
(1937) 08 PAT CK 0033
In the Patna High Court

Nitai Dutta

APPELLANT

Vs

Ganesh Mahto and Others

RESPONDENT

Date of Decision : 23-08-1937

Acts Referred:

Chotanagpur Tenancy Act, 1908 — Section 208, 213

Citation : AIR 1937 Patna 644 : 172 Ind. Cas. 147

Hon'ble Judges : James, J;Dhavle, J

Bench : Division Bench

Judgement

James, J.—The suit out of which this appeal arises was instituted to set aside an ex parte rent decree, and the sale of a holding in execution u/s 208, Chota Nagpur Tenancy Act, on the ground of fraud. The trial Court and the lower Appellate Court have found that the suit was fraudulent; that the rent had been deposited by the tenant to the knowledge of the land; and that service of processes was fraudulently suppressed in the suit and in the execution proceedings. The sale has, therefore, been set aside and the plaintiffs have been restored to possession of their holding. On the question of whether the proceedings in the suit and in the sale were vitiated by fraud, the matter is concluded by the findings of fact of the learned Subordinate Judge.

2. Mr. Abani Bhusan Mukharji on behalf of the auction-purchaser argues that a suit cannot be instituted to set aside a sale held u/s 208, Chota Nagpur Tenancy Act, on the ground of fraud. He relies upon the decision of this Court in Gosain Das Baishnab Vs. Gopal Singh and Others, . In that case an application had been made u/s 213, Chota. Nagpur Tenancy Act, to set aside the sale on the ground of fraud, which had been decided against the persons who subsequently attempted to institute a suit. It was held that after the sale had happened, a suit could not be instituted to set aside the sale on the ground of fraud, unless fraud or want of jurisdiction could be proved as affecting the proceedings u/s 213 of the Act. In the same way a person who applies under Order IX, Rule 13, to set aside an ex parte decree, with the result that there is a definite finding against him

that summons has been, properly served, will find that decision acting as res judicata to bar a subsequent suit based on the allegation that service of process has been fraudulently suppressed. In the present case, it appears that the proceedings in the suit and execution did not come to the knowledge of the plaintiffs until long after the period of limitation prescribed by Section 213 of Chota Nagpur Tenancy Act had expired. The right to institute a suit to set aside a sale on the ground of fraud or want of jurisdiction is expressly saved by the provisions of Section 214 of the Act. Mr. Abani Bhusan Mukharji argues that the innocent auction-purchaser ought not to be penalised by loss of his purchased property without compensation, since there is no finding of the lower Appellate Court that he was party to the fraud. In such cases the rule laid down by the Judicial Committee of the Privy Council in *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh* 10 MIA 454 : 2 Sar. 167 (PC) at p. 173 Page of 10M.T A.-- [Ed.] will prevail. Sir James Colvile delivering the judgment of their Lordships observed in that case:

The proposition that no digerence is to be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of the two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrongdoing, A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other.

3. I do not know that it can be said that where a fraud has been proved throughout the proceedings in the suit, and in. the sale, the Revenue Officer can be said to have had any jurisdiction at all u/s 208, Chota Nagpur Tenancy Act, but if the Court had to choose between two innocent parties, I consider that there can be no doubt regarding the correctness of the decree of the Munsif in the present case. The learned Munsif was apparently considering this aspect of the case when he remarked with such scorn on the appellant's claim to consideration as to bona fide purchaser for value. The appellant purchased 15.91 acres for Rs. 150 in March 1930. He permitted the tenant to grow his crop on the land, taking delivery of possession exactly at the time when the crop was ready for harvesting. If the sale had been set aside on application u/s 212 of the Act, the auction? purchaser would have been entitled to be paid Rs. 157-8-0; but he must have realized far more than this immediately on taking possession of the holding. Any Court of equitable jurisdiction having, to decide between these parties would properly have decided as the learned Munsif decided, that the innocent raiyat was entitled to be restored to his holding. There is no merit in this appeal which must be dismissed.

Dhavle, J.

4. I agree. In support of the contention that the appellant, against shop no participation in the decree-holder's fraud has been established, ought not to be penalised, Mr. Mukharji has cited *Zain-uj-Abdin, v. Muhammad Asghar Ali Khan*

10 A 166 : 15 IA 12 : 5 Sar. 129 (PC) and Gkitamber v. Kristnappa 26 B 543 : 4 Bom. LR 249. T& former was however a case in which, there was up fraud either in obtaining the original decree or in the execution sale, so that it became unnecessary, for Sir Barnes Peacock, who delivered the judgment of the Judicial Committee, to deal with Abdul Haye v. Nawab Raj (1868) Beng. LR 811 : 9 WR 198 which had been cited by Mr. Cowie for the appellant, and in which the judgment of the Full Bench had been given by Peacock, C.J. himself In the case in Chitamber v. Kristnappa 26 B. 543 : 4 Bom. LR 249 the ex parte decree was found to have been obtained by fraud, but the execution purchaser was not proved to have been a party to the fraud, and what was decided was that the sale could not be set aside merely on the ground of inadequacy of price fetched at the execution sale. That was not a case where, as in the present case, the execution sale was found to have been vitiated by fraud.

5. The distinction was elaborately considered by Mookerjee, J. in Bireswar Ghose v. Panc Mouri Ghose 27 CWN 587 : 74 Ind. Cas. 975 : AIR 1923 Cal. 638 :37 CLJ 145 where it was held that an execution which has been brought about by the fraud of the decree-holder is liable to be set aside on that ground even though it is not established that the auction-purchaser has participated in or has been cognizant of the fraud. If the sale is. set aside, then the question arises whether or not the auction-purchaser who was not a parly to the fraud is entitled to the return of the money paid by him. Mr. Mukharji has referred to Section 213-A, Chota Nagpur Tenancy Act, which provides for restitution to the auction-purchaser among others "where a decree for rent is set aside" with the consequence that any sale of immovable property in execution of such decree is according to that section, "deemed to be set aside." This section, however seems to be confined to cases where a decree for rent is set aside under the Chota Nagpur Tenancy Act : but a suit for "setting aside a decree on the ground of fraud, though saved by Section 258 of the Act, is no more a suit under the Act than a suit for a, declaration that a sale held in execution of a rent decree has been fraudulently confirmed and for recovery of possession, which is saved by Section 214 of the Act : see Kumar Ramishwar Narain Singh Vs. Mahabir Prasad and Others, . Section 213-A is, therefore, of no assistance to the appellant, to say nothing of the difficulty caused by the fact that the section requires "the Court of first instance" to make restitution. The matter must, therefore, be dealt with on general principles and in the light of the consideration whether it will be in accordance with the principles of justice, equity and good conscience that the auction-purchaser should have his money paid back to him. I entirely agree with my learned brother that in the present case the auction-purchaser, though technically innocent, has no claim to consideration as against the judgment-debtor.