

APPELLATE CIVIL.

Before Page and Mallik JJ.

BENI MADHAB MANDAL

v.

RAI CHARAN ARI.*

1928.

Aug. 7.

Sale in execution—Defence in a subsequent suit for possession—Civil Procedure Code (Act V of 1908), s. 47.

A property was sold in execution of a decree against representatives of P as belonging to the estate of P. In a subsequent suit for possession of that property, by the auction purchaser, against the representatives they took the defence that the property did not belong to the estate of P but to them personally.

Held, in Second Appeal, that all questions between the parties to the suit or their representatives, relating to the execution, discharge or satisfaction of the decree, must be raised and determined in execution proceedings as provided by the Code and not otherwise; and that the parties or their representatives are precluded from raising or canvassing any such question in any separate suit or proceeding, except by way of defence in a separate suit, when the defendant has been kept out of knowledge of the execution proceedings, until after the suit has been brought, by the fraud of the decree-holder or judgment creditor.

Jagneswor Sikdar v. Kailash Mandal (1) and other cases explained.

APPEAL by the plaintiff Beni Madhab Mandal.

Beni Madhab Mandal obtained a decree against Rai Charan Ari and three others, being the sons and legal representatives of one Pitambar Ari, and in execution brought the property in this suit to sale. No objection was taken in the execution proceedings that the property did not belong to the estate of Pitambar in their hands. Beni Madhab bought the same at the auction sale, but could not get possession and brought a suit for possession of the property against the four sons of Pitambar and a fifth defendant, whom he alleged to be a purchaser from Rai Charan and others, but, that was denied by the fifth defendant. In that suit Rai Charan and others

*Appeal from Appellate Decree, No. 755 of 1926, against the decree of Durga Prosad Ghose, Subordinate Judge of 24-Parganas, dated Nov. 20, 1925, affirming the decree of Nilendra Nath Bose, Munsif of Diamond Harbour, dated Jun. 14, 1924.

(1) (1925) 28 C. W. N. 821.

1928.

BENI MADHAB
MANDAL
v.
RAI CHARAN
ARI.

contended, that in 1915, long before Beni Madhab's decree the property had been sold in execution of a decree against Pitambar and one Bhim Ari bought the same and subsequently Rai Charan and the three other sons of Pitambar bought the same from Bhim Ari by a private treaty.

Both the lower courts dismissed the plaintiff's claim; thereupon this Second Appeal was preferred.

Mr. Anilendra Nath Ray Chaudhuri (with him *Mr. Basanta Kumar Mukherji*), for the appellant.

Mr. Satindra Nath Ray Chaudhuri, for the respondent.

Cur. adv. vult.

PAGE J. This case raises a question of some importance with respect to the rights of auction purchasers at a court sale in execution of a decree. The plaintiff obtained a money decree against defendants 1-4, the sons of one Pitambar Ari, to whom the plaintiff had lent money upon the security of a promissory note, to the extent to which the defendants were in possession of assets belonging to Pitambar's estate. On 16th April, 1919, the plaintiff himself purchased the property in dispute at a court sale in execution of the decree. No objection to the sale of this property was raised by the defendants or any of them under section 47 or Order XXI of the Civil Procedure Code or otherwise, and in due course an order confirming the sale was passed under Order XXI rule 92. Thereupon the sale became absolute, and the property was deemed to have vested in the plaintiff as from the date of the sale. (Section 65, and Order XXI, rule 92). The plaintiff, thereafter, took actual possession of the property, but having been ousted by the defendants 1-4 he brought the present suit to recover possession of the property on establishment of his title thereto.

At the trial, the defendants contended that the property in suit had been sold in execution of an earlier decree against their father Pitambar; that on 15th December, 1915, they had purchased it at a court

sale in execution of that decree; and that the property was not liable to attachment or sale in execution of the decree which the plaintiff had obtained on 1919.

