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The learned Counsel then proceeded to consider the Regulations as supporting the decision of the Full Bench in the case of *Shahaboodeen* v. *Futteh Ali* (1), and they also referred to *Tirthanund Thakoor* v. *Paresmon Jha* (2) and *Mohesh Chunder Banerjee* v. *Chunder Monee Debee* (3).

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

(2) *Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.*

TIRTHANUND THAKOOR AND OTHERS (PLAINTIFFS) *v.* PARESMON JHA AND ANOTHER (RESPONDENTS).*

Baboo *Tarrucknath Sen* for the appellants.

Baboo *Khettermohon Mookerjee* for the respondents.

HOBHOUSE, J.—This is a suit rather of a peculiar nature, and it is necessary to state carefully the facts on which we have to come to a decision on the point of law before us.

The plaintiff in this suit held a decree against one of the defendants, Rung Lall, in the Revenue Court for arrears of rent for the year 1273 and 1274. This decree was dated the 10th September 1867. The co-defendant of Rung Lall, namely, Paresmon Jha, held a money-decree in the Moonsiff's Court against the said Rung Lall, dated the 28th May 1867. In execution of this money-decree, the defendant Paresmon Jha put up for sale the rights and interests of Rung Lall in the tenure, which is the subject of dispute before us; and on the 29th November 1867, the said Paresmon Jha became the purchaser of the said rights and interests in the said tenure. Thereafter, on what date we are not shown, the plaintiff prayed in the Revenue Court for execution of his decree for arrears of rent of the 10th September 1867 by the sale of the said tenure of Rung Lall. The arrears of rent for which the decree was given were admittedly arrears due from the defendant, Rung Lall, as the tenant of the tenure which was sold to the defendant Paresmon.

When the plaintiff applied for execution of his decree in the manner I have said, the Deputy Collector, on the 25th April 1868, refused to allow such execution to proceed on the ground that whatever had been Rung Lall's rights and interests in the tenure had been sold to the defendant Paresmon at the previous sale by the Civil Court.

Under these circumstances, the plaintiff sues for the reversal of the sale made by the Civil Court on the 29th November 1867, and for the cancelment of the order of the Deputy Collector of the 25th April 1868, and to obtain sale of the tenure in question.

The lower Appellate Court has dismissed the plaintiff's suit on the ground that the sale to the defendant of the 29th November 1867 was a good sale, and that there cannot, therefore, be any re-sale of the rights and interests of the judgment-debtor Rung Lall in the tenure in question.

In special appeal it is contended that this judgment is erroneous in law, and the argument of the pleader for the special appellant is this:—He says that inasmuch as the defendant Rung Lall was the tenant of the under-tenure in question, and that inasmuch as the arrears of rent for which the decree was given to the plaintiff were arrears of rent due by the tenant of this particular tenure, so

(3) *Post*, p. 150.

* Special Appeal, No. 2997 of 1869, from a decree of the Subordinate Judge of Purneah, dated the 17th September 1869, affirming a decree of the Moonsiff of that district, dated the 27th May 1869.

Mr. *Field*, Q. C., and Mr. *Doyne* for the respondent, Sheikh Jowhur Ali.—The cases last cited are decided upon the con-

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the tenure itself was liable for the amount of the said arrears, and the defendant Paresmon, who bought that tenure bought it subject to such liability.

In the first place, it is quite clear to me that the two first prayers contained in the suit could not, under any circumstance, be granted. It is not for a moment contended that the decree of Paresmon in the Moonsiff's Court, that the sale to Paresmon in that Court, or that the order of the Deputy Collector of the 25th April 1863, are in any way tainted with fraud. It must, therefore, be held at once that the sale of the 29th November, whatever it may have conveyed to the purchaser, was, for what it was worth, a good sale; and also that the order of the Deputy Collector refusing to allow any re-sale of the tenure was an order passed with jurisdiction, and was an order, therefore, which we cannot in the Civil Court set aside. But I do not propose to base my judgment upon such a narrow basis as that the two principal prayers of the plaintiff cannot be complied with, and that, therefore, the suit must be dismissed. I will rather take it that the suit is of this nature,—that it is a suit to have it declared that the tenure purchased by Paresmon on the 29th November 1867, is a tenure which, notwithstanding his purchase, is liable for the arrears of rent decreed due from the former tenant of the tenure, and is therefore liable to be sold for the amount of those arrears.

