

APPELLATE CIVIL.

Before Edgley J.

TAMIZ ALI

2.

MAHAMMAD NASAR ALI BHUIYA.*

Debt Settlement Board—Settlement of debt, Application for—Execution proceedings in respect of debt pending in civil Court—Sale in execution—Stay of proceedings in civil Court—Notice of stay not received by civil Court before sale—Onus—Setting aside of sale on proof of prior application to Board—Appeal to High Court where there is no right of appeal—Illegal exercise of jurisdiction by lower Court—Revision by High Court—Bengal Agricultural Debtors Act, 1935 (Ben. VII of 1936, as amended by Ben. VIII of 1940), ss. 8, 34, 35—Code of Civil Procedure (Act V of 1908), ss. 47, 115.

Where an application for the settlement of a debt is made to the Board under s. 8 of the Bengal Agricultural Debtors Act, while execution of a decree in respect of the debt is pending in a civil Court, all proceedings in execution are automatically stayed under s. 35 of the Act, notwithstanding the fact that notice under s. 34 of the Act has not been received by the executing Court.

Where sale in execution of the decree is held before the receipt of the notice under s. 34 of the Act, the debtor may apply to the Court under s. 47 of the Code of Civil Procedure to have the sale set aside, but the onus lies heavily on him to show that the application under s. 8 of the Act was actually made before the sale.

Moturi Seshayya v. Verikatadri Appa Row (1) and *Rajani Kumar Mitra v. Ajmaddin Bhuiya* (2) distinguished.

Where an appeal has been preferred to the High Court in a case from which there is no right of appeal, the High Court may interfere in its revisional jurisdiction, if it is satisfied that the Courts below acted illegally in the exercise of their jurisdiction.

APPEAL FROM APPELLATE ORDER preferred by the judgment-debtor.

*Appeal from Appellate Decree, No. 162 of 1939, against the order of S. M. Masih, District Judge, Mymensingh, dated March 18, 1939, affirming the order of Santosh Kumar Ghosh, First Munsif, Netrokona, dated Feb. 17, 1939.

Relevant facts of the case and arguments in the appeal are sufficiently stated in the judgment.

1940

Tamiz Ali

v.

*Mahammad**Nasar Ali**Bhuiya.*

Birendra Kumar De and *Abani Kan̄a Roy* for the appellant.

Ramendra Chandra Roy and *Chandra Nath Mukherjee* for the respondents.

EDGLEY J. The judgment-debtor is the appellant in this case and the appeal arises with reference to the dismissal of an application filed by the judgment-debtor under s. 47 of the Code of Civil Procedure, in which he sought to set aside an execution sale.

It appears that the decree-holder obtained a decree for rent against the appellant on July 12, 1937. On May 26, 1938, he put this decree into execution and the requisite processes had been served by June 14, 1938. On June 30, 1938, the appellant applied to the Debt Settlement Board for the settlement of his debts and he alleges that the rent-decree, which the decree-holder was seeking to execute, was included in the application under s. 8 of the Bengal Agricultural Debtors Act. He maintained that the Debt Settlement Board in due course issued a notice under s. 34 of the Act, but, in spite of the issue of this notice, the execution sale was held on August 9, 1938. Thereafter, on November 11, 1938, the appellant applied to the Court under s. 47 of the Code of Civil Procedure to have this sale set aside. Issues were framed by the trial Court with regard to the question of the maintainability of the application and also on the points whether or not the application to the Board was a bar in respect of the subsequent proceedings in execution and whether the sale was vitiated by reason of the alleged issue of the notice under s. 34 of the Bengal Agricultural Debtors Act. Although it was decided that the application was maintainable, the other two points were decided

1940
Tamiz Ali
 v.
Mahammad
Nasar Ali
Bhuiya.
Edgley J.

against the appellant and the trial Court held that in fact no notice under s. 34 of the Bengal Agricultural Debtors Act had been issued by the Board and that, in these circumstances, the sale, which was held on August 9, 1938, could not be impeached by the appellant. The judgment-debtor thereafter appealed to the learned District Judge of Mymensingh and his appeal was dismissed.

