
(1921) 05 AHC CK 0005
In the Allahabad High Court

Gajadhar Prasad	Vs	APPELLANT
Nawab Muhammad Abdul Majid and Ali Hasan and Others		RESPONDENT

Date of Decision : 02-05-1921

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 4, 68
Contract Act, 1872 — Section 18

Citation : AIR 1921 All 327 : 63 Ind. Cas. 425

Hon'ble Judges : Walsh, J; Lindsay, J

Bench : Division Bench

Judgement

Lindsay, J.—This is an appeal from an appellate order of the District Judge of Benares, setting aside a decree of the Second Additional Subordinate Judge of Jaunpur by which he dismissed the plaintiff's suit. The learned Judge, holding that the suit had been erroneously dismissed upon a preliminary point of law, remanded the case for disposal on the merits.

2. The material facts of the case are as follows:

The defendants Nos. 1 to 11 held a decree against the defendants Nos. 12 to 19, in execution of which they brought to sale certain Immovable property of their judgment-debtors. The property being ancestral, the proceedings in execution were transferred to the Collector in accordance with the provisions of Section 68 of the Code of Civil Procedure. In such cases the Procedure of the Collector is regulated by Rules made by the Local Government in exercise of the power conferred by Section 70 of the Code. A sale proclamation was drawn up in which the value of the property offered for sale was estimated at Rs. 1309 14 0, and the column in the printed proclamation intended to show incumbrances on the property was blank. In other words, the proclamation purported to show that the property was free from incumbrance.

3. On the 20th June 1916 the property was purchased at auction by the present plaintiff, Nawab Abdul Majid, for a sum of Rs. 1,225. It is alleged that after the purchase and the deposit of the purchase-money in Court, the plaintiff came to

know that there were mortgage debts on the property exceeding its value. On making this discovery the plaintiff applied in the Revenue Courts to have the sale set aside and the purchase-money refunded. This application was unsuccessful. By his order, dated the 29th August 1916, the Collector rejected the application and confirmed the sale.

4. It is not quite dear what were the grounds upon which the application was based. These can only be gathered from what is set out in the Collector's order just referred to. One plea taken appears to have been, that the judgment debtors had no saleable interest in the property. The Collector was of opinion that this ground was not open to the applicant in proceedings being held before a Revenue Court and that in any case the plea could not be maintained, inasmuch as the judgment-debtors had a right of redemption amounting to a saleable interest.

5. The other ground taken before the Collector appears to have been that the applicant (purchaser) had been misled by the sale proclamation into the belief that the property was free of incumbrance. The Collector held that the Revenue Court was not responsible for any mistake in the sale proclamation so as to entitle the purchaser to have the sale set aside. The application was accordingly dismissed, the Collector remarking in his order that he took it that the applicant would have a remedy in a Civil Court.

6. The result has been the present suit brought by the auction-purchaser against the decree-holders and the judgment-debtors, in which the claim is to have the auction sale set aside and to have the purchase-money refunded to the plaintiff by the decree holders or whatever party the Court holds liable for the restoration of the money.

7. The Subordinate Judge held that the suit was not maintainable and that the plaintiff had no cause of action. He dismissed the suit accordingly. In appeal the District Judge took a different view. While he held that it could not be maintained that the judgment-debtors had no saleable interest in the property and that the suit could not succeed on this ground, he was of opinion that the plaintiff had a right to sue for cancellation of the sale on the ground of fraud, misrepresentation or material irregularity in the sale. We remanded the case, therefore, for disposal on the merits.

8. I may here remark that the learned District Judge is not strictly accurate when he observes that the plaintiff was "directed" to the Civil Court by the Revenue Authorities. All that I can find is that the Collector expressed an opinion that the auction-purchaser would have a remedy in a Civil Court.

9. In appeal here it is argued that the order of the lower Appellate Court is wrong and for the reasons about to be given I hold that it is. In my opinion, the view of the law taken by the trial Court is correct and the learned Judge of the Court below was wrong in holding that the plaintiff had disclosed any case of fraud upon which he could found this suit for cancellation of the sale and return of the

purchase-money.

