1901

RAM TARUCK HAZRA v. DILWAR ALI.

Rampini J.

sold does lie in an appeal to the Commissioner under s. 2 of Act VII (B. C.) of 1868. I think I am bound to hold this on the authority of the cases cited in the referring order, namely, the case of *Sadhusaran Singh* v. *Panchdeo Lal* (1) and the case of *Troyluckho Nath Mozumdar* v. *Pahar Khan* (2). The reasons given in these cases for this view are that in s. 2 of Act VII (B. C.) of 1880 it is provided that the two Acts XI of 1859 and Act VII (B. C.) of 1868, together with Act VII (B. C.) of 1880 itself, are to be read as one Act. By the provisions of s. 2 of Act VII (B.C.) of 1868, an appeal lies to the Commissioner by a person who is aggrieved, and who wishes to complain of any irregularity in publishing or conducting the sale, and by the final words of the section the order of the Commissioner in such an appeal is final. Nothing has been said before us to-day which satisfies me that these reasons are incorrect. Indeed no attempt has been made to controvert this reasoning. I must therefore adhere to the conclusion arrived at in those cases.

Of course I must not be understood as implying that no suit will lie in a Civil Court to set aside a sale on grounds other than that of irregularity in publishing or conducting a sale, such as fraud, absence of a good and valid certificate, non-service of notice under s. 10, Act VII (B.C.) of 1880, in such a way as to make it binding on the judgment-debtor, or other grounds of the like nature.

M. N. R. *Referred back to the Division Bench.*

[The decision of the Division Bench is reported in the foot-note.*]

(1) (1886) I. L. R. 14 Calc. 1. (2) (1896) I. L. R. 23 Calc. 641.

* *Before Mr. Justice Banerjee and Mr. Justice Brett.*

1901

June 21 *and July* 5.

RAM TARUCK HAZRA (DEFENDANT No. 2) *v.* DILWAR ALI AND ANOTHER (PLAINTIFFS). †

Public Demands Recovery Act (Bengal Act VII of 1880) s. 19—Suit to set aside a sale in execution of a certificate—Bengal Act I of 1895, ss. 19, 20—Act XI of 1859—Civil Procedure Code, ss. 11, 244, 287, 311, 312, 316, 588 (16), 595.

† Appeal from Original Decree No. 14 of 1898, against the decree of Babu Kedar Nath Mozumdar, Subordinate Judge of Burdwan, dated the 13th November 1897.

1901

RAM TARUCK HAZRA v. DILWAR ALI.

A suit to set aside a sale held in enforcement of a certificate under the Public Demands Recovery Act is a suit of a civil nature, which is barred neither by s. 244 nor by s. 312 of the Code of Civil Procedure.

JUNE 21. *Dr. Asutosh Mukerjee and Moulavi Sirajul Islam* and *Babus Gobinda Chandra Dey Roy* and *Turit Mohun Dass*, for the appellant.

Babu Ram Churn Mitter, Lal Mohun Das, Karuna Sindhu Mukerjee and *Jnanendra Nath Bose*, for the respondents.

JULY 5. BANERJEE and BRETT JJ. This appeal arises out of a suit brought by the plaintiffs respondents to set aside a sale under the Public Demands Recovery Act (VII of 1880 B. C.) and to recover possession of a certain share of the property sold, upon establishment of the plaintiffs' right to the same. The main allegations upon which the suit is based are, that *mouza* Bagh Kalapahar bearing No. 1381 on the touji or register of the Burdwan Collectorate belonged to the plaintiffs and the defendants Nos. 2 to 9, the share of the plaintiffs being 8 annas 3 *gundas* 1 *kara* 1 *kranti*; that the Collector of the District filed a certificate naming the plaintiffs and some of their co-sharers as debtors, and stating that a certain sum of money was due from them as road cess on account of *mehal* No. 1381 which was erroneously named as *mouza* Kathalgachi; that the sale proclamation which contained the same erroneous statement was published in *mouza* Kathalgachi and not in *mouza* Bagh Kalapahar, and owing to this want of due publication, Bagh Kalapahar, which was worth Rs. 25,000, was sold only for Rs. 165 and that the sale was fraudulently brought about by defendants 3 and 4 who bought the property in the name of defendant No. 1 and then made him execute a release in the name of their relative defendant No. 2.

The defendant No. 2 in his written statement claimed to be the real purchaser at the sale in question, denied the plaintiffs' allegations about the non-service of the sale proclamation and the value of the property sold; and urged that the sale was valid. Defendants No. 3 and 4 denied the allegation of fraud and disclaimed all connection with the sale and purchase. Defendant No. 8, who was one of the debtors named in the certificate, supported the plaintiffs. And the Secretary of State for India, who was made a defendant, admitted that the sale was bad for want of due publication of the sale proclamation.

