

## FULL BENCH.

Before Courtney Terrell, C.J., James and Manohar Lall, JJ.

1937.

SUKHOO SAO

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 November,  
10, 11.

v.

SITA RAM HAJJAM.\*

*Bihar Tenancy Act, 1885 (Act VIII of 1885), section 174—  
certificate of satisfaction by the decree-holder coupled with  
a deposit of five per cent. for the auction-purchaser, whether  
sufficient.*

Where the decree-holder and the judgment-debtor certified to the court that the decree had been satisfied and the judgment-debtor deposited five per cent. of the purchase money for payment to the auction-purchaser in court, held, that this was a sufficient compliance of section 174 of the Act, and the sale should be set aside.

~~Case~~ *Syed Mohammad Zakiruddin v. Mohammad Naeem*(1), followed.

*Hanuman Singh v. Baijnath Prasad Singh*(2) overruled.

Application in revision by the mortgagees of a portion of the holding.

The facts of the case material to this report will appear from the following order of reference made by Khaja Mohamad Noor, J. while admitting the application :

This is an application in revision against an order of the Munsif of Patna refusing to set aside a sale under section 174 of the Bihar Tenancy Act. It appears that within the period prescribed in that section the petitioners, who are ijaradars of a portion of the holding sold, and the decree-holder filed a joint application certifying to the court that the decree had been satisfied and the petitioners deposited 5 per cent. of the purchase money for payment to the auction-purchaser and asked that the sale be set aside. The auction-purchaser, however, objected to the sale being set aside as the provisions of section 174 of the Bihar Tenancy Act were not strictly complied with. The learned Munsif relying upon the case of *Raghunandan Pandey v. Garju Mandal*(3) decided by Mullick and Ross, JJ. refused to set aside the

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\*Civil Revision no. 307 of 1937, from an order of Babu R. P. Singh, Munsif, 3rd Court, Patna, dated the 25th February, 1937.

(1) (1937) 18 Pat. L. T. 776.

(2) (1936) 18 Pat. L. T. 409.

(3) (1925) I. L. R. 4 Pat. 718.

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sale, and therefore the petitioners have come up to this Court in revision.

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There are two Division Bench cases of this Court both decided by Mullick and Ross, JJ. One of them has already been referred to, and the other is *Sham Narayan Singh v. Basdeo Prasad Singh*(1). The first mentioned case is based upon the observation of the Calcutta High Court in the case of *Kabilaso Koer v. Raghu Nath Saran*(2). No authority seems to have been cited in the second case. Since then Rowland, J. has come to the same conclusion in *Hanuman Singh v. Baijnath Prasad Singh*(3). It is clear, therefore, that the trend of authorities in this Court is in favour of the view taken by the learned Munsif, but it is mostly based upon the view taken by the Calcutta High Court in *Kabilaso Koer v. Raghu Nath Saran*(2). The observation of Petheram, C.J. was, in my opinion and I say so with all respect, obiter dictum, as it was not necessary for the decision of that case, his Lordship having held that the suit itself was not maintainable at all. Since then there have been two decisions in the Calcutta High Court where a contrary view was held. One of them is a Division Bench case. They are *Rani Hemanta Kumari Debi v. Rajendra Kishore Nath Sarkar*(4) and *National Insurance Company, Limited v. Ezekiel Aaron David*(5). With all respect to the views of the Judges of this Court I feel doubt about the correctness of the decisions. It may be argued that payment of money to the decree-holder and then filing an application for setting aside a sale comes within the purview of the section 174, B. T. Act which provides for deposit of the amount recoverable under the decree. There is no provision that the decree-holder is not entitled to realise the decretal amount after the sale and before its confirmation. If the decree is satisfied after the sale, there is nothing recoverable under it and, therefore, nothing need be deposited so far as the decretal amount is concerned. At any rate the question requires consideration.

This application will be heard. Notices will be issued. I direct that the case may be placed before a Division Bench for hearing.

The case was then ordered to be heard by a larger Bench by Courtney Terrell, C.J.

On this reference.

*Naemul Huq*, for the petitioner: There has been a sufficient compliance with section 174 of the Bihar Tenancy Act. It makes no difference whether the money is *deposited in court* to the credit of the decree-holder or is paid direct to the decree-holder.

(1) (1925) 7 Pat. L. T. 25.

(2) (1891) I. L. R. 18 Cal. 481.

(3) (1936) 18 Pat. L. T. 409.

(4) (1926) A. I. R. (Cal.) 1236.

(5) (1937) 41 Cal. W. N. 998.

The learned Munsif has followed *Raghunandan Pandey v. Garju Mandal*(1). To the same effect is the decision in *Sham Narayan Singh v. Basdeo Prasad Singh*(2). But I rely on *Rani Hemanta Kumari Debi v. Rajendra Kishore Nath Sarkar*(3) and *Syed Mohammad Zakiruddin v. Mohammad Naeem*(4).