10. I dismiss from consideration altogether any argument founded upon the plea that the judgment debtors had no saleable interest in the property. Both the Courts below have held, and held rightly, that the right of redemption vested in the judgment-debtors represented a saleable interest, however small it might be. This part of the case (if there ever was such a part) is at an end. The law on the subject of sales in execution of decree is now well settled. In the case of a sale under a decree of the Court there is no warranty of title either by the decree-holder or by the Court, as there is in the case of private sales.

11. "The result is," to quote the language of a Bench of this Court in *Shanto Chandar Mukerji v. Nain Sukh* 23 A. 355 : (1901) A.W.N. 101 that the purchaser must be taken to buy the property with all risks and all defects in the judgment debtor's title, except as provided by Sections 313 and 315 that in the absence of fraud his only remedy is to recover back his purchase money, where it is found that the judgment-debtor had no saleable interest in the property at all, and that he cannot by suit, any more than by application, obtain a refund in proportion to the extent to which the judgment-debtor had no interest." This decision was under the old CPC (Act XIV of 1882), which recognised the right of an auction-purchaser to bring a regular suit to set aside a sale in cases where the judgment-debtor had no saleable interest in the property. Hence the reference to Sections 313 and 315 of the former Code. That right of suit has now been taken away by the present Code, as held in a recent decision of a Bench of this Court reported as *Farhat-un-nissa Bibi v. Sundari Prasad* 54 IC. 801 : 18 A.L.J. 124 : 2 U.P.L.R. 35 : 421 A. 275.

12. However, as I have already said, the present case cannot be treated as being one in which a suit is brought to set aside a sale on the ground that the judgment-debtor has no saleable interest.

13. The ruling in *I.L.R. 23 Allahabad (1)*, cited above, does recognise the right of an auction-purchaser to bring a suit for, setting aside the sale and for the return of the purchase-money in case of fraud, that is to say, actual fraud in the sense of dishonesty as laid down in the case of *Derry v. Peek* (1889) 14 AC. 337 : 58 L.J. Ch. 864 : 61 L.T. 265 : 38 W.R. 33 : 54 J.P. 148 : 1 Meg. 292.

14. The lower Appellate Court is not right in saying that a plaintiff can succeed in an action of this kind on the ground of "fraud, misrepresentation, or material irregularity in the sale." He must both plead and prove actual fraud and nothing short of this will do.

15. Order VI, Rule 4 of the Code of Civil Procedure, requires a party pleading fraud to state all necessary particulars of the fraud alleged. General allegations are insufficient to amount to an averment of fraud of which any Court ought to take notice, and where a plaintiff seeks relief on the ground of fraud, and particulars of the fraud alleged are not set forth in the plaint, the plaint should be rejected as not disclosing a cause of action. What then are the allegations in the

plaint in this suit?

16. Paragraphs 1, 2 and 3 relate to the previous history of the case and show how the execution proceedings come to be transferred to the Collector's Court. Paragraph 4 contains a statement that in the sale-proclamation which was issued, the value of the property was set out as Rs. 1,309 14-0 and that the property was represented in the proclamation to be free of incumbrance. In paragraph 5 the plaintiff alleges that by reason of this procedure on the part of the officials entrusted with the duty of sale, he was led to believe that the property was worth Rs. 1,309 odd and that in this belief he bought it in for a sum of Rs. 1,225.

17. In paragraph 6 the plaintiff recites his subsequent discovery that the property was incumbered beyond its value, while in paragraph 7 it is stated that the plaintiff has purchased a property which is of no value.

18. The 8th paragraph raises a legal plea to the effect that by reason of the omission to notify incumbrances in the sale proclamation the plaintiff is entitled u/s 18 of the Indian Contract Act to have the sale set aside at his option.

