

(1916) 07 AHC CK 0038
In the Allahabad High Court

Saiyed Nazir Husain and Another

APPELLANT

Vs

Kanhaya Lal and Another

RESPONDENT

Date of Decision : 15-07-1916

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 92, 68

Citation : AIR 1916 All 184 : 35 Ind. Cas. 473

Hon'ble Judges : Piggott, J;Lindsay, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This is a second appeal by two plaintiffs whose suit has been dismissed by both the Courts below. It arises out of the following facts. The plaintiffs were judgment-debtors under a simple money-decree held by the defendants, in execution of which decree certain Immovable property belonging to the plaintiffs was attached. The property being ancestral, the execution of the decree was transferred to the Collector u/s 68, Civil Procedure Code. Its execution proceeded subject to the rules made by the Local Government, which are to be found in the United Provinces Gazette of 14th October 1911, Part I, page 1005. In the result, the property attached was sold at auction and purchased by the decree-holders on the 20th of March 1913. The sale was confirmed on the 25th of April 1913. On the 25th of June 1913 the judgment-debtors presented a petition to the Collector asking that the sale should be set aside. They alleged that the decree-holders had fraudulently kept them in ignorance of the pendency of the execution proceedings; also that the sale was liable to be set aside because the decree-holders had purchased without the leave of the Court, and finally they tendered the full amount of the decree though not the extra payment for the benefit of the auction-purchasers which is required by Rule 30 of the rules published by the Local Government. This objection was rejected by the Collector on 2nd July 1913. Against that order an appeal lay to the Commissioner under Rule 45 of the rules of the Local Government already referred to. Instead of making such an appeal the judgment-debtors filed the present suit. They set forth in substance

the facts which had been put forward as the basis of their application to the Collector, and they asked for a decree for recovery of possession of the property acquired by the defendants at the auction-sale. Both the Courts below have held that this suit is barred by the provisions of Order XXI, Rule 92, Clause (3), Civil Procedure Code. They should have referred to Rule 32 of the rules published by the Local Government; but otherwise the decisions of the Courts below appear to be correct.

2. The case for the appellants was laid before us in a very careful and able argument. Reliance was placed upon the decision of their Lordships of the Privy Council in *Ganga Pershad Sahu v. Gopal Singh* 11 C. 136 : 11 I.A. 234 : 4 Sar. 572 also on the decision of a single Judge of this Court in *Sita Bam v. Subheda Knar* 24 Ind. Cas. 695. Reference was further made to *Bhaiaji Thakur v. Jharula Das* 24 Ind. Cas. 501 : 12 A.L.J. 1176 : 16 M.L.T. 210 : 27 M.L.J. 100 : 1 L.W. 549 : (1914) M.W.N. 636 : 16 Bom. L.R. 845 : 20 Cri.L.J. 360 : 42 C 244 : 18 C.W.N. 1020 . These last two cases are obviously distinguishable. In the last case the suit was one for a declaration that a decree had been obtained by fraud and for consequential relief. Of course a suit will lie to get rid of a decree which has been obtained by fraud; and if the decree is found to have been vitiated by fraud, the execution proceedings become null and void and will be set aside by the Court. In the case now before us no attack is made upon the decree, but only upon the conduct of the execution proceedings. In the single Judge case the plaintiff came into Court with the allegation that property belonging to her had been sold in execution of a decree against another person, and that she had had no previous opportunity of objecting to the execution proceedings because she had been fraudulently kept in ignorance of the same. On the facts before him the learned Judge was able to find that the plaintiff in that suit was not a person against whom an order had been made under Order XXI, Rule 92, Civil Procedure Code, and consequently her suit was not barred by the 3rd Clause of that rule. With regard to the Privy Council case reported as *Ganga Pershad Sahu v. Gopal Singh* 11 C. 136 : 11 I.A. 234 : 4 Sar. 572 it seems sufficient to remark that the decision proceeded upon the particular facts of the case, and that there has been a very definite alteration in the law since that decision was passed. The provisions of Section 311, Civil Procedure Code, Act XIV of 1882, are reproduced in Order XXI, Rule 90, of the present Code, with this important modification, that an application for setting aside a sale can now be made, not only on the ground of material irregularity, but also on the ground of fraud in publishing or conducting the sale. Consequential alterations have been made in the provisions of Order XXI, Rule 92, Civil Procedure Code, so that the prohibition contained in the 3rd Clause of that rule has a wider scope than that of the corresponding provisions of the Code of 1882. It was contended before us that the present case ought to be withdrawn from the operation of the rule because of the peculiar allegations in the plaint. It is quite true that the plaintiffs alleged that the defendants as decree-holders, not only contrived fraudulently to keep the plaintiffs in ignorance, but deluded them by carrying on a pretence of

negotiations for the satisfaction of the decree until the ordinary period of limitation within which the judgment-debtors could have applied to have the sale set aside had expired. In the first place, this question of limitation has no real bearing upon the facts of this case. u/s 18 of the Limitation Act any person, who, having a right to make an application, is by means of fraud kept from the knowledge of such right, is permitted to make the application in question within the prescribed period of limitation computed from the time when the fraud first became known to him. On the facts alleged in the present plaint, these plaintiffs as judgment-debtors were entitled to make an application to the Collector under Rule 31 of the Rules published by the Local Government or on the ground of the decree-holder's violation of the provisions of Rule 22, and could have pleaded Section 18 of the Limitation Act so as to bring their application within time. In the second place, the fraud alleged against the defendants in the plaint is simply that they kept the plaintiffs in ignorance of the execution proceedings. This was a fraud in the conduct of the sale, and a fraud which could not have been committed without fraudulent proceedings in connection with the publication of the sale. The negotiations to which the plaint refers were, according to the allegations made in the plaint, merely a step-in-aid of, and a part of the fraud said to have been perpetrated. We are unable to take the present case out of the operation of the provisions of Order XXI, Rule 92, Clause (3), Civil Procedure Code, or the corresponding provisions of Clause (3), Rule 32, of the rules made by the Local Government. In this view of the case it is not necessary for us to enter into the further question, whether the present suit is not also barred by the provisions of Section 47, Civil Procedure Code, a proposition for which the Courts below have been able to quote authority of this Court in the case of *Durga Kunwar v. Balwant Singh* 23 A. 478 : A.W.N. (1901) 175. With regard to this point it has been suggested on behalf of the appellants that the Courts below could have treated the present suit as an application" u/s 47, Civil Procedure Code, and dealt with it accordingly. There was in any case a fatal objection to the adoption of this course, in the fact that the Court in which the suit was instituted was not the Court executing the decree at the time when that decree was made over to the Collector. Apart from this, however, we are satisfied, for the reasons already given, that this was a case in which, on the facts alleged, the remedy of these plaintiffs was by way of an application, either under Rule 22 or Rule 31, of the rules published by the Local Government, and that their rights were limited to the due prosecution of such application.

3. The present suit has been rightly dismissed by the Courts below, and we must affirm their decisions, dismissing this appeal with costs including fees on the higher scale.