

(1910) 06 CAL CK 0041
In the Calcutta High Court

Harendra Lal Roy Chowdhury

APPELLANT

Vs

Nawab Salimullah Bahadur and Others

RESPONDENT

Date of Decision : 20-06-1910

Acts Referred:

Bengal Land Revenue Sales Act, 1859 — Section 18

Citation : 7 Ind. Cas. 21

Hon'ble Judges : Mookerjee, J;Carnduff, J

Bench : Division Bench

Judgement

1. The events antecedent to the litigation, which has culminated in the present appeal, have not formed the subject of controversy before us, and upon the evidence on the record, there is no room for serious dispute as to their true character. One Ananda Chandra Roy, a leading member of the Dacca Bar, was at one time the proprietor of the estate which bore No. 106 on the Revenue Rolls of the Collector of Dacca. Subsequently, upon transactions the details of which are not material for the purpose of the present litigation in 1898, Ananda Chandra transferred a portion of his proprietary interest to two gentlemen by name Garth and Wetherall with the result that the three became joint proprietors of the estate. A sum of about Rs. 2,199 was payable to Government as revenue in respect of this estate. Under the proprietary interest where of there were various tenures held by different persons. Some of these tenures were created by the proprietors after the transfer to Garth and Wetherall, while others had existed for many years before. After the transfer by Ananda Chandra to Garth and Wetherall, the proprietors decided to make default in the payment of Government revenue, so that the estate might be sold free of the interest of the tenure-holders, and the proprietors might realise the full value of the property undiminished by the incumbrances of the holders of the subordinate interests. Defaults were made on more than one occasion, but the object of the proprietors were defeated, as some of the tenure-holders who were very watchful, managed to deposit the Government revenue on behalf of the proprietors and thus to prevent the intended sale. The proprietors thereupon made an arrangement with

two of these tenure-holders, known as the Mirs and the Sahas and, as Ananda Chandra puts it in his evidence, appeased them. Subsequently, the proprietors again deliberately made default in payment of the Government revenue in respect of the instalment due in January 1903. The present plaintiff, who is the holder of several tenures under the proprietor within the estate, was apprised of this default after it had taken place, and on the 26th March 1903, he applied to the Collector for leave to deposit the amount of arrears u/s 18 of the Bengal "Land Revenue Sales Act 1859 (XI of 1859). Garth, however, intervened and objected to the grant of the application. Similar applications, it may be mentioned, had been made by other tenure-holders, and they were all equally opposed by Garth on behalf of all the proprietors. The Collector thereupon refused the applications, and one of the grounds, upon which he made his order, was expressly stated to be that the proprietor had personally appeared and declared that he had for long been refusing to pay the revenue and intended to refuse in future. The sale consequently took place on the date fixed, that is, the 27th March 1903, and the property was purchased by the Nawab of Dacca for two and a half lakhs of rupees. The tenure-holders subsequently applied for reversal of the sale, but their appeal was dismissed by the Commissioner on the 9th June 1903. The Commissioner in his order stated explicitly that the proprietors had not appealed, and, in fact, the sale had been brought about by an intentional default on their part with a view presumably to obtain a good price for the property as a result of the provisions of the Sale Law which give an unencumbered estate to the auction purchaser. The tenure-holders were consequently frustrated, not only in their attempt to save the property from sale, but also in their endeavour to have the sale set aside. On the 4th June 1904, the plaintiff commenced the litigation out of which the present appeal arises, and sought in the alternative to have the sale set aside or to have it declared that, as it has been brought about by fraud and conspiracy between the proprietors and the purchaser, the latter had not acquired the rights and privileges of a purchaser at a sale for arrear of revenue. The claim was resisted principally by the Nawab of Dacca as the purchaser of the property. He denied, in substance, that the sale had been held contrary to the provisions of the Revenue Sale Law, and repudiated the suggestion that the provisions of the statute had been in any manner abused. The learned Subordinate Judge has upheld both these contentions, and has dismissed the suit. The plaintiff has now appealed to this Court, and on his behalf, the validity of the sale has not been impugned on the ground that it was irregular or not conducted in accordance with the provisions of the Revenue Sale Law; but it has been argued that upon the facts, which are amply established by the evidence and are in reality not disputed by the defendant, the sale ought to be held as having been brought about by fraud and conspiracy, and that, consequently, it ought to be declared that the defendant has not acquired the status of a bona fide purchaser at a sale for arrears of revenue. In support of this position, reliance has been placed upon the principle deducible from the decision of their Lordships of the Judicial Committee in *Sidhee Nuzur Ally Khan v. Ojoodhyaram Khan* 10 M.I.A. 540 : 5 W.R. 83 (P.C.). In

