

(1923) 12 PAT CK 0003
In the Patna High Court

Hakim Mohammad Idris

APPELLANT

Vs

Lachman Das

RESPONDENT

Date of Decision : 15-12-1923

Acts Referred:

Citation : AIR 1924 Patna 504

Hon'ble Judges : Ross, J; Das, J

Bench : Full Bench

Judgement

Das, J.—I think this appeal must succeed. The appellant instituted a suit as against the respondent to have a revenue sale set aside and on the 29th January, 1921, he recovered a decree in the Court of the Subordinate Judge of Patna setting aside the revenue sale. The appellant thereupon instituted proceedings in execution for recovery of possession of the property sold and it is conceded that the application for execution was not made within six months after the date of the Civil Court decree. The question which the Courts below had to try was whether the execution was barred by limitation in view of the provisions of Section 34 of Act XI of 1859, The Court of first instance came to the conclusion that the Civil Court having set aside the sale on the ground that the Revenue Court had no jurisdiction to sell the property, Section 34 did not apply and the appellant was entitled to maintain execution although the application was not made within six months after the date of the Civil Court decree. The learned Judge in the Court below has taken a different view and he has dismissed the execution petition.

2. The Subordinate Judge in trying the original suit between the parties and giving a decree to the appellant said as follows: "The plaintiff examines one witness who proves that the notice was not served. He further produces two certified copies of the ledger showing that there was an excess of payment and that therefore the sale could not be held. Notices u/s 4 were also not served and the plaintiff did not get time to pay arrears. Ordered that the suit be decreed ex parte with costs with interest at 6 per cent per annum. Let the revenue sale be

set aside and the plaintiff the delivered into possession. The executing Court of the first instance took the view that the decree of the Subordinate Judge in the original case was a decree not strictly annulling the revenue sale but vacating the revenue sale on the ground that there was no arrears and that consequently there was no authority in the Collector to put up the property to sale. As I read the judgment of the learned Judge in the Court below it in no way throws any doubt on the construction put upon the judgment by Mr. Ghalib Hasnain. It is urged in this Court on behalf of the respondent that as a matter of fact the sale was not set aside on the ground the the estate was not in arrears, but on the ground that notices were not served in accordance with law and that the learned Judge in the Court below did not in fact accept the interpretation put on the judgment in the original case by Mr. Ghalib Hasnain. I am wholly unable to accept this contention. In my opinion the learned District Judge has not thrown any doubt on the construction placed upon the judgment in the original case by the learned Subordinate Judge dealing with the execution petition. Nor do I think that the judgment pronounced in the original case is capable of any other interpretation. It is urged before us that the plaint itself did not raise a case that the estate was not in arrears. That may or may not be so, but undoubtedly evidence was placed before the learned Subordinate Judge that the estate was not in arrears and that there was an excess payment made by the plaintiff; and the learned Subordinate Judge undoubtedly accepted that case and passed a decree in accordance with that finding. In my opinion it is quite impossible for a Court executing the decree to go beyond the decree and to enquire whether the Court was entitled to pass that decree in view of what was actually alleged by the plaintiff in the plaint. An executing Court is no doubt entitled to interpret a decree but is not entitled to pronounce that the decree should not have been passed by the Court. In my opinion the decree that was passed in the original case was a decree which recognised authoritatively that there was no sale at all and that the Collector had no jurisdiction whatever to put up the property to sale.

3. That being so the question arises whether Section 34 constitutes a bar to the maintainability of the execution petition having regard to the fact that the application was not made within six months after the date of the sale. In my opinion Section 34 applies only where a sale held under Act XI of 1859 is annulled by a final decree by a Civil Court: In other words where a suit is brought under the provisions of Section 33 of the Act and a Civil Court annuls the sale on any of the grounds mentioned in Section 33 of the Act an execution petition must be presented within six months after the date of the decree; suit, where the suit is not one under the provisions of Section 33 of Act XI of 1358 Section 34 in my opinion has no operation whatever. There is a dear distinction between a case where a sale is annulled and a case where the Court authoritatively recognizes that there was no sale at all, and consequently disregards it and proceeds to give a decree for possession to the plaintiff. Where the sale is authorised, but there is a direct violation of the statutory provision in conducting the sale, the suit must be one for annulment of the sale, and the