Now, the whole of this contention rests upon this theory, namely, that every under-tenure is hypothecated to the proprietor of the same for the rent derivable and due from such under-tenure. Now, although there is a law, s. 112 Act X of 1859, which declares that the produce of the land is held to be hypothecated for the rent payable in respect thereof, yet there is no law shown to us which has declared that the land itself is held to be hypothecated for the rent thereof. It seems to me, therefore, in the first place that the mere fact that there is a law declaratory that the produce of the land is held hypothecated for the rent, is strong evidence to show that there is no law by which the land itself is held to be hypothecated for the same purpose; the *expressio unius* is the *exclusio contrarii.*

But we are shown certain decisions of some Division Benches of this Court which are said to be in accordance with the special appellant's view upon this case—namely, *Khoobaree Rai* v. *Roghoobur Rai* (a), *Gopal Mundul* v. *Soobhudra Boistobee* (b), *Mussamut Sufuroonissa* v. *Saree Dhoopee* (c), *Doorga Persad Bose* v. *Sreekisto Moonshee* (d), *Maharajah Satish Chunder Roy Bahadoor* v. *Modhoosoodun Paul Chowdhry* (e).

Now, the most cursory glance at the cases to be found in Wyman makes it quite clear that the point before us was not in any shape brought before the minds of the Judges who decided the cases there reported, and in fact the pleader for the special appellant very candidly admits that that is so: and the most that he can make out of those reported cases is that there are some expressions in them which seem to favor his views.

Again, I think that from a careful consideration of the cases of *Gopal Mundul* v. *Soobhudra Boistobee* (b) and *Mussamut Sufuroonissa* v. *Saree Dhoopee* (c), it will appear that they were not cases in which the point before us was really the point which the Judges there decided. In *Mussamut Sufuroonissa* v. *Saree Dhoopee* (c), the Judges held that the suit turned upon fraud or no fraud, that the Judge below had found fraud

(a) 2 W. R., 131.

(b) 5 W. R., 250.

(c) 8 W. R., 384.

(d) 2 Wyman's Revenue, &c., Journal, p. 212.

(e) 3 *Ib.*, p. 19.

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struction of Act X of 1859, but this has to be decided upon Regulation VII of 1799.

If the sunnuds are expressly in the words of those referred to by the Counsel for the appellant, no doubt the High Court were

without any evidence thereof, and that, therefore, his decision was erroneous. And so in *Gopal Mundul* v. *Soobhudra Boistobee (a)*, the point before the Judges there again was fraud or no fraud; and although undoubtedly the learned Judges here expressed an opinion which is in favor of the special appellants' views, yet in so many terms they do not give Judgment as the result of that opinion; but, on the contrary, they remand the case for trial upon the question of fraud or no fraud.

The only case which seems to be at all strong in favor of the special appellants' view is that of *Khoobaree Rai* v. *RoghooburRai(b)*; and there the Judges do undoubteldy seem to say that because the rent was due upon the tenure sold, therefore, the person who bought that tenure was bound by the second sale of it. But in the same breath they say that he was so bound because of his negligence in not paying up the rents that were due upon the tenure. To make that case, therefore, applicable to the case before us, we ought to have been shown what was the date of the decree. If the decree was given after the purchaser in the Civil Court had become the proprietor of the tenure, then he might, perhaps, have been liable for the rents due upon the tenure, and when he neglected to pay them, the tenure would rightly have been sold. But the learned Judges do not state in their judgment what was the date of the decision, and we, therefore, really do not know whether that case is in point or not.

On the other hand, as I have said before, we are not shown any custom, nor any statute law, declaring that an under-tenure is hypothecated for the rents due upon it, and there is a statute law which seems to declare by the expression of one thing that the other is not law. And the cases of *Samiraddi Khalifa* v. *Harischundra(c)* and *Pran Bandhu Sirkar* v. *Sarbasundari Dabi* (*d*) are distinctly in point, and by them it is expressly declared that, under circumstances exactly similar to the present, the sale made in execution of a decree of a Civil Court is good so as to prevent any second sale of the same property in execution of a decree for arrears of rent against the former tenant of that property.

I think, therefore, that the Judge was right in saying that the plaintiffs, suit must be dismissed, and I would dismiss this appeal with costs.

LOCH, J.—I concur in the judgment pronounced by my colleague. I wish to add a few words with regard to the judgment in *Mussamut Sufuroonissa* v. *Saree Dhoopee* (*e*). That was a judgment pronounced by Mitter, J., in which I concurred, and it has been quoted in support of the case of the special appellant before us; and it has been urged that the opinion expressed by Mitter, J. in the judgment in *Samiraddi Khalifa* v. *Harischandra* (*c*), is opposed to the judgment he gave in that case. Looking, however, at the facts that were put before us in the case of *Khoobaree Rai* v. *Roghoobur Rai* (*b*) and the grounds upon which the special appellant came before us, it appears to me that in that judgment there is nothing inconsistent with what was said by my colleague, Mitter, J., in the case of *Samiraddi Khalifa* v. *Harischandra (c)*: because in the former case,

(*a*) 5 W. R., 205.

(*b*) 2 W. R., 131.