The first Court found that the allegation of fraud was not proved, that defendant No. 2 was the real purchaser at the auction sale, that the sale proclamation was published in Kathalgachi and not in Bagh Kalapahar, and that the property was sold in consequence at an inadequate price; and following the case of *Ramlogan Ojha* v. *Bhawani Ojha* (1), it set aside the sale and gave the plaintiffs a decree for possession of the share claimed.

Against that decree defendant No. 2 has preferred this appeal. The

(1) (1886) I. L. R. 14 Calc. 9.

1901

RAM TARUCK HAZRA v. DILWAR ALI.

appeal was heard by Mr. Justice RAMPINI and Mr. Justice PRATT, and as those learned Judges differed in opinion upon the question whether the suit was maintainable, the case has been referred to us under s. 575 of the Code of Civil Procedure. At the first hearing before us, it appearing that there was a conflict of decisions in this Court upon one of the questions that arose in the case, namely, the question whether a civil suit lies for setting aside a sale held in enforcement of a certificate under Act VII of 1880, B. C., on the ground of the sale being vitiated by material irregularity leading to injury or whether the only remedy of the debtor lay in an appeal to the Commissioner under s. 2 of Act VII of 1868, B. C., we referred that question to a Full Bench for determination. A majority of the Full Bench having answered the question in the manner following, namely, that s. 2 of Act VII of 1868 B. C., is no bar to a civil suit, the case now comes back to us for determination.

The learned vakil for the appellant very properly says that he is not prepared to question the correctness of the finding of the first Court, which has been upheld by the two learned Judges of this Court, who heard this appeal in the first instance, that there was no publication of the sale proclamation in Bagh Kalapahar, the property sold ; nor does he dispute the correctness of the view taken by Mr. Justice PRATT, as to the value of the property, that "at the lowest estimate it must be worth Rs. 10,000 to Rs. 12,000." The only contentions now raised before us on behalf of the appellant are, *first*, that upon the facts, this case does not come within the principle laid down in *Ramlogan Ojha* v. *Bhawani Ojha* (1) and *second*, that this suit is not one of a civil nature within the meaning of s. 11 of the Code of Civil Procedure, and even if it is, it is barred by ss. 244 and 312 of the Code.

In support of the first contention, it is argued that the principle upon which the case of *Ramlogan Ojha* v. *Bhawani Ojha* (1) is based is that when one property is advertised for sale by public auction, and a different property is sold, the sale is an absolute nullity ; but that principle is not applicable to this case, as here the property advertized for sale was Estate No. 1381 of the Burdwan Collector's Touji, and that was the property sold, the fact of the sale proclamation giving the property a wrong name, *mouza* Kathalgachi, instead of its correct name, *mouza* Bagh Kalapahar being altogether immaterial. That no doubt is the view taken by Mr. Justice RAMPINI, but with all respect for the opinion of that learned Judge, we are unable to assent to it in this case. We think, in concurrence with the Court below and with Mr. Justice PRATT, that the misdescription in the sale proclamation in this case brings it quite within the rule laid down in the case of *Ramlogan Ojha* v. *Bhawani Ojha* (1). S. 19 of Act VII of 1880 (B. C.) under which the sale in question was held, makes the practice and procedure provided by the

(1) (1886) I. L. R. 14 Calc. 9.

1901

RAM TARUCK HAZRA v. DILWAR ALI.

Code of Civil Procedure applicable to such sales and s. 287 of the Code of Civil Procedure requires that the sale proclamation should specify the property as fairly and accurately as possible; and "Pargana Haveli, Tauzi No. 1381, *mehal* Kathalgachi," the description in the sale proclamation in this case, was neither an accurate nor a fair description of *mehal* Bagh Kalapahar, Tauzi No. 1381, Pargana Haveli, the property sold. An estate is generally known and recognized by its name and not by its Tauzi number, which even the owner of it may not always carry in his recollection; and the description given in the sale proclamation must have led most people to think that *mehal* Kathalgachi was the property that was going be sold; the fact of the tauzi number given not corresponding to the *mehal*, being either not adverted to, or not considered material. The first contention of the appellant must therefore fail.

The second contention has three branches.

As to the first branch of this contention, namely, that this suit is not a suit of a civil nature within the meaning of s. 11 of the Code of Civil Procedure and not cognizable by the Civil Court, it is enough to say that no authority has been cited in its support, and we see no reason for holding that a suit to set aside an irregular sale of the plaintiffs' property in satisfaction of a debt is not a suit of a civil nature.

The second branch of the second contention, namely, that the suit is barred by s. 244 of the Civil Procedure Code, is equally untenable. S. 19 of Act VII of 1880 (B. C.), which is relied upon in its support, makes the practice and procedure provided by the Code of Civil Procedure in respect of sales in execution of decrees and certain other matters applicable to execution issued under the Public Demands Recovery Act of 1880. But the scope of s. 244 does not concern any of those matters.

