

**(1960) 05 CAL CK 0018**  
**In the Calcutta High Court**

**Case No :** Special Bench Ref. in Civil Revision Case No. 3786 of 1954

Kamal Kumar Nag Choudhury

APPELLANT

Vs

Parbati Charan Kundu and Others

RESPONDENT

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**Date of Decision :** 25-05-1960

**Acts Referred:**

Bengal Tenancy Act, 1885 — Section 174(3)  
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90  
Limitation Act, 1908 — Section 18

**Citation :** AIR 1961 Cal 81 : 64 CWN 788

**Hon'ble Judges :** P.N. Mookerjee, J;B.N. Banerjee, J;B.K. Guha, J

**Bench :** Full Bench

**Advocate :** Prafulla Kumar Chatterjee, for the Appellant; Manindranath Ghose and Anil Kumar Sett, for the Respondent

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## **Judgement**

F.N. Mookerjee, J.—This is a reference under proviso (ii) to Rule 1 of Chapter II of the Appellate Side Rules and the point referred relates to extension of time u/s 18 of the Indian Limitation Act. The point has arisen in connection with the setting aside of a sale u/s 174(3) of the Bengal Tenancy Act but the reference is much more comprehensive as the question has been framed in such a way as to include as well cases under Order XXI, Rule 90 of the Code of Civil Procedure. There is a family likeness in the two classes of cases and so far as the present point is concerned, it is pre-eminently a matter which is better and more effectively dealt with at once, or, at one and the same time, in relation to the above two statutory provisions.

2. The instant case, out of which this reference arises, was one for setting aside a sale u/s 174(3) of the Bengal Tenancy Act. The application under the section was filed by one of the judgment-debtors. The trial court found in favour of the applicant both on the question of "substantial injury (undervaluation and inadequacy of price) and the requisite fraud and material irregularity "in publishing and conducting the sale" but, as the application had been filed beyond six months from the date of the sale and as the auction-purchasers were held) to

be strangers, "not guilty of or accessory to any fraud" u/s 18 of the Indian Limitation Act, the trial court felt powerless to extend time under that section and, accordingly, it dismissed the application solely on the ground of limitation. That decision was upheld by the learned Additional District Judge, mainly, on the ground of limitation, upon the view, which, also, was the view of the learned trial Judge on the point that, for extending time against the auction-purchaser, it was necessary to find against him, too, fraud, as contemplated by the section, either as principal or as accessory, and, unless that was found and time extended as against him also, the application would fail on the ground of limitation. Incidentally, the learned Additional District Judge differed from the trial court on the question of material irregularity and fraud in the matter of publishing and conducting of the sale but his finding on the point was rather of a tentative character, and, as to undervaluation and inadequacy of price, he did not record any finding whatsoever and the finding of the learned Munsif on the point in favour of the applicant stood unreversed. The matter then came up to this Court and our learned brother Bachawat, J., who Heard the Rule, originally, or in the first instance, sitting singly, was of the opinion that if the view of the two courts below on limitation was correct, the Rule would fail, but if, on the other hand, for extension of time u/s 18 of the Indian Limitation Act, it was not necessary to prove that the auction-purchaser also, --- in addition to the decree-holder,--was "guilty of or accessory to" the fraud, contemplated under the section, the applicant-petitioner was entitled to such extension in the instant case and his application could not be thrown out on the ground of limitation and, in that event, the case would have to go back to the lower Appellate Court for proper consideration of the other questions, involved therein, as the finding of the learned Additional District Judge on the question of material irregularity and fraud in the publishing and conducting of the sale was more or less incidental and tentative and did not possess the character of a firm finding, made on a full and due consideration of the evidence and of the different aspects of the matter, so as to be final, binding and conclusive between the parties. On the question of limitation, to wit, the legal aspect of Section 18, adumbrated hereinbefore, Bachawat J., was inclined to differ from the two courts below but he was unable to give effect to his said inclination, --and to remand the case in the light of his opinion on the other part of the case, as already indicated above, -- in view of the two Bench decisions of this Court, reported in Mihirlal Vs. Panchkari Santra and Others, and Majibar Rahman Molla and Others Vs. Rahu Bux Dhali and Others, . As, however, Bachawat J. was unable to reconcile himself to the aforesaid two decisions, on reasons and on principle, he took the only course, open to him in the matter, namely, of referring the case to the Division Bench, but, in making the said reference, he gave detailed reasons in support of his view that the above two Bench decisions were not correct and required reconsideration.