19. In the 9th paragraph the plaintiff describes how his application to have the sale set aside was rejected by the Revenue Courts, and in the 10th paragraph it is stated that the cause of action accrued to him on the 29th August 1916, the date on which the Collector dismissed the application.

20. The relief claimed is the setting aside of the sale and a decree for the purchase-money with interest against the defendant No. 1 (one of the decree holders) or against any other defendant who may be deemed liable. I fail to discover in this plaint any foundation for a suit based upon fraud. There is not a word in it which imputes anything in the nature of fraud to any of the defendants. No act of any kind is attributed to them, except that of the decree-holders-defendants, in applying for execution of their decree by the sale of the property.

21. On the face of it the plaintiff's case amounts to nothing more than this, viz., that he was misled by the terms of the sale proclamation drawn up by the officials in charge of the sale and that by reason of the misrepresentation that the property was free from incumbrance he is entitled u/s 18 of the Contract Act to have the sale avoided.

22. This section, which defines what amounts to misrepresentation as between the parties to a contract, has nothing whatever to do with a sale in execution of a decree. And as pointed out above, the mere allegation of misrepresentation is not enough to enable a plaintiff to succeed. There must be allegation and proof of actual fraud which is quite a different thing, and there is nothing of that here.

23. The plaintiff attributes his misfortune to the acts of the officials in charge of the sale. They are no parties to the suit and no case against them could succeed for the reasons already given. They gave no warranty of title and the purchaser

bought at his own risk.

24. And as for the defendants who have been impleaded, there is not a single allegation against them upon which, if proved, the plaintiff could succeed in an action for fraud.

25. I hold, therefore, that the order of the lower Appellate Court is wrong, that it should be discharged, and that the decree of the Court of first instance should be restored. The appeal should be allowed with costs to the appellant both here and in the Court below.

Walsh, J.

26. I regret that I am unable to agree with my learned brother's view of this case, but in my view the order appealed from is right. Shortly stated, the plaintiffs case is that, either by deliberate concealment on the part of the decree-holder, or as the result of innocent misrepresentation on the part of the Court officials in announcing and conducting the sale, to which the decree-holder was a party, he has been induced to purchase a worthless property, the existence of a heavy encumbrance upon it having been concealed from him.

27. I agree with the Counsel for the plaintiff-respondent that if this suit does not lie the plaintiff has no remedy, and I cannot believe that this is the law in India. It would amount to a scandal if it were so. It is, no doubt, true that the suit is not expressly provided by the Code, but I think there is nothing in the Code which bars its. It clearly lies by the principles of "equity, justice and good conscience" which the Courts in India are enjoined to apply, and it is in my judgment indistinguishable in principle from the decision of the Privy Council in *Mahomed Kala Mea v. Harperink* 1 IC 122 : 36 I.A. 32 : 13 C.W.N. 249 : 6 A.L.J. 34 : 5 M.L.T. 126 : 9 C.L.J. 165 : 11 BL.R. 227 : 36 C. 323 : 19 M.L.J. 115 : 5 L.B.R. 25 (P.C.).

28. My only difficulty is that fraud is not specifically alleged in the plaint, although an inference of fraud is undoubtedly suggested by the allegations in the plaint. The order under appeal holds that the plaintiff has a right to sue "on the ground of fraud, misrepresentation or material irregularity" and has remanded the suit for trial on the merits. This may have been intended merely as a compendious summary of Order XXI, Rule 90, but infer from it that the lower Appellate Court, in disposing of the appeal, was asked to allow the question of fraud to be specifically raised, or was itself of opinion that it necessarily arose, and that it must be taken that, as an Appellate Court, it allowed the plaint to be amended so as to allege fraud. I should have done the same thing myself had I been hearing the appeal as the lower Appellate Court did, but in any case, the lower Appellate Court having done so, I decline to interfere with the exercise of its discretion, especially as it appears to me to be in the interests of justice. As the beneficent powers contained in the Code empowering any Court to amend or make orders so as to enable the merits to be decided are not so well understood, or at any rate applied, as they are in England, whence these provisions have

recently been adopted. I propose to state below what I believe to be the true principles governing this matter.

