

PRIVY COUNCIL.

LALA GAURI SANKER LAL AND OTHERS (DEFENDANTS) v.
JANKI PERSHAD AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

P. C.*
1889

November 22,
December 11.

Sale for arrears of revenue—Act XI of 1859, sections 18 and 33—Collector's order of exemption.

A Collector's order under section 18 of Act XI of 1859 for exempting an estate from sale for arrears of revenue must be an absolute exemption, and not an order having effect as an exemption or not, according to what may happen, or be done, afterwards. It must not depend on an act which may, or may not, be performed.

The High Court having set aside a sale, as contrary to the provisions of the Act XI of 1859, upon a ground other than that declared and specified in an appeal made to the Commissioner of Revenue against the order for the sale, the Judicial Committee, referring to section 33 as prohibiting such a course, reversed the decision of the High Court.

APPEAL from a decree (28th June 1887) of the High Court, reversing a decree (9th March 1886) of the Subordinate Judge of zilla Chupra.

The suit out of which this appeal arose was instituted on the 23rd May 1885 by numerous co-plaintiffs, some of whom were zemindars owning, and others were interested in, a mehal named Dumaria in Chupra, of which the jumma was Rs. 458-10-8, in respect of which there had been a default for certain months of 1883. The March and June kists being in default, the estate was sold by order of the Collector of Sarun on the 25th September 1883. It was purchased in the name of the defendant and present appellant, Lala Gauri Sanker Lal. Against this sale an appeal was preferred by the plaintiffs to the Commissioner of Revenue of the Division; but he, on the 18th September 1884, dismissed it, holding that there was no ground for interference.

The proprietors of Dumaria accordingly brought this suit on 23rd May 1885, alleging the sale to have been contrary to the provisions of the Sale Law, and specifying irregularities. They claimed that the sale should be set aside, and that they should have possession, mesne profits, and costs.

* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PHACOCK, and SIR R. COUCH.

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The auction-purchasers and the Government were made defendants. The grounds of defence were substantially the same, viz. that there had been actual default.

The issues raised questions whether there was any cause of action against the Government, and whether the sale was or was not contrary to the provisions of the Sale Law. The plaint alleged that an application tendering payment had been made on 22nd September 1883, whereupon the Collector after inquiry in effect ordered that the arrears should be received. This was called the special order in the judgments below. It was also alleged that the Collector, before the sale, viz. on 24th September 1883, made an order that the mehals on which arrears should have been deposited before a certain time would be released. This was termed the general order.

The Subordinate Judge decided that the sale was in accordance with the Sale Law, Act XI of 1859, and dismissed the suit with costs. On an appeal by the plaintiffs to the High Court, a Division Bench found that the arrears were not paid in due time, but were tendered before the sale. Differing from the Subordinate Judge, the High Court held that the special order had the effect of exempting the estate from sale. They, therefore, upon this special order, decided in favour of the plaintiffs. They were of opinion, at the same time, that had the plaintiffs failed on the strength of that order in getting the sale set aside, they could not have succeeded upon the general order of the 24th September. The appeal was decreed, the sale was set aside, and possession was awarded to the plaintiffs, with an account of mesne profits.

The Government, not having joined the co-defendants in preferring this appeal, were in the record made respondents under the statutory name.

On this appeal,

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the appellants, contended that the special order of the 22nd September 1883, even if proved to have been made as alleged by the plaintiffs, had not the effect of exempting the estate from sale under Act XI of 1859. Nor had the general order of the 24th September that effect. There was a subsisting arrear of revenue for which the mehal was liable to be sold. There was no obligation, legally binding on the Collector, to postpone the sale or to accept payment

after sunset on the last day allowed for payment. The sale was regular, and the plaintiffs were bound by it, with the result that the property had passed to the purchaser.

None of the respondents appeared.

Their Lordships' judgment, on a subsequent day, 11th December, was delivered by

SIR R. COUCH.—The appellants were defendants in a suit to set aside a sale of an estate or mehal called Dumaria for arrears of revenue due from the plaintiffs, made by the Collector of Sarun under the provisions of Act XI of 1859. The Lower Court dismissed the suit, but the High Court of Bengal reversed its decree, and ordered the sale to be set aside, and that the plaintiffs should recover possession of the estate.

On the 13th August 1883, Rs. 8-13-5 of Government revenue due on the 7th June 1883 being unpaid, a notification was issued by the Collector of Sarun that the estate would be publicly sold on Monday, the 24th September, and was duly published. On the 24th September the Collector made an order in these terms:—
 "Payments of revenue in arrear will be received in the treasury up to the time of sale. Applications for exemption on the ground of payment will be received up to 1-30 p.m., but they must be supported by treasury receipts for payment in full of all demands. No applications will be received, and no payments will be accepted, after the sale has commenced." On the 22nd September, Bindeswari Pershad Singh, one of the respondents, presented a petition to the Collector, stating that in mehal Dumaria there was an arrear of Rs. 8-12-5 in consequence of default in payment of revenue made by the other shareholders, and that he had brought the amount of arrears, and praying that it might be received and entered in the account and the mehal released from sale. On the back of this petition there is a written order, dated the 24th September, that the office report be submitted, and after entries of the office reports there are the following:—

"Receipt not produced before sale."

"C. C. QUINN."

"The 25th September 1883."

"Accept on payment of all Government demands."

"R. C. P., Sarun Collectorate."

"The ——— September 1883."

