

(1949) 11 CAL CK 0033
In the Calcutta High Court
Case No : Civil Rule No. 595 of 1949

Sailendra Nath Sen, Auction-Purchaser	APPELLANT
Vs	
Sudhanya Charan Das Naiya and Others	RESPONDENT

Date of Decision : 23-11-1949

Acts Referred:

Bengal Tenancy Act, 1885 — Section 173, 174(3)
Limitation Act, 1908 — Section 18

Citation : AIR 1950 Cal 166

Hon'ble Judges : R.P. Mookerjee, J

Bench : Single Bench

Advocate : C.S. Sen and Amal Kumar Mukherji, for the Appellant; Chandra Sekhar Bhowmik, for the Respondent

Judgement

R.P. Mookerjee, J.—This is an application in revision on behalf of the auction, purchaser against an order passed by the lower appellate Court setting aside a sale. The sale in question was held on 5th May 1941, and a jama of Rs. 74-8-16 gandas covering an area of about 79 bighas was sold for Rs. 203-9-0. About a quarter of this area was khas land and the remaining portion was tenanted. The sale was confirmed on 7th June 1941 and the auction purchaser thereafter obtained possession through Court. About four years later, on 24th July 1945, an application purporting to be under Sections 173 and 174 (3), Bengal Tenancy Act was filed by the judgment-debtors. It was alleged that the auction-purchaser was the benamdar of some of the judgment-debtors and this was made the foundation of the application u/s 173. Various allegations about suppression of service of notices and other irregularities and of fraud were made in support of the prayer made u/s 174 (3), Bengal Tenancy Act. This joint application was dismissed by the learned Munsif and all the allegations by the judgment-debtors were rejected.

2. An appeal was taken before the learned Subordinate Judge against this decision. It was held that although the judgment-debtors seemed to have some

understanding with the auction-purchaser prior to the confirmation of the sale and though the case was not free from a strong suspicion that some of the judgment-debtors were in league with the auction-purchaser, it had not been conclusively proved that he was the benamdar of some of the judgment-debtors. It was accordingly held that the application u/s 173 had been rightly dismissed by the learned Munsif. In connection with the appeal preferred u/s 174 (3), Bengal Tenancy Act, the learned Judge came to the conclusion that there had been not only material irregularities and fraud in publishing and conducting the sale, to the detriment of the applicants, but that the judgment-debtors had been kept out of their knowledge of the sale by the fraudulent action of the decree-holder. In this view, the sale was set aside.

3. It is against this order that the present application has been moved in this Court. It is contended in the first instance that no appeal lay to the lower appellate Court against the decision of the learned Munsif. Reliance is placed on the case of Durga Charan Sarkar Vs. Bishnupada Sana and Others, , for the proposition that if there be a joint application under Sections 173 and 174 (3), Bengal Tenancy Act, no appeal would lie even against that portion of the order which deals with the prayer u/s 174 (3), Bengal Tenancy Act. On a reference to the decision itself it is apparent that this proposition finds no support. If there is a joint application under the two sections mentioned above and the trial Court sets aside the sale u/s 173, Bengal Tenancy Act, the Court considered that an appeal against that part of the decision which dealt with the prayer u/s 174 (3), Bengal Tenancy Act would not entitle the aggrieved party to any relief in the appeal. This is due to the fact that the sale having been set aside u/s 173, it becomes infructuous for the appellate Court to go again and further into the question whether the sale can or ought to be set aside for the reasons assigned which come u/s 174 (3), Bengal Tenancy Act. In the case now before me, the trial Court had refused to set aside the sale under either of the two sections. If the Court of appeal sets aside the sale on appeal on grounds falling u/s 174 (3), Bengal Tenancy Act, there would be no decision by the appellate Court which would be contradictory to the decision arrived at by the trial Court u/s 173 of the Act. The jurisdiction of the Court to entertain an appeal against an order passed u/s 174 (3), Bengal Tenancy Act, cannot be taken away by reasons which were attempted to be placed before me. The appeal was competent so far as the same was directed against the order passed u/s 174 (3), Bengal Tenancy Act.

4. It is next contended on behalf of the petitioner by Mr. Sen that in a case coming u/s 174 (3), Bengal Tenancy Act, where the application is filed long after the statutory period and the provisions of Section 18, Limitation Act have to be attracted, the Court must come to a definite finding that the auction purchaser was a party to the fraud which had kept the applicants out of knowledge during the period in question. Reliance is placed on Jagiswar Das Vs. Debnarain Roy and Others . It may be pointed out that the observations which appear in that judgment are all obiter as it had been held that there had been a previous application by the petitioner some years ago. On that finding alone there could

be no doubt that the application was, apart from any other consideration, barred by limitation. Certain observations there are no doubt but they are not a decision on the point which actually arose. Reference was also made to the case of Abul Jamil Samsul Hamid Chowdhury Vs. Ambia Khatun and Others, . The actual decision in this case also was that the initial onus of proving that by reason of fraudulent concealment on the part of the person against whom the applicant had made the petition that he had been kept from the knowledge of his right to file the same, lies very heavily on the applicant. The manner in which such fraud is to be proved by the applicant was also indicated.

5. Section 18, Limitation Act, provides : "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, or where any document necessary to establish such right has been fraudulently concealed from him, 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."

This section was recently considered by B. K. Mukherjea J. in the case of Mahipati Haldar Vs. Atul Krishna Moitra and Others . It was held there that Section 18, Limitation Act may be availed of to extend the period of limitation of an application for setting aside a sale where fraud is proved to have been committed by the decree-holder though the auction, purchaser who was a stranger was not a party or accessory to the fraud. I respectfully agree with the view above. The fraud that can be alleged or proved against an auction purchaser would ordinarily be a fraud subsequent to the sale but as has been held repeatedly that for invoking the benefit of Section 18, Limitation Act, it is not necessary to prove fraud subsequent to the sale. The provisions of Section 18 cannot be interpreted so as to make it incumbent on the petitioner to prove that in respect of the items of fraud proved against the decree-holder, the auction purchaser was also an accessory thereto. In this view, the findings arrived at by the Court of appeal below were sufficient for setting aside the sale.

6. The Rule is accordingly discharged with costs.