(1922) 01 CAL CK 0012

In the Calcutta High Court

Tejendra Chandra Dhar, Executor to the Estate of late Ram Dhan Dhar — APPELLANT

Vs

Durgadas Dutt and Others — RESPONDENT

Date of Decision : 06-01-1922

Acts Referred:

Citation : AIR 1923 Cal 324 : 67 Ind. Cas. 398

Hon'ble Judges : Panton, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit for khas possession of the lands in dispute by the purchaser of an estate at a sale for arrears of revenue. The defendants pleaded that by reason of an agreement between the defaulter and the purchaser the latter was not entitled to the benefit of a revenue sale, and that the defendants had a protected interest in the land which could not be annulled. The Courts below found that the defendant''s interest was that of a tenure-holder, and was not a protested interest, but that the sale in essence was a private sale, and the plaintiff, therefore, could not get khas possession of the land. The plaintiff has appealed to this Court.

2. It is found that the former proprietor Purno was heavily indebted, and that he purposely defaulted in the payment of Government revenue in order that the property might fetch a higher price than at a private sale. He had already twice done this, but his object had been frustrated by the tenure-holder depositing the arrears of revenue. He defaulted a third time, and on this occasion he entered into an agreement with Ramdhan (the plaintiff''s predecessor-in-interest), before the sale, under which the latter was to purchase the property at the revenue sale. The price of the disputed tarof together with other mahals was settled at Rs. 4,300, and it was agreed that if the price at the auction sale was less than that amount, Ramdhan was to pay Purno the balance privately, but that if the hiding exceeded that sum, and plaintiff had to bid any sum in excess of Rs. 4,300, the defaulter (Purno) would refund such excess to Ramdhan. As security

for the performance of the contract Ramdhan deposited Rs. 1,000 with a third person (one Shamsunder). As a matter of fact the bidding went up to Rs. 5,100 and Purno refunded the excess to Ramdhan.

3. The learned District Judge has held that the wilful default of Purno in order that the revenue sale might fetch a higher price than a private sale was fraudulent. That fact by itself cannot affect the rights of the purchaser if he is no party to the design. A proprietor of an estate may be unwilling to retain an estate, and if he defaults in paying revenue in order that he may get a higher price at the sale which entitles the purchaser to set aside all interests other than protected interests, his fraudulent motive cannot affect the rights of a bona fide purchaser at the sale. It is not found that there was any agreement between Purno and Ramdhan before there was default in paying the revenue. It is accordingly contended that the purchaser is not affected by any fraudulent design on the part of the defaulter.

4. But the finding of the learned Additional District Judge is "that Ramdhan Dhar knew what the real nature of the sale was, that it was essentially a private sale and not a revenue sale, and, if he knew that, it must reasonably be held that for the sake of obtaining an advantage (the advantage of the power to annul incumbrances) he agreed in making the transaction ostensibly a revenue sale and that the advantage he thus obtained was an unfair advantage and was obtained by deceit, and that, therefore, he colluded with Purno and, along with Purno acted fraudulently." Ramdhan Dhar, the predecessor in-interest of the plaintiff, was then a party to this fraud and is bound by its consequences.

5. In the case of Nawab Sidhee Nazir Ali Khan v. Ajoodhyaram Khan 8 W.R.P.C. 83 : 10 M.I.A. 540 : 1 Ind. Jur. 186 : 2 Sar. P.C.J. 198 : 1 Suth P.C.J. 635 : 19 E.R. 1076 the Judicial Committee held that it was a great fraud in a mortgages to attempt to deprive the mortgagor of his right of redemption by means of a fictitious sale of the property for arrears of revenue. The agreement in that case however, was made with the purchaser before the default took place. But in Sreenath Ghose v. Harinath Dutt 18 W.R. 240 : 9 B.L.R. 220 there was an actual arrears of rent for which a decree had been obtained and execution threatened before any negotiation took place with the purchaser. Markby. J., in that case observed: "Now, we are by no means sure that it is not the duty of a lessor under such circumstances to do his utmost to postpone the sale, and so to protest the interests of his lessee, that is certainly what an upright and honest man would do under the circumstances; and it is a route of English Law which seems to be founded on broad principles of equity, which are applicable here also, that an intermediate landlord is bound to protest his own tenant from all paramount claims. See Graham v. Allsopp (1848) 8 Ex. 186 : 77 R.R. 592 : 18 L.J. Ex. 85 : 154 E.R. 800. At any rate we cannot doubt that it is gross fraud in the intermediate landlord to use his influence to urge on a sale for arrears of rent in order to secure to the purchaser the advantages of such, a sale under the Act; the intermediate landlord at the same time bargaining to receive as a reward for

