(1899) 01 CAL CK 0005

In the Calcutta High Court

Case No : Appeal from Order Nos. 224 and 237 of 1898

Bhuban Mohan Pal and Another	APPELLANT
Vs	
Rajah Peary Mohan Mukerjee and Nunda Lal Dey	RESPONDENT

Date of Decision : 06-01-1899

Acts Referred:

Citation : (1899) 01 CAL CK 0005

Judgement

1. This appeal arises out of an application for setting aside a sale of immoveable property held in execution of a decree for arrears of rent on the ground that the sale was brought about by fraud, and that the judgment-debtors were kept out of knowledge of the sale until the time when the auction-purchaser took possession of the property. The first Court found for the judgment-debtors and set aside the sale.

2. On appeal the lower Appellate Court has reversed the order of the first Court, without coming to any finding as to whether the allegation that the gale had been brought about by fraud was correct, the ground being that the Applicants had failed to show that they had been kept out of knowledge of the sale by the fraud of the decree-holders and the auction-purchaser, and that their application was barred by limitation.

3. Against this decision of the lower Appellate Court the present appeal has been preferred, and, at the hearing of the appeal, a preliminary objection is raised on behalf of the Respondents that a second appeal does not lie, the order of the lower Appellate Court being final under sec. 588 of the Code. The argument in support of this objection is this, that the application must be treated as one under sec. 311 of the Code of Civil Procedure; that it cannot come under sec. 244 of the Code as the auction-purchaser is a third party and not one of the parties to the suit, and that consequently the last paragraph of sec. 588 makes the order of the lower Appellate Court final. And in support of this contention a decision of a Full Bench of this Court in the case of Mohendro Narain Chaturaj v. Gopal Mondul I. L. R. 17 Cal. 769 (1890) is relied upon. On the other hand, it is

argued by the learned vakil for the Appellants that the application for setting aside the sale in this case being based on the ground that the sale had been brought about by fraud, it comes under sec. 244, and not under sec. 311 of the Code, and that the fact of the auction-purchaser being a third party, does not prevent the application from being dealt with under sec. 244; and in support of this contention, the decision of the Privy Council in Prosunno Kumar Sanyal v. Kali Das Sanyal I. L. R. 19 Cal. 683 (1892) and the decisions of this Court in the cases of Dayamoyi Dassi v. Sarat Chunder Mozumdar I. L. R. 25 Cal. 175 (1897) and the case of Nimai Chand Kanji v. Deno Nath Kanji 2 C.W.N. 691 (1998) are relied upon.

4. We are of opinion that the preliminary objection urged on behalf of the Respondent ought not to prevail, and that a second appeal lies in this ease. It is true that the case of Mohendro Narain Chatu raj v. Gopal Mondul ILR 17 Cal. 769 (1890), cited by the Respondents favours, the objection raised on their behalf, but the decision of the Privy Council in Prosunno Kumar Sanyal v. Kali Das Sanyal I. L. R. 19 Cal. 683 (1892). must be taken to have over-ruled, in effect, the case of Mohendro Narain Chaturaj v. Gopal Mondul ILR 17 Cal. 769 (1890). We have had occasion to consider this matter in an unreported case, namely, Second Appeal No. 956 of 1895 Now reported 3 C. W. N. 395, and the view we take there is also confirmed by the decisions of this Court in the cases of Dayamoyi Dassi v. Sarat Chunder Mojumdar I. L. R. 25 Cal. 175 (1897). and Nimai Chand Kanji v. Deno Nath Kanji 2 C. W. N. 691 (1898).

5. It was contended on behalf of the Respondents that the decision of the Privy Council in the case of Saadatmand Khan v. Phul Kuar I. L. R, 20 All, 412 (1898). would go to show that the order of the first Appellate Court in a case like this is final, and that a second appeal does not lie from such an order. The argument is based upon the fact that an appeal to Her Majesty in Council was allowed from an order of the District Judge made in an appeal from an order passed on an application for getting aside a sale. This question was not raised in that case, and, moreover, the order made in that case was clearly under sec. 312, the ground upon which the sale was sought to be set aside being irregularity in the conduct of the sale and not fraud. If that was so, the order complained of was one that came specifically under sec. 588 of the Code and could not come within the definition of "decree" in the Code, and so no second appeal could lie in that case.