Both the lower courts have held that the sale to the defendants was proved and that the sale to them was valid, and the plaintiff's suit has been dismissed. The plaintiff, however, in the lower courts and also in the present appeal has contended that inasmuch as the defendants did not prefer any objection to the sale in the execution proceedings they were precluded from challenging the validity of the sale by way of defence to the present suit by the auction purchaser for possession. Now, although the defendants pleaded that they had no knowledge of the decree or of the execution proceedings which culminated in the sale of the disputed property to the plaintiff, no issue was raised in that behalf and no finding was obtained by the defendants in either court that they were not aware of the decree and of the execution proceedings, or that their want of knowledge was due to the fraud of the plaintiff, and for the purposes of this appeal it must be taken that at all material times the defendants were fully cognizant of the steps that the plaintiff was taking to enforce his claim against the property in suit. In support of his contention the appellant referred to a number of authorities to the effect that all questions relating to the execution, discharge or satisfaction of a decree between the parties or their representatives must be raised and decided in the execution proceedings, and that "the penalty imposed on a negligent judgment-debtor is set out in rule 92, and it is that the court shall make an order confirming the sale and thereupon the sale shall become absolute. This amounts to a judicial determination that none of the objections exists on which the validity of the sale could have been questioned," per Walmsley and Suhrawardy JJ. in *Jagneswor Sikdar v. Kailash Mandal* (1). See also *Durga Charan Mandal v. Kali Prasanna Sarkar* (2), *Sheikh*

1928.

BENI MADHAB
MANDAL.

v.

RAI CHARAN
ARI.

PAGE J.

(1) (1925) 28 C. W. N. 821, 824. (2) (1899) I. L. R. 26 Calc. 727.

1928.
 BENI MADHAB
 MANDAL.
 v.
 RAI CHARAN
 ARI.
 PAGE J.

Murullah v. Sheikh Burullah (1), *Dwarkanath Pal v. Tarini Sankar Ray* (2), *Basiram Malo v. Kattiyani Debi* (3), *Mohan Singh Chowdhuri v. Panchanan Sadhukhan* (4), *Gokulsing Bhikaram Pardeshi v. Kisansingh* (5), *Umed v. Jas Ram* (6). On the other hand, the respondents relied upon a line of authorities in which the court, strictly following the language of section 47 of the Civil Procedure Code (Act V of 1908), pointed out that the legislature had not prohibited the determination of such questions *in* but *by* a separate suit, and, therefore, held that all objections to the sale that might have been but were not raised in the execution proceedings by the judgment-debtor might be pleaded by way of defence in a suit by the purchaser for possession of the property that had been sold in execution of the decree. *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* (7), *Nil Kamal Mukerjee v. Jahnnabi Chowdhurani* (8), *Durga Charan Agradani v. Karamat Khan* (9), *Chandramoni Saha v. Halijennessa Bibi* (10), *Suradhani Dutta v. Sitoo Sheikh* (11), *Venkataramanachariar v. Meenatchi Sundararamaier* (12), *Munishi China Dandasi v. Munishi Pedda Tatiah* (13).] Now, if either rule is applied in its full rigour injustice may result. On the one hand it would be unjust that a judgment-debtor, who by reason of the fraud of the decree-holder or judgment-creditor had remained unaware of the execution proceedings until after the auction-purchaser had brought his suit for possession, should be debarred from raising objections to the sale as a defence to the claim for possession. On the other hand, it would be unjust to an auction-purchaser at an execution sale who *bona fide* and in due course of law had obtained an order confirming the sale, that the right to object to the validity of the sale should depend upon whether the judgment-debtor was the plaintiff or the

