Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ram Sabuk Bose v. *Monmohini Dossee and others, from the High Court of Judicature at Fort William in Bengal; delivered Saturday, 12th December* 1874.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

IN this case their Lordships, having heard the argument on the Appeal, propose to give judgment upon its merits, and some observations will subsequently be made on the objection which was taken to the statements in the Petition of Appeal.

The suit was brought by a putneedar to set aside the sale of his putnee talook, called Juggut-bullubpore, which had been sold for arrears of rent through the Collector, under the provisions of Regulation VIII. of 1819, and the Defendants to the suit were the Zemindar Muddun Mohun Haldar, and the purchaser at the sale, Ram Sabuk Bose. The plaint charged fraud on the part of the Zemindar and the purchaser in the proceedings previous to the sale, and charged that the receipt of the notice which was served under the provisions of the Act had been forged. Various objections taken to the sale have been disposed of in favour of the Defendants, and one only remains for consideration in the present Appeal; that is, whether the witnesses who have signed the receipt are substantial persons within the meaning of the Regulation.

The Regulation provides, in the second clause of the eighth section, for the manner in which the notice of sale shall be served and published. It directs that it shall be stuck up in some conspicuous part of the cutcherry of the Zemindar, and it also provides for publicity and service in the cutcherry of the defaulter. It is with the latter only that it is necessary to deal in the present Appeal. The Regulation says, "A similar notice shall be stuck up at "the sudder cutcherry of the Zemindar himself, "and a copy or extract of such part of the "notice as may apply to the individual case "shall be by him sent to be similarly published "at the cutcherry or at the principal town or "village upon the land of the defaulter. The "Zemindar shall be exclusively answerable for "the observance of the form above prescribed, "and the notice required to be sent into the "mofussil shall be served by a single peon, who "shall bring back the receipt of the defaulter "or of his manager for the same, or in the "event of inability to procure this, the signatures of three substantial persons residing in "the neighbourhood, in attestation of the notice "having been brought and published on the "spot."

It appears that the receipt of the defaulter could not be obtained. His gomasta was seen, but he refused to give one; and thereupon the peon obtained the signatures of seven persons who, it is alleged, resided in the neighbourhood. At the hearing before the Principal Sudder Ameen, evidence was given as to the residence and the status of three of those seven, and the Principal Sudder Ameen, being satisfied that they were substantial persons within the meaning of the Regulation, thought it unnecessary to go into evidence with respect to the other four; and he found in very distinct terms these three persons

resided in the neighbourhood, and were substantial persons. This is his finding upon the facts, "The Plaintiffs take exception to the above "seven persons not residing in the neighbour-"hood of the defaulter's mehal. To this it "would be observed that Warris Mollah, one "of the seven persons above alluded to, was "the mundul of Juggutbullubpore, and Goluck "Chowkeedar was the chowkeedar of the village. "These two certainly are what the law calls "'substantial' men. As regards Kabel, though "not a man of much consequence, he was "known to carry on the trade of a tailor in the "village; consequently, a receipt signed by, "among others, three such men as Warris, Goluck "Chowkeedar, and Kabel, must be considered "a sufficient proof for the service of notice. "A more respectably signed document cannot "be, from the circumstances of the country "(the respectable portion of every community "being at all times averse to appear in a "court of justice), expected." The objection at their Lordships' bar was directed only to one of these witnesses, Kabel, who carried on the trade of a tailor. It has not been contended that the other two did not satisfy the requirements of the statute, although in the judgment under appeal it appears to have been held by the High Court contrary to its former decision on the same point, that two of them did not satisfy its words.

There was an appeal from the finding of the Principal Sudder Ameen to the judge of the Twenty-four Pergunnahs; and Mr. Beaufort, the judge of the Twenty-four Pergunnahs, affirmed the decision. He affirmed it upon two grounds: first, upon the facts, and then that supposing the witnesses did not satisfy the statute, still notice having been really served upon the Plaintiff, the putneedar, as

was proved in the cause, through his gomastah, the non-compliance with the direction of the statute would not, under the circumstances, vitiate what had been done. His finding is, "I am of opinion that the Appellants have "failed to show any sufficient ground for "rejecting the receipt. When the gomasta, "who was in the cutcherry, refused to give a "receipt, the peon brought the guru of the "village, and made him write a receipt under "a tree close by, and then he got some of the "bystanders to sign the receipt. The evi- "dence proves these facts, and proves that the "three persons who were called as witnesses "at the trial of the case in the Lower Court "saw the notice affixed to the door; and I "find no ground for holding that they are not "substantial within the meaning of the law; "I think that all that is required is good "evidence to the fact of the publication of the "notice on a certain date, and that that has "been supplied in this case;" therefore he affirmed the judgment of the Court below upon the fact that these witnesses were substantial men. Then he goes on thus, "I would go further and "say that the directions of the law are intended "for the guidance of the Collector only." Then "he gives his reasons, "Before putting up the "putnee tenure to sale he must require proof "that the notice was duly served, and the law "says that such proof must be of such and such "a nature. The Collector is not required to "take evidence; he has to examine merely the "written documents produced by the Zemindar, "and if the proof appears to be *primâ facie* "good, the putnee is sold on the responsibility "of the Zemindar. Then, if the putneedar has "recourse to the Civil Court, the issue is not "whether the proof adduced to the Collector "at the time of sale was strictly within the

