

Dhani Ram appealed to the High Court.

Babu *Umakali Mukerjee* for the appellant.

Babu *Ram Charan Mitra* for the respondent (decree-holder.)

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DHANI
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v.
LUCHMESWAR
SINGH.

The judgment of the High Court (TREVELYAN and BEYERLEY, JJ.) was as follows:—

The only question in this case is whether it is competent to the appellant in these execution proceedings to oppose the application for execution on the ground that the person, who is said to have consented to the decree on his behalf, had no authority to consent to it. In our opinion this is a question which could not be raised in execution. We entirely agree with the view expressed by the Madras High Court in the case of *Sudindra v. Budan* (1). Mr. Justice Hutchins, at page 83, points out that under section 244 the questions to be decided in execution are questions relating to the execution, discharge or satisfaction of the decree. A question whether the decree was obtained by fraud or collusion is not one which relates to the execution of the decree, but which affects its very subsistence and validity. This case is in many respects similar. An application in execution assumes the validity of the decree sought to be executed. If it is competent to a judgment-debtor to raise in execution questions as to the validity of a decree, there seems very little reason why he should not question the propriety of the decree, and thus rip up the whole of the proceedings. We are of opinion that this is not a procedure allowed by law. The appeal is dismissed with costs.

S. C. C.

Appeal dismissed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Rampini.

TROYLUCKHO NATH MOZUMDAR AND OTHERS (DEFENDANTS) v.
PAJIAR KHAN AND OTHERS (PLAINTIFFS.)*

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March 10.

*Public Demands Recovery Act (Bengal Act VII of 1880), sections 2 and 8—
Bengal Act VII of 1868, section 2—Sale for arrears of cesses—Suit to
set aside certificate and sale in execution thereof—Limitation.*

* Appeal from Appellate Order No. 105 of 1895, against the order of Babu Brojo Behari Shome, Subordinate Judge of Khulna, dated 28th of December 1894, reversing the order of Babu Ram Narain Sarkar, Munsif of Satkhira, dated the 21st of May 1894.

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No suit would lie to set aside the sale of a property sold in execution of a certificate issued by the Collector for arrears of cesses, where it was found by the Court that there was an unsatisfied arrear at the time of the sale. The only remedy of the judgment-debtor, whose property has been sold, is by way of an appeal to the Commissioner under section 2 of Bengal Act VII of 1868.

Sadhusaran Singh v. Panchdeo Lal (1) followed.

ONE Pahar Khan and others brought a suit in the Court of the Munsif of Satkhira against one Rajendra Mozumdar and another for recovery of possession of a certain property, by setting aside the certificate issued for arrears of cesses and the sale, which took place in execution thereof, on the allegation that, after the issue of the certificate, they sent the arrears due to the Collector and received a receipt for the same. The defendants, amongst other grounds, objected that the certificate as well as the sale could not be set aside, as the plaintiffs did not bring the suit within one year from the date of the service of the notice, therefore their right was barred by limitation. They also pleaded that no separate suit would lie to set aside the sale. The Munsif dismissed the suit of the plaintiffs, holding that their right to set aside the certificate was barred by limitation. He also held that the principle laid down in the case of *Sadhusaran Singh v. Panchdeo Lal* (1) applied to the present case, and as at the time of the sale there was an arrear due, the plaintiffs' suit was not maintainable. On appeal, the Subordinate Judge, relying upon the case of *Gujraj Sahai v. Secretary of State* (2), held that the suit was maintainable, and remanded the case for trial on the merits.

From this decision the defendants appealed to the High Court.

Babu Lal Mohan Das (Babu Chunder Kant Sen with him) for appellants.—Section 2 of Act VII of 1880 (B. C.) enacts that that Act, so far as is consistent with the tenor thereof, shall be construed as one with Act XI of 1859 and Act VII of 1868 (B. C.) The effect of this is to incorporate in Act VII of 1880 (B. C.) the provisions of Act VII of 1868 (B. C.), including section 2, which prescribes an appeal to the Commissioner against

(1) I. L. R., 14 Calc., 1.

