

(1877) 07 CAL CK 0010
In the Calcutta High Court

Ram Soonder Surma Mozoomdar and Others

APPELLANT

Vs

Bhoobun Chunder Sen

RESPONDENT

Date of Decision : 06-07-1877

Acts Referred:

Contract Act, 1872 — Section 182, 185

Citation : (1878) ILR (Cal) 301

Hon'ble Judges : R.C. Mitter, J; Birch, J

Bench : Division Bench

Judgement

Birch, J.—(after stating the facts, continued as follows): I do not treat the suit as one brought to annul the sale on the ground of its having been made contrary to the provisions of Act XI of 1859. What the plaintiff seeks to establish in this suit is, that by the fraud of the defendant they have been deprived of their property, and they ask to be relieved from the effect of that fraud and to be placed in the position in which they were before the auction-sale took place. To such a suit the provisions of Act XI of 1859 in restriction of suits to annul sales cannot, in my opinion, be extended. We have to look to the general law of limitation, and treating this as a case for relief on the ground of fraud, the suit is clearly within time. [His Lordship then proceeded to deal with the facts of the case.]

2. The Subordinate Judge has decreed the suit and ordered that the plaintiffs obtain possession of the share claimed with costs and interest thereon from defendants 2 and 3. He has also made the said defendants liable for the costs of Government with interest.

3. I take the same view of the evidence as the Subordinate Judge has. But I think that the form of the decree must be different. Our order will be that the defendant No. 3 do reconvey to the plaintiffs the property which is the subject of this suit, upon receiving from them the sum of Rs. 220 with interest thereon at 4 per cent, from the date of payment thereof; that the cost of the stamp for conveyance and the registration thereof be borne by the defendant No. 3; that in default of the conveyance being executed within two months from the date of

this decree, the conveyance be executed by the Court, the cost of the transaction being added to the costs of this appeal. The order of the lower Court is modified. The costs in this Court to be borne by defendant No. 3 with interest at 6 per cent. The order of the Subordinate Judge as to costs in the lower Court will stand.

Mitter, J.

4. I am also of opinion that the plaintiffs in this case upon the facts, which appear to me to have been satisfactorily established by the evidence, are entitled to recover possession of the share of the zemindary for which this suit has been brought, and to obtain a conveyance of the same from the defendant, appellant.

5. Although in the plaint there is also a prayer for the reversal of the auction-sale, I do not think that, under the circumstances of this case, that prayer can be granted.

6. In this view of the case, it does not fall within the provisions of Article 14 of the second schedule of the Limitation Act, or Section 33 of the Revenue Sale Law. It should be considered simply a suit to obtain a certain relief on the ground of fraud, and consequently Article 95 is applicable to it. Putting the case, therefore, in the most favourable position as regards the defendants, the knowledge of the fraud cannot possibly date back further than the date of the auction-sale. The present suit having been-brought within three years from that date is, therefore, not barred by limitation.

7. The mehal seems to have been sold for an arrear of five annas of the revenue kist of September 1872. It is stated by the plaintiffs that Bhim Narain, second defendant, father of Bhoobun Chunder, defendant No. 3, the appellant before us, was entrusted by all the co-sharers with the entire management of the estate; and that it was his duty, therefore, to see that the whole of the revenue due in that kist was paid. But upon the evidence I am not prepared to say that this part of the plaintiffs' case has been established. I am inclined to believe that it was not a premeditated default on the part of any one of the co-sharers to further a fraudulent scheme. It was merely the result of an accidental negligence on the part of some one of the co-sharers. It is deposed to by the plaintiffs' witnesses themselves that one Hurry Dass Chuckerbutty was employed by some of the co-sharers, for instance, Wooma Soondery and Bissessuri, two of the plaintiffs in this suit, to deposit in the Collectorate their proportionate shares of the revenue. The evidence as to the whole mehal being in the possession of Bhim Narain on behalf of the rest of the co-sharers is neither clear nor satisfactory. But upon the evidence I am satisfied that, shortly before the day of the sale, the defendant Bhim Narain undertook to make an attempt to save the mehal from the impending auction-sale by putting in an application to the Collector u/s 6 of the Revenue Sale Act on behalf of all the co-sharers.

8. The learned pleader for the appellant has drawn our attention to several discrepancies in the depositions of the plaintiff's witnesses upon this point, but these discrepancies, far from affecting their credibility, appear to me to be such

as would naturally occur in the statements of truthful witnesses speaking to events which had happened some time before.

9. I am of opinion, therefore, that it has been well established in his case that before the auction-sale Bhim Narain undertook to make an application on behalf of all the co-sharers u/s 6 of Act XI of 1859. He was employed for this purpose by one of the co-sharers, viz., Radha Kissen Surma Mozoomdar, a witness in this case, and Haranund Nundi, another witness of the plaintiffs, who came to Nusseerabad on their behalf to protect their interests after the mehal had fallen into arrears. Bhim Sein, I think, having accepted this engagement became an agent of the plaintiffs for this special purpose within the meaning of Section 182 of the Contract Act. It is said that this was a mere gratuitous offer on the part of Bhim Sein, and there was no consideration for it. But that circumstance would not take away from him the character of an "agent;" see Section 185.

10. Now it is clear from the evidence that Bhim Sein intentionally, and with a view to cause wrongful loss to the plaintiffs and equally wrongful gain to himself, neglected to perform his duties as an "agent." He not only omitted to make an application to the Collector as he undertook to do, but by fraudulent misrepresentations prevented others from making a similar application on behalf of the plaintiffs. I entirely concur with the lower Court in its opinion that the statements of the plaintiffs' witnesses, Chunder Nath Dey, Ram Gopal Nag, and Brojnath Bose, are fully reliable upon this point; they prove beyond doubt that, on the day of auction-sale, Bhim Sein in the Collector's cutcherry showed them a petition which he said he would present to the Collector as soon as he would come to Court. They went away with this assurance.

11. It is evident from the deposition of the plaintiffs' witness No. 4, Juggobundhoo Bose, that these representations were falsely made by Bhim Sein to successfully carry out a fraudulent scheme of purchasing this mehal in the benami of his son. He had with him at that time a muktarnamah executed by his son, who was not at Nusseerabad, but at his house, which was at some distance for that place, empowering the witness Juggobundhoo to bid for the property at the impending auction-sale. Then we have the fact clearly established that when the Collector came to Court, he did not make even any show of attempt to save the property. These facts leave no reasonable doubt in my mind that Bhim Sein accepted the agency on behalf of the plaintiffs to make an application u/s 6 of Act XI of 1859 with a view that he might with more facility carry out his intention of purchasing the property himself. This was clearly a fraud against the plaintiffs, and under these circumstances, it seems to me just and equitable that Bhim Sein should not be allowed to reap the benefit of his fraud. The plaintiff's are therefore entitled to the relief proposed to be given by my learned colleague.