answer to this contention, it has been argued on behalf of the respondent that the proprietors did not make any improper use of the provisions of the Revenue Sale Law; that they were entitled, whatever their motive might be, to make default in the payment of Government revenue: and that although they had fixed the purchaser and the price before the sale took place, the purchaser, who was a party to all these negotiations, had acquired the rights and privileges of a bona fide purchaser at a sale for arrears of revenue. It has also been faintly suggested that the Court in its discretion ought not to make a declaratory decree in the present suit, as the plaintiff will be amply protected, if when a suit is brought to annul his incumbrance, he is allowed to defend himself on the ground now urged by him in support of his claim. "In our opinion, there is 110 room for controversy that the sale has been brought about by fraud and conspiracy and that, under colour of the provisions of the Revenue Sale Law, the proprietors, in collusion with the purchaser, have, by an ingenious device, carefully planned and successfully executed, prepared the way for considerable benefit to themselves at the expense of the plaintiff-appellant.

2. The method, which was adopted by the proprietors of the estate for the attainment of the object they had in view, is fairly clear upon the evidence on the record, and has, in fact, been fully disclosed by Ananda Chandra himself with almost cynical frankness in his deposition. He states that the proprietors were determined to have the estate sold under the provisions of the Revenue Sale Law so that the under-tenures might be avoided. They were anxious, however, to protect themselves against the risk of loss if the property should fetch a comparatively small price at the sale. They determined consequently to fix the price and the purchaser. Ananda Chandra was himself the retained pleader of the Nawab of Dacca. Garth was the Chief Manager of the Nawab. These two gentlemen induced the Nawab to agree to purchase the property at the auction sale. It was arranged that the bids should be offered on behalf of the Nawab up to a limit of two-and-a-half lakhs of rupees, which was treated as the maximum value of the property if all the incumbrances could be successfully annulled, so that the purchaser at the revenue sale might receive the whole of the profits without any portion thereof being intercepted by tenure-holders. The Nawab, however, appears to have realised that he might be a loser in the end, if, after payment of the two-and-a-half lakhs, he found it impossible to annul the interest of all the tenure-holders. He, therefore, insisted that, although he would pay at the auction sale nominally two-and-a-half lakhs of rupees, a sum of Rs. 60,000 was to be subsequently refunded to him by the proprietors, to be held by him on deposit, on the understanding that, upon the annulment of all the incumbrances, when the net profit would reach a limit of Rs. 15,000 he would re-pay the Rs. 60,000 to the three proprietors. This, in substance, was the secret arrangement between the proprietors, who deliberately made default in the payment of the Government revenue, and the Nawab, who agreed to purchase the property at a nominal sum of two-and-a-half lakhs of rupees, out of which Rs. 60,000 was to be privately refunded to him. This scheme, so deliberately planned, was

successfully carried out. Garth, as we have already seen intervened before the impending sale to frustrate the attempt of the tenure-holders to deposit the arrears and thus avert it. Indeed, the evidence makes it clear that Garth, who is described as having been a very influential person, used all his influence to have the application of the tenure-holders rejected and the sale accomplished. On the day of the sale, Garth was present on the scene, and sat by the Collector on his right side. He indeed practically superintended the conduct of the sale, and Chandra Kumar Mukerjee, the muktear of the Nawab, states frankly that the last bid, which he offered on behalf of the Nawab, was dictated, by Garth. An examination of the bid-sheet shows that, but for the secret arrangement with the Nawab, the property would have passed out of the hands of the proprietors for a much smaller sum than two-and-a-half lakhs, and, but for the precaution they took, they would have lost all chance of the extra profit. Besides, Chandra Kumar, who offered bids on behalf of the Nawab under the directions of Garth, and Ananda Chandra Boy, who offered bids, as he naively admits, lest the Nawab should purchase the estate for a low price, there were two outside bidders present. One of these offered to bid to the extent of Rs. 60,000, while the other, Rrojobashi Pal, went up to a limit of Rs. 205,000. If there had been no secret arrangement with the Nawab for the refund of a sum of Rs. 60,000, he would, in the ordinary course, have offered a bid up to the limit of one lakh and ninety thousand. In that event, the estate would have passed into the hands of Rrojobashi Pal, and the extra profit, to which the proprietors looked for ward, would have been diminished by Rs. 45,000. It is manifest, therefore, that by this secret arrangement, the proprietors fully gained their object, which was to have the estate sold at the highest possible value by the destruction of the interest of the tenure-holders. It is worthy of note, apart from this aspect of the case, that Garth, who had intervened before the sale and had been present at it, found it necessary to intervene immediately after the conclusion of the bids. u/s 22 of the Act of 1859, the "" party declared as the purchaser of the estate is ordinarily required at once to deposit twenty-five per cent, of the amount of his bid, and, in default of such deposit, the estate is directed to be forthwith put up again and sold. The Collector, no doubt, may extend the time for payment of the deposit money but that is entirely a matter within his discretion. At the conclusion of the sale in this case, it was discovered by Garth, who was (he Chief Manager of the Nawab, that he had not sufficient funds in hand to enable him to deposit the earnest money. The muktear, who had offered the bids, made a reference to Garth, who advised that an application should be made to the Collector, and he assured the muktear that would do". And as a matter of fact, as soon as the application was presented, it was granted. It has been suggested on behalf of the appellant, and in our opinion not without foundation, that this indulgence was secured only by reason of the great personal influence of Garth. After the completion of the sale, as we have already stated, a determined attempt was made by the tenure-holders to have the sale reversed, and there is little doubt that this endeavour failed by reason of the intervention of Garth, who was anxious, for reasons now obvious, that it should stand good. These then are

