

Sheikh Ariatullah Vs Sashi Bhusan Hazrah

Court: Calcutta High Court

Date of Decision: Aug. 27, 1919

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 91, Order 21 Rule 92, 47

Citation: 55 Ind. Cas. 547

Hon'ble Judges: John Woodroffe, J; Chatterjea, J

Bench: Division Bench

Judgement

Chatterjea, J.

These appeals arise out of proceedings for setting aside two sales held in execution of two decrees for rent on the ground

that the sales were illegal.

2. It appears that in two rent suits brought in the year 1912 the plaintiff claimed rent at the rate of Rs. 22 and Rs. 18 respectively, those being the

rents entered in the settlement proceedings. The defendants pleaded that the rents were Rs. 12 9-0 and Rs. 11 only. The suits were decreed on the

18th February 1913 on the following terms: The suits be decreed with costs, but the plaintiff will be at liberty to execute the decree to the extent

based on the Jama admitted in the defence after one month. As regards the balance of the decretal sums, the plaintiff will execute them as soon as

the review be rejected, if the review be granted, the plaintiff should postpone execution of the balances for two years and nine months or earlier

when the settlement suits are disposed of." As a matter of fact there was no application for review pending at that time, and the order was based

on a mistake of fact. The decree-holder on the 12th April 1913 took out execution for the full amounts. On the 16th May the judgment debtor

applied for review of judgment stating that no application for review was pending when the decree was passed, and applied for postponement of

the sale pending the disposal of the application for review. The sale was postponed till the 16th June if the decretal amounts were deposited by that

date, and again postponed till the 23rd June 1913, but the money not being deposited the sale took place on that date. The judgment debtor on the

21st July 1913 applied to have the sales set aside on deposit of the decretal amounts. The amounts to be deposited were settled by the Court, and

they were deposited on the 24th July, and the sales were set aside on the 31st July. The decree holder appealed against the said order, and the

Appellate Court remanded the cases on the 4th June 1914 for re-settlement of the decretal amounts. As a result of the resettlement the orders

setting aside the sales were confirmed. The decree-holder again appealed, but the Appellate Court confirmed the order of the Court of first

instance setting aside the sales. The decree-holder moved this Court, and this Court on the 3rd April 1917 set aside the order setting aside the

sales, on the ground that the amounts mentioned in the sale proclamation had not been deposited.

3. In the meantime the application for review made on the 16th May 1913 was allowed on the 18th November 1913, and the following order was

passed: This is an application for review. The ground is that there is a palpable error in the judgment. In the order portion of the judgment it is

stated that the plaintiff will execute them (the decrees) as soon as the review is rejected." But I am informed by the Pleader on both sides that at

the time the judgment was delivered or at any time no review regarding any suit concerning the Jamas in dispute was pending. The review was with

regard to other Jamas in dispute in a number of analogous suits. With regard to the disputed Jamas a title suit was pending and is still pending

between the parties. The reference to the review is evidently a mistake and on this ground a review may be granted. Evidently what the Court

meant is that the parties should wait till the suits are disposed of or for a reasonable time. Ordered that the application be allowed but without

costs. In the order portion of the judgment instead of the words as regards the balance of the decretal sums" etc., the following words, will be

substituted in the judgment and the decree: "As regards the balance of the decretal sums plaintiff will execute "them as soon as the appeal be

disposed of or within two years and six months if the appeal be disposed of earlier, and it is further ordered that the decree of the appeal will

govern these cases."

4. As stated above, the order of the Courts below setting aside the sales was set aside by the High Court on the 3rd April 1917, and the decree-

holder on the 29th September 1917 applied for confirmation of the sales. The judgment-debtor thereupon put in an application to have the sales

set aside u/s 47 and Order XXI, Rule 90, of the Civil Procedure Code, and also objected to the confirmation of the sale applied for by the

decree-holder, The Court of first instance made an order setting aside the sales, but on appeal that order was reversed. The judgment-debtor has

appealed to this Court.

5. It is contended on behalf of the appellant that the original decree was set aside or amended on review on the 18th November 1913; under that

decree the decree holder was entitled to take out execution only for a portion of the amount decreed and could not take out execution for the

entire amount until the disposal of the appeal in the suit then pending. The sale, therefore, held in execution of the said decree was illegal, and the

Court could not confirm such illegal sale, and that no question of limitation applies with respect to the objection to the confirmation of the sale.

