

APPEAL FROM ORIGINAL CIVIL.

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

HARI CHARAN SINGH

v.

CHANDRA KUMAR DEY.*

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Dec. 17.

Notice, service of—"Adult," meaning of—Public Demands Recovery Act (Beng. I of 1895), ss. 10, 12, 31—The Collector of 24-Parganas—Certificate Officer.

A person above the age of sixteen years at the date of the service of notice is an "adult" within the meaning of s. 31 of the Public Demands Recovery Act.

When a notice under s. 10 of the Public Demands Recovery Act actually reaches the judgment-debtor and he contests the claim, it cannot be said that the notice was not validly served because the person on whom the service was made is not proved to be residing with the judgment-debtor, the object of serving the notice being to enable the judgment-debtor to contest his liability.

The Collector of 24-Parganas is the proper Certificate Officer to enforce a certificate under the Act against immoveable property in Calcutta.

APPEAL by the plaintiff, Hari Charan Singh, from the judgment of WOODROFFE, J.

The material facts of this case are fully set out in the Indian Law Reports, 34 Calcutta Series at p. 788, and also in the judgment of this Appellate Court.

The case originally came on for hearing before WOODROFFE, J.; and his Lordship's judgment is reported in the Indian Law Reports, 34 Calcutta Series at p. 795.

From this judgment the plaintiff appealed.

Mr. H. D. Bose (Mr. B. L. Mitter with him), for the appellant. A Collector's certificate does not amount to a decree until service of notice is made under s. 10 of the Public Demands Recovery Act.

The facts in the Full Bench case of *Purna Chandra Chatterjee v. Dinabandhu Mukerjee* (1) are the same as in this

* Appeal from Original Civil, No. 24 of 1907, in suit No. 485 of 1905.

(1) (1907) I. L. R. 34 Calc. 811.

case, the only difference being that there was no application made under s. 12 of the Public Demands Recovery Act in that case. Although there was a petition objecting to the sale, it was not in the nature of a petition contemplated by s. 12 of the Public Demands Recovery Act: see also ss. 10, 11, 12 of that Act. In the case of *Ambica Prasad v. Gopal Bhus Das* (1), although there was no notice under s. 10 of the Public Demands Recovery Act, there was a real application under s. 12 of that Act. An application under s. 12 must deny liability.

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[FLETCHER, J. The certificate may be a good one, but may nevertheless be not enforceable.]

That is so: s. 16 of the Public Demands Recovery Act shows that.

[MACLEAN, C. J. You knew all about the certificate.]

Yes, I did know; but my submission is that the question here is one of jurisdiction.

[HARINGTON, J. Under s. 15 you have to bring a suit within six months after an application made under s. 12.]

That is for a suit for cancellation of a certificate. On the question of ss. 244 and 312 of the Civil Procedure Code, see *Srinath Hore v. Bishan Chandra Das* (2).

[FLETCHER, J. If your contention is correct, the Secretary of State is not a necessary party?]

That is my submission, and, moreover, the Secretary of State has said that he is not a necessary party: *Raghubans Sahai v. Ful Kumari* (3), *Girish Chandra Changbar v. Golam Karim* (4), *Elokeshi Dasi v. Abinash Chandra Bose* (5). All that ss. 10, 11, 12 and 15 of the Public Demands Recovery Act refer to are as to the validity of a certificate as a decree.

The Collector of 24-Perganas has no jurisdiction to sell properties in Calcutta.

[MACLEAN, C. J. Who then is to conduct the sale?]

It is not the intention of the Legislature that immoveable property in Calcutta should be sold at all in execution of a

(1) (1907) 1 C. L. J. 550.

(3) (1905) 1 C. L. J. 542.

(2) (1905) 2 C. L. J. 504, 505.

(4) (1908) I. L. R. 33 Calc. 451.

(5) (1907) 5 C. L. J. 638.

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certificate. Moreover, the Collector of Calcutta has no jurisdiction to sell immoveable property; he can sell only goods and chattels.

The Hon'ble Mr. O'Kinealy (Advocate-General) (Mr. S. P. Sinha, Standing Counsel, with him) for the Secretary of State. Notice was in fact served, and the Court should have so found that. This case is not covered by the Full Bench decision in *Purna Chandra Chatterjee v. Dinabandhu Mukerjee* (1), this being a suit to set aside a sale. It is the province of the executing Court to say whether the sale was a nullity or not. Notice of the sale was served on the brother-in-law of the plaintiff. The case of *Khetter Mohan Mullick v. Gunga Narain Mullick* (2) shows what is the meaning of the word "family," and said it meant every relative of the testator. Ashutosh Bose was living in the house of the plaintiff and was an adult, in which case he was a proper person to receive the notice under s. 31 of the Act.

