

(1899) 06 CAL CK 0015
In the Calcutta High Court

Ram Narain Tewari and Others

APPELLANT

Vs

Shew Bhunjan Roy and Others

RESPONDENT

Date of Decision : 30-06-1899

Acts Referred:

Citation : (1900) ILR (Cal) 197

Hon'ble Judges : Francis W. Maclean, J; Banerjee, J

Bench : Division Bench

Judgement

Francis W. Maclean, K.C.I.E., C.J.,

1. In this case I have the misfortune to differ from Mr. Justice Stevens, who has held that, having regard to the provisions of Section 244 of the CPC this suit is not maintainable.

2. Shortly the facts are these. There was a rent suit brought against the present plaintiff, and an ex parte decree was obtained against him on the 16th January 1894, and under that ex parte decree the property was put up for sale, and sold on the 10th June 1894, and the purchaser, who is the respondent on the present appeal, was put into possession on the 25th December in the same year. Subsequently, the present plaintiff, who was the defendant or one of the defendants in the former suit (our information as to the former suit is not very definite), applied to set aside the ex parte decree, not upon the ground of fraud, but upon the ground of non-service of the summons upon him, and that ex parte decree was set aside. We are not in possession of the actual date when this was done, but it is said that it was in September 1895. The ultimate fate of that suit was that as the then plaintiff did not proceed with it, it was dismissed for default.

3. On a date, which has not been given to us, the present plaintiff applied to set aside the sale to the present respondent, on the ground of fraud, and that application was rejected on the 21st August 1895, upon the ground that the auction-purchaser, the present respondent, was not made a party to the proceedings. On the 27th July 1896, he brings his present suit, in which he

prayed for a declaration that his title to portions of the land sold had not been affected in any way by the fraudulent proceedings (which he alleged in his plaint) and for confirmation of his possession. The fraudulent proceedings of which he complained were not merely the sale of the property under the decree, but the whole proceedings in the suit, and especially the circumstances under which the ex parte decree was obtained, and the suit must be taken in effect as a suit challenging, not only the sale, but challenging the decree, on the ground of fraud.

4. Both the Munsif and the Subordinate Judge held that the suit was maintainable, and made a decree in the plaintiff's favour, but Mr. Justice Stevens has reversed their decision, holding that the plaintiff is barred by Section 244 of the Code of Civil Procedure. I am unable to share that view. The plaintiff's suit is one not merely to set aside the sale (to which Section 244 would have been a bar), but virtually to have it declared that the whole suit, including the decree, was a sham, and fraudulent as against him. Such an issue could not have been tried u/s 244, the proceedings under which presuppose the existence of a valid and binding decree. It is perfectly true that as the ex parte decree was set aside, there is no decree of the previous suit now to be set aside, but it was set aside for want of due service of the summons on the present plaintiff, and not on the ground of fraud, which the plaintiff by his present suit desires to go into, and which he contends, if proved, will vitiate the whole of the proceedings including the sale. I can see nothing in Section 244, which prevents him from doing this, and I think that, even if there be now no decree to be actually set aside, the plaintiff is entitled to show that the decree, under which the sale was held, was obtained by fraud as against him, and this view appears to me to be consistent with the case of *Abdul Mazumdar v. Mahomed Gazi Chowdhry* I.L.R (1894) 21 Cal, 605, and the case of *Pran Nath Roy v. Mohesh Chandra Moitra* I.L.R., (1897) 24 Cal., 546, nor do I think that it clashes with anything that has been said in the case of *Nemai Chand Kanji v. Deno Nath Kanji* (1898) 2 C.W.N., 691 or in the cases of *Moti Lall Chakerbutty v. Russick Chandra Bairagi* (1896)., 26 Cal, 326, note; *Bhubon Mohun Pal v. Nunda Lal Dey* I.L.R (1899) ., 26 Cal., 324, and *Hira Lal Ghose v. Chundra Kanto Ghose* I.L.R(1899) ., 26 Cal., 539.

5. This proposition has not been seriously controverted by the respondent's learned Vakil, but he urges that the learned Subordinate Judge has not found as a fact that the decree was obtained by fraud, and he asks for a remand to have that issue determined. I think, however, looking at the judgment as a whole, that is what the Subordinate Judge intended to find: otherwise it is difficult to appreciate why he should have referred to and relied upon the cases reported in Volumes 21 and 24, Calcutta Series, which I have just cited. He says: "Fraud being the key note of the plaintiff's suit, it is saved from the operation of Section 244, as that section has been expounded by the case of *Abdul Mazumdar v. Mahomed Gazi Chowdhry* I.L.R (1894) 21 Cal., 605, and by the still more recent case of *Pran Nath Roy v. Mohesh Chandra Moitra* I.L.R (1897) 24 Cal., 546." In these cases the distinction is drawn between suits in which the plaintiff asks, not only to set aside the sale, but also to set aside the decree, on the ground of

fraud, and that distinction must, I think, have been present to the learned Subordinate Judge's mind.

6. There are other passages in his judgment, which show that he was dealing with the question of fraud as to the decree and not merely as to the sale. For instance, he says, "the recent case quoted by the appellant of Keshab Chunder Ghose v. Durga Tarini Ghosh (1897) 1 C.W.N., cxi, does not at all touch the present case, inasmuch as the decree and the sale had not been aspersed as fraudulent." And again: "I agree with the Munsif in finding that Amir is the real beneficiary, and this finding goes a long way in bringing home the plea of fraud set up by the plaintiff," the plea of fraud being, not only in regard to the sale, but in regard to the decree.

7. I, therefore, think that the learned Subordinate Judge intended to find, and has found, that the decree in the previous suit was obtained by fraud, and, that being so, there is no reason which would justify us in remanding the case to have that issue retried. The appeal must be allowed, and the decree of the Subordinate Judge restored with costs, both before Mr. Justice Stevens and this Court.

Banerjee, J.

8. I am of the same opinion.