29. Unfortunately, the appeal was only argued before us very superficially, and I, therefore, preferred to take time to look into some of the authorities, and to state in writing, with some elaboration, my reasons for dismissing the appeal.

30. As I understand, the main contention underlying the argument of the appellant is that the old maxim *caveat emptor* applies to auction-sales. The decision of the Privy Council in *Mahomed Kala Mea v. Harper* 1 IC 122 : 36 I.A. 32 : 13 C.W.N. 249 : 6 A.L.J. 34 : 5 M.L.T. 126 : 9 C.L.J. 165 : 11 B.L.R. 227 : 36 C. 323 : 19 M.L.J. 115 : 5 L.B.R. 25 (P.C.) (*supra*) shows that this is not so. This maxim has almost disappeared from English Law, the exceptions to it being so many as almost to destroy its existence as a Rule. It never had any binding force or effect against either actual concealment or innocent misrepresentation.

31. Unfortunately in this case the merits have really not been tried and we do not know what the facts are. Over and over again one has to protest in this Court against decisions by the lower Courts of points of law before the real facts are found. "The most convenient course," says Lord Halsbury in *Adams v. Newbigging* (1888) AC 308 : 57 L.J. Ch. 1066 : 59 L.T. 267 : 37 W.R. 97 a case bearing strongly upon the case now under appeal, "is to consider what facts are established in this case before applying any rule of law to determine the rights of the parties."

32. The suit is brought against defendants Nos. 1-11 and defendants Nos. 12--19, the former being decree-holders of a decree obtained in the Court of the Munsif of Jaunpur against the latter. The decree-holders applied for execution. The execution proceedings were transferred to the Court of the Collector on revenue side, the Rules of which, as they affect this question, do not materially differ from the provisions of Order XXI of the Civil Procedure Code. Somebody must have supplied the Court of the Collector, or the officials charged with the duty of announcing and conducting the sale, with particulars of the property to be sold. Presumably, it has yet to be proved, this information was supplied by affidavit by the decree-holder, or by some one on his behalf, or at any rate to his knowledge. The value of the property was stated to be Rs. 1,309-14-0. There is alleged to have been encumbrance upon it in excess of this amount. Here again it seems that the facts as to this have not yet been found. The column in the particulars of the property to be sold which is provided for the statement of the encumbrances was blank. In other words, it is alleged that the existence of the encumbrance was concealed from proposing purchasers. The plaintiff, relying upon this representation by the Court, which must have been inspired by some one or other of the defendants, bought the property for Rs. 1,225. According to him he has paid this sum for a heavily encumbered and worthless property. It is not a question, of the judgment-debtor having no saleable interest. The judgment-debtor's right to the equity of redemption is not in question. The

property was deliberately sold as unencumbered. It was not. All these allegations are contained in the plaint. The only legitimate inference to be drawn from them, if they are true, is either that the defendants who obtained the conduct of the sale by the Court wilfully misrepresented the subject-matter, or innocently concealed a material and important fact, whereby the plaintiff has suffered loss.

33. To my mind, it is immaterial, or at any rate no bar to relief if relief can be secured by a suit, that in such circumstances a clumsy and unscientific plaint pleads Section 18 of the Indian Contract Act, and asks for the cancellation of the sale. On such allegations the plaintiff is, to my mind, clearly entitled either to recover damages for fraudulent concealment, or to an indemnity, which was the equitable relief granted, where restitution could not be awarded, in cases of material misrepresentation.

34. To continue, the plaintiff on discovering the true facts applied to the Court of the Collector to set aside the sale. His application was dismissed, and the sale confirmed by an order of the Collector, dated the 29th August 1916. It was held by the Collector that the judgment-debtor had a saleable interest in the property. That is not the question. The Collector went on to say that the statement of encumbrances was to enable the Collector to "size up the value of the property," and was not intended to supply information for bidders at an auction and the Court cannot be held responsible for a mistake. I take it the applicant would have a remedy in the Civil Court." The present argument for the appellant is that he has none.

