APPELLATE CIVIL.

Before Rankin C. J. and Pearson J.

1931

April 21.

AKSHAYKUMAR NATH TALUKDAR

v.

AHMAD ALI HOWLADAR.*

Co-sharer—Default in payment of revenue and sale, procured by co-sharer—Liability to reconvey property, to owner, by purchaser co-sharer.

Liability of a co-sharer, who colludes to procure a default in the revenue and to procure a sale which would vest the estate of another co-sharer in him, to reconvey that share to its owner, does not depend upon the co-sharer being directly liable to pay the revenue.

Deo Nandan Prashad v. *Janki Singh* (1) and *Doorga Singh* v. *Sheo Pershad Singh* (2) referred to.

SECOND APPEAL by transferee defendant.

The facts of the case are fully set out in the judgment.

Satindranath Ray Chaudhuri for the appellants. Defendant No. 1 was not liable for any portion of the revenue for separate estate No. 1536/2 and so he cannot be called a co-sharer of the plaintiffs. So the claim for reconveyance was wholly untenable : *Deo Nandan Prashad* v. *Janki Singh* (1).

There is no evidence that the auction-purchaser in the second sale or the defendant No. 1 in any way colluded with the defendant No. 5, and so there is no case for reconveyance made out.

Lastly, the suit for reconveyance is barred by limitation. Article 95 of the Indian Limitation Act does not apply to such a case.

*Appeal from Appellate Decree, No. 461 of 1930, against the decree of Hemantakumar Haldar, Subordinate Judge of Bakarganj, dated June 12, 1929, modifying the decree of Phanibhushan Banerji, Munsif of Barisal, dated June 30, 1927.

(1) (1916) I. L. R. 44 Calc. 573 ; L. R. 44 I. A. 30.

(2) (1889) I. L. R. 16 Calc. 194.

Ishwarchandra Chakrabarti for the respondents. The estate No. 1536/2 was created out of the estate No. 1536 and separate accounts were introduced. Therefore, the owner of the two estates were co-sharers and the suit for reconveyance is maintainable. See sections 10 and 13 of Act XI of 1859, *Deo Nandan Prashad* v. *Janki Singh* (1), *Satish Kanta Roi* v. *Satish Chandra Chottopadhya* (2) and *Kusum Kamini Debi* v. *Hara Sundar Majumdar* (3). It does not matter whether a co-sharer is directly liable to pay the revenue or not. The defendant No. 1 committed fraud in procuring the sale of estate No. 1536/2 and he cannot get any advantage out of his wrongful act.

The finding of fact, as to collusion and fraud, by the lower appellate court cannot be challenged in Second Appeal.

The suit for reconveyance is not barred, for Article 95 of the Indian Limitation Act clearly applies. See also *Panchkouri Ghosh* v. *Pran Gopal Mukerjee* (4) and *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar* (5).

RANKIN C. J. This case is somewhat unusual and just a little difficult. It seems that there was a revenue-paying estate, *Tâluk* Kamalakanta Chakrabarti, divided into two separate accounts. One was estate No. 1536. That belonged to defendant No. 1 and also to the father of defendants Nos. 5 to 12. The other account was No. 1536/2 and that was a separate *hissâ*, 1 anna 12 *gandâs* 2 *karhâs* of the same *tâluk* and belonged to the plaintiffs. The plaintiffs' estate, by reason of some chicanery on the part of the predecessor of defendants Nos. 5-12 was sold for arrears of revenue in 1921, and was purchased by him. The plaintiffs brought a suit to have it declared that the sale was bad and, before they got a decree, in September, 1923, the March *kist* for 1923 fell due.

(1) (1916) I. L. R. 44 Calc. 573; L. R. 44 I. A. 30.
(2) (1919) 24 C. W. N. 662.
(3) (1925) 30 C. W. N. 1004.
(4) (1909) 13 C. W. N. 518.
(5) (1877) I. L. R. 3 Calc. 300.

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Estate No. 1536/2 was again sold for default of revenue and it was purchased by defendant No. 4, who was not a co-sharer in either of the two accounts. He sold it to defendant No. 3, who sold it to defendant No. 1, in the *benâmi* name of defendant No. 2. Thereupon, the plaintiffs bring their suit, first of all to set aside that sale and this part of their suit has been dismissed by both the courts. Secondly, they claim that the defendent No. 1, who is a co-sharer in No. 1536, is liable to hold what he bought, namely, estate No. 1536/2, on account of the plaintiffs, subject to their contributing what he had paid. The case made by the plaintiffs is to this effect: They say that, while they were fighting to recover this estate from defendants Nos. 5 to 12, whose father had bought it at the first sale, the defendant No. 1 was a party to an arrangement—not to call it a conspiracy—with defendant No. 5 to the effect that the revenue in both these estates should not be paid for the *kist* of 1923 and that they were acting in concert with the idea that both estates would be sold, but would be sold to somebody who would make the *tâluk* over to defendant No. 1. Their case is that the defendant No. 5 and the defendant No. 1 were really colluding to procure a default in the revenue and to procure a sale, which would vest the plaintiffs' estate in defendant No. 1. Now, the first question is whether that case, if it is made out on the facts, is a good case and would entitle the plaintiffs to the relief, which the learned Subordinate Judge has given, that is to say, an order on defendant No. 1 to reconvey the plaintiffs' share to the plaintiffs on the plaintiffs depositing the auction-purchase money with proper stamp in court. It has been contended on behalf of the appellants that it is not so. It is said that the defendant No. 1 was not directly liable for any portion of the revenue for No. 1536/2, that separate account; and that the only case in which any amount of scheming would entitle the plaintiffs to get such an order against their co-sharer is a case where the co-sharer is liable to pay the

