
(1924) 07 AHC CK 0035
In the Allahabad High Court

Fateh Lal	Vs	APPELLANT
Sher Singh		RESPONDENT

Date of Decision : 30-07-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1925 All 264 : 85 Ind. Cas. 660

Hon'ble Judges : Sulaiman, J; Mukerji, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Sulaiman, J.—This civil revision arises out of certain execution proceedings. A suit was decreed and under the judgment there ought to have been an instalment decree passed against the defendant. Owing to some mistake of the office the decree which was prepared did not specifically mention that the money was payable in instalments. An application for execution of that decree was put in by the decree-holder within one year of the decree and accordingly no notice of it was issued the judgment-debtor. Among the properties sought to be attached was a Revenue Court decree in favour of the judgment-debtor. It appears from the deposition of the judgment-debtor subsequently made and the record that notices were issued to the Revenue Court requesting it to abstain from executing the decree sought to be attached until such notice was cancelled, and a notice was also sent to the judgment-debtor prohibiting him from transferring or charging the same in any way. Apparently these notices were issued under Order 21, Rule 53, Sub-clause IV. The judgment-debtor took no steps in the matter and kept quiet. Ultimately the Revenue Court decree was put up at auction and sold and purchased by the applicant Fateh Lal for a much smaller sum.

2. It may be noted that by the time the Revenue Court decree was actually put up for sale one of the two instalments had actually fallen due and the amount so due was more than the amount for which the decree was actually sold. But till

then she decree as it stood did not contain any direction as to the payment of the decretal amount in instalments. Subsequently the judgment-debtor put in an application before the Subordinate Judge for an amendment of the decree so as to bring it in accordance with the judgment. That decree was then rightly amended. After having amended the decree the learned Subordinate Judge at the instance of the judgment-debtor set aside the sale of the Revenue Court decree and the only ground mentioned by him was that inasmuch as the original decree had been amended the sale of the attached decree had become ipso facto nullified. From that order the auction-purchaser appealed to the District Judge. The District Judge dismissed the appeal.

3. Speaking personally for myself, I would hold that no revision lies from the order of the District Judge. On an appeal preferred by the present applicant himself he had jurisdiction to go into the question whether the first Court's order was right or wrong and after having considered the matter he has expressed his opinion one way. I cannot hold that in expressing this opinion and upholding the order of the Court below he has acted with any material irregularity or illegality in the exercise of his jurisdiction. His opinion may or may not be correct. That is after all-merely an error of law.

4. At the same time if the learned Subordinate Judge had no jurisdiction to set aside the sale or if he acted with illegality or irregularity it would be open to this Court, to which no appeal lies, to revise his order.

5. The question we have to consider is whether the sale of the Revenue Court decree was merely irregular or whether it was illegal and without jurisdiction. Under the old Code, having regard to the definition of a decree given in that Code, it was held by this Court that a Revenue Court decree was not a decree within the meaning of the Code and that it was not governed by the first portion of Section 273, vide the case of *Aulia Bibi v. Abu Jafar* (1899) 21 All. 405. It is possible that at the time when this decree was sought to be attached the Court was under the impression that it being a Revenue Court decree could be attached and sold. It cannot, however, be denied that under the definition of the decree has given in Section 2 of the new Code, the word "Civil" has been omitted and therefore a decree may include not only a Civil Court decree but also a Revenue Court decree. It follows therefore that the proper way to attach such a decree would have been that provided for in Order 21, Rule 53, Sub-clause 1. This does not appear to have been done. The attachment of the Revenue Court decree was therefore irregular. But the new Code consists of substantive provisions contained in the first XI Parts and then the Rules contained in three Schedules attached thereto. u/s 60 of the Code the Court is given jurisdiction to attach and sell in execution of a money decree all properties movable and immovable other than those exempted under it. Provisions contained in the rules comprised within the schedules are mere rules of procedure and they would not oust the jurisdiction of the Court. Non-compliance with any of the provisions contained in the rules would be an irregularity. This has always been held in cases where

provisions with regard to the issues of sale proclamations & c. have not been complied with. The Court therefore in proceeding to attach and execute the decree as if it were a decree other than that covered by Order XXI, Rule 53, Sub-clause 1, merely committed an irregularity. I have already pointed out that the judgment-debtor had full notice that the Court was so proceeding. Ha did not intervene and take any objection. He allowed the execution to be carried out after the property had been sold. I am therefore unable to hold that the sale was a nullity and without jurisdiction. The utmost that can be said is that the sale had taken place with some irregularity.

6. The learned Subordinate Judge was of opinion that if property has been sold in execution of an incorrect decree then as soon as the decree is amended the sale must ipso facto be set aside even though a third party has purchased the property. In my opinion this view is erroneous. So long as at the time when the sale took place there was valid decree standing the execution was perfectly valid and the subsequent event that the decree was amended or even set aside would not necessarily nullify the sale. It must therefore be said that the learned Subordinate Judge has not acted legally in setting aside the sale. He has also acted with material irregularity in not directing his attention to the main question before him, but has simply set aside the sale as if no option was left to him.

7. It is, however, necessary to note that u/s 115 of the Civil Procedure Code this Court is not bound to intervene but may refuse to exercise its discretion if the circumstances require that such discretion should not be exercised. In the present case the Revenue Court decree was sold for a small value and purchased by a third party. u/s 93, Clause (i) of the Tenancy Act no application for the execution of a decree shall be made by an assignee of the decree unless the assignor's interest in the land to which it relates has become vested in such an assignee. It is not suggested that this auction-purchaser has in any way acquired an interest in the tenancy in respect of which the Revenue Court decree for arrears of rent was passed. It is apparent therefore that the Revenue Court would not entertain an application for execution at the instance of the auction-purchaser. Had the application been made by the attaching creditor before the Revenue Court decree had been sold the position would have been different. On the other hand the judgment-debtor has suffered considerable loss inasmuch as his Revenue Court decree has been sold for a much smaller amount. It also appears from the record that ha has, as a matter of fact, paid off the entire sum due to the decree-holder and has also deposited the full amount with interest payable to the auction-purchaser in case the sale is to be set aside. Having regard to all these circumstances I am of opinion that we should not interfere in this case-and the application in revision should be dismissed.

Mukerji, J.

8. It agrees that the circumstances of the case are such as do not call for any exercise of our revisional powers.

9. The application is accordingly dismissed but without any order as to costs.