35. It is, therefore, important to examine what was decided by the Privy Council in *Mahomed Kala Mea v. Harper* 1 IC 122 : 36 I.A. 32 : 13 C.W.N. 249 : 6 A.L.J. 34 : 5 M.L.T. 126 : 9 C.L.J. 165 : 11 B.L.R. 227 : 36 C. 323 : 19 M.L.J. 115 : 5 L.B.R. 25 (P.C.). That was a suit brought by a purchaser under similar circumstances. The property was not worth more than Rs. 40,000. It was encumbered to the extent of Rs. 64,500 and interest. This was not made known to the plaintiff, who purchased it for Rs. 38,000.00 The decree-holders did not contest the suit; but the judgment-debtors did, and succeeded upon various technical grounds, including the plaintiff's negligence, which is another way of saying "caveat emptor." The Privy Council held that there was no defence to the suit, and that the plaintiff was justified in relying upon the Court's description of the property, and had no means of discovering the truth. It had been suggested that the Court Officer ought to have put up the property for sale again. The Privy Council point out that "if the truth had been published nobody but a lunatic would have bid" and that "if the truth had been kept back there would have been a gross and deliberate fraud." Their Lordships speak in strong terms about the view that a Court can ever be justified in forcing upon a purchaser, who has been misled by its accredited agents, "a bargain so illusory and so unconscientious." The plaintiff had purchased a shadowy equity of redemption "not worth one farthing." In that case there had been material misrepresentation. There was no finding that any one had been actually guilty of personal fraud. It seems to me

on all fours with the present suit.

36. It is important in this connection to note that in another case decided by their Lordships of the Privy Council, *Saadatmand Khan v. Phul Kuar* 20 A. 412 : 2 C.W.N. 550 : 25 I.A. 146 : 7 S. P.C.J. 380 : 9 IC. 624 it was decided--the case being an application to set aside a sale on the ground of irregularity--that an under-statement of the value of property made in the proclamation, and calculated to mislead bidders, was a material irregularity; and further that in *Kissorimohun Roy v. Harsukh Das* 17 C. 436 : 17 I.A. 17 : 13 IC 452 : 5 S.P.C.J. 472 : 8 IC 830 their Lordships of the Privy Council pointed out (vide page 443) that "in India warrants for attachments in security are issued on the ex parte application of the creditor, who is bound to specify the property which he desires to attach, and its estimated value." This is equally so in respect of sales under a decree, by order of a Court in India. Their Lordships further pointed out in *Dorab Ally Khan v. Executor of Khajah Moheooddeen* 5 I.A. 116 : 3 C. 806 : 2 IC. 426 : 1 IC 1097 decided when the procedure was not what it now is and when the question arose out of a seizure and sale by the Sheriff, that, when property is put up for sale in the exercise of his jurisdiction (and I take it the same principle applies when it is the Court which sells), the execution creditor must be treated as a principal in the transaction." Their Lordships made much the same order in that case as the order now under appeal, and at the instance of the purchaser, who complained of a failure of consideration and endeavoured to get back his purchase-money, remanded the case for further trial to enable the Court in India to "mould the relief according to the facts finally established,"

37. The present suit is not really a suit to set aside the sale at all, but to recover damages or to obtain equitable relief against misrepresentation. Much the same view seems to have been taken by a Single Judge of this Court in *Sita Ram v. Subheda Kuar* 24 IC 695 and in *Calcutta in Ram Narain Tewari v. Shew Bhunjan Roy* 27 C. 197 : 14 IC 130 in both of which the circumstances were quite different, but the underlying principle the same. Vide also *Hashim Isphany v. N.A.P.K. Chetty Firm* 33 IC 1003 : 9 B. L.T. 169 : 8 L.B.R. 427.

