

(1869) 04 CAL CK 0040

Calcutta High Court

Case No: Special Appeal No. 2683 of 1868

Didar Bax Shah and Others

APPELLANT

Vs

Sheikh Nabi Bax

RESPONDENT

Date of Decision: April 7, 1869

Judgement

Kemp, J.

This was a suit to set aside a sale conducted under the provisions of Act X of 1859, on the score of illegality. The Court of first instance held, that the suit was cognizable by the Civil Court, but on the merits dismissed it. On appeal, the Judge held, that as no fraud was alleged, the suit would not lie: Nilmoney Bonick v. Puddolochun Chuckerbutty Case No. 1678 of 1865; 5th Feb. 1866 (B.L.R. Sup. 379). On special appeal this Court, present Kemp and E. Jackson, JJ., on the 27th May 1868, remanded the case for trial, observing that the objections to the sale raised questions of illegality, which, if established, would render the sale null and void. The Court further observed that a suit to declare a sale null and void, on the ground of illegality, would lie in the Civil Court. See the case of Jokee Lal v. Nursing Narain Singh 4 W.R., Act Rul. 5. The Judge, on remand, held, and we think rightly, that his enquiry was restricted by the order of remand to the question, whether either or both of the illegalities alleged had been established. The first allegation was, that at the time of the sale, a warrant of execution against the judgment-debtor's movable property was still in force. The Judge was of opinion, that the warrant ceased to be in force on the 26th January, and that the proceedings of the Collector in attaching and selling the immovable property of the judgment-debtor were not without jurisdiction. The second allegation was, that the purchase-money was not paid in by the eighth day after the sale, as prescribed in section 9, Regulation VIII of 1819, in conformity with which sales under Act VIII of 1835 are required to be conducted. On this, the Judge observes: "that it is admitted that the purchase-money was not paid until the fourteenth day after the sale; but it was urged that by reason of the press of work in the Collectorate at that time, on account of its being a quarter rent-paying season, the special appellants could not get the money taken at the treasury

earlier." This excuse the Judge found to be of "no value," inasmuch as the auction-purchasers do not say that they brought the purchase-money to the Deputy Collector, who held the sale within eight days, and that he declined to receive it. "As then," concludes the Judge, "the purchase-money was not paid in by the eighth day, according to section 9, Regulation VIII of 1819, the tenure sold ought to have been re-advertised for sale and re-sold, and the sale held, by reason of the failure to pay in the purchase-money by the eighth day, became null and void."

2. The plaintiffs' suit was decreed, the sale set aside, and the plaintiffs declared to be entitled to obtain possession of the tenure sold, with costs against the defendants in special appeal, it is contended--

1st. That the Judge was in error in thinking that the remand order precluded any inquiry as to the question, whether the illegalities alleged, if established, amounted to such illegalities as would render the sale null and void.

2nd. That the mere non-payment of the purchase-money within eight days, does not amount to such an irregularity as to make the sale null and void.

3rd. That the plaintiff might have a cause of action if he could show that the non-payment of the purchase-money, within eight days, produced a material injury to his interest.

3. A cross-appeal is preferred by the plaintiffs, special respondents, against the finding of the Judge, on the question of the warrant against the movable property of the judgment-debtor not being in force when the proceedings against the immovable property were taken. On the first point taken in special appeal, I am of opinion that the order of remand is clear and distinct to the effect, that the allegations of illegalities, if established, amount to such illegalities as would render the sale null and void. This appears the more clear from our judgment in review when the case was re-argued by the learned counsel, Mr. Piffard, for the special appellant, then applicant for review, for we then observed that there could be no question, that if the illegalities complained of were established, the sale was illegal. Mr. Piffard, however, urged that though the Court was right so far, the Court was not competent to direct a Civil Court to enquire into such points which had been formally decided by the Collector and Revenue Commissioner, but he was unable to show that the Revenue Courts had decided the points raised before us in special appeal. The learned counsel for the special appellant, Mr. Peterson, has attempted to re-argue a point which has already been decided in our former decision remanding the case, and to which we adhered after hearing the case re-argued in review.

4. I think it more convenient to take the cross-appeal first, for Mr. Peterson, in the course of his argument, admits that the sale can be set aside on two grounds: 1st, fraud; 2nd, want of jurisdiction. Now it is clear that, if the allegation of the special respondent, that there was a warrant against his movable property in force, when

the Collector attached and directed the sale of the tenure be established, the act of the Collector in holding the sale was wholly without jurisdiction. This is clearly laid down in *Jokee Lal v. Nursing Narain Singh* 4 W.R. Act X Rul., 5 quoted in our judgment.

5. u/s 88, Act X of 1859, every warrant of execution shall continue in force for such period as the Collector may direct, not being more than sixty days calculated from the date upon which the warrant is signed by the Collector. Now, in the present case, it is clear that, on the 3rd February, after the return of the Nazir to the effect that no movables were forthcoming, the decree-holder, the special appellant, was allowed by order of the Collector four days' time within which to point out further movable property belonging to his judgment-debtors, the special respondents. This was an enlargement of the time u/s 88 of the Act, and the original warrant, which on the 3rd of February, was not 60 days' old, remained in full force. No fresh warrant, as supposed by the Judge, was necessary. The order of the Collector on the 2nd of February (before the period granted by him to the decree-holder to point out further movable property of the judgment-debtor had elapsed) directing the sale of the immovable property, and the sale which followed in pursuance of that order, were wholly without jurisdiction, and must be set aside. It appears to me unnecessary to go further into the case, as a clear illegality on the score of want of jurisdiction has been established on the cross-appeal of the plaintiffs, special respondents. I may, however, remark that the second ground of illegality alleged by the plaintiffs was held to be one which, if established, would render the sale null and void under our order of remand and judgment in review.

6. I would dismiss the special appeal of the defendant with costs, and affirm the decision of the Judge setting aside the sale and restoring the plaintiffs to possession. The cross-appeal of the plaintiff, special respondent, is decreed with costs.

Glover, J.

I concur in dismissing this special appeal on the objection taken in cross-appeal by the special respondents.