Court has complete power to set aside the sale, provided the requirements of Section 33 are complied with. But where the sale is not authorised, there is in law no sale, and, there being nothing to annul, all that the Civil Court does, is to recognise that there is no sale and to pass a decree for possession in favour of the plaintiff. I have no doubt whatever that Section 33 applies to a case where the sale is authorised, but is attended with some illegality or irregularity and Section 33 affords a complete protection to such sales, although they have been attended with illegality or irregularity, unless the conditions specified in Section 33 are fulfilled and the procedure indicated in that Section is adopted. But where there is no authority whatever for the sale, Section 33 has no operation and the Court, in dealing with a case where there is an entire absence of jurisdiction in the Collector to put up the property to sale does not annul the sale but recognises authoritatively that there was no sale at all. In my opinion where the estate is not in arrears there is no authority in the Collector to put up the estate for sale and a Civil Court has complete power to recognise authoritatively that there was no power in the Collector to put up the property to sale and to hold that there was in fact no sale at all. That in my opinion was the decree pronounced in the original case brought by the appellant against the respondent. That being so Section 34 in my opinion does not apply.

4. There are numerous cases on the point; but it will be sufficient to refer to two cases to which, I notice the learned Subordinate Judge refers. In the case of *Harkhu Singh v. Bunsidhar Singh* (1898) 25 Cal. 876, it was held that a suit to set aside a sale purporting to be under Act XI of 1859, on the ground that no arrears of revenue was due may be brought in the Civil Court even if such ground has not been specified in an appeal to the Commissioner. How it is important to remember that a Civil Court has no power to set aside a sale u/s 33 of Act XI of 1859 unless the ground, upon which the Sale is attacked has been declared and specified in an appeal made to the Commissioner u/s 2 of the Act of 1868. It follows, therefore, that if a suit to set aside a sale on the ground that no arrears of revenue was due, is to be regarded as a suit u/s 33 of Act XI of 1859, the fact that the actual ground was not declared and specified in an appeal to the Commissioner would constitute a complete bar to the maintainability of such a suit. In my opinion the decision of *Harkhu Singh v. Bunshidhar Singh* (1898) 25 Cal. 876 is an authority for the view that a suit to set aside a sale on the ground that no arrears of revenue was due is not a suit u/s 33 of Act XI of 1859. The only other case to which I need refer is the case of *Balkisen Das v. Simson* (1898) 25 Cal. 333. It was held in that case that there is no jurisdiction in the Collector to put up an estate for sale where that estate is not in arrears. In that particular case it was also held that a Civil Court has jurisdiction to entertain the objection to the sale although the point had not been considered and disposed of by the Commissioner and that Section 33 of Act XI of 1859 is no bar to such a suit. In dealing with the question the Judicial Committee pointed out that the enactments of 1859 and of 1868 were intended to apply to cases in which, if the irregularity or illegality of the sale proceedings alleged by the objector be

negatived, the sale will remain valid. They further pointed out that where the estate is not in arrears at all, there was no jurisdiction whatever in the Collector, to sell the property and held that the whole proceedings of the Collector were beyond his jurisdiction and were not entitled to the protection given him by the Act in cases where the sale is authorised, although it may be attended with some irregularity or illegality. A distinction is clearly drawn in the judgment of the Judicial Committee between a case where the sale is authorised but is attended with some irregularity or illegality and a case where the sale is not authorised at all. In my opinion all these decisions establish conclusively that where there is no jurisdiction in the Collector to put up a property to sale, the sale cannot be regarded as a sale under Act XI of 1859. Section 34-only applies where the sale is held under Act XI of 1859 and is annulled by a final decree of the Civil Court.

5. IN my opinion the view which was taken in this case by the learned Subordinate Judge was right. I would allow this appeal set aside the order of the learned Judge in the Court below and restore the order of the learned Subordinate Judge. It follows that execution must proceed.

6. The appellant is entitled to his costs throughout.

Ross, J.

7. I agree.