CALCUTTA HIGH COURT

Birendra Nath Raha

Vs

Mir Mahabubar Rahaman

(Chakravartti , J.)

17.12.1946

JUDGMENT

Chakravartti, J.

1. This suit out of which this appeal arises was brought by the heirs of one Mir Suratjanfor a declaration that the revenue sale of four properties, described in the Schedule to the plaint, was without jurisdiction or, in the alternative, for having the sale set aside on the ground that it had not been held in accordance with the provisions of the Revenue Sales Act. The usual incidental reliefs were also sought. The trial Court made the declaration asked for and granted an injunction against the auction-purchaser, restraining him from interfering with the plaintiffs' possession. The latter appealed to the District Judge and having failed there, preferred the present second appeal.

2. The facts, admitted or as now found, are the following. Mir Suratjan, who was the owner of the four properties, obtained from the Local Government a loan of Rs. 1000 for the improvement of the first property. The money was made payable in ten annual instalments, beginning from 1932, and each instalment was to be paid on the 1st of Januaty. Mir Suratjan paid three of them, but before he could pay the fourth, he died, leaving the plaintiffs as his heirs, and thereafter no other instalment was paid. The Collector attempted to realise the dues from the plaintiffs by proceedings under the Public Demands Recovery Act, but failed to recover anything. Thereafter, he brought the properties to sale under the provisions of the Revenue Sales Act and caused them to be sold on 8th of January 1941. The appellant was the only bidder and he purchased the properties for Rs. 150 which, the trial Court has found, was a "somewhat low" price. The plaintiffs preferred an appeal to the Commissioner which was unsuccessful and thereupon they brought the present suit.

3. It is not necessary to refer to the allegations of irregularity contained in the plaint. They were of the usual type and were all repelled by the trial Court which held that neither had the alleged irregularities been proved, nor the injury of an insufficient price shown to have resulted from

them, nor had it been established that the grounds on which relief was sought in the suit, had been taken in the appeal to the Commissioner. The question raised by those allegations was thus laid to an early rest. The only question which survived and which requires decision in this appeal is that of the Collector's jurisdiction to sell the properties on which both the Courts below held in favour of the plaintiffs.

4. Of the four properties, the first is a tank, held in korfa right, The second and the third are nishkar interests, held under private proprietors. The fourth is a tenure, held under Saburannessa Bibi, wife and now the widow of Mir Suratjan himself. It will be seen that neither of the properties is an estate, as defined in the second Eevenue Sales Act (7 [VII] of 1868 B.S.), nor is any one of them held under the Government; nor is any revenue in the ordinary sense payable to the Government on account of any one of them.

5. The sale was held by the Collector in the purported exercise of his powers under Section 7(1), Land Improvement Loans Act (19 [XIX] of 1883), Clauses (a), (c) and (d), which read as follows:

7. (1) Subject to such rules as may be made under Section 10, all loans granted under this Act, all interest (if any) chargeable (thereon) and costs (if any) incurred in making the same, shall, when they become due, be recoverable by the Collector in all or any of the following modes, namely:

(a) from the borrower - as if they were arrears of land revenue due by him;

* * * *

(c) out of the land for the benefit of which the loan has been granted - as if they were arrears of land-revenue due in respect of that land;

(d) out of the property comprised in the collateral security (if any) - according to the procedure for the realisation of land-revenue by the sale of immovable-property other than the land on which that revenue is due.

Provided that no proceeding against any land under Clause (c) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower, and of mortgagees of, or persons having charges on, that interest, and, where the loan is granted under Section 4 with the consent of another person, the interest of that person, and of

mortgagees of or persons having charges on that interest.

6. The trial Court held that these provisions did not entitle the Collector to proceed against the properties in suit by way of a revenue sale. In the Court's opinion, although the Collector had undoubted authority under Section 7(1), Land Improvement Loans Act to recover the unrealised balance of the loan as an arrear of land revenue, he could apply the procedure of a revenue sale only if that procedure was in itself applicable to the properties concerned. But, under the provisions of the Revenue Sale Law, no lands or interests in land could be sold by the revenue sale procedure unless they were held under the Crown, which the properties in question were not. The Court also pointed out that the properties being subordinate interests held under private proprietors, an "anomalous and confusing position" would result if they were sold at a revenue sale, which would require effect to be given to the well-known legal consequences of such sales, such as the passing of the interest of the Crown and the accrual of a right to the auction-purchaser to annul incumbrances and under-tenures.