3. In the Division Bench, the case came up before Sarkar, J., and myself and, as we felt that the point was of sufficient importance to justify and require

consideration, at least, by a Special Bench, we made the necessary recommendation and referred the matter to the learned Chief Justice for an appropriate reference to a Special Division Bench under proviso (ii) to Rule 1 of Chapter II of the Appellate Side Rules of this Court, This reference has, accordingly, been made by the learned Chief Justice and we have been constituted the Special Division Bench for hearing and disposing of the same.

4. In recommending to the learned Chief Justice, the reference to a Special Division Bench, Sarkar, J., and myself framed the following question for the consideration of the Special Division Bench, namely-

"Whether for extending time u/s 18 of the Indian Limitation Act for the filing of an application for setting aside a sale under Order XXI, Rule 90 of the CPC or Section 174(3) of the Bengal Tenancy Act, it is necessary to establish, inter alia, that the applicant was prevented by fraud of the auction-purchaser, even where he is a stranger, from making the application in time, or, to put it in statutory language, that, by reason of such fraud, the applicant was kept from knowledge of his right to make the application for the requisite period".

5. We were fully alive to the fact that the instant case was one u/s 174(3) of the Bengal Tenancy Act but, in spite of that, we framed the question for consideration to cover cases both under the said section and the analogous provision (Order XXI Rule 90) of the Code of Civil Procedure. This we did in the wider interest of administration of law and justice and to ensure a full, complete and comprehensive examination of the above particular aspect of Section 18 of the Indian Limitation Act, which, as we have said above, is fundamentally the same in regard to both the above two types of cases. We were also alive to the fact that the divergence of judicial opinion on the point was not such as to enable us to refer the matter to a Full Bench under the Rules of this Court as, strictly speaking, all the Bench decisions on the point,--and some single Judge decisions too, -- were against the petitioner, who had the support only of Judges, sitting singly, We say this as, in our opinion, the Bench decision in Radha Kisson Mahesri and Others Vs. Tansuk Mahesri and Others, which incidentally, was a case under Order XXI Rule 90 of the Code, however much it may purport to indicate the contrary, is plainly distinguishable, as there the party concerned was not the auction-purchaser but a claimant for rateable distribution, obviously entitled only to "notice" before any order is made setting aside the sale. We noticed also that the weight of authority or preponderance of judicial opinion was against the petitioner, but, that notwithstanding, we felt the necessity of recommending the above reference as, in our opinion, even from the above Bench decisions themselves (Vide, in particular, the leading decision amongst them, namely, Mihirlal Vs. Panchkari Santra and Others, , certain aspects emerge, which make further consideration of the matter imperative in the interest of justice, particularly in view of certain very relevant, weighty and pregnant observations of Mukherjea, J., as he then was, in Mahipati Haldar Vs. Atul Krishna Moitra and Others and of our learned brothers Bachawat, J., in the instant case.

6. Turning now to the point under reference, we would refer first to the several statutory provisions which require consideration in that connection. The first, of course, is Section 18 of the Indian Limitation Act, which, in its relevant part, runs as follows:

"Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, ..... the time limited for instituting a suit or making an application -

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby .....