- (1) (1905) 9 C. W. N., 972. (7) (1897) I. L. R. 24 Calc. 355.
 (2) (1907) I. L. R. 34 Calc. 199. (8) (1899) I. L. R. 26 Calc. 946.
 (3) (1911) I. L. R. 38 Calc. 448, (9) (1903) 7 C. W. N. 607.
 451. (10) (1908) 9 C. L. J. 464.
 (4) (1926) I. L. R. 53 Calc. 837. (11) (1922) 27 C. W. N. 280.
 (5) (1910) I. L. R. 34 Bom. 546. (12) (1904) 19 M. L. J. 1.
 (6) (1907) I. L. R. 29 All. 612. (13) (1920) 41 M. L. J. 261.

defendant in a separate suit, or that the validity of the absolute title that had vested in him under section 65 and Order XXI, rule 92 of the Code should remain open to objection by the judgment-debtor until the auction-purchaser had obtained possession of the property.

Now, are the divergent rulings upon this subject to which I have referred incapable of reconciliation? I think not. And I am the more disposed to take this view because I find that Mitra, Walmsley and Suhrawardy JJ. have each of them expressed an opinion in favour of the one view as well as of the other. In my opinion, when the matter is probed more deeply, the true rule will be found to lie between the two extremes.

There can be no doubt as to the object that the legislature had in view when enacting the provisions of the Code relating to execution. It was to provide machinery whereby an auction-purchaser at a sale in execution of a decree should be able to obtain an absolute and conclusive title to the property sold in a simple and expeditious manner. "It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the courts in India have not placed any narrow construction on the language of section 244" (now section 47) [per Lord Macnaghten in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1).] "If there was really a ground of complaint, and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree holder

1928.
BENI MADHAB
MANDAL.
v.
RAI CHARAN
ARI.
PAGE J.

(1) (1892) I. L. R. 19 Calc. 683, 689.

1928.

BENI MADHAB
MANDAL.

v.

RAJ CHARAN
ARI.

PAGE J.

“ might be perfectly ignorant—that they should take
 “ no notice of that, allow the sale to proceed, and then
 “ come forward and say the whole proceedings were
 “ vitiated. That, in their Lordships’ opinion, cannot
 “ be allowed,” [per Sir Richard Couch in *Arunachel-
 lum v. Arunachellam* (1)]. See also *Basti Ram v. Fattu* (2), *Behari Singh v. Mukat Singh* (3), *Gokulsing
 Bhikaram Pardeshi v. Kisansingh* (4), *Dwarkanath
 Pal v. Tarini Sankar Ray* (5), *Mohan Singh
 Chowdhuri v. Panchanan Sadhukhan* (6).
 In my opinion, the true rule to be collected from the
 authorities is this, that all questions between the
 parties to the suit or their representatives relating to
 the execution, discharge or satisfaction of the decree
 must be raised and determined in the execution pro-
 ceedings as provided by the Code and not otherwise
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 precluded from raising or canvassing any such
 question in any separate suit or proceeding, except by
 way of defence in a separate suit when the defendant
 has been kept out of knowledge of the execution pro-
 ceedings until after the suit had been brought, by the
 fraud of the decree-holder or judgment-creditor.

In the circumstances obtaining in the present suit,
 in my opinion, the respondents were precluded from
 raising the defence that the property in suit was not
 liable to be sold in execution of the plaintiff’s decree,
 and as against defendants 1-4 the appeal succeeds,
 and the decrees of the lower courts will be set aside.

The plaintiff is entitled to a declaration of his
 title and to a decree for possession as prayed as against
 the defendants 1-4. As against defendant 5 the
 decree of the lower court stands and the suit is dis-
 missed. The respondents defendants 1-4 will pay
 the appellant’s costs in all the courts.

MALLIK J. I agree.

N. G.

Appeal allowed partly.

(1) (1888) I. L. R. 12 Mad. 19
 (25); L. R. 15 I. A. 171,
 (174).

(2) (1886) I. L. R. 8 All. 146.

(3) (1905) I. L. R. 28 All. 273.

(4) (1910) I. L. R. 34 Bom. 546.

(5) (1907) I. L. R. 34 Cal. 199.

(6) (1926) I. L. R. 53 Cal. 837,
 842.