

CALCUTTA HIGH COURT

Bonomali Haldar

Vs

Bishambhur Haldar

(F W Maclean, C.J. K Prinsep and O'Kinealy, J. Banerjee and Hill, JJ.)

30.01.1899

JUDGMENT

F.W. Maclean, C.J.,

1. In this case I agree with the view expressed by the two referring Judges, which is in accord with that expressed in the two cases of *Pulin Chandra Roy v. Akbar Hossein¹ and Bhola Nath Maiti v. Mohinuddin Mahomed (1894) I.L.R., 21 Cal., 350(Supra)*, note. Agreeing as I do with the reasons upon which those decisions are based, no useful object will be attained by my merely repeating them. The question then must be answered in the negative, and the case must be remanded, as is suggested in the reference, for the purpose of ascertaining whether the case is brought within Section 18* of the Limitation Act, Act XV of 1877.

2. The costs will abide the results of the re-trial.

Prinsep, J.

3. I am of the same opinion. The difficulty in this case has arisen from the attempt to consolidate, by reading as one Act, three different Acts of a different character, and passed after some interval of time, relating to the recovery of public demands. To provide against any possible confusion that may arise from such circumstances the words "so far as is consistent with the tenor" of the Acts specified in Section 2 of Bengal Act VII of 1880, have been used in that section; and accordingly it has now fallen upon us to decide what is the real meaning and effect of Section 8 of Bengal Act VII of 1868, as applied to proceedings taken under the Act of 1880. The conclusion that I have arrived at, after giving full consideration to the matter, is that the terms of Section 8 of Bengal Act VII of 1868, must be limited to sales held in respect of arrears of public revenue provided for by Act XI of 1859, and to none other, and that it does not apply to sales held to realize public demands under Section 8 of Bengal Act VII of 1880.

O'Kinealy, J.

4. I agree with the decision in the case of *Pulin Chandra Boy v. Akbar Hossein* (1893) I.L.R., 21 Cal., 350(Supra), and think that the certificate in this case is not one under Section 28 of Act XI of 1859.

Banerjee, J.

5. I am of the same opinion. The question for the determination of which this case has been referred to a Pull Bench is, "whether Section 8 of Bengal Act VII of 1868 applies to a certificate of title granted to a purchaser at a sale in execution of a certificate issued under" Section 7 of Bengal Act VII of 1880, for arrears of rent alleged to be due to an estate under the Court of Wards, or whether it is limited in its application to the two descriptions of certificates of title therein referred to, namely, certificates granted under Section 28 of Act XI of 1859 and those granted under Section 11 of Bengal Act VII of 1868."

6. Upon that question, besides certain cases which have only an indirect bearing, there are three cases having a direct bearing, namely, the cases of *Pulin Chandra Roy v. Akbar Hossein* (1893) I.L.R., 21 Cal., 350(Supra), and *Bhola Nath Maiti v. Mohinuddin Mahomed* (1894) I.L.R., 21 Cal, 350(Supra), note, referred to, and the case of *Rajoni Kanta Roy v. Champa Dasi*² ccli. Of these, the first two affirm the view indicated in the latter alternative of the question, while the last mentioned case answers the former alternative in the affirmative; and the question is, which of these two views is correct.

7. I am of opinion that the view taken in the two first mentioned cases is correct. Section 8 of Bengal Act VII of 1868 enacts that "Every certificate of title which may be given to any purchaser under the provisions of Section 28 of the said Act XI of 1859, or of Section 11 of this Act, shall be conclusive evidence in favour of such purchaser and of every person claiming under him, that all notices in or by this Act or by the said Act XI of 1859 required to be served or posted, have been duly served and posted." This being then, "an enactment" to use the language of Erle, C.J., in the case of *Nothard v. Pepper*³ altering the law as to evidence and creating statutory evidence whereby the rights of parties may be defeated "must be construed strictly, and the plain language of the section would limit its application to the two descriptions of certificates therein expressly mentioned. But then it is contended that though Section 8, standing alone, might bear that construction, yet the effect of Section 2 of Bengal Act VII of 1880, under which the sale in question was held, would be to make Section 8 of the Act of 1868 applicable to this case. In support of this contention certain cases have been referred to as showing, in the first place, that Section 316 of the Code of Civil Procedure, the only other provision of law under which the certificate in question could possibly be held, regard being had to Section 19 of Bengal Act VII of 1880, to have been granted, is inapplicable to this case; and as showing further, that certain sections of Act XI of 1859 and of Bengal Act VII of 1868, namely, Section 27 of the former and Section 2 of the latter, have, notwithstanding that they are not in terms applicable to such cases, been held to be applicable to sales under Bengal Act VII of 1880. And it is argued