7. We quote next the relevant sections of the Bengal Tenancy Act, namely,

Section 174(3): Where a tenure or holding has been sold for arrears of rent due thereon, the decree, holder, the judgment-debtor, or any person whose interests are affected by the sale, may, at any time within six months from the date of the sale, apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting the sale:

Provided as follows:

(a) no sale shall be set aside on any such ground unless the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud, and

(b) no application made by a judgment-debtor or any person whose interests are affected by the sale under this sub-section shall be allowed unless the applicant either deposits the amount recoverable from him in execution of the decree or satisfies the Court for reasons to be recorded by it in writing, that no such deposit is necessary. Section 174A.

(1) Where no application is made under Sub-section (1) of Section 174 within thirty days from the date of sale or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where in the case of an application under Sub-section (1) of Section 174, the deposit required by that sub-section is made within thirty days from the date of sale, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby,

(3) Where a sale is set aside under this section, the purchaser shall be entitled to an order against any person to whom the purchase money has been paid for its repayment with or without interest as the Court may direct.

(4) No suit to set aside an order made under this Section shall be brought by any person against whom such order is made.

(5) Notwithstanding anything contained in this Section an application may be made under Sub-section (3) of Section 174 to set aside the sale, and where such application is allowed the order made under sub-section (1) confirming the sale shall be deemed to be cancelled.

and the corresponding provisions of the Code of Civil Procedure, namely, Order XXI Rule 90:

(1) Where any Immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it, or on the ground of failure to issue notice to him as required by Rule 22 of this Order:

Provided (i) that no "sale be set aside on the ground of such irregularity, fraud or failure unless upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure,

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of and person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon.

Order XXI Rule 92.

(1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale: Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

8. Having quoted above the relevant statutory provisions, we propose to make some preliminary observations, which will facilitate the real approach to the problem before us by enabling us to pay particular attention to the fundamental

distinction, which essentially underlies that approach. The fundamental distinction, which we have in mind, arises from the statutes themselves in relation to necessary parties to an application for setting aside the sale under the above statutory provisions. It is to be seen from the said statutory provisions that, in neither, is there any clear indication as to who are necessary parties to the making of an application for setting aside a sale. All we get in express terms is that no order setting aside a sale is to be made without notice to all parties (persons), affected thereby (Vide the proviso to Sub-section (2) of Section 174-A of the Bengal Tenancy Act, read with Sub-rule (2) of p. 21 Rule 92 of the Code of Civil Procedure). This particular provision in either of the above two statutes came by way of amendment in the wake of acute divergence of judicial opinion on the question whether, in an application for setting aside a sale, only the decree-holder, or, the auction-purchaser also, was a necessary party, or whether he was, at best, entitled to a notice before the sale is set aside (Vide in this connection, Surendra Mohini Debi v. Loharam Chattopadhyaya 16 CWN. 570 and Satish Chandra De Sarkar Vs. Rakhal Chandra Saha and Others, , citing some of the contrary decisions; vide also Kripali Singh v. Pairoo Raut 11 CLJ 86, in which some of the earlier decisions were considered). It was acknowledged on all hands that the decree-holder was a necessary party, -- as, indeed, he was, when it is remembered that he was the person, at whose instance, the sale in question was held and the relative execution proceeded to that stage or to the point of sale and against whom alone the relevant grounds for setting aside the sale could be directed and to whom alone, apart from the Court and its officers, they may have any reference. With regard to the auction-purchaser, however, there was a sharp difference of opinion. It is to be borne in mind, in this connection, that the auction-purchaser was not directly concerned with any of the grounds, on which the impugned sale could be sought to be set aside or the application for setting aside the sale, under either of the above two provisions, could be made, though he would, undoubtedly, be a person, who or whose interest would be affected by the setting aside of the sale. Indeed, the cases which considered him to be a necessary party, or, at least, entitled to a notice before the setting aside of the sale, were intrinsically based on this consideration and the underlying principle was, in truth, supplied by the well-known maxim "Audi alteram partem", (see in this connection 11 C. L.J. 86, supra, see also Rajendra Lal v. Atal Bihari 25 CLJ. 456 : (AIR 1917 Cal 633) citing Tikait Ajant Singh Vs. F.T. Christian and Others , which, however, may well be satisfied, in the above context, by conceding to him (the auction-purchaser) the status of a necessary party for purposes of the order, -- as distinguished from the making of the application, -- for setting aside the sale.

