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jee v. *Chunder Monee Debee* (1). It is true that the Courts in these decisions had to construe Act X of 1859, and not Regulation VII of 1799, which had then been repealed: but powers of sale analogous to those found in the Regulation of 1799 are provided in s. 105 of Act X of 1859, with this

(1) *Before Mr. Justice Kemp and Mr. Justice Ainslie.*

MOHESH CHUNDER BANERJEE (ONE OF THE DEFENDANTS) *v.* CHUNDER MONEE DEBEE AND OTHERS (PLAINTIFFS).*

The 27th February 1871.

Baboos *Sham Lall Mitter* and *Mohendro Lall Seal* for the appellant.

Baboo *Nil Madhab Sein* for the respondents.

The judgment of the Court was delivered by

AINSLIE, J.—This suit was remanded on the 1st of December 1862 by L. S. Jackson and Glover, JJ., with a direction to the lower Appellate Court to try the question whether the lease on which the lands had been held contained any stipulation reserving a right of sale for arrears of rent; and a further issue was also laid down regarding which nothing has been said in the present appeal.

The lower Appellate Court has now found that there was nothing in the lease which reserved a right of sale to the zemindar, and consequently holds that the tenure was sold subject to incumbrances. Against this decision, the special appellant has urged two grounds of appeal: 1st, that the *onus* of proof has been put on the wrong party; that he was called upon to produce the kabuliat, whereas the opposite party should have been called upon to produce the pottah. As in this case, the auction-purchaser, special appellant, is the zemindar, he must have proofs in his own hands equal to any that can be found in the hands of the opposite party, and there was no occasion to call upon the opposite party to prove his (special appellant's) case.

The other ground is, that with reference to the decision in *Rungo monee Debia* v. *Raj Comaree Bibee* (*a*), the appellant was not bound by the decree of foreclosure passed against the former holder. It appears to us that the facts in this case are not similar to the facts of that case. Here, there was a decree of foreclosure which entirely extinguished the rights of the debtor. In that case, there was a simple decree against the debtor, making him personally responsible for a portion of the allowance due to the widow of once of the members of a joint Hindoo family in consequence of his purchase of the share of another member of the family; but it is distinctly stated in the judgment quoted that the decree did not directly affect or bind the land, but merely bound the judgment-debtor personally, and prevented him from denying his liability. We, therefore, think that the cases are not analogous, and that this issue will not affect the present case. The special appellant has also sought to argue a further obection, as to the collusiveness of the decree obtained by the opposite party; but as that point is not taken in the grounds of appeal, we decline to hear him on this ground.

We dismiss the Special appeal with costs.

* Special Appeal' No. 1729 of 1870, from a decree of the Subordinate Judge of Hooghly, dated the 7th May 1870, affirming a decree of the Moonsiff of that district, dated the 16th March 1870.

(*a*) 6 W. R., 197.

difference that the language of the latter Act is more favorable to the contention of the respondent than that of the Regulation of 1799. The Chief Justice, in commenting on the Regulation of 1799, considered it to be clear that the power to sell the tenure itself free from incumbrances was not given by that Regulation.

The Regulations principally relied on by the respondent are Regulation VII of 1799, s. 15, cl. 7, and regulation VIII of 1819. The part of the regulation of 1799 relied on declares that, "if the defaulter be a dependant talookdar, or the holder of any other tenure, which, by the title-deeds or established usage of the country, is transferable by sale or otherwise, it may be brought to sale by application to the Dewanny Adawlut in satisfaction of the arrears of rent." The language is not well adapted to meet the case of incumbered tenures; but the words, "if the defaulter be the holder of any tenure, it may be sold," may fairly mean that the tenure the defaulter holds, or has, such as it is in his hands, may be sold; and it does not seem to be a forced construction that the decisions above referred to have put on the statute, in holding that, if the tenure has passed to another, and is no longer in him, the alleged manner enabling it to be sold for his debt, and that if he has an incumbered tenure, then only the interest which he has in it is subject to the power of sale (*sic*). The older Regulations of 1793, 1795, and 1797 were referred to for the purpose of showing the general object to have been to give the zemindars the same powers to recover rents from their dependent talookdars, as the Government had to recover the fixed revenue from them; but these provisions relate principally to powers of distress. The recital relied on in the preamble of Regulation XXXV of 1795 (which relates to distresses), *viz.*, that justice required that proprietors should have the means of levying their rents and revenues with equal punctuality as the Government, is not found in regulation VII of 1799; and would not justify a construction of that regulation which would give, by an inference, a power of sale of so stringent a kind as that contended for. Regulation VIII of 1819, s. 11, no doubt gives an express power to sell the tenure free of all incumbrances that may have

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accrued upon it by the act of the defaulting proprietor, his representatives, or assignees; but the power so given is confined to the case of tenures where the right of selling or bringing to sale for an arrear of rent has been specially reserved by stipulation in the engagements interchanged in the creation of the tenure. The preamble of the Act shows the existence of such tenures, and the Regulation treats them as a distinct class. It has been already pointed out that the sunnuds in this case do not contain this special power, and that the High Court was in error in so assuming.

