

CALCUTTA HIGH COURT

Sheikh Ariatullah

Vs

Sashi Bhusan Hazrah

(J Woodroffe and Chatterjea, JJ.)

27.08.1919

JUDGMENT

Chatterjea, J.

1. These appeals arise out of proceedings for setting aside two sales held in execution of two decrees for rent on the ground that the sales were illegal.

2. It appears that in two rent suits brought in the year 1912 the plaintiff claimed rent at the rate of Rs. 22 and Rs. 18 respectively, those being the rents entered in the settlement proceedings. The defendants pleaded that the rents were Rs. 12 9-0 and Rs. 11 only. The suits were decreed on the 18th February 1913 on the following terms: The suits be decreed with costs, but the plaintiff will be at liberty to execute the decree to the extent based on the Jama admitted in the defence after one month. As regards the balance of the decretal sums, the plaintiff will execute them as soon as the review be rejected, if the review be granted, the plaintiff should postpone execution of the balances for two years and nine months or earlier when the settlement suits are disposed of." As a matter of fact there was no application for review pending at that time, and the order was based on a mistake of fact. The decree-holder on the 12th April 1913 took out execution for the full amounts. On the 16th May the judgment debtor applied for review of judgment stating that no application for review was pending when the decree was passed, and applied for postponement of the sale pending the disposal of the application for review. The sale was postponed till the 16th June if the decretal amounts were deposited by that date, and again postponed till the 23rd June 1913, but the money not being deposited the sale took place on that date. The judgment debtor on the 21st July 1913 applied to have the sales set aside on deposit of the decretal amounts. The amounts to be deposited were settled by the Court, and they were deposited on the 24th July, and the sales were set aside on the 31st July. The decree holder appealed against the said order, and the Appellate Court remanded the cases on the 4th June 1914 for re-settlement of the decretal amounts. As a result of the resettlement the orders setting aside the sales were confirmed. The

decree-holder again appealed, but the Appellate Court confirmed the order of the Court of first instance setting aside the sales. The decree-holder moved this Court, and this Court on the 3rd April 1917 set aside the order setting aside the sales, on the ground that the amounts mentioned in the sale proclamation had not been deposited.

3. In the meantime the application for review made on the 16th May 1913 was allowed on the 18th November 1913, and the following order was passed: This is an application for review. The ground is that there is a palpable error in the judgment. In the order portion of the judgment it is stated that the plaintiff will execute them (the decrees) as soon as the review he rejected.' But I am informed by the Pleader on both sides that at the time the judgment was delivered or at any time no review regarding any suit concerning the Jamas in dispute was pending. The review was with regard to other Jamas in dispute in a number of analogous suits. With regard to the disputed Jamas a title suit was pending and is still pending between the parties. The reference to the review is evidently a mistake and on this ground a review may be granted. Evidently what the Court meant is that the parties should wait till the suits are disposed of or for a reasonable time. Ordered that the application be allowed but without costs. In the order portion of the judgment instead of the words as regards the balance of the decretal sums' etc., the following words, will be substituted in the judgment and the decree: 'As regards the balance of the decretal sums plaintiff will execute 'them as soon as the appeal be disposed of or within two years and six months if the appeal be disposed of earlier, and it is further ordered that the decree of the appeal will govern these cases.' "

4. As stated above, the order of the Courts below setting aside the sales was set aside by the High Court on the 3rd April 1917, and the decree-holder on the 29th September 1917 applied for confirmation of the sales. The judgment-debtor thereupon put in an application to have the sales set aside under Section 47 and Order XXI, Rule 90, of the Civil Procedure Code, and also objected to the confirmation of the sale applied for by the decree-holder, The Court of first instance made an order setting aside the sales, but on appeal that order was reversed. The judgment-debtor has appealed to this Court.

5. It is contended on behalf of the appellant that the original decree was set aside or amended on review on the 18th November 1913; under that decree the decree holder was entitled to take out execution only for a portion of the amount decreed and could not take out execution for the entire amount until the disposal of the appeal in the suit then pending. The sale, therefore, held in execution of the said decree was illegal, and the Court could not confirm such illegal sale, and that no question of limitation applies with respect to the objection to the confirmation of the sale. Secondly, that even if the question of limitation arises, the right to apply to set aside the sale arose on the 3rd April 1917 when the High Court set aside the orders of the Court below setting

aside the sales, and that in any case the judgment-debtor is entitled to a deduction of the period between the 31st July 193, when the sales were set aside by the Court of first instance, and the 3rd April 1917, the date of the order of the High Court, and deducting the said period' the present application under Section 47 was well within 3 years under Article 181 of the Limitation Act.