9. There was thus a basic difference between the position of a decree-holder and that of an auction-purchaser in relation to a proceeding for setting aside the sale and, although it may well be that both of them were necessary parties to such a proceeding, there was still a well-reasoned and intelligent distinction in that while the former was a necessary party to the making of the application, that is to say,

at and from its very inception, the latter was a necessary party only for purposes of the order, setting aside the sale, or, in other words, only to the extent that no such order could be made in his absence. The conflict or divergence of judicial opinion on the point, prior to the relevant amendment or amendments, really arose from the failure to observe or recognise the above distinction and when, at that stage, the legislature intervened, presumably to resolve the said conflict or divergence, but did not provide for the making of the auction-purchaser a party to the application but merely interposed a provision to the effect that "no order shall be made unless notice of the application has been given to all persons affected thereby (Vide Order XXI Rule 92(2) proviso (Code of Civil Procedure) and Section 174A(2) proviso (Bengal Tenancy Act), which latter provision, though expressly applying to applications u/s 174(1), applies also, in our opinion, to applications u/s 174(3) on a proper reading of the entire Section 174A -- in particular, Sub-sections (1), (2) and (5) thereof), it is reasonable to hold that the proviso was inserted with reference inter alia to the auction-purchaser for ensuring that he may be heard before the sale is set aside, or in other words, that the sale should not be set aside without hearing him, and, so far as he (the auction-purchaser) was concerned, nothing more was intended by the said amendment or amendments. Even without the amendments, the position was fundamentally the same and the above distinction was ever present, though not always recognised or borne or kept in mind, and the amendment or amendments only served to emphasise its intrinsic truth and importance.

10. It thus emerges that the auction-purchaser is not a necessary party to the making of the application for the setting aside of the sale, though he is, undoubtedly, a necessary party to the proceeding in that, without him, or, in his absence, no order can be made, allowing the said application and setting aside the sale. If this be the true view, there is no necessity for extension of time u/s 18 of the Indian Limitation Act, so far as he, the auction-purchaser, is concerned, as he is not a necessary party to the making of the application for setting aside the sale and as the question of limitation arises, -- and can arise, -- only in relation to the making of the said application. It is thus not necessary for invoking the said Section 18 to prove that the auction-purchaser also was "guilty of or accessory to" the fraud, mentioned in the said Section, and, even without such proof, the Section would apply to extend the time and save the application from being time-barred, provided, of course, -- but provided only, -- that the requisite fraud is established against the decree-holder, -- who alone, is the necessary party to the making of the said application, -- either as principal or as accessory. In this view, it would follow that the Bench decision in the case of *Mihirlal Vs. Panchkari Santra and Others*, , was wrong, and so also the single Judge decisions in *Majaharali and Another Vs. Mafijaddi Sardar and Another*, and *Jagiswar Das Vs. Debnarain Roy and Others* , and *Lodge, J.*'s suggested construction of the Section (Section 18) in *Saila Bala Dasi Vs. Atul Krishna Mondal and Others*, , -- to which cases our attention was drawn as prior and independent decisions to the same effect, -- as also the statement of the law on