his services a share in the advantages thereby secured. And if this be a fraud, then to this fraud the plaintiff was a party; and the sale being part of the machinery by which this fraud was effected, we think it ought to be put entirely on one side in considering the question now before us, and that, as between the plaintiff and the Beparees, the plaintiff ought to be considered, not as having the rights of an auction-purchaser under the Bengal Act, VIII of 1865, but only as having the right of a private, purchaser."

6. This case was followed in the cases of Harendra Lal Roy v. Salinullah (I) and Uma Charan v. Midnapore Zemindary Co., (sic) In them the agreement with the purchaser appears to have taken place before the default was committed though in the latter the final settlement of the price at which the purchaser was to purchase the property at the sale took place only on the day of sale. The learned Judges in that case observed: "ln the case before us, the default was wilfully made; the sale was deliberately brought about though the judgment-debtor was able to pay the judgment debt; the purchaser and the price to be paid by them "Were settled, in advice here we have all the characteristics of a private sale. It was clearly an abuse of statutory provisions for sale of tenures in execution of decrees for rent, to bring about designedly a sale under such circumstances, so that the right of under-tenure holders might be destroyed, an unencumbered title conveyed to the purchaser, and the maximum of benefit conferred upon the defaulter. The transaction in all its characteristics was a private sale, and if we were to regard it as a real rent sale, we would have to hold that an unscrupulous tenure holder may successfully avail himself of the stringent provisions of the rent law, solely with a view to injure subordinate tenure-holder and to profit by their detriment, while providing, by means of a secret arrangement with the intending purchaser, ample safeguards against any possible loss to himself by the transaction," and held "that the plaintiffs (the purchasers) must be treated as in no batter position than a purchaser by a private transfer."

7. We think in the present case although Ramdhan only joined in the fraud after the default had been made he cannot, by reason of his entering into the agreement before the sale which was the machinery by which the fraud was to be carried out, and with knowledge thereof, be permitted to enjoy to the detriment of others the benefits which result to a purchaser at a sale for arrears of revenue; and that Ramdhan did not by this transaction acquire rights higher than those of a purchaser at a private sale.

8. It is contended on behalf of the appellant that the defendant not having called upon the plaintiff to produce the agreement, oral evidence was inadmissible to prove the terms of the agreement. But no objection was taken when oral evidence was adduced on the point. Had any objection been taken at the time the defendant might have called upon the plaintiff to produce the written agreement. We do not think, therefore, that the objection should be entertained.

9. Since Ramdhan did not acquire rights higher than those of a purchaser at a private gale, it is unnecessary to consider whether the interest was a protected

one. The plaintiff is not entitled to khas possession. He is entitled only to the rent which was being paid previously to the sale.

10. The suit is not one for rent but the Courts below have given a decree for rent without objection on the part of the defendant on this point. We accordingly hold that the plaintiff should get rent at the rate provided in the kabuliyat.

11. The appeal is accordingly dismissed. We direct that each party do bear (sic) costs in all Courts.

12. In the view we have taken is the appeal, it is unnecessary to consider the question of status of the defendants which was dealt with by the Court below and which forms the subject-matter of the cross objections before us. The cross-objections are accordingly disallowed, With regard to cross objections we make no order as to costs. This judgment will govern the other appeals (Second Appeals Nos. 216 and 521 of 1920.)