Secondly, that even if the question of limitation arises, the right to apply to set aside the sale arose on the 3rd April 1917 when the High Court set

aside the orders of the Court below setting aside the sales, and that in any case the judgment-debtor is entitled to a deduction of the period

between the 31st July 1913, when the sales were set aside by the Court of first instance, and the 3rd April 1917, the date of the order of the High

Court, and deducting the said period" the present application u/s 47 was well within 3 years under Article 181 of the Limitation Act.

6. With regard to the first contention it appears that at the time when the sales took place (23rd June 1913), the application for review was

pending, and the order passed upon the application shows that the decree-holder was not entitled to take out execution for the entire decretal

amount until the disposal of the suit (or the appeal in the suit) which was then pending. The sale held for realization of the entire amount of the

decree, according to the order passed on review, was, therefore, illegal, and the question is whether the Court would be justified in refusing to

confirm the sale if it finds that the decree under which the sale was held has subsequently been set aside or amended. It is contended on behalf of

the respondent that under the present CPC the sale really does not require confirmation if there is no application under Order XXI, Rules 89, 90

and 91, or if there is any such application and the application is disallowed. It is pointed out that the proviso to Section 316 of Act XIV of 1882

has been left from the present Code. That proviso ran as follows:

Provided that the decree under which the sale took place was still subsisting at that date.

7. It is contended that the result of the omission of the proviso is that the Court is bound to confirm the sale if there is no application under Rules

89, 90 or 91 or if such an application is made and disallowed, whether or not there was a subsisting decree under which the sale is held. Now, if

there is no subsisting decree the sale must be set aside u/s 47 of the Code, and although there may be an application u/s 47 to set aside the sale on

such a ground pending, the sale must (according to the respondent's contention) be confirmed under Order XXI, Rule 92, though the next moment

the sale will have to be set aside u/s 47 on the ground that there was no subsisting decree. We do not think that that is contemplated by Order XXI,

Rule 92. Order XXI, Rules 89, 90, 91 and 92, presupposes a valid decree under which the sale is held, and the first three rules provide for setting

aside the sales, and Rule 92, says that if there be no application for setting aside the sale, or such an application is made and disallowed, the sale

shall be confirmed, Rule 92 does not affect the power of the Court to refuse to confirm a sale, or make it compulsory to confirm the sale when the

Court finds that the sale is held under a decree which did not authorize the sale. It seems unreasonable that the Court must confirm a sale under

Order XXI, Rule 92, although it finds that the foundation for the sale is gone, and then proceed to set aside the sale which, it has confirmed, being

fully aware that the sale was illegal. In the present case having regard to the order passed on review, it must be held that execution could not be

taken out for the amount for which execution was taken out, and the sales took place for amounts in respect of which there were no decrees

existing at the time.

8. In these circumstances we think the Court would be justified in refusing to confirm the sale. The learned Pleader for the respondent has brought

to our notice that the suit which was pending at the date of the sale has been decided against the judgment-debtor, the result of which is that the

decree-holder is entitled to the full amounts of the decrees passed in the rent suits, but the decision of the title suit was subsequent to the sale, and

cannot validate the sale held in execution of the decree under which the full amount could not at that time be recovered.

9. The next question for consideration is whether the application u/s 47 is barred by limitation. The Article applicable is Article 181 of the

Limitation Act, which provides for a period of 3 years from the time "when the right to apply accrues." Now before the 18th November 1913

when the order was passed on review, the judgment-debtor could not apply u/s 47, and before that order was passed, the sale had been set aside

by the Court of first instance on the 31st July 1913. It is contended on behalf of the respondent that the sale was set aside under Order XXI, Rule

89. That is so, but the judgment-debtor could not apply u/s 47 to set aside a sale which had already been set aside on the 31st July 1913, though

under Order XXI, Rule 89, the order setting aside the sales was ultimately set aside by this Court on the 3rd April 1917. Whether it be held that

the right to apply to set aside the sales under the circumstances did not arise until the 3rd April 1917 when the order of the High Court was made,

or that the limitation remained in suspense between the 31st July 1913 and the 3rd April 1917, the application is not barred by limitation.

10. The order of the Court of Appeal below is accordingly set aside, and that of the Court of first instance restored.
Having regard to all the

circumstances of the case we direct that each party do bear his own costs in all Courts.

Woodroffe, J.

11. I agree.