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1889 In the Lower Court, and in the High Court, the last entry is spoken of as made on the 22nd September 1883. It does not appear for what reason. Mr. Quinn was the Collector. It is not known who was the person who used the initials R. C. P., but no issue was raised in the suit as to the authority to make that entry, and that cannot now be disputed.

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In the judgment of the Lower Court it is found that the payment was not made before 1-30 p.m. on the 25th September, to which day the sale of Dumaria and a number of other estates in arrear had been duly adjourned by the Collector, and at the time of the sale no treasury receipt was produced. The payment was made at the Collector's office some time before 2 p.m. on the 25th and before the commencement of the sale, but after the officers had left the office and gone to the Collector's ijlās (bench) to attend it.

Thus the order of the 24th September, called the general order, under which an exemption might have been granted, was found not to have been complied with, and the plaintiffs were obliged to rely upon what is called in the issues the special order dated the 22nd September. The Lower Court held that this is not an order for exemption under section 18 of Act XI of 1859. The High Court has held that it is. That Court says the effect of the order may be expressed as follows:—"I exempt this estate from sale, provided the arrears are paid before sale." It appears to their Lordships that what is called the special order is not such an order as is intended by section 18. It should be an absolute exemption, not an order which may have effect as an exemption or not according to what may happen or be done afterwards. The section says it shall be competent to the Collector or other officer, at any time before the sale, to exempt the estate from sale. The Collector is to record in a proceeding the reason for granting exemption. Although this, as the High Court says, may be done at any time, the reason should exist at the time the exemption is granted, and not be a fact which may happen afterwards, or an act which may or may not be performed. The words "accepted, &c.," have been called by the Lower Courts an order and considered as one, but it may be doubted whether they are more than a note by one of the Collector's

officers that the Rs. 8-12-5 would be received, and therefore the mehal would be released from sale.

There is another and, their Lordships think, a fatal objection to the decree of the High Court. Section 25 makes it lawful for the Commissioner of Revenue to receive an appeal against any sale made under the Act if preferred within a specified time, and gives him power to annul any sale made under the Act which shall appear to him not to have been conducted according to its provisions. Section 26 gives power to the Commissioner, on the ground of hardship or injustice, to suspend the passing of final orders in any case of appeal from a sale, and to represent the case to the Board of Revenue, who, if they see cause, may recommend the Local Government to annul the sale, and the Local Government may do so, and cause the estate to be returned to the proprietor on such conditions as may appear equitable and proper. And section 33 enacts that no sale shall be annulled by a Court of Justice upon the ground of its having been made contrary to the provisions of the Act, unless the ground shall have been declared and specified in an appeal made to the Commissioner. The plaintiffs appealed to the Commissioner. In their grounds of appeal they say the Collector on the 24th September passed a general order and they complied with it. They do not mention any order of the 22nd September. The Subordinate Judge thought paragraph I of the memorandum of appeal was sufficient, but it is not. It only says the sale is fit to be set aside for reasons detailed in the following paragraphs. If the case now set up had been stated in those paragraphs, the Commissioner would have inquired into it, and if he thought there was hardship or injustice might have represented the case to the Board of Revenue. The second issue, as summarized by the Subordinate Judge is, "Does section 33 of XI of 1859 bar the suit?" and upon his opinion of paragraph I he held that it did not bar the suit. In the judgment of the High Court this issue is not noticed. It is said that the two points upon which the parties went to trial were—1st, Was the amount due for arrears paid before the sale commenced? 2nd, What was the meaning and legal effect of the orders of the 22nd September and 24th September? This is a misapprehension. The issue upon section 33 was tried by the Subordinate Judge. It was decided against the

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defendants, but the decree being entirely in their favour, it was not necessary for them to file a notice of objection under section 561 of the Code of Procedure. They could support the decree on the ground that the second issue ought to have been decided in their favour. The High Court ought to have decided that issue, or have shown in their judgment a reason for not doing so. If it had been decided that the suit was barred by section 33, the appeal to the High Court ought to have been dismissed.

Upon both the grounds which have been considered, their Lordships are of opinion that the decree of the High Court ought to be reversed, and the appeal to that Court dismissed, with costs, and the decree of the Lower Court affirmed, and they will humbly advise Her Majesty to order accordingly.

The respondents, other than the Secretary of State for India in Council, must pay the costs of this appeal.

Appeal allowed.

Solicitors for appellants : Messrs. T. L. Wilson & Co.

C. B.

P. C. *
 1890
 January 31,
 February 4
 and 5.

KHAGENDRA NARAIN CHOWDHRY AND OTHERS (PLAINTIFFS) v.
 MATANGINI DEBI AND ANOTHER (DEFENDANTS),
 AND A CROSS APPEAL.

[Consolidated appeals from the High Court, Calcutta.]

*Decree—Form of decree—Suit for possession by owners of adjoining estates—
 Right of parties to equal moieties of property decreed, although each had
 claimed the exclusive title—Decrees dismissing their suits reversed, the
 evidence being sufficient as to the former, but not the latter right.*

In cross suits between the owners of adjoining estates, each claimed against the other to be entitled to, and to be put into possession of, property situate on the boundary between their estates.

The High Court dismissed both claims on the ground that the evidence of the exclusive right of either party was insufficient.

Held that, although this might be so, there was nevertheless sufficient evidence of possession having been held by both the one and the other, and of the title of both, to support the conclusion that each had a claim to an equal moiety, to which each should be declared entitled. Each should be put into possession of the moiety which was opposite to and adjoined his estate.

* *Present*: LORD WATSON, LORD MORRIS, SIR B. PRACOCK, and SIR R. COUCH.