

(1887) 12 CAL CK 0009
In the Calcutta High Court

Brojo Gopal Sarkar

APPELLANT

Vs

Busirunnissa Bibi and Another

RESPONDENT

Date of Decision : 07-12-1887

Acts Referred:

Citation : (1888) ILR (Cal) 179

Hon'ble Judges : Norris, J; Ghose, J

Bench : Division Bench

Judgement

1. The facts of this case are shortly these : The plaintiff held a certain tenure under Busirunnissa Bibi, the principal defendant in this suit. Busirunnissa recovered an ex parte decree for arrears of rent against the plaintiff under Act X of 1859, and, in execution of that decree, brought the tenure to sale, and at the sale, which took place on the 20th December 1884, the tenure was purchased by one Nil Mahomed, the second defendant.

2. The plaintiff has brought the present suit to set aside the above sale upon the ground that the rent decree, as also the proceedings taken by Busirunnissa in execution thereof, were all fraudulent, and that she herself purchased the property ostensibly in the name of Nil Mahomed.

3. The Court of first instance was of opinion that the plaintiff had no notice of the suit in which the decree was obtained, and that the sale in execution thereof was fraudulent; and it accordingly gave the plaintiff a decree.

4. On appeal, the learned Judge of the District Court has reversed the judgment of the Court of first instance, and dismissed the suit, upon the ground that, in accordance with the law laid down by a Divisional Bench of this Court in Saroda Chum Chuckerbutty v. Mahomed Isuf Meah 11 C. 376 the suit does not lie, and that "the question of irregularities in the sale is one for the Court executing the decree." He also holds that "the execution provisions of the CPC are applicable in Act X cases," and quotes the decision of the Privy Council in Nilmoni Singh Deo v. Taranath Mukerjee 9 C. 295 : 12 C.L.R. 361 in support of his view.

5. The learned vakeel who appeared before us for the appellant questioned the correctness of the ruling in *Saroda Chum Ghuckerbutty v. Mahomed Isuf Meah* 11 C. 376 and citing some other rulings, as bearing upon the question, contended that, the sale being impugned upon the ground of fraud and not bare irregularities, the suit was well maintainable.

6. In the view we take of the matter before us, it is not necessary to express any opinion as to the correctness or otherwise of the ruling in question, for it seems to us that it has no application to the circumstances of this case. The sale which was sought to be questioned in that case was one under Bengal Act VIII of 1869, where, in Section 34, it was provided that suits under that Act, and all proceedings therein, were to be regulated by the Civil Procedure Code. Now, one of the sections of the CPC which may be taken to apply to proceedings in execution of a decree under Act VIII of 1869 is a. 244 ; and the learned Judges who decided the above case held, as we understand their judgment, that the purchaser at the sale being the decree-holder, and the question raised being one relating to the execution of the decree, and between parties to the suit in which the decree was obtained, no separate suit would lie, by reason of the provisions of Section 244, to set aside the sale, notwithstanding that the sale was impugned upon the ground of fraud. Now the sale with which we are concerned took place under Act X of 1859, wherein, it will be observed, there was no such provision as in Section 34 of Act VIII of 1869. It follows, therefore, that Section 244 of the Civil Procedure Code, or the corresponding Section 11 in Act XXIII of 1861, can have no application to the proceedings in execution of a decree under Act X of 1859. See *Hur Dyal Mundul v. Tirthanund Thakoor* 13 W.R. 34.

7. The learned Judge however has relied upon a ruling of the Privy Council referred to above; but upon an examination of that case it will appear that all that the Judicial Committee held was that decrees under Act X of 1859 passed by Eevenue Authorities could be transferred for execution to a Civil Court exercising jurisdiction in another district; and that a Rent Court established by Act X of 1859 was a Civil Court falling within Section 284 of Act VIII of 1859 We do not think that this ruling establishes the broad proposition which the Judge thinks it lays down, that " the execution provisions of the CPC are applicable in Act X cases."

8. There being, therefore, no provision in Act X of 1859 which makes Section 244 of the CPC applicable to the execution proceedings taken under that Act, the only question for our determination is, whether a suit lies in the Civil Court for the purpose of setting aside the sale upon the ground of fraud. Upon this question we feel, no hesitation in holding that it does lie. See *Nilmoney Bonick v. Poddo Lochun Chuckerbutty* 5 W.R. 20 ; *Umbica Churn Chuckerbutty v. Dwarka Nath Ghosei* 8 W.R. 506 ; *Nundo Lall Doss v. Delawur Ali* 11 W.R. 244 ; *Hur Dyal Mundul v. Tirthanund Thakoor* 13 W.R. 34 ; *Ishan Chunder Bandopadhyaya v. Indra Narain Gossa-mi* 9 C. 788 : 12 C.L.R. 391 ; *Ujolla Dasi v. Dhiraj Mahatab Ghand* 7 C.L.R. 215.

Nor do we think that the fact relied upon by the Judge in one portion of his judgment, that the Revenue Court decided against the plaintiff "on the point of execution irregularity," is a bar to a separate suit, when such suit is based not upon bare irregularity in the sale proceedings, but upon fraud in connection with the suit itself, and the sale which was brought about by the decree-holder in furtherance of that suit.

9. Upon all these considerations, we are of opinion that the judgment of the Court below must be reversed, and the case remanded to that Court for trial on the merits.

10. Costs to abide the result.