7. On appeal by the auction-purchaser, the learned District Judge endorsed this view of the trial Court but, for himself, relied more strongly on an additional ground. He held that inasmuchas "loans for land improvement, interest and costs," "declared realizable under the certificate procedure by the Land Improvement Loans Act," was specifically mentioned in App. A, Bengal Certificate Manual as one of the public demands within the meaning of Article 3 of Schedule I, Bengal Public Demands Recovery Act, the amount in question could only be realised by the certificate procedure. Both the Courts accordingly held that the revenue sale-had been without jurisdiction and the interest of the plaintiffs had remained unaffected.

8. The appellant challenged this finding and contended that the Courts below had come to a wrong conclusion on wrong reasons. The common reason given by them, it was said, was erroneous, because the combined effect of Act 11 [XI] of 1859 and Act 7 [VII] of 1868 was to authorise sale by the revenue sale procedure, not only of revenue paying estate, but also of rent paying tenures, even though the rent might be payable to a private proprietor. At any rate, the Acts authorised a revenue sale of tenures in respect of which some money was payable to the Government which, though not revenue proper, was yet revenue in the extended sense given to the term by Act 7 [VII] of 1868. The special reason given by the District Judge, it was said, was erroneous, because it overlooked Section 55, Public Demands Recovery Act which expressly provided that the procedure prescribed by the Act was not intended to be exclusive. In support of the first contention, reference was made to the definitions Of 'estate', 'revenue' and 'tenure' in Act 7 [VII] of 1868.

9. In order to appreciate the positive contention of the appellant, it is necessary to refer here to a distinction between Clause (c) and (d) of Section 7(1), Land Improvement Loans Act which have been set out already. It will be seen that the former of them makes the loan recoverable out of the very land for the improvement of which it was taken. The latter of them makes it recoverable out of the collateral security. It was contended that the first of the properties of the present suit was saleable by the revenue sale procedure under Clause (c) of the section, read with Section 11 of Act 7 [VII] of 1868, being the land for the improvement of which the loan was taken and that land being a tenure; and that the remaining properties were saleable under Clause (d), read with Section 5, Secondly of Act 11 [XI] of 1859, being land of the collateral security and thus lands other than that on which the arrear was due.

10. It was contended lastly that in any event, the Collector had jurisdiction to sell the lands under Section 7(1), Land Improvement Loans Act and if he had sold them by a wrong procedure, he had, at the worst, committed an irregularity, which could be no reason for setting aside the sale unless the plaintiffs proved, as Section 33, Revenue Sales Act, 1859, required, that they had sustained substantial injury by reason of the irregularity and had taken the ground in their appeal to the Commissioner. Neither of these facts had been established.

11. The respondents contended that the Courts below had not definitely found that the loan had been taken for the improvement of the first property and that as regards the remaining properties, there was no evidence at all that they formed the collateral security. Their contention on Section 7(1), Land Improvement Loans Act was that Clause (c) did not contemplate a revenue sale, because the proviso to the sub-section, which circumscribed the effect of a sale under the clause was in conflict with Section 12 of Act 7 [VII] of 1868 and Section 37 of Act 11 [XI] of 1859 which defined the rights of a purchaser at a revenue sale in the cases respectively, of tenures and estates. Neither did Clause (d) contemplate a revenue sale, because its language did not make Section 5, secondly of Act 11 [XI] of 1859 applicable.

12. The first contention of the respondents may be disposed of at once. It is true that the Courts below have not recorded a clear finding that the loan was taken for the improvement of the first property, though the trial Court assumed, in a somewhat tentative fashion that it was. But no finding was really called for. It was the plaintiffs' own case in their plaint that Mir Suratjan had borrowed the money for the improvement of the first property and one of them deposed to the same effect. As regards the remaining properties, if it was the plaintiffs' case that they were not the collateral security and therefore not saleable, the burden lay upon them to establish the fact, since they were impugning, the sale. They did nothing to discharge the burden and offered no evidence on the matter. On the other hand, the sale certificate granted ten the appellant, Ex. A, states that the properties were "mortgaged to the Government". In the circumstances, it must be

held that the second third and fourth properties were in fact the collateral security for the loan.