The main point which has been argued on behalf of the appellant in this case is that, in view of the fact that an application had been made to the Debt Settlement Board under s. 8 of the Bengal Agricultural Debtors Act, which included the decree which was the subject-matter of the execution proceedings in Execution Case No. $\frac{54}{C}$ of 1938, the Court had no option but to set aside the sale under s. 47 of the Code of Civil Procedure as soon as the fact had been brought to its notice that the application had been actually made to the Board and, in this connection, it was further contended that the non-receipt of the stay order under s. 34 of the Bengal Agricultural Debtors Act must be regarded as immaterial. With regard to this matter, it may be noted that the appellant places particular reliance upon the provisions of s. 35 of the Bengal Agricultural Debtors Act. This was a point which was not directly raised in either of the Courts below, but, as it involves an important question of law, there is no reason why it should not be raised in this Court.

In the first place, it has been argued by the learned advocate for the respondents that no appeal lies to this Court, having regard to the principles laid down in the case of *Prafulla Krishna Deb v. Nosibannessa Bibi* (1). In view of the fact that the decree, which it was sought to execute, was in respect

of a sum of Rs. 19-11-6 only, this contention must be accepted, having regard to the provisions of s. 153(a) of the Bengal Tenancy Act. At the same time, I am of opinion, for the reasons which will presently appear, that the Courts below have taken an erroneous view of the law with regard to this matter and have acted illegally in the exercise of their jurisdiction. It is, therefore, open to this Court to interfere, in the exercise of its revisional jurisdiction under s. 115 of the Code of Civil Procedure.

1940

Tamiz Ali
v.
Mahammad
Nasar Ali
Bhuiya,
Edgley J.

The learned advocate for the appellant in this case, as already pointed out, relies mainly upon the provisions of the first part of s. 35 of the Bengal Agricultural Debtors Act, which is in the following terms:—

Notwithstanding anything contained in any Act, no decree of a civil Court or certificate under the Bengal Public Demands Recovery Act, 1913, shall be executed—

(i) for the recovery of a debt included in an application under s. 8 or in a statement under sub-s. (1) of s. 13, until—

- (a) the application has been dismissed by the Board in respect of such debt; or
- (b) an award in which such debt is included has ceased to subsist under sub-s. (5) of s. 29.

His argument is to the effect that, as soon as an application to the Board is made under the provisions of s. 8 of the Act, the civil Court loses its jurisdiction to execute any decree which may have been included in the application in question. He admits that, according to the ordinary procedure which should be followed by Debt Settlement Boards, a notice under s. 34 of the Act should be issued to the Court concerned and that, on receipt of such notice, the Court should stay all further proceedings in the matter. He contends, however, that, in a case in which the Board failed to fulfil its duty under s. 34 and the execution sale was held by reason of such

1940
 Tamiz Ali
 v.
 Mahammad
 Nasar Ali
 Bhuiya.
 Edgley J.

failure, it would be open to the judgment-debtor himself to bring the matter to the notice of the executing Court, which would be bound to set aside the sale if the judgment-debtor succeeded in showing that he had duly applied for the settlement of his debts under s. 8 of the Act and his application included the decree which had been put into execution by the sale in question.

The main argument of the decree-holder is to the effect that the question of the illegality of the sale should be pleaded at the proper stage of the execution proceedings before the sale actually took place. He contends that such a plea should be regarded as a plea in bar which should be deemed to be waived unless such plea is expressly taken before the sale. In support of this contention reliance is placed upon the decision of the Madras High Court in the case of *Moturi Seshayya v. Venkatadri Appa Row* (1). In that case the learned Judges observed that—

It must be remembered that the plea of *res judicata* is one which does not affect the jurisdiction of the Court, but is a plea in bar of a trial of a suit or an issue, as the case may be, which a party is at liberty to waive.

This case was cited with approval by this Court in the case of *Rajani Kumar Mitra v. Ajmaddin Bhuiya* (2), in which the learned Judges observed that—

If a party does not put forward his plea of *res judicata* in a suit he must be taken to have waived it or it must be taken to be a matter which ought to have been made a ground of attack and deemed to have been a matter directly and substantially in issue in the suit under explanation (IV) of s. 11 of the Code of Civil Procedure.

