

(1896) 03 CAL CK 0008
In the Calcutta High Court

Pahar Khan and Others

APPELLANT

Vs

Troyluckho Nath Mozumdar and Others

RESPONDENT

Date of Decision : 10-03-1896

Acts Referred:

Public Demands Recovery Act, 1880 — Section 2

Citation : (1896) ILR (Cal) 641

Hon'ble Judges : W. Comer Petheram, C.J.; Rampini, J

Bench : Division Bench

Judgement

W. Comer Petheram, C.J. and Rampini, J.—This is a suit for the setting aside of a sale held in execution of a certificate decree. The Court of First Instance held that, as regards the setting aside of the certificate, the suit was barred by limitation. It further held that there was an unsatisfied arrear (though a small one) due at the time of the sale, and that therefore the case did not come within the purview of the ruling in the case of *Gujraj Sahai v. Secretary of State* ILR 17 Cal. 414 but rather within the ruling in the case of *Sadhusaran Singh v. Panchdeo Lal* ILR 14 Cal. 1, and accordingly dismissed the suit. The lower Appellate Court set aside the decree of the Court of First Instance, on the ground that the provisions of Section 2 of the Bengal Act VII of 1868 do not bar the institution of a regular suit to set aside a sale, like the one in question, inasmuch as in the case of *Gujraj Sahai v. Secretary of State* ILR 17 Cal. 414 the learned Judges who decided that case expressed a doubt as to the applicability of the provisions of Section 33, Act XI of 1859, to a case like the present one.

2. Before us it has been contended that the Lower Appellate Court was wrong holding that under the circumstances of the case the suit is maintainable, and in remanding it for trial of the issues left undecided. We consider that this contention must prevail. It was found as a fact by the Court of First Instance that there was an unsatisfied arrear at the time of the sale, and hence the sale could not be held null and void. This finding has not been displaced by the Lower Appellate Court. That being so, the case clearly comes within the rule laid down

in the case of Sadhusaran Singh v. Panchdeo Lal ILR 14 Cal. 1, in which it has been said "the only remedy of a judgment-debtor whose property has been sold in execution of a certificate issued under Bengal Act IX of 1880, and who has sustained substantial injury by reason of a material irregularity in publishing or conducting the sale is by way of an appeal u/s 2 of Bengal Act VII of 1868." There is nothing in the judgment in the case of Gujraj Sahai v. Secretary of State ILR 17 Cal. 414, which in any way conflicts with this ruling.

3. In the circumstances, we set aside the decree of the Lower Appellate Court and restore that of the Court of First Instance. "This order carries costs.