

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Forbes v. Baboo Luchmeeput Singh Doogur and others, from the High Court of Judicature at Fort William in Bengal; delivered January 26th, 1872.*

---

Present :

SIR JAMES W. COLVILE.

SIR JOSEPH NAPIER.

SIR MONTAGUE SMITH.

---

SIR LAWRENCE PEEL.

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

Ali Reza, a Mahometan, 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 istamrar to Hossein Reza and his descendants on a fixed and absolute jumma of 2,291 rupees.

On the 13th March, 1850, the Appellant advanced to Ali Reza 39,500 rupees; 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 17 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 favour 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. The case is reported in 10 Moore's Indian Appeals, 340.

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 February, 1855, an *ex parte* Decree was made against them for the amount of the arrears claimed, viz., 712 rupees. On the 19th March, 1855, the Zemindar prayed that the Decree might be put into execution and the talooks sold, and they were sold accordingly on the 26th day of April, 1855, to the Respondent Jowhur Ali for 1,000 rupees. 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 Appellants, in order to obtain the fruits of the long litigation, at last decided in his favour, 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 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 Cutchery of the Zemindar, and that such tender was there refused, with the answer that Sazawals had been appointed, and that until they were removed no rent would be received. It also appears that the Appellant endeavoured to get his name placed on the Register of the Zemindar, and that before the sale he applied to the Zillah Judge for a Perwannah, 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 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 Mookhtear 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 Counsel 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 (*Mahabooddeen v. Futtah Ali and another*, 7, Weekly Reporter, 260). This, which may be regarded as the leading decision in India, has been followed by the Courts there (*Tirthanund Thakoor v. Paresmon Jha*, 13 Weekly Reporter, 449; *Banerjee v. Debee and Others*, 15 Ja., 237). It is true that the Courts in these decisions had to construe Act 10, of 1859, and not Regulation 7, of 1799, which had then been repealed ; but powers of sale analogous to those found in the Regulation

of 1799, are provided in Section 105, of Act 10, of 1859, with this difference—that the language of the latter Act is more favourable 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 7, 1799, S. 15, cl. 7, and Regulation 8, 1819. The part of the regulation of 1799 relied on declares that “if the defaulter be a dependent 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 the interest which he has in it is subject to the power of sale.

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 Zemindar 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 35, 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 7 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 8, 1819, Section 11, no doubt gives an express power to sell the tenure free of all incumbrances that may have 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 favour of the Appellant than that cited from 7 Weekly Reporter. 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 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 the Cutchery, 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 referred to from the 7th Weekly Reporter. 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 10 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 talooka, when he knew that the heirs 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 persistently 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 execution 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 above mentioned; 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.

