

(1914) 02 CAL CK 0003
In the Calcutta High Court

Case No : Appeals from Appellate Orders Nos. 149 and 174 of 1912

S.M. Amirannessa Chowdhurani

APPELLANT

Vs

S.M. Kurimannessa Chowdhurani and Others

RESPONDENT

Date of Decision : 04-02-1914

Acts Referred:

Citation : (1914) 02 CAL CK 0003

Final Decision : Allowed

Judgement

1. One Syed Hossain Hydar Chowdhury obtained two decrees for rent against one Vilayatunnessa. Vilayatunnessa is a lunatic and was represented by her husband as her guardian. The tenures were sold in execution and were purchased by Vilayatunnessa's son's wife Kurimunnessa. Subsequently Vilayatunnessa's daughter Amirunnessa applied on behalf of Vilayatunnessa to have the sales set aside on the ground of fraud. She alleged that the former guardian, the decree-holder and the auction-purchaser were parties to the fraud. The applications were successful and the sales were set aside. Amirunnessa then applied on behalf of the lunatic for mesne profits from the auction-purchaser during the period the latter was in possession. The first Court granted the application. These orders were set aside in appeal by the District Judge. The Applicant now appeals to this Court. In support of the appeals, it has first been contended that sec. 144 of the CPC applies. That section is to the effect that "where and in so far as a decree is varied or reversed, the Court of first instance" may cause restitution to be made to any party entitled to the benefit of restitution as the result of the variation or reversal. It is contended that having regard to the definition of the word "decree" in sec. 2 (2) of the Code an order for sale is a decree. We are not satisfied that the case falls within the terms of sec. 144. What was set aside was the sale itself--the transfer of the property. It is difficult to say that a transfer is a decree.

2. It is not, however, necessary to decide this point, for we are of opinion that the case falls within the provisions of sec. 151 of the Code. The auction-

purchaser was held to be privy to the fraud. He was guilty of an abuse of the process of the Court. Sec. 151 says that the Court has an inherent power to prevent abuse of its processes. It has already been held in the case of Beni Madho Singh v. Pran Singh 15 C. L. J. 187 (1911) that a Court has power under sec. 151 to order restitution in a case of this kind when a sale in execution is set aside. It is true that the correctness of the decision has been rendered open to doubt by the decision in the case of Safaraddi v. Durga Prasad Sen 16 C. L. J. 83 (1912), but the present case is indistinguishable from the case of Beni Madho Singh v. Pran Singh 15 C. L. J. 187 (1911) and we are bound by the latter decision.

3. It is true that it is not strictly correct to use the term mesne profits in this connection. The sale was not void. It was only voidable. The auction-purchaser was not in wrongful possession. But clearly the Applicant is entitled to be restored to the position in which he would have been if the fraud had not been perpetrated. He is entitled to an order to that effect. The amount of compensation will be assessed accordingly in the subsequent proceedings in the Court of first instance.

4. The appeals are allowed. The orders of the District Judge are set aside. The Appellant is entitled to orders for compensation to be assessed upon the principles set forth.

5. The Appellant is entitled to his costs in all Courts. We assess the hearing fee in this Court at three gold mohurs--a single fee for the two appeals. [At the conclusion of the arguments and after judgment had been pronounced but not signed, an objection was taken that in the view their Lordship took a second appeal was incompetent. Their Lordships intimated that they would consider the point and when the judgment was signed were pleased to hold that the appeals were competent.]