that, if that is so, there is no reason why Section 28 of Act XI of 1859 should not be held applicable to this case, and the certificate of sale in question should not be held to have been granted under that section and to come within the scope of Section 8 of Bengal Act VII of 1868.

8. With reference to the first branch of this contention, I do not think that there is any good reason for holding that Section 316 of the Code of Civil Procedure is inapplicable to this case, and that the certificate of sale in question could not have been granted under that section.

9. Section 19 of Bengal Act VII of 1880 says that a certificate of public demand may be enforced and executed by all or any of the ways and means mentioned and provided in and by the Code of Civil Procedure for the enforcement and execution of decrees for money, and all the practice and procedure provided by the said Code of Civil Procedure in respect of sales in execution of decrees and in respect of certain other matters specifically mentioned, shall apply to every execution issued to enforce such certificate. That would make the provisions of the Code of Civil Procedure for the granting of a certificate of sale applicable. But then it is said that view is opposed to the decision of this Court in the cases of *Sadhu Saran Singh v. Panchdeo Lal*⁴ and *Ram Logan Ojha v. Bhawani Ojha*⁵. I do not think that view is opposed to those two decisions. It is true that, in both those cases Section 312 of the Code of Civil Procedure, in so far as it relates to a suit or an application for setting aside a sale, has been held to be inapplicable to a sale under the Public Demands Recovery Act (Bengal Act VII of 1880), but that does not go to show that the granting of a certificate of sale to the auction-purchaser could not have been under the Code of Civil Procedure. The passage in the judgment in the earlier of the two cases cited upon which reliance was placed is that in which the learned Judges say: "But it seems to us that the words in respect of sales in execution of decrees do not include any proceedings instituted after the sale for setting it aside." Though that may be so, it does not follow that the procedure for a sale in execution, down to its completion by the grant of a sale certificate, would be inapplicable to a sale under Bengal Act VII of 1880. The learned Judges do not say that the words of Section 19 of Bengal Act VII of 1880 do not include "any proceedings instituted after the sale," but they are careful to qualify the words "proceedings instituted after the sale" by the words "for setting it aside." There is, in my opinion, a real distinction between the proceedings leading to the sale and to its completion by the grant of a certificate of sale to the auction-purchaser, and separate and antagonistic, though simultaneous, proceedings instituted by a judgment-debtor or by a decree-holder or by a third party to have the sale set aside; and it was in regard to these latter proceedings that it was held in the case relied upon, that the Code of Civil Procedure was inapplicable to a sale under Bengal Act VII of 1880, and that the proper procedure is to be found in other enactments.

10. The second case relied upon merely follows the case to which reference has just been made. In my opinion, therefore, there is no real conflict between the view taken in the case of *Pulin Chandra Roy v. Akbar Hossein* (1893) I.L.R., 21 Cal., 350(supra), and the two cases of *Sadhu Saran Singh v. Panchdeo Lal* (1886) I.L.R., 14 Cal., 1(Suupra), and *Ram Logan Ojha v. Bhawani*

Ojha (1886) I.L.R., 14 Cal., 9(Supra).