The third branch of the second contention, namely, that the suit is barred by s. 312 of the Code of Civil Procedure, deserves a little more consideration. It might seem at first sight that the procedure provided by the Code which is made applicable to sales under the Public Demands Recovery Act by s. 19 of the Act, includes s. 312 of the Code. But the contention is opposed to the case of *Ramlogan Ojha* v. *Bhawani Ojha* (1), which we are bound to follow so long as it is not overruled by a Full Bench of this Court or by the Privy Council. Moreover, as pointed out in the case just referred to, what s. 19 of Act VII of 1880 (B. C.) makes applicable to sales under that Act is the Procedure provided by the Code of Civil Procedure in carrying out execution sales to their completion, and not the supplementary procedure provided for enquiring into applications for setting aside sales, nor the further provision in s. 312 prohibiting suits.

It is argued that the decision of the Full Bench in *Bishambhur Haldar* v. *Bonomali Haldar* (2), by holding that s. 316 of the Code of Civil

(1) (1886) I. L. R. 14 Calc. 9. (2) (1899) I. L. R. 26 Calc. 414.

1901

RAM TARUCK HAZRA v. DILWAR ALI.

Procedure applies to sales under the Public Demands Recovery Act of 1880, has in effect overruled *Ramlogan Ojha* v. *Bhawani Ojha* (1), and made s. 312 applicable to such sales. We do not consider this argument sound.

"There is," as I observed in my judgment[a] in the Full Bench case just referred to, "in my opinion a clear distinction between the proceedings leading to the sale and to its completion by the grant of a certificate of sale to the auction purchaser and separate and antagonistic, though simultaneous, proceedings instituted by a judgment-debtor, or by a decree-holder or by a third party, to have the sale set aside."

But, if any doubt remains upon the language of the law, it will be removed when we look to the reason of the thing. Act VII of 1880 (B. C.) was intended to provide a summary mode for the realisation of certain public demands by authorising revenue officers to file certificates of those demands being due, which are to have the force and effect of decrees, and by providing that those officers may enforce their certificates by the procedure provided by the Code of Civil Procedure for execution of decrees for money. But it by no means follows that the Legislature intended that the rule in s. 312 of the Code, prohibiting a civil suit for setting aside an execution sale, should apply to sales held to enforce such certificates.

The Code of Civil Procedure, while prohibiting a civil suit to set aside an execution sale, provides, against an order setting aside or refusing to set aside such a sale, (See s. 588, cl. 16) an appeal which may sometimes lie to the High Court, and a further appeal (See s. 595) to the Privy Council, where the value of the subject matter in dispute comes up to the appealable amount. In the absence of any such provision in the Public Demands Recovery Act of 1880, would it be reasonable to suppose that the Legislature intended to bar a civil suit for setting aside a sale under that Act, when such a suit is allowed in the case of a sale for arrears of Government revenue under Act XI of 1859? We think not.

It is argued that s. 20 of Act I of 1895, B. C., the Public Demands Recovery Act now in force (as amended by Act I of 1897 B. C.), makes s. 311 of the Code of Civil Procedure expressly applicable to sales under the certificate procedure, and that this shews that the Legislature intended s. 312 to be applicable to sales under the Act of 1880. But this argument is, in our opinion, not sound. S. 20 of the new Act by referring only to s. 311 of the Code shews by implication that the provision in s. 312 prohibiting a civil suit is not intended to apply to sales under the Act. Nor does the language of s. 19 of the present Act go further than that of the Act of 1880. The inference deducible from the change in the law, so far as it has been changed, is in our opinion rather adverse to the appellant's contention than in its favour.

[a] Judgment of Banerjee J.

(1) (1886) I. L. R. 14 Calc. 9.

1901

RAM TARUCK HAZRA v. DILWAR ALI

We cannot hold that the jurisdiction of the Civil Court to entertain a suit has been taken away by implication in the case.

For all these reasons we think the third branch of the second contention of the appellant must also fail.

On the merits we have already held that the sale in question was grossly irregular, one property having been advertized for sale and a different property sold. Indeed, we may go further and hold that the officer of the Court had no authority to sell the property that has been sold. And there can be no question that the petitioner has sustained substantial injury, property worth at least Rs. 10,000 having been sold for Rs. 165. That being so, the sale has been rightly set aside by the Court below.

Before concluding, we would observe that for a small arrear of Rs. 131-5 annas stated in the certificate (Ex. 14), as due on account of road cess of a *mouza* erroneously named Kathalgachi, a valuable property of the debtors worth at least Rs. 10,000 has been sold without any proper sale proclamation, without the observance of any of that caution as to the necessity for which their Lordships of the Privy Council in *Baijnath Sahai* v. *Ramgut Singh* (1) remark: "They entirely concur in the observations regarding the necessity for caution in sales of this description by public officers with which the Judges of the High Court conclude their judgment."

In the result then we concur in the view taken by Mr. Justice PRATT, and this appeal must therefore under s. 575 of the Code of Civil Procedure be dismissed, and the decree of the Court below affirmed with costs. We assess the hearing fee in this Court at Rs. 850.

M. N. R. *Appeal dismissed.*

(1) (1896) I. L. R. 23 Calc. 775.