[FLETCHER, J. The general meaning of "adult" under the Common Law of England, is one who has attained his majority.]

There is no real denial that the plaintiff was living there. My next submission is that this suit is not for possession, but to set aside the sale, the plaintiff being all along in possession. Limitation is laid down in the Full Bench case of *Purna Chandra Chatterjee v. Dinabandhu Mukerjee* (1) which held that Art. 12 applied. Before that decision there were many cases which said that the decree was utterly bad, and, therefore, it was necessary that there should be a separate suit to set it aside. There was nothing to say you should apply under s. 244 of the Code, and take your objection because there was no decree, but this point is now cleared up by the Full Bench case (1). Every certificate under the Public Demands Recovery Act has the effect of a decree.

[FLETCHER, J. On non-service of notice, a decree becomes a nullity.]

That depends on whether the execution portion of the Code is to apply to execution proceedings of the Public Demands Recovery Act. Section 244 of the Code applies to execution proceedings under the Public Demands Recovery Act. Section 311 of the

(1) (1907) I. L. R. 34 Calc. 811.

(2) (1881) 4 C. W. N. 671.

Code only applies to an application for setting aside a sale on a material irregularity, and you have to go to s. 312 of the Code to affirm or to set aside the application.

[MACLEAN, C.J. Section 244 of the Code pre-supposes the existence of a valid decree.]

Exactly so. The question whether the sale is bad or not cannot be dealt with in a separate suit.

[MACLEAN, C.J. What the Full Bench case (1) held was that there was a good decree but that you could not enforce a sale without notice.]

Yes. It has always been held that if an attachment notice has not been served, it is a mere irregularity. The case of *Kishory Mohun Roy v. Mahomad Mujaffar Hossein* (2) specially decided that. That case went to the Privy Council: see *Mahomed Mozuffer Hossein v. Kishori Mohun Roy* (3). Once proceedings under s. 16 of the Public Demands Recovery Act are over, the procedure is changed, and no change can be made to the decree: see *Malkarjun v. Narhari* (4) referred to.

My next submission is that the Full Bench case (1) is wrong, and its decision should be referred to the Full Court.

[MACLEAN, C. J. The Full Bench case (1) expressly abstains from saying what would have happened if there was an application under s. 12 of the Public Demands Recovery Act.]

Yes, that is so. There is nothing in the point raised as to the jurisdiction of the Collector. The property was sold by the Collector not in his capacity as a Collector but as a Certificate Officer: see section 4 of the Public Demands Recovery Act.

Mr. H. D. Bose, in reply.

Cur. adv. vult.

The judgment of the Court (MACLEAN, C. J., HARRINGTON and FLETCHER, JJ.) was delivered by

MACLEAN, C. J. This is an appeal by the plaintiff from a decision of Woodroffe, J., dismissing the suit which was brought

(1) (1907) I. L. R. 34 Calc. 811.

(8) (1895) I. L. R. 22 Calc. 909;

(2) (1890) I. L. R. 13 Calc. 188.

L. R. 22 I. A. 139.

(4) (1900) I. L. R. 25 Bom. 837, 846.

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to set aside a sale of No. 15, Dixon's Lane, Calcutta, made under the provisions of the Public Demands Recovery Act (Act I of 1895 as amended by Act I of 1897) for arrears of certain road cesses.

The facts relating to this suit, so far as they are material, may be stated as follows. The plaintiff was the owner of No. 15, Dixon's Lane, Calcutta, and of four collieries in the District of Burdwan. On the 17th October 1901, he mortgaged this house and a 6-annas share in the collieries to the defendant Meyers. It is admitted that road cess in respect of the collieries was in arrears and that a certificate under the provisions of the Act was duly made and filed by the Certificate Officer of Burdwan.

It is alleged by the respondents but denied by the appellant, that notice under section 10 of the Act was served on the appellant on the 12th July 1902. On the 25th July 1902 directions were given to enforce the certificate, and the case was transferred for execution to the Certificate Officer of the 24-Parganas. Thereupon, the appellant filed an objection before the Certificate Officer of the 24-Parganas asking for stay of execution to enable him to move the Certificate Officer of Burdwan. This application was granted, and the appellant, on the 29th September 1902, filed a petition before the Certificate Officer of Burdwan. On the 10th January 1903, the appellant filed a supplemental petition of objection before the Certificate Officer of Burdwan.

The objections of the appellant were heard by the Certificate Officer of Burdwan on the 28th January 1903, and disallowed. The appellant subsequently filed another petition of objection before the Certificate Officer of Burdwan, but this objection was, on the 2nd March 1903, also disallowed. Again, on the 5th March 1903, the appellant petitioned the Certificate Officer of Burdwan, but his objections were again overruled.