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[At this stage their Lordships called upon the respondent.]

*B. C. Sinha*, for the respondent: Section 174 of the Bihar Tenancy Act contains a complete procedure which must be followed. The interest of the auction-purchaser has to be protected. That has been made clear by their Lordships of the Judicial Committee when they point out that after the sale has been held, it can be set aside only on strict compliance with the provisions of Order XXI, Rule 89, Code of Civil Procedure [See *Seth Nanhe Lal v. Umrao Singh*(5).]

[LALL, J.—That case arose out of a suit brought to set aside an execution sale on the ground that the decree-holder had been paid off, but there was no application for setting aside the sale made to the executing court within thirty days.]

If direct payment to the decree-holder were to be countenanced, it will open a door to collusion and fraud.

[LALL, J.—Where is the question of collusion when both the decree-holder and the judgment-debtor inform the court within thirty days that the former has received the full amount?]

After the sale there can be no adjustment of the decree between the decree-holder and the judgment-debtor alone. I rely on *Raghunandan Pandey v.*

(1) (1925) I. L. R. 4 Pat. 718.

(2) (1925) 7 Pat. L. T. 25.

(3) (1926) A. I. R. (Cal.) 1236.

(4) (1937) 18 Pat. L. T. 776.

(5) (1930) 35 Cal. W. N. 381, P. C.

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*Garju Mandal*<sup>(1)</sup>, *Hanuman Singh v. Baijnath Prasad Singh*<sup>(2)</sup>, *Kabilaso Koer v. Raghunath Saran*<sup>(3)</sup> and *Shiva Prasad v. Tapsi Singh*<sup>(4)</sup>.

*Naemul Hug*, not called upon in reply.

S. A. K.

COURTNEY TERRELL, C.J., JAMES AND MANOHAR LALL, JJ.—This is an application in revision against an order of the Munsif of Patna refusing to set aside a sale under section 174 of the Bihar Tenancy Act. The application was originally heard by Mohamad Noor, J. sitting singly and he referred it to a Division Bench and it has ultimately come over to this Bench. The reason why the learned Judge referred it to the Division Bench was that a certain conflict of opinion appeared to exist between two points of view—the one represented by a judgment of Rowland, J. in *Hanuman Singh v. Baijnath Prasad Singh*<sup>(2)</sup> and the other represented by a later decision of Manohar Lall, J. in *Syed Mohammad Zakiruddin v. Mohammad Naeem*<sup>(5)</sup>.

The facts are simply stated. After a sale and within thirty days of the sale the decree-holder and the judgment-debtor certified to the court that the decree had been satisfied and fully paid and the ijaradars deposited five per cent. of the purchase money for payment to the auction-purchaser and asked that the sale be set aside. It was contended by the auction-purchaser that the provisions of section 174 had not been fulfilled and that it was necessary for the judgment-debtor, notwithstanding any satisfaction of the decree which may have taken place, to deposit the amount of the decretal debt in court for the benefit of the decree-holder (whether or not the decree-holder could afterwards take it out or not) in addition to depositing the five per cent. of

(1) (1925) I. L. R. 4 Pat. 718.

(2) (1936) 18 Pat. L. T. 409.

(3) (1891) I. L. R. 18 Cal. 481.

(4) (1935) Civil Revision no. 478 of 1935.

(5) (1937) 18 Pat. L. T. 776.

the purchase money. On the other hand, it was contended that there had been a substantial compliance of section 174, and the question before the Court is as to whether in the circumstances the section has been complied with.

We have carefully read the two judgments in question in which numerous prior decisions have been dealt with, and we desire merely to say that we are in full agreement with the judgment of Manohar Lall, J. that in such circumstances the section has been complied with and the Munsif should have set aside the sale. It is unnecessary to review the authorities because Manohar Lall, J. has already done so in his judgment and we think correctly.

In the result the application in revision will be allowed and the sale will be set aside and the auction-purchaser must pay the costs throughout: hearing fee three gold mohurs.

It would appear that the petitioners, who were ijaradars of a portion of the holding sold, also lodged an appeal before the District Judge. The District Judge felt himself bound by the authority of the judgment of Ross, J. in *Raghunandan Pandey v. Garju Mandal*<sup>(1)</sup> and dismissed the appeal for that reason. He, however, also might properly have come to the conclusion that no appeal lay, and it is not argued before us that any appeal does lie in law from the order of the Munsif being the matter in revision only. In these circumstances all we need do is to set aside the judgment of the District Judge, but no further order in respect of costs is necessary beyond what we have just made.

*Rule made absolute.*

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