

(1935) 12 CAL CK 0033
In the Calcutta High Court

Sashi Bhusan Ghose and Others

APPELLANT

Vs

Bhupendra Nath Pal and Others

RESPONDENT

Date of Decision : 02-12-1935

Acts Referred:

Citation : AIR 1936 Cal 112

Hon'ble Judges : M.C. Ghose, J

Bench : Division Bench

Judgement

M.C. Ghose, J.—This suit was instituted by the plaintiffs against six defendants stating that they had wrongfully deprived them of certain bricks which they had bought in a Court execution sale, that the bricks should be returned to them or in the alternative that they should be given adequate compensation for the loss of the bricks. The facts in short are these: Defendant 6 was a manufacturer of bricks. He became involved in debts and could not pay them off. Many suits were instituted against him in the year 1928. The first suit was instituted by defendants 3 and 4 on 19th April 1928 in the Court of the Subordinate Judge of Hooghly. That suit was decreed on 21st May for Rs. 1,830 and further that of the two kilns of bricks, the kiln No. 10 should remain subject to a first charge for the decree. The second suit was instituted by the plaintiffs on 23rd, May 1928 in the Court of the Munsif of Serampore. This suit was decreed ex parte on 26th July for Rs. 830. The third suit was instituted by defendant 2 on 16th June 1928 in the third Court of the Subordinate Judge, Hooghly. On 20th June the defendant attached the two kilns of bricks before judgment. While the charge on kiln No. 10, at the instance of defendants 3 and 4 was subsisting and the attachment of the two kilns by defendant 2 was subsisting on 27th July 1928, the plaintiffs applied for execution of their decree and on 5th September 1928 the two kilns of bricks were sold by the Munsif of Serampore and the plaintiffs purchased the same for Rs. 1,000 of which they deposited Rs. 158-11-0 only in cash and debited the balance against their decree. This Rs. 158-11-0, deposited by them in Court, was withdrawn and taken away by defendant 6. Meantime defendant 2 applied in the Court of the Subordinate Judge, Third Court, Hooghly, for

execution of his decree. The two kilns were attached and the sale proclamation was issued. The plaintiffs appeared in that Court and made an objection on the ground that they had already purchased the two kilns. This application was dismissed and the two kilns of bricks were sold in auction in the Court, of the Subordinate Judge, 3rd Court on 9th October 1928, and they were sold for a sum of Rs. 3,585 to defendant 1 and the money was distributed rateably to defendants 2, 3, 4 and 5 who were creditors, the plaintiffs not having applied for rateable distribution.

2. Then on 11th October 1928, plaintiffs instituted the present suit claiming either the bricks or damages for loss of the same. The Subordinate Judge who tried the suit held that while the other four creditors obtained decrees on sale of goods to the debtor defendant, the plaintiffs had only a promissory note whereupon they obtained an ex parte decree and the very day after they obtained a decree they applied for execution and in the sale proclamation they understated the number of bricks and purchased them at an inadequate price of Rs. 1,000 and then allowed without objection defendant 6 to take away the balance of Rupees 158-11-0 from the Court. Thereupon, the first Court held that the decree was not bona fide, but it was a collusive and fraudulent one and upon that finding the trial Court dismissed the suit. In appeal, the appellate Court held that the decree obtained by the plaintiffs was not collusive or fraudulent. Then the Court proceeded to try the different issues raised by the different defendants and rejected them all and decreed the suit for Rs. 1,000 against defendants 2, 3, 4 and 5 dismissing the suit against defendants 1 and 6.

3. As to the dismissal of the suit against defendant 1 who was the purchaser at the second sale both Courts held that he was a bona fide purchaser who purchased for a fair value and he is not liable to anyone. The Court of appeal does not state why the suit was dismissed against defendant 6. It is urged that in any event he should refund to the plaintiff Rs. 158-11-0 which he had withdrawn from the Court. The argument appears valid. The main argument on behalf of defendants 3 and 4 is that they, by the Court's decree of 21st May 1928, obtained the first charge on kiln No. 10 which was sold for Rs. 2,505 and out of those sale proceeds defendants 3 and 4 obtained Rs. 1,830 for their share as a first charge on that kiln. It is urged on the other side that the plaintiffs had no knowledge of the charge made by defendants 3 and 4 and therefore they are not bound by the same. But where a charge is created by a decree, no question of notice arises and a subsequent purchaser will be bound, irrespective of whether such purchaser has notice of the charge or not: see the case of Hemlata Debi v. Bhowani Charan Ray (1934) 39 C W N 725.

4. I am of opinion, this plea of defendants 3 and 4 is good and the suit must be dismissed against them with costs. In my opinion, the plaintiffs are entitled to get the sum of Rs. 1,000 which they lost by the re-sale of the bricks. The question is who should pay the damages to them. As stated above, Rs. 158-11-0 will be paid by defendant 6. It is argued on behalf of defendant 2 that the

attachment before judgment which they had obtained in the Court of the Subordinate Judge, 3rd Court, Hooghly, was in force when the plaintiffs had the bricks sold in the Court of the Munsif of Serampore and therefore that sale cannot prevail against the prior attachment. This argument does not appear sound. The attachment previous to the sale was made in the interest of the decree-holder in order to prevent the judgment-debtor from disposing of the property before the sale. It does not operate against any other creditor of the judgment-debtor.

5. It is urged however that the sale made by the plaintiffs was a surreptitious sale inasmuch as they did not comply with the provisions of Order 21, Rule 52, Civil P. C., which provides:

Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property may be held subject to the further orders of the Court from which the notice is issued.

6. Here, the Court of the Subordinate Judge of Hooghly had already attached the property. It was the duty of the plaintiffs to send a notice to that Court that the property would be sold subject to their decree. They did not take any action under this rule. The question is, what is the effect of the omission. The Court of appeal below has held that the omission was unintentional, that the plaintiffs did not know nor did the Nazir of the Munsif's Court know that these bricks had been previously attached by the order of the Subordinate Judge, 3rd Court, Hooghly. Assuming that they did not know, the question is whether it was due to their culpable negligence. It is to be presumed that Judges and public officers have regularly performed their duty. In this case the decree-holders had duly paid for the attachment in the Court of the Subordinate Judge. It is to be presumed that the public officer whose duty it was to attach the property had in fact done so and the plaintiffs or the Nazir of the Munsif of Serampore, if they had been properly vigilant, would have found out the matter and it was their culpable negligence which made them ignorant of the previous attachment and by omitting to take action under Order 21, Rule 52, the plaintiffs have in fact prejudiced the case of the other creditors. Whether such omission makes the sale void or voidable the creditors who were prejudiced by this omission are entitled to a relief from this Court. Defendant 2, in my opinion, was prejudiced by the plaintiffs' omission to take action under Order 21 Rule 52 of the Code and the plaintiffs are not entitled to get any damages from him. There remain only two defendants, namely defendants 5 and 6. As already stated, Rs. 158-11-0 will be paid by defendant 6. The balance sum of Rs. 1,000 will be paid in equal shares by defendant 5 and defendant 6. The plaintiffs, will pay costs of defendants 1, 2, 3 and 4 and they will get their costs from defendants 5 and 6 throughout.