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revenue and makes default in paying the revenue. That certainly has been the commonest class of cases in the law reports and that was the case before the Privy Council in *Deo Nandan Prashad* v. *Janki Singh* (1). But it seems to me that, on principle, it is difficult to say that the matter depends upon the co-sharer being directly liable to pay the revenue. If the co-sharer, although not liable to pay the revenue on this particular joint account, goes and arranges with another and procures with him that there shall be a default in order that the co-sharer may ultimately purchase, that seems to be conduct inconsistent with any relation of mutual confidence between co-sharers and, if so, equity can give a remedy. At one time it was broadly held that there was no fiduciary relationship at all between co-sharers [*Doorga Singh's* case (2)], but if there is any such relation between co-sharers, can it be limited to this that each will pay his own share of the revenue? The essence of the matter is the procuring of a revenue sale in order to defeat the other's interest. The defendant No. 1 was not liable to pay the revenue, but that is no reason why he should enter into an arrangement with the defendant No. 5 that the defendant No. 5 should not pay in order that there might be a sale and that the defendant No. 1 should get the plaintiffs' property. The one kind of conduct would seem to be just as much fraudulent or wrongful as the other, always provided that the plaintiffs and the person, who so acts, are co-sharers. In the present case, the plaintiffs and the defendant No. 1 are in strictness co-sharers. There is a separate account for the 1 anna 12 *gandâs* 2 *karhâs hissâ*, it is true: but if people interested in one account do not pay the Government revenue, it is in some circumstances possible, as between the Government and the holders, for the Government to sell the whole estate as an integral whole in order to recover the revenue in default and, therefore, it seems to me that the defendant No. 1 is technically a co-sharer of the plaintiffs. The

(1) (1916) I. L. R. 44 Calc. 573; L. R. 44 I. A. 30.

(2) (1889) I. L. R. 16 Calc. 194.

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plaintiffs clearly would have been entitled to object to his making default on No. 1536 with the intention of imperilling No. 1536/2 and purchasing both by a nominee on his own account. Now the lower appellate court finds that, as part of his scheme to deprive the plaintiffs of their property, he deliberately procured that default should be made in payment of the revenue on both estates and although, in fact, the estates were separately sold, I am not of opinion that on these facts the plaintiffs are without remedy. Of course, if defendant No. 1 had not intentionally procured the default which resulted in the revenue sale, he would have been entitled to purchase the plaintiffs' estate for himself. I cast no doubt upon that at all. But that is not this case.

What has troubled me throughout this case is the question whether there is any evidence on which the lower appellate court could come to the conclusion that the defendant No. 1 did procure, with the defendant No. 5, that there should be a sale at which the defendant No. 4 would buy the interest of the defendant No. 1. The Munsif took the view that all these people were very friendly, no doubt, but there was no real evidence of collusion between the defendant No. 1 and this man Abdul Sobhan, and the Munsif says that it was a mere surmise that the defendant No. 1 had anything to do with the conduct of defendant No. 5. The lower appellate court takes the view that there is no direct evidence. It says "fraud and collusion cannot ordinarily be proved by "direct evidence. It is to be gathered from the "circumstances;" and it sets out certain circumstances as being evidence, to its mind sufficient, of this collusion between the defendant No. 1 and the defendant No. 5. It says that the first purchase, that is to say, the first sale was made by the father of defendant No. 5, that the second purchase was made in the name of defendant No. 4, that these two purchasers were friends, that defendant No. 1 and defendant No. 5 were co-sharers, that is, in the other part of the *tâluk*, that they were on very good terms

with each other, that the defendant No. 1 used to pay revenue through the defendant No. 5, that the defendant No. 5 did not pay the revenue and so there was a sale of both the estates. It says,—then we find that the defendant No. 4 was not the real purchaser, we find that the defendant No. 5 had been fighting with the plaintiffs until their remedy by appeal had been barred by limitation and then the moment he gets to a certain stage he lets the whole thing go by default to be bought by the defendant No. 4 and ultimately very soon afterwards, by a dubious channel, it comes to defendant No. 1. In these circumstances, the learned Judge says—I think there is some evidence and I think there is sufficient evidence to satisfy me that the defendant No. 1, who got the property, did it by pre-arrangement with the defendant No. 5 to secure that there should be a default in payment of the revenue. On Second Appeal, the one question before us is whether or not there is any evidence of collusion in that sense and this is the question which has given me great difficulty under the circumstances. It is quite true, as the learned Subordinate Judge says, that you have got to infer these things from the circumstances and not from direct evidence; and, in the end, I think it would be wrong to hold that these circumstances taken together amount to no evidence of collusion. I think, if this were a case for a jury, the case should have been allowed to go to the jury. In these circumstances, it seems to me that we cannot interfere with the findings of fact. In this view, the appeal must fail and be dismissed with costs.

PEARSON J. I agree.

Appeal dismissed.

S. M.