" words of the law, but whether the evidence " adduced before the Court to prove the service " of the notice on or before a certain date " is credible and satisfactory. The reasonable " object of the law is that the defaulter should " have timely notice of the intention to sell; " and if it be proved that such notice was given " to the satisfaction of the court, the number " of witnesses present, their actual *status* in " social life, and the distance of their dwelling- " houses, are points which are immaterial." It is to be observed that on this point there is a decision of the High Court when Sir Barnes Peacock presided in it, to the same effect. In the case of *Sona Beebee*, Appellant, and *Lall Chand Chowdhry and another*, Respondents, reported in the 9th Weekly Reporter, page 242, the Chief Justice says, "This was a suit " to cancel a sale of an under-tenure under " Regulation VIII. of 1819. The material part " of clause 2, section 8, Regulation VIII. of " 1819, so far as this case is concerned, is that " the notice required to be sent into the mofussil " shall be served. The Zemindar is exclusively " answerable for the observation of the forms " prescribed by that clause. The subsequent " part of the section, which prescribes that the " serving peon shall bring back the receipt of " the defaulter or of his manager, or in the " event of his inability to procure it, that he " shall obtain that which by the Regulation " is substituted for it, is merely directory, and " if not done does not vitiate the sale, provided " the notice is duly served."

Their Lordships are disposed to agree with the judgment of the High Court as delivered by Sir Barnes Peacock, confined as it is to cases where there is proof that the notice was duly served. The consequences of holding that a statutory sale of these putnees could be set aside

because one of the witnesses to the notice turned out not to be substantial, when it was in fact served, would be to give too great effect to form at the expense of substance.

The putneedar was not satisfied with these two decisions. Although the point is certainly small and narrow, whether this tailor was a substantial man or not, he appealed to the High Court. The two Courts below having found that in point of fact Kabel was a substantial person, his appeal could only be upon matter of law, namely, that they had misconstrued the Regulation and the meaning of the word "substantial." Upon this appeal to the High Court, he at first fared no better than he had done in the Courts below, and a division bench of the High Court affirmed the two former judgments, and for reasons which to their Lordships' minds are perfectly satisfactory. Having noticed some of the objections, which are not now relied upon, they say, "Next, as to these witnesses' respect-
" ability. The word used in the regulation is
" 'substantial,' meaning, of course, men who
" have some *status* in the community, men of
" local influence or importance, or respectability.
" We think that the law has been complied with
" on this point also. One of the witnesses is
" the Mundal, the head man of the village;
" another is the Chowkeedar, an official whose
" attestation is always considered as the best
" possible in all matters connected with service
" of notice." It is well to call attention pointedly to this finding as to the Chowkeedar, because it is entirely inconsistent with the decision of the same division Bench upon review, where they considered that the Chowkeedar is not a substantial witness within the meaning of the Act. "The
" third appears to be a tailor, residing temporarily
" at the place, but who lives in the neighbour-

" hood. This man is declared to be not a " proper witness. We do not see why the man " is not to be considered competent to attest the " serving of notice. He appears to be a respect- " able man, though not a rich one; and besides, " the phrase 'substantial,' on which special " Appellant lays so much stress, must be taken " comparatively. In a small village the measure " of a 'substantial' witness will, of course, be " much lower than in a place of importance."

The putneedar, still dissatisfied, applied for a review of that judgment, and, upon the review, the Court, consisting of the same two judges, without much reference to or discussion of their former judgment, reversed it upon grounds to which I will now refer. In order to see upon what grounds the Court really acted in thus reversing their former judgment, it is necessary to say that they refer in their judgment to the contention of Mr. Paul, the counsel for the Appellant, in this way: "It is contended by " Mr. Paul, the learned counsel for the appli- " cant for review, that the law requires that the " attesting witnesses must be 'substantial,' that " is to say, responsible, moderately wealthy men, " against whom, in a case of false attestation, " the party injured may have his remedy in a " suit for damages." This is what they observe on the evidence: "Now, in this case, the attest- " ing parties are sufficient in number, and they " reside in the neighbourhood, but, with the " exception of the Mundul, the rest are not what " can be called substantial persons. One is the " Chowkeedar of the village, and the other a " thika tailor. The Legislature invested the " Zemindar with the power of bringing sub- " ordinate putnees to sale, and made him " exclusively answerable for the due observance " of the prescribed processes under which such

" tenures could be brought to sale. To protect " the putneedar from fraud, it was enacted that " the notice of sale must be attested by three " substantial persons. Now it is clear that, " unless the attesting parties answer to the " common meaning to be put upon the word " 'substantial,' the putneedar would be wholly " without remedy in case of false attestation." Now the Court, this being a special Appeal, could only decide upon some matter of law, and the matter of law which they appear to rule upon the construction of this Act is that the word "substantial" means a wealthy man from whom damages could be recovered by the putneedar, supposing the attestation to be false.