13. The special ground on which the learned District Judge relied may also be disposed of shortly. We may point out first that Appendix A, as given in the Bengal Certificate Manual, is not a part of the Bengal Public Demands Recovery Act, although it has been reproduced in certain editions of the Act in such manner as to create a misleading impression that it is. The Appendix is only a list, prepared by the Board of Revenue on its own responsibility, of what it considers to be public demands falling under Schedule I of the Act (see Board's instructions, Section 1 Rule 5, Bengal Certificate Manual, 1933 Edn., p.7l). It has no statutory force whatever. As regards the entry with which we are concerned, viz., "loans for land improvement, interest and costs", the list is also inaccurate in so far as it describes such loans as "declared realisable, under the certificate procedure" by Section 7, Land Improvement Loans Act, 1883, for the provision referred to only says that the loans are recoverable as arrears of land revenue, but does not say that they are recoverable under the certificate or any other procedure. We do not by any means suggest that the loans were wrongly included in the list as public demands : all that we are pointing out is that the express declaration that they are such demands and are recoverable under the certificate procedure indicates only the opinion of the Board and is not to be found in either the Land Improvement Loans Act or the Public Demands Recovery Act. In the second place, the fact that certain dues are public demands and therefore recoverable under the certificate procedure, does not involve that they are recoverable under no other procedure. Section 55, Public Demands Recovery Act expressly provides that the powers conferred by the Act are in addition to and not in derogation from any powers conferred by any other Act for the recovery of any due, debt or demand. It follows that if, under the provisions of some other Act, some other procedure is applicable to the recovery of a certain kind of demand, that remedy is not affected by the fact that the demand is recoverable under the Public Demands Recovery Act as well. The learned District Judge was therefore not right in holding that because the arrears of the loan were recoverable under the certificate procedure, the procedure of a revenue sale was necessarily excluded.

14. The real question for determination is whether under Section 7(1), Land Improvement Loans Act, read with the two Revenue Sales Acts, there could legally be a revenue sale of the properties concerned. It will be convenient to deal separately with the two material clauses of Section 7(1), Clause (c) and (d) both of which appear to have been disregarded by the Courts below. They concerned themselves solely with Clause (a) which only imposes a personal liability on the borrower.

15. As has been pointed out already, the two clauses are not equally applicable to all the four properties concerned. The first property is the land for the benefit of which the loan was granted and the remaining three properties were the collateral security. Accordingly, the question as to the

first property falls to be judged by reference to Clause (c) and that as to the remaining properties by reference to Clause (d).

16. As regards properties for the improvement of which loans may be granted, the Land Improvement Loans Act is perfectly general in its terms and speaks of grant of loans for the improvements 'land'. Such land may be an estate or a tenure or a raiyati holding in the hands of the borrower. Clause (c) of Section 7(1) lays down one of the methods of recovery and all that the clause provides is that arrears of loans shall be recoverable out of the land for the benefit of which they were granted "as if they were arrears of land revenue due in respect of the land". The clause does not in terms say that the loan shall be recoverable by a revenue sale of the land, but the language used covers that procedure. Section 33 of Act 11 [XI] of 1859 clearly implies that there can be a revenue sale for the recovery of demands which are not themselves revenue, but only "re-alisable in the same manner as arrears of revenue are realisable". But the procedure of a revenue sale is not the only procedure covered by the language of Clause (c). The third item in the list of demands given in Schedule I, Bengal Public Demands Recovery Act is "any money which is declared by any law for the time being in force to be recoverable or realisable as an arrear of revenue or land revenue," and such monies being recoverable by the certificate procedure, the language of Clause (c) covers that procedure as well. There may be yet other procedures to which the language of the clause would apply. Since more than one procedure are covered by the language of Clause (c), it cannot be said that the clause intends all of them to be applicable in all cases, irrespective of their applicability to the property in question under the respective laws by which they are prescribed. The true construction must be that of the several procedures covered by the general language of the clause, that or those are applicable in a particular case which the property in question would admit of.

17. It may be said that since Clause (c) makes arrears of loans "recoverable as if they were arrears of land revenue due in respect of that land," it makes such arrears land revenue and nothing further is required to authorise a revenue sale of the land in default. We are of opinion that a provision, making certain dues "recoverable as if they were arrears of land-revenue," cannot have the effect of converting such arrears into land revenue and thereby authorising a revenue sale of the property concerned, regardless of the character of the property or the provisions of the sale law itself. The effect, as we have stated, is simply to make the several procedures by which arrears of land revenue may be recovered generally available, leaving the particular procedure, adapted to a particular case, to be chosen therefrom. If the contrary view be taken and such a provision be regarded as authorising a revenue sale of all kinds of interests, under whomsoever held, most extraordinary results would follow, some of which were pointed out in *Bejoy Singh Dudhoria v. Hem Chandra Choudhury*[1] There, the question arose in connection with Section 114(3), Bengal Tenancy Act, which is expressed in exactly the same

language as the clause we are considering, but did not require decision. In our opinion, the true meaning of Clause (c) is as above explained and, accordingly, the enquiry as to that Clause in the present case must be whether a revenue sale of the first property, a korfa interest held under a private individual, could be possible under Act (11 [XI] of 1859), read with Act 7 [VII] of 1868.

