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Court : Kolkata

Decided On : Jan-19-1933

Reported in : AIR1933Cal636a

Appellant : Sm. Balkish Bibi and ors.

Respondent : Faridal Alam and anr.

Judgement :

Mitter, J.

1. The question raised by this appeal turns on the construction of Sections 33 and 34, Revenue Sales Act-Act 11 of 1859. It appears that the property of the appellants before us was sold at what purports to be a revenue sale under Act 11 of 1859. A suit was brought by the appellants for setting aside that sale which was in respect of a tenure to which the combined provisions of Act 11 of 1859 and Act 7 of 1858 of the Bengal Council were applicable. The suit ultimately resulted in a decree by the High Court in favour of the appellants-a decree setting aside the sale. The High Court was of opinion that the sale was altogether without jurisdiction as there was no arrears of revenue due from the appellants. The Judges were of opinion that the case was governed by the decision of their Lordships of the Judicial Committee in the case of Haji Buksh Elahi v. Durlav Chandra, Kar (1912) 39 Cal 981 and that the sale was premature and, as has already been stated, without jurisdiction and liable to be set aside. After this

decision of the High Court which is dated 23rd August 1928, there was an application for execution of the decree of the High Court which directed not only the setting aside of the sale but declared that the plaintiffs the appellants would be entitled to recover possession of the properties if they had been dispossessed.

2. The present application for execution out of which this appeal arises was filed before the Court of the Subordinate Judge at Chittagong on 24th November 1930. To this application the present respondents objected on the ground that the application for execution was barred under the provisions of Section 34, Act 11 of 1859, it not having been filed within six months as is provided for in that section. The objection prevailed with the learned Subordinate Judge of the Court below and he came to the conclusion that the application for execution having been made beyond the statutory period as is provided under Section 34 it was clearly time-barred. He dismissed the execution case. Against this order the present appeal has been brought by the decree-holders and it has been contended on their behalf that the provisions of Section 34, Act 11 of 1859, are not attracted to the facts of this case seeing that the sale was not under Act 11 of 1859 but it was held in a case where there had been no arrears of revenue according to the findings of the highest Court of appeal in India. It is argued that by the express terms of Section 34, the section applies if the sale is made under the Act and the sale in the present case is not under the Act as on the findings there was no arrears of revenue. This view is supported by the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Balkishen Das v. Simpson* (1898) 25 Cal 833, where their Lordships of the Judicial Committee made the following observations. Lord Watson in delivering the judgment said this:

Section 3, Act 11 of 1859, provides that, in default of payment of revenue, within the time appointed for each district by the Board of Revenue the 'estate in arrear in those districts shall be sold at public auction to the highest bidder. The Act does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue. The whole clauses of the Act of 1859, in so far as these relate to sales or to their challenge at the instance of the proprietor, as well as the provisions of Section 3, Act 7 of 1878 (Bengal), are framed upon the express footing that they are to be applicable to the sale of

estates which are in arrear of duty. The enactments of 1859 and of 1868 are obviously intended to apply to cases in which, if the irregularity or illegality of the sale proceedings alleged by the objector be negatived, the sale will remain valid.

3. It appears clear from this decision that a sale held where there is no arrear of revenue is not a sale under the provisions of the Revenue Sales Act. To such sales the Land Revenue Sales Act cannot possibly apply. We are therefore of opinion that the law of special limitation provided for by Section 34 for the execution of the decree does not apply to the present case. In the view which we take we are supported by the decision of P.R. Das and Ross, JJ., in the case of *Hakim, Mahammad Idris v, Lachman Das*, reported in an unauthorized report (A.I.R. 1924 Pat. 504). The learned Judge points out that a distinction is clearly drawn in the judgment of the Judicial Committee between a case where the sale is authorized but is attended with some irregularity or illegality and a case where the sale is not authorized at all. The learned Judge proceeds further and says this:

In my opinion all these decisions establish conclusively that when there is no jurisdiction in the Collector to put up a property to sale, the sale cannot be regarded as a sale under Act 11 of 1859. Section 34 only applies where the sale is held under Section 11 of 1859 and is annulled by a final decree of the civil Court.

4. It remains to notice the authority cited by the learned advocate for the respondents in support of his contention that Section 34 applies to a case where the sale is held either under the Act or on the ground of want of jurisdiction; and we are referred to the case of *Sreemunt Lall Ghose v. Shama Soonduri Dassee* (1869) 12 WR 276. We do not think that in that case that question was directly raised. It was only incidentally remarked by Markby, J., who delivered the judgment and he said this:

An application has been made to us, to make an order under the provisions of Section 34, Act 11 that the purchase money should be refunded to the defendant by the Collector; but I think that order must be made, not by us but in the execution of the decree. We are also asked to make a special declaration that the sale is annulled, but that appears to us to be unnecessary. For the purposes of Section 34, Act 11 of 1859, we consider that the sale is already annulled by the decree for

possession.

5. These are observations which are obiter and these observations were made at a time when the view prevailed in India that even a sale held where there was no arrear of revenue was a sale under the Act. That view is no longer tenable in the face of the clear pronouncement of their Lordships of the Judicial Committee in the case of *Balkishen Das v. Simpson* (1898) 25 Cal 833 referred to above. The result is that the order of the Subordinate Judge is set aside and it is directed that he should entertain this application for execution and proceed to deal with it in accordance with law. There will be no orders as to costs.

M.C. Ghose, J.

6. I agree.

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