(*c*) 3 B. L. R. A. C., 49.

(*d*) 3 B. L. R., A. C., 52.

(*e*) 8 W. R., 384.

in error, if their judgment is to be read as assuming that the tenure was made saleable by the special terms of the sunnud. The fact, however, as to the identity cannot, at present, be ascertained. It is necessary, however, to test whether,—considering that the rent was in arrear, that Shah Ali Reza's name was still on the register, and that his heirs were in possession at the time of the institution of the summary suit, and as there was no tender by the appellant of the amount of arrears claimed in the suit against the heirs,—the Regulations would authorise a sale of the tenure, so as to enable the purchaser to get possession of the land discharged from all encumbrances created by the grantee. The learned Counsel referred at length to the various Regulations previous to Regulation VIII of 1819, and submitted that, according to that Regulation, read in conjunction with Regulation I of 1820 and Act VIII of 1835, the decree of the High Court was correct.

The other respondents did not appear.

Their LORDSHIPS delivered the following judgment :—

This is an appeal from a decree of the High Court of Calcutta on review, in effect dismissing a suit brought in the Zillah Court of Purneah in 1856 by the appellant, as mortgagee after foreclosure, to recover possession of certain talooks in Pergunnah Havalee, and to set aside a judicial sale of them made at the instance of Baboo Pertab Singh, the zemindar, under a claim for arrears of rent.

The main question in the appeal is whether the sale of the talooks made to Sheikh Jowhur Ali, the respondent, who alone appeared at the hearing, under a decree in a suit instituted by the zemindar against the heirs of Shah Ali Reza, the mortgagor, for arrears of rent, treating them as defaulting tenants, is a

the point urged before us was that the lower Appellate Court was wrong in holding that the proceedings of the zemindar were tainted with fraud and collusion, and that was the point that we were called upon to dispose of; and we held that mere loose expressions of fraud used by the lower Appellate Court were quite insufficient to justify the Subordinate Judge in coming to the conclusion of fraud against the special appellant.

I concur in the decree proposed by my colleague in this case that the special appeal be dismissed with costs.

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valid sale as against the appellant, the mortgagee, who was not a party to that suit.

Ali Reza, a Mahomedan, held the property by an hereditary tenure created by sunnuds granted prior to 1793 to the ancestors of Ali Reza. These sunnuds are not set out in the present record; but it has been certified since the argument, by the Registrar of the High Court, that they are the same as those printed in the record of the appeal in a former suit between the appellant and the representatives of Ali Reza. Their Lordships thought it right to ascertain with accuracy the contents of these sunnuds, inasmuch as the High Court based their judgment in a great degree on the assumption that the tenure was made saleable for arrears of rent by special terms contained in them. It appears from the sunnuds, thus verified, that this assumption is unfounded; and it was admitted by the learned Counsel for the respondent that, if they were the same as those set out in the former record, this was so. By the sunnuds the mouzahs are given by way of *istemrâr* to Hossein Reza and his descendants on a fixed and absolute jumma of Rs. 2,291.

On the 13th March 1850, the appellant advanced to Ali Reza Rs. 39,500; and to secure this advance, the latter made, in ordinary form, a conditional sale of the talooks to him, to be absolute if the money was not repaid on 13th March 1851.

It is necessary to advert shortly to the litigation which has been going on since 1851 in this and two contemporaneous suits. The mortgage-debt not having been paid, the appellant took proceedings to foreclose under Regulation XVII of 1806; and the foreclosure was completed in due course in August 1852. Thereupon, on the 28th January 1853, the appellant commenced a suit against Ali Reza to obtain possession, which was defended on grounds impeaching the validity of the foreclosure. This suit passed through all the Courts, and underwent a great variety of fortune. The Zillah Judge, on the 18th December 1854—a day material to be borne in mind—made a decree in favor of the appellant for the possession of the talooks. On appeal to the Sudder Dewanny Adawlut, the suit was remanded, when the then Zillah Judge dismissed it, and the Sudder Court affirmed his decision; but both these judgments were reversed

by Her Majesty on appeal, and the order in Council declared that the appellant was entitled to the possession of the mortgaged premises as absolute owner in the case of *Forbes* v. *Ameeroonissa Begum* (1). The order in Council bears date on the 3rd February 1866. Shortly after the decree of the Zillah Judge of the 18th December 1854, in the appellant's suit for possession,—*viz.*, on the 6th January 1855,—the zemindar, Pertab Singh, brought a summary suit in the Collector's Court against the heirs of Ali Reza for arrears of rent. The heirs in that suit allowed judgment to go by default, and on the 26th Februay 1855, an *ex-parte* decree was made against them for the amount of the arrears claimed,—*viz.*, Rs. 712. On the 19th March 1855, the zemindar prayed that the decree might be put into excution and the talooks sold, and they were sold accordingly, on the 26th day of April 1855, to the respondent, Jowhur Ali, for Rs, 1,000. This is the sale which it is sought to set aside in the present suit. It is plain that, when this summary suit against the heirs of Ali Reza was commenced, they had no title or right whatever in the talooks. The appellant had become absolute owner, and, moreover, he had obtained the decree of the Zillah Judge for possession, which was ultimately sustained on the final appeal to Her Majesty.