18. It is clear that the property is not an estate and it can come under the purview of the Revenue Sales Acts, if at all, only as a tenure. 'Tenure' is defined in Act 7 [VII] 1868 as including all interests in land, whether rent-paying or lakhiraj, which are transferable either by custom or by the terms of the grant creating them. The definition is extremely wide, but since the sole concern of the Act with tenures is to provide for their sale, the definition mi?st be read along with Section 11 which authorises sales and gives some further indication as to what kind of tenures are contemplated. It is provided in Section 11 that in order that a tenure may be sold, some revenue payable to Government should be in arrear. The incidents of a tenure coming under the Act are therefore three, it must be an interest in land; it must be transferable, and it must bear some revenue payable to Government. A korfa is undoubtedly an interest in land, it was also transferable in 1941 if there was a right of occupancy in it and, otherwise too, transferable with the consent of the landlord. Since the respondents who impugned the sale did not prove that the korfa in the present case was not transferable, they cannot have the sale declared void on the ground that this incident of a saleable tenure was lacking. But prima facie it seems impossible that any revenue should be payable to Government in respect of a korfa held under a raiyat, or indeed in respect of any interest not held directly under the Crown.

19. The appellant, however, contended that the revenue need not be land-revenue and that an interest in land, although held under a private owner, would be a tenure within the meaning of the Act and thus saleable under it, if some kind of revenue was payable on account of it to the Government. In the present case, the arrears of the loan, charged on the land, were said to be 'revenue' within the extended meaning given to the term in the definition contained in the Act.

20. In our opinion, this contention is altogether misconceived. Clause (c) of Section 7(1), Land Improvement Loans Act, under which the sale was held, itself suggests in the clearest possible manner that the arrears are not revenue proper, but are only to be deemed to be revenue. All enquiry as to whether the arrears are in fact 'revenue' as defined in Act (7 [VII] of 1868), is therefore pointless, for the clause proceeds on the basis that they are not. It is true that the word used in the clause is not 'revenue' but 'land-revenue,' but the difference is immaterial, since under the Revenue Sales Acts, the procedure for the recovery of revenue and land-revenue out of the property in respect of which they are due, is the same. If in the view of the Act, the arrears were 'revenue,' though not land-revenue, there was no point in specifically making them re-coverable as the latter or indeed in making any special provision. Being revenue, they might be left to be

recovered as such by the force of the Revenue Sales Acts themselves.

21. But apart from the above consideration, it is clear that judged by the definition, the arrears of the loan cannot be revenue and, further, it does not seem possible that any revenue should be payable to Government in respect of an interest in land held under a private owner. 'Revenue', as defined in the Act, includes three items, (i) sums payable to Government by a 'proprietor', i.e., a person holding an estate or tenure directly under Government; (ii) takavi and (iii) sums advanced by the Government to proprietors for improvement of their property. Items 1 and 8 cannot obviously be payable by a person holding under a private owner; and as regards takavi, that too means money advanced by Government to zemindars for improvement of their land : see Mohan *Ram Jha v. Baboo Shib Dutt*[2] and Revenue Sales Manual, 1933 Edn., p. 12,. Note 14. The arrears of the loan in the present case do not come under any of the items comprised in the definition of revenue. It is true that the definition uses the word 'includes' and would seem to be not exhaustive. But any other dues that might be brought under it must bear the common characteristic of being payable by a proprietor. The conclusion thus seems clear that it being a requisite of tenures, saleable under Act 7 [VII] of 1868, that some kind of revenue should be payable on account of them to Government and it being impossible that any revenue should be payable in respect of interests held under private owners, such interests are outside the contemplation of the Act. The appellant pointed to the word 'rent-paying' in the definition of tenure and contended that this word suggested that interests under private owners were included. But, as is well-known, one of the objects of the second Revenue Sales Act was to place rent due to Government on the same footing as arrears of revenue and the word relied on has reference only to tenures held under and paying rent to Government.

22. We consider it unnecessary to add to our reasons for the view we are taking by referring to the obvious difficulties of holding a revenue sale of subordinate interests held under a private owner. It follows sufficiently from what we have stated above that the first property of the present suit, being a korfa interest held under a raiyat, is not a tenure within the meaning of Act 7 [VII] of 1868 and did not become so by reason of its liability for the loan and that it could not legally be sold at a revenue sale for arrears of the loan by virtue of anything contained in Section 7(1)(c), Land Improvement Loans Act.