38. The decisions relied upon by the appellant before us, viz., *Farhat-un-nissa Bibi v. Sundari Prasad* 54 I.C. 801 : 18 A.L.J. 124 : 2 U.P.L.R. 35 : 421 A. 275 and *Ram Saroop v. Dalpat Rai* 58 I.C. 105 : 18 A.L.J. 905 : 2 U.P.L.R. 318 : 43 A. 60 do not relate to the question now under discussion.

39. The law in England is well settled, and is relevant in India under the rule compelling the Courts in India to administer "equity, justice and good conscience," although the Privy Council in the authority cited above did not think it necessary to state the written law under which the Courts in India ought, to have decreed that suit. The main difficulty in England has generally arisen in deciding the circumstances under which interference was possible, and the nature of the relief granted by the Courts of Equity, when damages for fraud were not claimed these being almost invariably sought by a suit at common law. The relevant authorities are: *Redgrave v. Hurd* (1882) 20 Ch.D. 1 : 51 L.J. Ch.

113 : 45 L.T. 485 : 30 W.R. 251 Newbigging v. Adams (1887) 34 Ch. D. 582 : 56 L.J. Ch. 275 : 55 L.T. 794 : 35 W.R. 597.

40. The appropriate relief in this case, following the above decisions, would seem to be a decree either directing the re-payment of his purchase-money to the plaintiff, or directing the decree-holder to indemnify him against the encumbrances whose existence was concealed. I am unable to see how the plaintiff can in justice be held entitled to less than this.

41. In case it should be said that any objection existed to the form of remand adopted by the Court below in the order under appeal, I would point out that the Courts in India have always held themselves to be vested with an inherent power of remand, where the trial of a suit, or the investigation of the merits, has not been satisfactory. This view was held in this Court before the present Code, which for the first time enacted the provision adopted from the English procedure which is contained in Section 151, vide *Durga Dihal Das v. Anoraji* 17 A. 29 : A.W.N. (1894) 190 : 8 IC. 342. This view has been recently reinforced in the decision in *Abdul Karim Abu Ahmed Khan Ghaznavi v. Allahabad Bank Ltd.* 41 I.C. 598 : 44 C. 929 : 26 C.L.J. 49 : 21 C.W.N. 877.

42. Farther, if, as a matter of form, it should be necessary (according to ray view it is not necessary) that before this Court can confirm the order now under appeal, the plaint ought to be amended so as to include an express allegation of fraud against the decree-holder, or the judgment-debtor, or any of the defendants who are appealing, I should hold that if the order of the Court below is not in substance an order permitting such amendment, it would be the duty of this Court to direct that the necessary amendment should be made. There is not much authority in the Indian Law Reports on the subject of Section 153. It is largely a matter of discretion, depending on the circumstances of each case. But Section 153 is taken from the English Law and the English authorities amply justify its application in this case.

"My practice," said Lord Bramwell in *Tildesley v. Harper* (1879) 10 Ch. D. 393 : 48 L.J. Ch. 495 : 39 L.T. 552 : 27 W.R. 249 "has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that by his blunder he had done some injury to his opponent which could not be compensated by costs.

However negligent or careless may have been the omission," said Lord Esher, "and however late the proposed amendment, it should be allowed. There is no injustice if the other side can be compensated by costs.

43. "The object of Courts," said Lord Bowen, "is to decide the rights of parties and not to punish them for mistakes they may make in the conduct of their cases." *Cropper v. Smith* (1884) 26 Ch. D. 709 at p. 710 : 53 L.J. Ch. 891 : 51 L.T. 733 : 33 W.R. 60.

44. These principles are of the highest importance in India, where much of the

practice is highly technical, and much of the pleading is clumsy and misconceived, whereby the decision of the merits is avoided and the ends of justice may be defeated.

45. I think this appeal should be dismissed with costs.

46. In accordance with the established practice the judgment delivered above prevails, And the order of the Court is that the appeal is dismissed with costs.