the circumstances antecedent to this litigation. They are amply proved by the evidence on the record, and no attempt has been made on behalf of the respondent to dispute their substantial accuracy. The question, therefore, arises, whether in the events which have happened, the plaintiff is entitled to a declaration that the purchaser has not acquired the rights and privileges of a purchaser at a sale for arrears of revenue. His contention, in substance, is that the whole transaction was, in its essence, a private sale, although the parties went through the form of a revenue sale with a view to affect injuriously the rights of under-tenure-holders. In our opinion, there is no room for reasonable doubt that the plaintiff has established his case. It is sufficient for this purpose to refer to the decision of their Lordships of the Judicial Committee in the case already cited, *Sidhee Nuzur Ally Khan v. Ojoodhyaram Khan* 10 M.I.A. 540 : 5 W.R. 83 (P.C.), and to the decision of this Court in *Sri Nath Ghose v. Haw Nath* Dat 9 B.L.R. 220 : 18 W.R. 240. In the first of these cases, it was ruled that although a Government sale for arrears of revenue gives a title against all the world with certain exceptions, a fraudulent purchase at such auction sale places the purchaser in a very different position; in other words, as their Lordships pointed out upon the authority of *Collins v. Blantern* 2 Wils. 341, a Court will strip off all disguises from a case of fraud, and look at the transaction as it really is. In the second case to which reference has been made, this Court applied the principles in question to a sale of tenure under the Rent Law brought about designedly to get rid of an under-lessee. There a landlord had deliberately defaulted to pay the superior landlord his just dues with the intention that a decree might be obtained against him, and his tenure sold so that the under-tenure might be extinguished. The purchaser was settled from before the sale and the price also was fixed beforehand; while there was further a secret arrangement between the parties, who acted in conclusion with each other, as to the mode in which the profits of the transaction were to be divided. Under these circumstances, the Court held that, although the sale was held under the provisions of the Rent Law, it had the same effect as a private alienation because it was, in substance, a transfer under pre-arranged conditions to a purchaser who was a party to the arrangement. Mr. Justice Mark by remarked that, if a lesser enters into an agreement with another person to get rid of the lessee by means of a fictitious sale for arrears of rent and to share the profits of the transaction, that is a fraud as against the lessee. This proposition is, in our opinion, incontestable, though one of the reasons assigned by the learned Judge in support thereof may be open to criticism, namely, that, as an intermediate landlord is bound to protect his own tenant from all paramount claims [*Graham v. Allsopp* (1848) 3 Exch. 186 : 77 R.R. 592 : 18 L.J. Ex. 85], his failure to do so may be treated as defendant. It is clear, however, that it is gross fraud on the part of an intermediate landlord to use his influence to urge on a sale for arrears of rent in order to secure to the purchaser the advantages of a rent sale, while the intermediate landlord secretly bargains to receive as a reward for his services a share in the advantages thereby secured. The sale is merely a part of the machinery by which the fraudulent purpose is effectuated, and it ought to be

entirely put aside and the purchaser treated as occupying the same position as if he had obtained the property by a private transfer. This is in no way unjust to the purchaser, who was admittedly a party to the device by which the sale was brought about, as also to the arrangement for the distribution of the advantage secured thereby. In the case before us, though the sale has the appearance of a sale for arrears of revenue, the transaction is, in its essence, a private alienation. The proprietors determined in advance who was to be the purchaser of their estate. They fixed the amount of the purchase-money, and they put it so high, as to make it practically sure that no stranger aware of the risks attendant upon a purchase at a revenue sale, would offer to bid to that extent. The proprietors further made a secret arrangement with the intending purchaser that they would refund to him a portion of the purchase money, to be held by him as a deposit and applied for their benefit in a specified contingency. The transaction, in all its characteristics, was a private sale, and if we were to regard it as a real revenue sale, we would have to hold that an unscrupulous proprietor may successfully avail himself of the provisions of a revenue law of the most stringent character enacted for the benefit of the estate solely with a view to injure subordinate tenure-holders, and to profit by their detriment, while providing, by means of a secret arrangement with the intending purchaser, ample safeguards against any possible loss to himself by the transaction. The conclusion appears to us to be irresistible that the plaintiff is entitled to a declaration that the sale, under which the Nawab has derived title has clothed him with the rights and privileges of a private purchaser and not with those of a purchaser at a revenue sale [Cf. Indian Contract Act, Section 23 Illustration (i)]

