

(1876) 08 CAL CK 0003
In the Calcutta High Court

Abdool Hamid alias Sabhan Miah

APPELLANT

Vs

Abul Munsoor

RESPONDENT

Date of Decision : 03-08-1876

Acts Referred:

Citation : (1877) ILR (Cal) 98

Hon'ble Judges : Richard Garth, C.J.;Mitter, J

Bench : Division Bench

Judgement

Richard Garth, C.J.—In this appeal it is only necessary for us to decide one of the points which have been taken by the defendants, the appellants, and that point is upon the plea of limitation.

2. After stating the facts as above, the learned Chief Justice proceeded as follows:

3. The plaintiff relies upon the same ground as that taken in his former suit, viz., that Shitul Chunder's purchase was made on behalf of his (the plaintiff's) co-debtors; and that the judgment-debt was consequently extinguished. He contends, therefore, that the subsequent sale was void as against the plaintiff.

4. One objection to this suit, which was made in the Court below, and is now made by the defendant, the appellant, is, that it is brought to set aside a sale in execution of a decree of a Civil Court within the meaning of Clause 14 of the 2nd schedule of the present Limitation Act, and this point was argued before us yesterday.

5. There are other questions in the case, and many circumstances which we should have had to take into consideration, if it had been necessary to decide the suit upon its merits. But the facts already mentioned are sufficient to raise the question of limitation, and that question we think ought to be decided in favour of the appellant.

6. It has been argued by the plaintiff's pleader, that this is not a suit for the purpose of setting aside the sale by which the property passed to defendant No.

2, but a suit to recover possession of that property, and that, assuming the purchase of the decree by Shitul Chunder to have been made for the plaintiff's co-debtors, the decree itself is no longer in force, and the sale which took place under it was absolutely null and void. It is obvious, however, that this is not a correct view of the law. The purchase of the benefit of the decree by the plaintiff's joint-debtors could not affect the decree itself, although it had the legal effect of satisfying the judgment-debt which the decree created. There is no suggestion that the decree was not in itself a just one; and the order made by the Court in the execution of that decree and the sale which took place under that order were both binding upon the plaintiff until proper steps were taken to reverse them, and the title of the defendant who purchased under that sale was also a perfectly good title, until the sale was set aside in due course of law. The mistake into which the learned Judge has fallen in the Court below is this that he supposes the sale which took place under a valid order of the Court and under a decree which is at this moment effectual and undisputed, is ipso facto void by reason of the judgment-debt having been satisfied. The sale was not void, but only voidable and whatever may be the frame or language of the plaint in the present suit, its real object and the purpose is to avoid or set aside the sale; because that is the only means by which the defendant's title can be defeated, and the plaintiff restored to his right of possession.

7. We have been referred by the plaintiff's pleader to a case, *Kishen Bullub Mahaiaab v. Rughoo Nundun Thakoor* 6 W.B. 305 but that is a totally different case from the present, and will be found not to support the defendant's contention. The plaintiff there had obtained a decree against Pearee Lall Mahta for certain sums of money. Pearee Lall Mahta (the judgment-debtor) then died, and after his death, his wife, for the purpose of preventing her husband's property being taken in execution, made a sham sale of it in the first instance to a third person, and a collusive suit followed, in which a decree was fraudulently obtained, and the property sold under that decree to another party. In this state of things, the plaintiff (the execution-creditor) brought a suit to set aside the collusive sale and subsequent proceedings, upon the ground that they were all one entire fraud, concocted for the purpose of defeating his judgment. It is obvious that this was not a suit to set aside a sale under a decree within the meaning of Clause 14 of the Act.

8. Another case in the Agra High Court Reports, decided by Morgan, C.J. and Ross J. was also referred to, in which the point as to the one year's limitation seems also to have been taken and overruled. That case is very imperfectly reported, and the ground of the decision seems rather to have been that the one year's limitation did not apply, because the defendant had been guilty of some fraud which prevented the rule of limitation from applying. Whatever may be the correct solution of that case, we certainly do not consider it an authority by which we ought to be influenced in our present judgment.

9. The case cited by Mr. Ghose--of *Ram Kant Chowdhry v. Kalee Mohun*

Mookerjee 22 W.P. 84 decided by Kemp and Brich, J.J. is a distinct authority in this Court in favour of the view we take of this question.

10. The appeal will consequently be allowed with costs. The decree of the lower Court will be reversed, and the plaintiff's suit will be dismissed with costs of the Court below.