The present case is stronger in fovor of the appellant than that of *Shahaboodeen* v. *Futteh Ali* (1). In this case, before the zemindar took proceedings against the heirs of Ali Reza, the title of the appellant had passed beyond the stage of being an incumbrance only on the tenure. He had become the absolute owner of the tenure itself, and the heirs of Ali Reza, against whom the summary suit was brought, had no title or interest whatever left in it. They were not the holders of any tenure, to use the words of Regulation VII of 1799, and were certainly not "proprietors" in the words of the Regulation VIII of 1819.

The judgment below was also grounded on the fact that the heirs were in actual possession, and that the name of Ali Reza, their ancestor, was on the register. This was so, but they were holding possession wrongfully. Not only was their title gone, but a decree for possession had been obtained against them, and executed so far as it was possible to do so. Their possession, therefore, was in no sense lawful, and their mere *de facto* possession was known by the zemindar to be wrongful. With this knowledge the zemindar could not properly treat the heirs as holders of the tenure, so as to affect the rights of the appellant, of whose title and efforts to obtain possession he had notice.

It is true the appellant did not tender the rent which was the subject of the suit against the heirs, but, on the other hand, when he tendered the rent due from the date of his decree at

(1) Case No. 992 of 1866; 13th March 1867.

the cutcherry, the prior rent was not demanded of him, and, on the contrary, he was told the zemindar's *sazawals* were in possession, and no rent would be received. These facts, coupled with the other proceedings of the zemindar's agents, show that a further tender was useless, and therefore unnecessary, even assuming that such a tender ought to have been made to stop the proceedings in the summary suit against the heirs to which he was no party, which their Lordships are by no means prepared to affirm.

In recommending the reversal of the judgment under appeal, their Lordships in effect affirm the authority of the decision of the Full Bench in the case of *Shahaboodeen* v. *Futteh Ali* (1). It may be inferred from their judgment that the High Court in this case would have followed that authority, if the terms of the sunnuds had been correctly brought before them.

Their Lordships do not desire by this judgment to weaken any powers that zemindars may, by law, possess to enforce payment of their rents. What other powers and remedies the zemindar, Pertab Singh, had, and might have exercised, it is not necessary, nor is it now of any general importance, to determine, for the remedies for arrears of rent are at present mainly provided by Act X of 1859 and subsequent Acts. The only question their Lordships are called upon to decide is as to the validity of this sale, and they have come to the conclusion that, under the Regulations in force at the time, and under the circumstances of this case, this sale, for the reasons already given, was invalid.

Their Lordships think that the appellant is entitled to the mesne profits from the time of the sale to Jowhur Ali, as against him; and that in taking the account of such profits, all rent and arrears of rent due and payable to Pertab Singh and his heirs should be deducted and allowed. The appellant also claims to be entitled to a decree for mesne profits against the heirs of Pertab Singh, on the grounds (1) that the zemindar was acting in collusion with Jowhur Ali; and (2) that he persisted in the sale of the talook, when he knew that the heirs

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of Ali Reza, who alone were defendants in this suit, had no interest at all in them. Their Lordships do not think it necessary to express any opinion on the charge of collusion; but considering that the zemindar proceeded to obtain a sale of the tenure, notwithstanding he had notice of the appellant's title, and of the order made by the Zillah Court for giving him possession, and that such sale has been the means of keeping the appellant out of possession, and the cause of this suit, and that he has presistently disputed the title of the appellant, they are of opinion that the decree for mesne profits should be against the heirs of Pertab Singh, as well as against Jowhur Ali, but that executions should not be had against such heirs in respect of them until after failure to obtain satisfaction from Jowhur Ali.

Their Lordships will therefore humbly recommend to Her Majesty that the decree appealed from be reversed, and that it be declared that the sale to Jowhur Ali was invalid, and should be set aside; that the appellant is entitled to possession, and to be registered as the holder of the talooks; and that he has been so entitled since the said decree of the Zillah Court of Purneah of the 18th December 1854; and that it should also be declared that the appellant is entitled to mesne profits from the time and in manner abovementioned; and further that the respondents should pay the costs of the litigation in India; and if any costs have been paid in India, they should be refunded: and their Lordships will direct that the appellant should have the costs of this appeal.

Appeal allowed.

Agents for appellant: Messrs. *Burton, Yeates,* and *Hart.*

Agent for respondent, Sheikh Jowhur Ali: Mr. *Wilson.*