6. With regard to the first contention it appears that at the time when the sales took place (23rd June 1913), the application for review was pending, and the order passed upon the application shows that the decree-holder was not entitled to take out execution for the entire decretal amount until the disposal of the suit (or the appeal in the suit) which was then pending. The sale held for realization of the entire amount of the decree, according to the order passed on review, was, therefore, illegal, and the question is whether the Court would be justified in refusing to confirm the sale if it finds that the decree under which the sale was held has subsequently been set aside or amended. It is contended on behalf of the respondent that under the present Civil Procedure Code the sale really does not require confirmation if there is no application under Order XXI, Rules 89, 90 and 91, or if there is any such application and the application is disallowed. It is pointed out that the proviso to Section 316 of Act XIV of 1882 has been left from the present Code. That proviso ran as follows:

Provided that the decree under which the sale took place was still subsisting at that date.

7. It is contended that the result of the omission of the proviso is that the Court is bound to confirm the sale if there is no application under Rules 89, 90 or 91 or if such an application is made and disallowed, whether or not there was a subsisting decree under which the sale is held. Now, if there is no subsisting decree the sale must be set aside under Section 47 of the Code, and although there may be an application under Section 47 to set aside the sale on such a ground pending, the sale must (according to the respondent's contention) be confirmed under Order XXI, Rule 92, though the next moment the sale will have to be set aside under Section 47 on the ground that there was no subsisting decree. We do not think that that is contemplated by Order XXI, Rule 92. Order XXI, Rules 89, 90, 91 and 92, presupposes a valid decree under which the sale is held, and the first three rules provide for setting aside the sales, and Rule 92, says that if there be no application for setting aside the sale, or such an application is made and disallowed, the sale shall be confirmed, Rule 92 does not affect the power of the Court to refuse to confirm a sale, or make it compulsory to confirm the sale when the Court finds that the sale is held under a decree which did not authorize the sale. It seems unreasonable that the Court must confirm a sale under Order XXI, Rule 92, although it finds that the foundation for the sale is gone, and then proceed to set aside the sale which, it has confirmed, being fully aware that the sale was illegal. In the present case having regard to the order passed on review, it must be held that execution could not be taken out for the amount for which execution was taken out, and the sales took place

for amounts in respect of which there were no decrees existing at the time.

8. In these circumstances we think the Court would be justified in refusing to confirm the sale. The learned Pleader for the respondent has brought to our notice that the suit which was pending at the date of the sale has been decided against the judgment-debtor, the result of which is that the decree-holder is entitled to the full amounts of the decrees passed in the rent suits, but the decision of the title suit was subsequent to the sale, and cannot validate the sale held in execution of the decree under which the full amount could not at that time be recovered.

9. The next question for consideration is whether the application under Section 47 is barred by limitation. The Article applicable is Article 181 of the Limitation Act, which provides for a period of 3 years from the time "when the right to apply accrues." Now before the 18th November 1913 when the order was passed on review, the judgment-debtor could not apply under Section 47, and before that order was passed, the sale had been set aside by the Court of first instance on the 31st July 1913. It is contended on behalf of the respondent that the sale was set aside under Order XXI, Rule 89. That is so, but the judgment-debtor could not apply under Section 47 to set aside a sale which had already been set aside on the 31st July 1913, though under Order XXI, Rule 89, the order setting aside the sales was ultimately set aside by this Court on the 3rd April 1917. Whether it be held that the right to apply to set aside the sales under the circumstances did not arise until the 3rd April 1917 when the order of the High Court was made, or that the limitation remained in suspense between the 31st July 1913 and the 3rd April 1917, the application is not barred by limitation.

10. The order of the Court of Appeal below is accordingly set aside, and that of the Court of first instance restored. Having regard to all the circumstances of the case we direct that each party do bear his own costs in all Courts.

Woodroffe, J.

11. I agree.