3. The learned counsel for the respondent has faintly suggested that the suit ought to fail on two preliminary grounds. He has argued, first, that the plaintiff has not proved that he has any cause of action, because he has not established that the tenures held by him are of such a character as are liable to be annulled at the instance of a purchaser at a revenue sale; and, secondly, that the Court, in its discretion, should refuse to make a declaratory decree in the present case. In our opinion, there is no substance in either of these contentions. In so far as the first of them is concerned, it cannot be disputed that the plaintiff is the holder of under-tenures within the estate purchased by the respondent. He has not given any evidence to prove that the tenures have been in existence from the time of the Permanent Settlement. The burden of proving that the tenures are protected interests, is undoubtedly upon the person who sets them up [Forbes v. Mohamed Hossein 12 B.L.R. 210 : 20 W.R. 44; Pash Behari Basu v. Hara Moni Debya 15 C. 555 and Preonath Mitter v. Kiran Chandra Roy 27 C. 290. In the absence of evidence to show that the tenures held by the appellant fall within any of the statutory exceptions, it must be presumed that they are liable to be annulled and consequently the plaintiff has a good cause of action. It may, further, be observed that the objection taken is entirely futile, because the defendant is not prepared to admit that the tenures set up by the plaintiff are protected; in fact, if he made such an admission, the controversy between the

parties would be immediately at an end. In so far as the second objection is concerned, it is, in our opinion, equally groundless. That the revenue sale has thrown a cloud upon the title of the plaintiff as the holder of intermediate tenures within the estate, cannot be seriously disputed. The defendant, as purchaser at the revenue sale, is entitled to bring his suit for annulment of the encumbrances at any time within 12 years of the date when the sale became final and conclusive, under Article 121 of the second Schedule of the Limitation Act, 1908. It has been suggested that the plaintiff need not have rushed into Court, and might have waited till his title was challenged. In our opinion, the plaintiff was not bound to wait till he actually found himself in jeopardy. The allegation of fraud and conspiracy, upon which his case rests, was dependent for its proof mainly upon oral evidence. If he had waited for 12 years, it is not improbable that much of the evidence available might have disappeared. As it is, although he sued promptly within one year from the date of the sale, the principal actor Garth died on the 16th June 1904, before his evidence could be taken or even summonses served upon him. The other principal actor, Ananda Chandra, was, at the time of his examination as a witness, 62 years old. It would obviously have been an act of inexcusable folly on the part of the plaintiff had he risked delay. It is perfectly true that to entitle a plaintiff to maintain a suit for declaration u/s 42 of the Specific Relief Act, 1877, he must prove that he has a present existing interest, and no cause of action accrues to him until there is some infringement or threatened infringement of his right : in other words, the cloud must be cast before he can ask for its removal; he must allege and prove hostility on the part of the defendant, for no Court will move on purely speculative grounds [Promotho Nakh Ghose v. Jadoo Nath Sen 1 Ind. Jur. 293; Ram Khelawun Singh v. Oudh Koer 21 W.R. 101.]. But it cannot be suggested here that the defendant is not interested in denying the title of the plaintiff, nor can it be contended that the plaintiff had no business to bring him into Court. From the facts established by the evidence it is beyond controversy that the revenue sale was brought about by deliberate default on the part of the proprietors, and the defendant made the purchase at the auction sale in concert with the proprietors with a view to annul the incumbrances of the tenure-holders, amongst whom the plaintiff is one. It is fairly clear, therefore, that there was, before the commencement of the action, such hostility on the part of the defendant to the title of the plaintiff as to justify the institution of this suit. The defendant, if he had no interest to deny the title of the plaintiff, might have defeated the action by a declaration that he had neither denied nor was interested to deny the right which the plaintiff sought to establish. The two subsidiary grounds, upon which the claim of the plaintiff is sought to be defeated, are of an entirely technical and unsubstantial character. As no other objections have been urged on behalf of the defendant and as upon the merits the plaintiff is clearly entitled to relief, the result is that this appeal must be allowed and the decree of the Court below discharged. The suit will be decreed, and a declaration will be made in favour of the plaintiff to the effect that the defendant, the Nawab of Dacca, has by his purchase acquired the status merely of a private purchaser and not that of a

purchaser of an entire estate as a sale for arrears of revenue. The plaintiff is entitled to his costs both here and in the Court below as against the first defendant.