. The plaint stated that there was a sum of Rs. 14, odd annas, in deposit with the Collector of Fureedpore in the plaintiff's favor; that the sum alleged to have been due to them (plaintiffs) on account of arrears of Govern-

* Special appeal, No. 1268 of 1869, from a decree of the Judge of Small Cause Court with powers of Sub-judge of Fureedpore in Zillah Dacca, dated the 13th March 1869, affirming a decree of the Moonsiff of that district, dated the 21st November 1868.

ment revenue was Rs 10, odd annas, and thus the plaintiffs though it did not make any distinct allegation in so many express words that there were no arrears of revenue due by the plaintiffs did in fact aver that if the above sum of Rs. 14 odd had been duly credited in the plaintiff's favor, it would have been more than sufficient to meet the arrears of revenue, and thus that there were none. There were other averments in the plaint as to the irregularities in the notice and such like, but for the purposes of our present judgment it is not necessary to make any further specific observation as to them.

The plea of the defendants, the Collector of Jessore and the auction-purchasers, was that there were certain arrears due by the plaintiffs; that as under section 25, Act XI. of 1859, no appeal was made by the plaintiffs against the sale, so with reference to the provisions of section 33 of that Act, plaintiffs were not in a position to contest the legality of the sale before any Court of Justice.

Both the lower Courts have held that, as in this case no appeal was made to the Commissioner under the provisions of Section 25, Act XI. of 1859, within 15 days of the sale, so the provisions of Section 33 of that Act barred the jurisdiction of the Civil Courts to give the plaintiffs any redress; and accordingly dismissed the plaintiff's suit.

The plaintiff's appeal specially to this Court, and the plea taken is that as there were no arrears of revenue due, the provisions of Act XI. of 1859 do not in any way apply to this case; and consequently the lower Appellate Courts refusing jurisdiction with reference to the provisions of that Act, was erroneous in law.

There is a Full Bench decision in the case of *Bajinath Shu v. Lala Sital Prasad* (1), where though not on a precisely similar state of facts the principle had been laid down that where there is no evidence of any arrears of Government revenue being due, the provisions of Act XI. of 1859 do not apply, as the sale cannot be said to have taken place under the provisions of that Act.

We fully concur in the principle laid down in that decision, that where there are no arrears of Government revenue due, it cannot be said that an act relating to sales for arrears of Government revenue would apply. This is also the view which we understand has been taken by Kemp and Markby, J.J., in *Sreemunt Lall Ghose v. Shama Sondaree Possee* (2). The whole question, therefore, before us is as to whether there were any arrears of revenue due to the plaintiffs by the Government; and in order to a finding on this point, we think, that the ordinary and proper course would be to remand the case to the lower Appellate Court. But before we do this, we think it necessary to see whether there is any evidence on the record on the part of the plaintiffs which can form the basis of a judicial finding on this point. Now the plaintiffs have, in the first place, filed certain accounts,

(1) 2 B. L. R., F. B., 1.

(2) 12 W. R., 273.

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which are not attested either upon their own oath or upon that of any witnesses. These, therefore, can be no legal evidence in their favor.

There are then certain challans of the Collectorate filed by the plaintiffs, purporting to shew that the annual jumma payable and paid for a certain number of years was Rs. 89-1-1, and on a calculation made upon this basis, it would appear that the challans of remittances made by the plaintiffs would be some evidence in the plaintiff's favor, in order to shew that the demand for Government revenue had been, in many instances, satisfied on the calculation adopted by plaintiff on the present occasion. There is then also an allegation on the part of the plaintiffs that the practise would be for the money to be deposited with the Collector of Fureedpore, who would make remittances to the Collector of Jessore.

On the other hand it is alleged by the defendants that the plaintiffs' plea simply was, that owing to the fault of the patnidars the sums had not been paid in due time. On the whole, however, I think there is evidence upon which the lower Appellate Court could come to a finding whether arrears of revenue existed or not; and that is so whether the provisions of Act XI of 1859 would be applicable or not.

The case is therefore remanded to the lower Appellate Court to find, upon the evidence on the record, and on a comparison of the accounts, whether or not there was a balance of Rs. 10, odd annas due from the plaintiffs to the Government, on account of revenue, for which their estates would be legally liable to sale under Act XI. of 1859. If it is found that there was no balance due to Government, the lower Appellate Court will consider that the provisions of Act XI. of 1859 do not apply to this case, and will take jurisdiction and set aside the sale as not made under that law. If on the other hand the Court finds that there was a balance due to the plaintiffs by Government on account of revenue, it will consider that the provisions of Act XI. do apply; and in that case it would be right in refusing to take cognizance of the plaintiffs' suit, or give them any relief, on the ground that no appeal had been made to the Commissioner within the fifteen days absolutely prescribed by the law. The costs of this appeal will follow the result.

HOBHOUSE, J.—I am of the same opinion. I confess I am not without doubts on the subject, but I think on the whole that we ought to remand this case to be tried on the issue which Mr. Justice Bayley has laid down. It seems to me that it is a condition precedent to the exercise of any authority by the Collector under Act XI. of 1859, and it may be said a condition precedent to the assumption by him of any power under that Act, that there should be an arrear of revenue due before he can institute proceedings under that Act. Sections 2, 3 and 5 of that Act read together seem to me to be conclusive on this point. The doubt which I have is with reference to the wording of Section 25, which would seem to say that any irregularity committed by the Collector *must* be the subject of an appeal to the Commissioner, and that unless such an appeal be made within a certain time, the

Civil Courts are barred from jurisdiction by the provisions of section 33. On the whole, however, I am inclined to think that the words in section 25 cannot be held to apply to anything except to proceedings legally taken under the Act, and so do not apply to that declaratory part of the Act by which jurisdiction is given to the Collector to institute any proceedings at all. The words are these:—"The Commissioner shall be competent in every case of an appeal so preferred to cancel a sale which would appear to him not to have been conducted according to the provisions of this Act," so that the appeal would rather seem to be against the irregularity of the proceedings after the sale shall have been ordered, and would seem not to refer to the provisions in the Act which give jurisdiction to proceed to sell; and so again the provisions of section 33 allude to the irregular conduct of the sale, and not to that part of the Act which gives jurisdiction to conduct the sale; and certainly the principle laid down in the Full Bench ruling which Mr. Justice Bayley has quoted, is just as applicable as a principle to the facts before us as it was to the facts of the case before the Full Bench. When reduced to its shortest compass, the principle of the Full Bench ruling seems to me to be comprised in these words, to be found at page 71 of the judgment delivered by Mr. Justice Macpherson.—"In the present case no arrear of revenue was due, nor anything which could legally be levied as such. Act XI. of 1859, therefore, did not apply to the case at all, and the sale did not take place under its provisions." If therefore we could say in this case that no arrear of revenue was due, we should, if we followed that ruling, be obliged to say that Act XI. did not apply, and that anything done, therefore, under its provisions, was null *ab initio*; and we are quite certain that at any rate we are putting a reasonable construction on the law for if it is found as a fact that there was no arrear of revenue due at the sunset of the last day of payment, then there should have been no sale; and if on the other hand it be found as a fact that there was an arrear due, then everybody will be kept in the position that he ought to hold, and the only sufferer will be the person who never ought to have brought this suit, *viz.*, the plaintiff.

If the Judge should find an arrear of revenue to have been due, he will give the plaintiff a decree, and if not he will dismiss his suit.

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