23. As regards Clause (d) which applies to the remaining properties, the provision there contained is that the loan shall be recoverable out of properties constituting the collateral security "according to the procedure for realisation of land, revenue by the sale of immovable property other than the land on which the revenue is due." The relevant enquiry as to this clause is where the procedure referred to is to be found and whether it means or includes a revenue sale.

24. The appellant contended that the procedure was prescribed by Section 5, clause secondly of

Act 11 [XI] of 1859 and it was the procedure of a revenue sale. We are unable to agree. As has often been pointed out, the power of sale under Section 5, secondly is only inferential and by no means clear and Act 7 [VII] of 1868 which 'was enacted for, among other objects, making clearer provision for the sale of one property on account of the dues of another, did so by prescribing the procedure of certificate sales. The Board of Revenue itself appears to regard the power of sale under this clause to have fallen into desuetude. (See Revenue Sales Manual, 1933 Edn., p. 12, Note 16). But the clause remains in the Act and assuming there is a power of sale thereunder, the provision applies only to sales for "arrears due on account of estates other than that to be sold." Clearly, the property to be sold and the property on account of which the arrears are due, must both be estates, but Clause (d) of Section 7(1), Land Improvement Loans Act, contemplates some procedure which is applicable to the sale of all kinds of immovable property for arrears of land revenue due on some other land. The latter provision can therefore have no reference to Section 5, secondly of Act 11 [XI] of 1859. It was conceded on behalf of the appellant that outside Section 5, secondly of Act 11 [XI] of 1859, there was no provision which could be said to warrant a revenue sale of one property for arrears due on another. It follows (that the procedure contemplated by Clause (d) being some procedure which is general in its application to all kinds of immoveable property as regards the property to be sold and to all lands as regards the property on which the arrears are due; it is not the procedure prescribed by Section 5, secondly of Act 11 [XI] of 1859 and the former provision does not contemplate revenue sales at all. In any event, even if the procedure of a revenue sale be within the contemplation of the clause, it can apply only to cases where the land for the benefit of which the loan was granted and the property of the collateral security are both estates. In the present case, neither of them was an estate and the revenue sale of the second, third and fourth properties was, therefore, also without jurisdiction.

25. It was contended lastly that even if the sale was bad as regards all the properties, the Collector having had jurisdiction to sell them, the adoption of the procedure of a revenue sale was only an irregularity which could be no ground for avoiding the sale unless the conditions laid down in Section 33 of Act 11 [XI] of 1859 were satisfied. We are unable to accept this contention. It is true that, illegalities as to revenue sales stand on the same footing as irregularities for the purposes of Section 33, as several decisions of the Judicial Committee have pointed out; but sales without jurisdiction are outside the section altogether. Jurisdiction has been held to mean jurisdiction to hold the particular sale as for example, in cases where no arrears were due; and where there is no jurisdiction to hold a revenue sale in any circumstances, the lack of jurisdiction is obviously greater and indeed absolute. When jurisdiction is said to exist, what is meant is not a right to sell the property, but jurisdiction to hold a revenue sale. Section 33 itself makes this clear, for it applies only to cases where a sale has been "made contrary to the provisions of this Act", which presupposes that the Act applied, but certain of its provisions had not been complied with. We are unable to hold that Section 33 has any application to a case

where there was no jurisdiction to hold a revenue sale at all. The appellant relied on the Pull Bench decision in *Ashutosh Sikdar v. Behari Lal*[3] We cannot see that that case is of any assistance to him. All that was there held was that if a mortgagee sold the mortgaged property for the satisfaction of some other claim, without bringing a suit upon his mortgage as required by Section 99, T.P. Act (now Order 34, Rule 14, Civil P.C.) the sale was not void but only voidable. There was no question of jurisdiction in that case but only a question of procedure.

26. It was also contended, though less than faintly, that the suit was bad inasmuch as the Government had not been made a party. It was however held by the Privy Council in *Balkishen Das v. Simpson*[4] approving of the decision of this Court in *Bal Mokoond Lal v. Jirjudhan Roy*[5] that in a suit of this description, the Secretary of State was not a necessary party. We may add that notice of the present appeal was directed to be given to the Provincial Government and they were represented before us by the Assistant Government pleader.

27. For the reasons given above we hold that the appeal must fail and we dismiss it with costs.

Blank, J.

I agree.

Cases Referred.

18 A.I.R. 1921 Cal. 520
2('72) 17 W.B. 21
3('08) 35 Cal. 61 (F.B.)
4('98) 25 I.A. 151
5('83) 9 Cal. 271