Their Lordships think that this is too limited a view. It is, no doubt, desirable that men of property should sign these receipts if they can be obtained, but wealth is only one element in the position and *status* of the witness, and if he lives in the neighbourhood, and if he be a respectable man and of good character, their Lordships see no reason why, upon evidence appearing of such facts, of which the judge in each case must satisfy himself, the judge, in estimating the position of the man, may not properly come to the conclusion that he is a substantial person. In the present case, the evidence appears to show that the man objected to carried on the trade of a tailor, that he had lakheraj lands, that he lived in the neighbourhood, was well known, and was (to use a description built up of many circumstances) a "respectable" person. Their Lordships think that upon such evidence the Judge of First Instance and the Judge of the Twenty-four Pergunnahs, who had a right to review his decision on questions of fact, might properly come to the conclusion that the witness was a

substantial man. Their Lordships, therefore, think that the first judgment of the High Court was more correct than the last.

On these grounds, their Lordships have come to the conclusion to reverse the second judgment of the High Court upon the review; but, inasmuch as the Zemindar Muddun Mohun has not appealed from that judgment, they see no reason to give him relief, so far as the order affected him personally only; that is to say, so far as it ordered him to pay the costs; and therefore the reversal of the judgment will be without giving any right to him to have any costs that he may have paid under it refunded.

Their Lordships have given very serious attention to the objection raised by Mr. Graham, on the part of the Respondents, to the inaccurate statements in the petition for leave to appeal to Her Majesty. The appeal was made to Her Majesty upon special grounds, one being that the question was of considerable practical importance upon the construction of the Regulation. The petitioner was obviously out of time, and he could only obtain leave to appeal by excusing that lapse of time. Some of the statements in the petition are clearly inaccurate. It is stated, among other things, that the petitioner himself had applied for review of the judgment now appealed from on the 3rd of February 1866, and that the learned judges of the Division Bench differed in opinion as to the propriety of allowing the application, and did not allow it; and he introduced the fact of that petition to the High Court as an excuse for a part of the delay, alleging further that, according to the then understood practice of the Court, which he says was afterwards changed, the application was in time. It turns out that the statement is inaccurate in this, that he did not petition the Court for a review of the judgment at all, but

that the petitioner was the Zemindar Muddun Mohun. Now when he came to excuse himself for the lapse of time, it is obvious that he should have been particularly careful to give their Lordships accurate information upon the points relating to that petition for review. If he had correctly stated the facts in his petition, although the point to be decided in the appeal was one of general importance, leave to appeal might not and probably would not have been granted. There is, therefore, a material mis-statement in the petition.

Their Lordships have considered whether the mis-statement was intentionally made with a view to deceive this tribunal; and if they had been clearly satisfied that this was the intention of the petitioner, or of those who advise him in India, they would, even at this late stage, dismiss the Appeal; but they are not fully satisfied that such was the intention; and although the mis-statement is material, and one that clearly ought not to have occurred, and shews, at least, a great deal of culpable negligence, they are not so satisfied that it was done with the intention to deceive, as to dismiss the Appeal at this late period. They desire, however, to say, that they think so seriously of this objection, and it is so necessary to insist that there should be *uberrima fides* on the part of those who come for leave to appeal, on special grounds, to Her Majesty, that they must mark their sense of what has occurred by refusing to give to the Appellants the costs of the Appeal. They desire, further, to say, that if the objection had been made, as it ought to have been, by a preliminary motion, they have little doubt that motion would have been successful, and the order for hearing the Appeal rescinded. Even if it had been made before the Appeal had been entered upon at their Lordships' bar—when

it was called on—they must have yielded to it; but considering that the Appeal has been heard upon the merits, that Mr. Doyne's observations upon the facts and the law had been concluded, and it was only in the course of the argument for the Respondents that this objection was taken, they think, under all the circumstances of the case, that they ought not now to dismiss the Appeal, and that it will be enough to mark their sense of the impropriety of the petition by the refusal of costs.

In their Lordships' opinion, an objection of this kind ought to be taken by the Respondents as early as the matter is brought to their notice, for the plain reason that if the leave to appeal is on that ground rescinded, no further costs are incurred, and it is wrong to leave the objection until the hearing of the Appeal, when the Record has been sent from India, and when all the costs attending the hearing have been incurred. In the present case not only was there no preliminary motion made to rescind the leave to appeal, but the Respondent's case, although referring to the facts, did not point to them with distinctness, and there is no reason directed to the objection.

Under these circumstances, their Lordships think that they will best perform their duty, the Appeal having been heard, and their Lordships being clearly of opinion that the judgment appealed from is wrong, by reversing that decision, but doing so without costs; and that will be the recommendation they will humbly make to Her Majesty.