(2) I. L. R., 17 Calc., 414.

any sale held under that Act or Act XI of 1859. That this is so is confirmed by the repeal by Act VII of 1880 (B. C.) of the words "not being a sale made under, and by virtue of, any execution issued upon a certificate made as hereinafter is provided" in section 2 of Act VII of 1868 (B. C.), which was done evidently for the purpose of rendering that section, among others, applicable to a sale held under an execution issued upon a certificate. Section 33 of Act XI of 1859 is not applicable to a sale held under an execution issued upon a certificate made under Act VII of 1880 (B. C.), because a demand for road cess and public works cess is not realisable in the same manner as arrears of revenue are, and also because a sale under an execution issued upon a certificate is held under the provisions of the Civil Procedure Code, and not under Act XI of 1859. The notices required to be served under the two Acts are not the same. Section 33 of Act XI of 1859 allows a suit to set aside a sale, only when such sale is held contrary to the provisions of that Act. It follows, therefore, that an appeal to the Commissioner under section 2 of Act VII of 1868 (B. C.) is the only remedy for a person who seeks to set aside a sale held under a certificate, on the ground of irregularity in publishing or conducting a sale, and of substantial injury resulting therefrom. The remedy provided by section 311 of the Code of Civil Procedure is not applicable to such a sale, for although section 19 of Act VII of 1880 (B. C.) enacts that "all the practice and procedure provided by the Code of Civil Procedure in respect of sales in execution of decrees, &c., shall apply to every execution issued to enforce such certificate," apparently including therein section 311 of the Code of Civil Procedure, yet the only reasonable interpretation of those words is that the procedure relating to sales in execution of decrees *up to the point of sale* and no further is applicable to sales held under Act VII of 1880 (B. C.), for if both section 311 of the Code and section 2 of Act VII of 1868 (B. C.) were applicable to such sales, the person whose property is sold would be entitled to pursue both remedies concurrently, one before the Commissioner and the other before the civil Court, with the possible result that conflicting orders might be made, while there is no appeal to the civil Court from the order of the Commissioner or *vice versa*. This case falls

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within the principle laid down in the case of *Sadhusaran Singh v. Panchdeo Lal* (1); the Court below has misunderstood that decision as well as the observation in the case of *Gujraj Sahai v. Secretary of State* (2).

The respondents did not appear.

The judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) was as follows :—

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* (2) but rather within the ruling in the case of *Sadhusaran Singh v. Panchdeo Lal* (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* (2) 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.

Before us it has been contended that the lower Appellate Court was wrong in 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* (1), in which it has been

(1) I. L. R., 14 Calc., 1.

(2) I. L. R., 17 Calc., 414.

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 under section 2 of Bengal Act VII of 1868." There is nothing in the judgment in the case of *Gujraj Sahai v. Secretary of State* (1), which in any way conflicts with this ruling.

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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.

S. C. G.

Appeal allowed.

Before Mr. Justice Banerjee and Mr. Justice Gordon.

GIREJANUND DATTA JHA AND ANOTHER (PLAINTIFFS, APPELLANTS)
 v. SAILAJANUND DATTA JHA (DEFENDANT, RESPONDENT.) *

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Valuation of Suit—Appeals—Court Fees Act (VII of 1870), section 16 and February 25.
Schedule II, Article 17, Clause iii—Declaratory decree—Consequential relief—Hindu law of endowments—"Charao" (offerings to an idol), Right of the priest in—Arrears of maintenance, Suit for—Indian Limitation Act (XV of 1877), Schedule II, Articles 16, 128, 129.

In a suit upon an *ekrar* executed by the priest of an idol for recovery of arrears of maintenance and for declaration that the money due was realizable from the surplus of the *charao* offerings to the idol, and recoverable from the defendant's successors in office, the original Court passed a decree for the arrears, but refused to make the declaration. The plaintiffs appealed only against the order refusing the declaration, the memorandum of appeal bearing a Court fee stamp of Rs. 10. The respondent objected that the declaration asked for in appeal involved consequential relief and an *ad-valorem* fee was payable by the appellant.

(1) *Held*, the memorandum was correctly stamped under section 16 and clause iii, Article 17, Schedule II of the Court Fees Act (VII of 1870).

Venkappa v. Narasimha (2) and *Vithal Krishna v. Ballerishna Janardun* (3) distinguished.

(2) *Held*, upon a review of the Hindu law on endowments,—where an idol is an ancient one permanently established for public worship and the

* Appeal from Original Decree No. 47 of 1894, against the decree of Babu Madhub Chundra Chakravarti, Subordinate Judge of Bhagalpore, dated 30th of September 1893.

(1) I. L. R., 17 Cal., 414.

(2) I. L. R., 10 Mad., 187.

(3) I. L. R., 10 Bom., 610.