the point in the two Bench decisions of this Court, *Majibar Rahman Molla and Others Vs. Rahu Bux Dhali and Others*, , and *Purna Chandra v. Anukul Biswas* ILR 36 Cal 654, which, we may just add here, was merely obiter or in the nature of obiter dictum, as the actual finding, in either of the said two cases, was the absence of any fraud whatsoever, either of the decree-holder or of the auction-purchaser. It follows also that the true law on the point was laid down by Mukherjea J., in *Mahipati Halder Vs. Atul Krishna Moitra and Others* , and by B.B. Ghose J., in *Kedar Hura v. Asutosh Roy* 44 C. L.J. 565, and, as to the decision of the Madras High Court in *Karuppanna Goundan Vs. Ponnuthayee alias Subbammal and Others*, , we would, as at present advised, only say that its conclusion on the point, now before us, is correct. We would, however, reserve our opinion on the more extreme proposition, formulated and approved by the learned Judges of the Madras High Court, -- and on their reasonings and observations in support of the same, -- that, for purposes of Section 18 of the Indian Limitation Act, in its application to cases for setting aside sales under inter alia Order XXI Rule 90 of the Code of Civil Procedure, the fraud of either the decree-holder or the auction-purchaser would be sufficient. It may not be easy to appreciate how the fraud of the decree-holder would necessarily extend the time as against the auction-purchaser, -- and, if it does not, how the application would succeed as against him (auction-purchaser), when the section (Section 18), by its very terms, requires fraud to be established against the person, against whom time is sought to be extended. If, then, the auction-purchaser is a necessary party to the making of the application, it may well be argued that it would be necessary to get extension of time as against him also and Section 18 would, in that context, require that he, too, should be found "guilty of fraud or accessory thereto". It may also be argued, -- and argued with force and much greater amount of logic, -- that the real and immediate question before the Court is whether the application should be allowed and the sale should be set aside and not whether the sale should be confirmed, so that whether it can be confirmed against one party and declared invalid against the other may not be strictly relevant at that stage, and it may be more pertinent to enquire whether it can be set aside against one and refused to be set aside against the other and what, in such circumstances, should be the ultimate fate of the application. In the context, we do not feel convinced that it is possible to decide the point, which is now before us, -- and which was before the Madras High Court in AIR 1956 Mad. 198, supra, --without determining the preliminary and fundamental question whether the auction-purchaser is a necessary party to the making of the application for setting aside the sale, as was done by the learned Judges of the Madras High Court. We have, accordingly, decided the said preliminary question and, as seen above, we have answered it in the negative. That is enough for our present purpose and we propose to leave it there without expressing any final opinion on the more extreme proposition of the learned Judges of the Madras High Court (Vide AIR 1956 Mad 198, Supra) noticed earlier, and reserving consideration or further consideration of the same, -- and of the reasons, given therefore, -- for a more appropriate future occasion.

11. While on the above, it is somewhat interesting to note that, the Bench decision of this Court, which, inter alia, we are overruling by this judgment, namely, *Mihirlal Vs. Panchkari Santra and Others*, , was itself not wholly or altogether oblivious of the above fundamental distinction, on which we have based our present decision. This is clearly perceptible in the following observation of Das Gupta, J., as he then was, at p. 640 of the report (CWN): (at p. 522 of AIR): .

"Section 174(3) does not in words state as to who should be made a party. In Section 174-A there is a provision that no order setting aside a sale shall be made unless notice of the application had been given to all persons affected thereby. "Whatever view may be taken as regards the stage where such notice is to be given", there can be no doubt, in my opinion, that an application for setting aside the sale cannot be considered at all unless the person against whom the relief is primarily claimed has been made a party and received notice."

which, if we may say so with respect, -- particularly, in view of the portion underlined above (here in " ") --would not, necessarily, or, without more, support the view, presumably, taken by his Lordship, that the auction-purchaser was a necessary party to the making of the application for setting aside the sale and would not thus fit in with his ultimate and somewhat abrupt conclusion to that effect. Significantly, also, Das J. who was the other member of the Bench, merely "agreed in the order", proposed by Das Gupta J.

12. In our opinion, then, the answer to the question, referred to us, should be in the negative and, with that answer, we send the case back to the learned Chief Justice for necessary directions.

13. There will be no order for costs in this Reference.

Guha, J.

14. I agree.

Banerjee, J.

15. I agree.