6. It was further contended that the observation of the Judicial Committee in the case of Prosunno Kumar Sanyal I. L. R. 19 Cal. 683 (1892). that the fact of the auction-purchaser being a third party, does not prevent a case from being dealt with under sec. 244 of the CPC was in the nature of an obiter dictum, and cannot be taken to overrule the decision of the Pull Bench in Mohendro Narain Chaturaj v. Gopal Mondul I. L. R. 17 Cal. 769 (1890).

7. We gave our reasons for considering this argument untenable in our judgment in the unreported case Now reported 3 C. W. N. 395 referred to above; and it is

enough to say that the question whether sec. 244 of the Code would be a bar to a suit for setting aside an execution sale on the ground of fraud where a third party was the auction-purchaser, was a question that did directly arise before the Privy Council, and the decision of their Lordships was that that section was a bar to the suit.

8. The effect of that decision was therefore this, that an application for setting aside a sale on the ground of fraud would come under sec 244, notwithstanding that the purchase was made by a person who was a third party.

9. The preliminary objection being disposed of against the Respondents, let us now see how the appeal stands on the merits.

10. The point urged on behalf of the Appellants is that the lower Appellate Court was wrong in holding that the application for setting aside the sale in this case was barred by limitation. If the application was one governed by Art. 160 of the second schedule of the Limitation Act, then the conclusion arrived at by the lower Appellate Court would be one that would not be open to question in second appeal. Then is the application one that is governed by Art. 166? We are of opinion that this question must be answered in the negative. Art. 166 of the Limitation Act applies only to an application to set aside a sale in execution of a decree on the ground of irregularity in publishing or conducting the sale or on the ground that the decree-holder has purchased without the permission of the Court.

11. The ground upon which the sale now in question is sought to be set aside is not either of those two grounds, but is fraud on the part of the decree-holder and also on the part of the auction-purchaser in bringing about the sale. That is a very different ground from irregularity in publishing the sale. This case, therefore, is governed, not by Art. 166, but by Art. 178, there being no other provision in the Act applicable to the case; and if that is so, the question of limitation cannot arise, the application being within three years from the date when the right to apply accrued.

12. The view we take is supported by the decision of this Court in Nimai Chand Kanji v. Deno Nath Kanji 2 C. W. N. 691 (1898)

13. It was argued that as one of the facts found by the lower Appellate Court is that it is not shown that the auction-purchaser was a party to the fraud alleged to have been committed by the decree-holder in bringing about the sale,................................ so far as the auction-purchaser is concerned, the case against him can only be regarded as one for setting aside the sale on the ground of irregularity, and that the extended period of limitation in the case of an application to set aside a sale on the ground of fraud, cannot apply to the case so far as it proceeds against the execution purchaser.

14. We are unable to accept this contention as sound. If the sale was a fraudulent sale, then, even if the auction-purchaser was not a party to that fraud, still it could not be said that the application ought not to be dealt with as

one outside the scope of Art. 166.

15. The application is one to have the sale set aside; and if it was vitiated by fraud, the consequence of that must attach, so far as the present question goes, as much to the case of the decree-holder as to the case of an auction-purchaser.

16. It would be different if it had been necessary for the applicant to obtain an extension of the period of limitation under Art. 18 of the Limitation Act. That section expressly provides that the extended period of limitation on the ground of fraud is applicable only as against a party to the fraud. Here the applicant obtains the extended period not by the application of Art. 18, but because his case docs not come under Art. 166, but comes under a different article under which, quite apart from Art. 18, the application is not barred.

17. The application, as we have pointed out, is governed by Art. 178 of the second schedule of the Limitation Act, there being no other provision of the law applicable to this case which is one for setting aside a sale on the ground of fraud.

18. For the foregoing reasons, we are of opinion that the decision of the lower Appellate Court that the application is barred by limitation, must be set aside, and the case sent back to that Court in order that it may be determined on the merits.

19. The costs of this appeal will abide the result. The question for which the case is remanded is whether the sale in question was brought about by the fraud of the decree-holder.