In the cases cited above, it would appear that the plea of *res judicata* had not been expressly taken in the pleadings and it was on this account that it was held that this defence had been waived. In the present case, however, it cannot be said that the appellant had at any time waived his right to rely on the provisions of s. 35 of the Bengal Agricultural Debtors Act. As soon as he filed his application to

(1) (1916) 36 Ind. Cas. 289, 290.

(2) (1928) 48 C. L. J. 577, 579.

the Debt Settlement Board on June 30, 1938, he was justified in assuming that the Board would comply with the mandatory requirements of s. 34 of the Act and would issue a notice to stay all further proceedings in execution of the decree in respect of any debt which might have been included in his application. Ordinarily, therefore, no occasion would have arisen for him to inform the Court that he had actually made an application to the Board for the settlement of his debts or to contend that, by reason of such application, the decree had become incapable of execution. In this view of the case, the decisions, upon which the learned advocate relies, are of little avail to him.

In my view, there can be no doubt that the intention of the legislature was to provide that all proceedings for the execution of decrees for debts included in an application under s. 8 should be automatically stayed as soon as the application was filed before a Board and, for this purpose, it was provided under s. 34 of the Act that due notice with regard to such application should be given to the civil Court. The terms of this section are mandatory inasmuch as it says that—

the Board shall give notice thereof to such Court in the prescribed manner, and thereupon the suit or proceeding shall be stayed until the Board has either dismissed the application in respect of such debt or made an award thereon.

At the same time, in view of the language of s. 35 of the Act, it is impossible to hold that it could have been the intention of the legislature that a judgment-debtor should be deprived of a valuable right which had been conferred upon him by the Act by reason merely of some carelessness on the part of the Board, which might result in failure to issue the required notice.

It is contended on behalf of the respondent that, when once a rent-sale has been held, the debt must be regarded as satisfied and the matter will, therefore, no longer fall within the scope of the

1940

Tamiz Ali
v.
Mahammad
Nasar Ali
Bhuiya.
Edgley J.

1940

Tamiz Ali
v.
Mahammad
Nasar Ali
Bhuiya.
Edgley J.

Bengal Agricultural Debtors Act and that a rent-sale, which has been held by the civil Court in the exercise of its jurisdiction, cannot be set aside under s. 47 of the Code of Civil Procedure, in a case such as that with which we are now dealing. I am not prepared to accept this contention. The question as to the validity of the execution-sale is clearly a matter which arises between the parties to the suit and relates to the execution of the decree and therefore falls within the purview of s. 47 of the Code of Civil Procedure. At the same time, when once an execution-sale has been held, there is a strong presumption to the effect that it was validly held by a Court which acted in the exercise of its ordinary jurisdiction. This being the case, the onus would lie heavily upon the applicant to show that the sale was in fact illegal on the ground that before the sale he had applied to the Debt Settlement Board for the settlement of his debts and had included in his application the debt in respect of which the execution proceedings had been taken, which resulted in the sale. If the applicant is able to discharge this onus, in my opinion, the Court would have no option but to set aside the sale even if it had received no notice under s. 34 of the Bengal Agricultural Act. The result would, therefore, be that, even if the debt had been extinguished by the sale, it would revive after the sale had been set aside and the provisions of the Bengal Agricultural Debtors Act would apply thereto.

The question whether or not the application under s. 8 of the Bengal Agricultural Debtors Act had actually been made by the appellant to the Debt Settlement Board and whether this application included the decree which he sought to execute in Execution Case No. $\frac{54}{C}$ of 1938 has not been considered by the Courts below. This being the case, the decisions of both the Courts must be set aside and this case is remanded to the trial Court for

further consideration in the light of the above observations. The appeal is, accordingly, allowed,

Costs will abide the final result.

The hearing-fee in this Court is assessed at three gold mohurs.

This order will, however, not have the effect of disturbing the findings of the trial Court with regard to the maintainability of the application and the further finding to the effect that no notice under s. 34 of the Bengal Agricultural Debtors Act was actually issued by the Board.

Appeal allowed; case remanded.

G. K. D.

1940

Tamiz Ali
v.
Mahammad
Nasar Ali
Bhuiya.

Edgley J.