On the 28th March 1903, the Certificate Officer of 24-Parganas was again directed to enforce the certificate. After some abortive attempts to enforce the same against the moveable properties of the appellant and by the arrest of the appellant, the certificate was enforced against his immoveable property, and accordingly, on the 22nd February 1904, the house in question.

was sold under the provisions of the Act to the defendant Chandra Kumar Dey for Rs. 230. It appears that the appellant still remains in possession of the property. The appellant in the present suit complains that as the provisions of the Act have not been complied with, the sale of the house ought to be set aside or declared invalid.

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On the present appeal the three most pregnant questions appear to be:—

(i) Was notice under the provisions of section 10 of the Act in fact served on the appellant in a manner provided by the Act?

(ii) If no such notice was served, was the sale a nullity, having regard to the fact that the appellant filed an objection under section 12 of the Act?

(iii) Was the Collector of the 24-Parganas the proper Certificate Officer to enforce the certificate, having regard to the fact that the property is situate in Calcutta?

Other questions were raised and decided against the appellant in the Court of first instance: they were as to the application of Art. 12 to the second Schedule of the Limitation Act and of sections 244 and 312 of the Code of Civil Procedure as a bar to the suit.

Turning then to the first of these three questions, the learned Judge found that the notice under section 10 of the Act was not duly served. Now, section 31 of the Act provides that service under section 10 shall be made by delivering or tendering a copy thereof to the judgment-debtor, and if the judgment-debtor cannot be found, the section provides certain substituted modes of service which include service "on an adult member of his family residing with him."

The facts relating to the service of the notice appear from the evidence to be as follows:—It is admitted that the appellant was keeping out of the way so as to avoid service, and it is not seriously contested by the appellant that the notice was served at the house in question on Ashutosh Bose, the appellant's brother-in-law. The appellant, however, contends that Ashutosh Bose was not an "adult male member of his family residing with him." The evidence shows that Ashutosh Bose was over the age of 16 years at the date of the service of the notice, and we agree with

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the learned Judge that he was "adult" within the meaning of the section. The notice was undoubtedly served on Ashutosh Bose, and it is a fair and reasonable inference from the evidence and the conduct of the appellant, that it reached the latter's hands.

The learned Judge has, however, found that Ashutosh Bose was not a member of the appellant's family residing with him, and though we are not disposed to agree with the learned Judge, thinking that he has, possibly, placed too narrow a construction on the section, it is not, in the view we take, necessary to finally determine this point.

We think, on the evidence, the sounder view is that Ashutosh Bose was residing with the appellant. The onus of proving non-service of the notice was on the appellant, and it is shown that, at the time the notice was served on Ashutosh Bose, the latter was actually in the appellant's house. No evidence having been given that Ashutosh Bose had any other permanent or other residence, we think it is a reasonable inference from the evidence that Ashutosh Bose was at the time of the serving of the notice residing with the appellant. But even if Ashutosh Bose was not a member of the appellant's family residing with him, it is reasonably clear that Ashutosh Bose did in fact hand the notice he received to the appellant and that the appellant, by his subsequent action, treated the service as good service. It is a very significant feature that in his application of the 3rd July 1905, the appellant does not even suggest that a copy of certificate and notice were not duly served upon him, and the point was not raised in his plaint until after the trial had actually commenced, when he was allowed leave to amend, as he did by paragraph 4 of the plaint. It is clear from his petition of the 24th September 1902, that the appellant knew all about the certificate; he told the Court that he was going to file a petition to cancel it.

In these circumstances, it does not lie in the mouth of the appellant to say that he was not served with the notice; and this is the foundation of his case. The object of serving the notice is to enable the party against whom the claim is made to contest his liability to pay, and this the appellant did, but failed. We accordingly hold that the notice under section 10 reached the

appellant and that he treated it as having been validly served under the Act.

In this view, it is not necessary to express any opinion on the other points, except the third, as the whole substratum of the plaintiff's case is that the notice has not been served upon him; though we do not desire it to be understood that we differ from the conclusions on these points of the Court of first instance.

Dealing with the third and last points raised in the course of the argument, viz., that the Collector of the 24-Parganas is not the proper Certificate Officer to enforce the certificate against immoveable property in Calcutta, we are unable to find any force in this argument. We think that the evidence of Mr. Cumming shows that the Collector of 24-Parganas is the proper Certificate Officer to enforce the certificate against immoveable property in Calcutta.

In the result, the appeal must be dismissed with costs.

Appeal dismissed.

Attorney for the appellant: *Romesh Chandra Basu.*

Attorneys for the respondents: *P. N. Banerjee & C. H. Kesteren.*

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