11. I may add that even if Section 316 of the Code of Civil Procedure was not applicable to the present case, still it would not follow that a certificate granted to an auction-purchaser at a sale held under Bengal Act VII of 1880 comes within the scope of either Section 28 of Act XI of 1859, or Section 11 of Bengal Act VII of 1868, which is the position which the appellant must make out before the irrebuttable presumption under Section 8 of Bengal Act VII of 1868 can be raised in his favour. Now it is conceded, as it must be, that the certificate of sale in question cannot come within the scope of Section 11 of Bengal Act VII of 1868. It must, therefore, be shown to come under Section 28 of Act XI of 1859 before the presumption just referred to can arise.

12. This brings me to the consideration of the latter branch of the contention, namely, that as certain other provisions of Act XI of 1859 and Bengal Act VII of 1868 have, by virtue of Section 2 of Bengal Act VII of 1880, been held to be applicable to sales under this last mentioned enactment, Section 28 of Act XI of 1859 should, for the same reason, be held to be applicable to this latter class of sales. The cases which have been relied upon are the two cases of Sadhu Saran Singh v. Panchdeo Lal (1886) I.L.R., 14 Cal., 1(supra), and Ram Logan Ojha v. Bhawani Ojha (1886) I.L.R., 14 Cal, 9(Supra), just referred to, and the case of Monindra Nath Mookerji v. Saraswati Dasi⁶ in which it was held that Section 27 of Act XI of 1859 was applicable to a sale under the Public Demands Recovery Act of 1880. But because certain sections of the earlier enactments have, by virtue of Section 2 of Bengal Act VII of 1880, been held to be applicable to sales under the latter enactment, it does not follow that the section we are now dealing with, namely, Section 28 of Act XI of 1859, should be held to be similarly applicable. Whether it is so applicable or not would depend upon the language of the section, and its consistency with the tenor of the enactment to which it is sought to be made applicable. Now referring to Section 28 of Act XI of 1859, I find it extremely difficult to hold that the effect of Section 2 of Bengal Act VII of 1880 is to make it applicable to a sale under the latter enactment. Section 28 provides that immediately upon a sale becoming final and conclusive, the Collector or other officer shall give to the purchaser a certificate of title in the form prescribed in Schedule A annexed to the Act, and the form given in the schedule shows that it is intended to apply only to a sale for arrears of public revenue, and not to a sale for any other demand recoverable under any other Act.

13. Can it, then, be said that merely because Bengal Act VII of 1880 is by Section 2 of that Act to be construed as one with Act XI of 1859, a sale of the kind to which the form of certificate referred to in Section 28 of Act XI of 1859 can have no application, must, nevertheless, be held to be a sale to which that section applies. I think this question must be answered in the negative.

14. I may observe that Section 2 of Bengal Act VII of 1880 has been held not to have the effect of making Sections 33 and 34 of Act XI of 1859 applicable to sales in execution of certificates for recovery of public demands, and that Section 2 of Bengal Act I of 1895, the present Public

Demands Recovery Act, does not embody the rule of construction contained in Section 2 of the former Act. See *Mohibul Huq v. Shew Sahay Singh*⁷ and *Mahomed Abdul Hye v. Gajraj Sahay*⁸

15. For these reasons and the reasons given in the referring order, I think that the contention of the appellant upon the question referred to us must fail, and the case must be remanded to the Lower Appellate Court for a decision upon the question of fraud.

Hill, J.

16. I am of the same opinion, and all that I wish to say is that I have heard nothing here to-day to induce me to alter the opinion on either of the points raised, which I expressed in the case of *Pulin Chandra Roy v. Akbar Hossein* (1893) I.L.R., 21 Cal., 350, and that I adhere to it.

Cases Referred.

- 1(1893) I.L.R., 21 Cal., 350
- 2(1898) 2 C.W.N., (S.N.)
- 3(1864) 17 C.B.N.S., 39 (50)
- 4(1886) I.L.R., 14 Cal., 1
- 5(1886) I.L.R., 14 Cal., 9
- 6(1890) I.L.R., 18 Cal., 125
- 7(1897) I.L.E., 25 Cal., 85
- 8(1897) I.L.R., 25 Cal., 283