On the 24th March 1856, the appellant commenced the present suit to set aside the sale and for possession against the zemindar, the purchaser Jowhur Ali, and the heirs of Ali Reza. His right to recover was at first opposed in the Courts below, on the ground that, by the judgments given in India in the first of the above-mentioned suits, his title, by foreclosure, had been invalidated; and, on this objection, decrees were made against him by the Zillah and High Courts. On the reversal of these judgments by the Queen in 1866, the appellant, in order to obtain the fruits of the long litigation, at last decided in his favor, obtained a re-hearing of his case on review; and the High Court then pronounced the judgment against him now under appeal. The contention of the appellant is that the zemindar could only sell the interest of the heirs of Ali Reza (if any), and not

(1) 10 Moo. I. A., 340.

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the tenure and estate which had passed to him before the decree for sale; and he also impeached the sale on the ground that it was fraudulent and collusive, and on objections founded on various alleged irregularities.

In the view taken by their Lordships, it will only be necessary to consider the first point,—*viz.*, the right of the zemindar to sell, under the decree in the summary suit against the heirs of Ali Reza, the tenure then vested in the appellant.

The respondent contends that the sale was by law valid. He relies on the facts that some rent was in arrear; that Ali Reza's name was on the register, and his heirs in possession; and that the appellant did not tender the amount of the arrears. But, on the other hand, it appears that, if the heirs of Ali Reza were in possession, which is somewhat uncertain on the facts, their names were not put on the zemindar's register; and it also appears that, shortly after the commencement of the summary suit of the zemindar, and before the decree for sale, the officers of the Zillah Court, in pursuance of the decree of the 18th December 1854, gave the appellant symbolical possession by planting bamboos, which the zemindar's agents soon afterwards pulled up; and that the appellant's agent tendered the rent for December 1854 at the cutcherry of the zemindar, and that such tender was there refused, with the answer that *sazáwals* (1) had been appointed, and that until they were removed, no rent would be received. It also appears that the appellant endeavored to get his name placed on the register of the zemindar, and that before the sale he applied to the Zillah Judge for a *parwána*, directing the zemindar to place his name on the register, who refused the order. The appellant did not then apply to the zemindar, and it may be inferred that he did not do so because the above proceedings of the zemindar, who had then obtained the decree against the heirs of Ali Reza, had shown that such an application was useless. It is apparent from these facts that the zemindar had the fullest notice of the title of the appellant and of his claim to possession before the decree for sale, and that, having that notice, he proceeded, without notice to

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him, to obtain a decree for sale *ex parte* against the heirs of Ali Reza. There can also be no doubt that the purchaser Jowhur Ali (who was, in fact, the Mooktear of the zemindar, and purchased at a grossly inadequate price) had in the same way notice of the appellant's title and his proceedings. It requires very plain positive law to support such a sale against the real owner under a decree thus obtained.

The High Court, in the judgment under appeal, assume that the sunnuds, in their terms, gave the zemindar power to sell the tenure itself free from incumbrances; but, in the event of that assumption being unfounded, the learned Council for the respondent contended that the zemindar had that power, either as an incident to the tenure, or by virtue of the Regulations.

No authority was shown to satisfy their Lordships that, by any known law or usage, zemindars had the power to sell tenures of this kind for arrears of rent as a right inherent in, or incident to, the tenure, or that any such power rightfully exists, unless by special stipulation, independently of the Regulations.

A long and minute commentary was made during the argument upon the Regulations bearing on the subject from 1793 downwards, with the view, on the part of the respondent, of showing that they authorized a sale of the tenure itself, free of previous titles and incumbrances created by the defaulting tenant and his predecessors. Their Lordships do not think it necessary to discuss in detail these Regulations, because they are disposed to agree in the main with the construction put upon them in a decision of the Full High Court, which is directly opposed to this contention. The decision referred to was pronounced in an elaborate judgment of the Full Bench of the High Court (the Chief Justice, Sir Barnes Peacock, presiding), in which the Regulations are fully collated and examined—*Shahaboodeen* v. *Futteh Ali* (1). This, which may be regarded as the leading decision in India, has been followed by the Courts there—*Tirthanund Thakur* v. *Paresmon Jha* (2) and *Mohesh Chunder Baner-*

(1) Case No. 992 of 1866; 13th March 1867. (2) *Ante*, p. 142.

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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.